

Rianne Letschert  
Ines Staiger  
Antony Pemberton  
*Editors*



# Assisting Victims of Terrorism

*Towards a European Standard of Justice*



Springer

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**With financial support from the VICT Programme European Commission -  
Directorate-General Justice, Freedom and Security**

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Towards a European Standard of Justice



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Rianne Letschert  
Tilburg University International  
Victimology Institute (INTERVICT)  
Netherlands  
R.M.Letschert@uvt.nl

Antony Pemberton  
Tilburg University International  
Victimology Institute (INTERVICT)  
Netherlands  
a.pemberton@uvt.nl

Ines Staiger  
K.U. Leuven  
Leuven Institute of Criminology  
European Forum for Restorative Justice  
Herbert Hooverplein 9  
Belgium  
Ines.Staiger@googlemail.com

ISBN 978-90-481-3024-5 e-ISBN 978-90-481-3025-2  
DOI 10.1007/978-90-481-3025-2  
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2009932668

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Printed on acid-free paper

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# Acknowledgments

In December 2006 the European Forum for Restorative Justice was awarded a project on ‘Developing standards for assistance to victims of terrorism’ by the European Commission. The partners involved were the International Victimology Institute Tilburg (INTERVICT), the Centre for the Study of Terrorism and Political Violence of the University of St. Andrews, the Catholic University of Leuven (K.U. Leuven) and Victim Support the Netherlands (in cooperation with the European Forum for Victim Services – now Victim Support Europe). As will be further elaborated in the introduction, the project aimed to develop more extensive standards for the aid and assistance to victims of terrorism at the European level.

The standards were developed in two seminars (held in November 2007 at the K.U. Leuven), in which academic experts and practitioners involved in the assistance of victims of terrorism articulated (see Annex 1). The groundwork for the seminars was a first draft literature review, undertaken by researchers of the K.U. Leuven/European Forum for Restorative Justice (Ines Staiger, MA) and INTERVICT (Antony Pemberton, MA, Karin Ammerlaan, L.L.M, and Dr. Rianne Letschert)<sup>1</sup> supported by a steering committee of experts from the Institute of Criminology of the K.U. Leuven (Prof. Dr. Ivo Aertsen and Prof. Dr. Letizia Paoli), INTERVICT (Prof. Dr. Jan Van Dijk), the Centre for the Study of Terrorism and Political Violence of the University of St. Andrews (Prof. Dr. Alex Schmid), the European Forum for Restorative Justice (Dr. Inge Vanfraechem), and Victim Support the Netherlands (Rob Sardemann; in cooperation with Victim Support Europe). The comments on the first draft of the literature review – by the participants of the seminar – were incorporated in this version. The final event of the project was a conference on 10 and 11 March 2008 at INTERVICT, Tilburg University, where the draft standards and the final results of the literature review were presented to a broader public.

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<sup>1</sup>Ines Staiger was researcher at the K.U. Leuven/European Forum for Restorative Justice and was project manager of this project. She is a jurist and holds an MA in European Criminology. Antony Pemberton is senior researcher at INTERVICT. Before that, he was senior policy staff member of Victim Support the Netherlands. Karin Ammerlaan was researcher at the Department of Private Law of Tilburg University and research fellow at INTERVICT. She has finished her PhD in 2008 on the needs of victims of disasters and the role of the Government. Rianne Letschert is associate professor and research director of INTERVICT.

The researchers wish to thank the members of the Steering Committee for their assistance in developing the outline of this study, and for providing invaluable input by commenting upon the draft and final versions of the literature review. We also thank the participants of the seminars and the conference for their valuable contribution and interesting discussion items brought forward during the seminars and conference workshops.

We furthermore wish to express our gratitude to bereaved family members of victims of terrorist acts for sharing their experiences with us. During the short time available for this study we could not conduct an empirically sound study interviewing a large number of survivors. Nevertheless, the stories we heard were inspirational and provided us with important information. A book like this can only focus on the needs of victims of terrorism *in general*. We acknowledge the fact that every situation is different and each person unique. We can only express our hope that it provides a just overview of the most important needs victims may have.

March 2009

Rianne Letschert  
Ines Staiger  
Antony Pemberton

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(The study was completed on 1 July 2008. Only a few important documents adopted after this date are (briefly) referred to.)

# Executive Summary

## Introduction

The fight against terrorism is receiving increased awareness due to recent world-wide large-scale terrorist acts, and only since then has some attention been directed specifically to victims of terrorism. Existing legal instruments of international bodies like the European Union, the Council of Europe and the United Nations concerning victims of terrorism are relatively abstract or include victims of terrorism under the broader heading of victims of crime in general. In addition, policies and legislation relating to victims of crime or victims of terrorism vary widely on the domestic level. Against this background, the European Union commissioned a project that should aim to develop more extensive standards for the aid and assistance of victims of terrorism at the European level. This study provides the basis from which more extensive standards could be derived. The study focuses particularly on developing standards in the field of continuing assistance, access to justice, administration of justice and compensation to victims of terrorism. A novel feature of the approach is that also the possible utility of restorative justice approaches is examined.

An important question to address was whether there is a real need to adopt specific standards for victims of terrorism, thereby implying that their needs might differ from victims of ordinary crime. Is a sufficient reason the fact that the adoption of a set of recommendations would imply an unequivocal recognition of the specific situation of victims of terrorism, who are most often used as an instrument to achieve a certain political goal? This public dimension might require a public response which may be seen as solidarity. In addition, could it be argued that the social and psychological empowerment that could emanate from a specific set of guidelines must not be underestimated, given the scope of the problem? And that, in view of the specific characteristics of the violence and the special types of legal and especially social measures (be it individually-based or community-based) that are necessary to effectively address this form of victimisation, a specific instrument to support victims of terrorism would be of added benefit above and beyond general instruments in support of victims and victims' rights? These questions were at the heart of this study.



In order to determine whether victims of terrorism are entitled to or in need of specific standards, the following framework of analysis was used throughout the study:

- Do victims of terrorism have needs of a *different kind*, i.e. additional or other needs than other victims of crime?
- Do these needs *differ in degree*, i.e. when the consequences of terrorism are more or less severe, does meeting the need in question become more or less important?
- Are there indications that meeting a need of victims of terrorism requires *additional efforts in implementation*?

## Defining Terrorism, Victims and Restorative Justice

In Chapter 1, the difficulty in defining controversial concepts such as terrorism, its victims and restorative justice become apparent. Relating to the definition of terrorism, it was demonstrated that terrorism has many features and that the literature has given labels to different forms of terrorism, such as Islamist terrorism, ethno-nationalist or separatist terrorism, domestic or international terrorism. The different characteristics of these forms of terrorism makes it difficult to make a categorisation that would cover all existing forms, mainly because most features could fall under more than one heading. Chapter 1 gives an overview of legal definitions put forward by international or regional organisations and more sociological definitions drafted by academics. It was concluded that all definitions have at least three main characteristics in common: the intention to cause death or serious bodily harm or damage to property, the targets are often randomly selected persons, in particular civilians or noncombatants, with the purpose to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.

The literature review does not present a definition of terrorism, since the aims of the study are to determine the specific needs of victims of terrorism. Despite the absence of a definition and the diversity of terrorist acts, it is more important to further study the differences of effect of the various forms of terrorism on victims, thus adhering to a victims' perspective. An important question is whether victims of specific types of terrorism should be addressed in a similar way or whether the specific character of the attack merits different approaches with regard to victim protection schemes. The tension seems most apparent between small-scale terrorism of which an individual is the direct target, such as hostage-takings, and large scale-terrorist attacks resulting in many casualties (see further Chapters 3 and 4).

Just as it is difficult to agree on a definition of terrorism, it also appears problematic to define the term 'victims' in the context of terrorist attacks. Chapter 1 gives an overview of definitions of the term 'victim' contained in international instruments and those put forward by academics. Following the analysis made, a

division was made into primary, secondary and tertiary victims. *Primary victims* are those who directly suffered harm from the terrorist attack, including those who experience property damage (economic loss) due to violent acts. The group of *secondary victims* consists of dependants or relatives of the deceased and first responders to acts of terrorism. Lastly, the distinguishing feature of terrorism is fear and this fear is stimulated by threats of indiscriminate and horrifying forms of violence directed against ordinary people everywhere. Discussing the full scope of the consequences of terrorism therefore means discussion of the impact on this wider group, frequently termed either *tertiary or vicarious victims*.

Finally, Chapter 1 discusses how to define restorative justice. It is problematic to find one ultimate definition of restorative justice mainly because the concept of restorative justice covers a diversified meaning. Albeit the differences of purist and maximalist interpretations of restorative justice, three basic conceptions, namely encounter, reparation and transformation can be found – to different degrees – in the various definitions of restorative justice. Chapter 1 gives an overview of the most common definitions of restorative justice in literature and in international legal instruments, but does not present a working definition. The international legal instruments do not define ‘restorative justice’ as such. While provisions at EU and Council of Europe level are rather concerned with ‘mediation’, the *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* define restorative justice programmes. This provision offers a general framework that needs to be further incorporated with restorative justice values and principles, which is elaborated in Chapter 7. Underlying assumptions of restorative justice programmes can be identified as follows: the response to crime should repair as much as possible the harm suffered by the victim; offenders should be brought to understand that their behaviour is not acceptable and that it had consequences for the victim and the community; offenders can and should accept responsibility for their action; victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and the community has a responsibility to contribute to this process. Common restorative justice programmes like victim–offender mediation, conferencing and circles can be applied at the micro-and meso-level. In this respect, the CoE *Recommendation (99) 19 concerning Mediation in Penal Matters* does not restrict the application of mediation to any type of crime. Moreover, the CoE *Recommendation (2006)8 on Assistance to Crime Victims* includes victims of terrorism and refers to the aforementioned recommendation. Therefore, it could be argued to apply restorative justice to terrorism as well. In addition, it has to be taken into consideration that restorative justice as a means to solve interpersonal disputes may be redefined for cases of terrorism, taking into account other restorative mechanisms as used for instance in large-scale conflict situations. Thereby, the community/societal consequences of terrorism can be addressed as well. Moreover, the inclusion of restorative justice principles and values at the macro-level can help to redefine the common response to terrorism. On this basis, a multi-layered approach could be developed that does not only address the interpersonal and community level but also the overall response to terrorism.

## **International Instruments and Policies Focusing Specifically on Victims of Terrorism**

Chapter 2 provides an overview of developments and activities taking place within international organisations relating to victims of terrorism or that could have an impact on victims of terrorism. An analysis is made of the more general victims' rights instruments, which include victims of terrorism and the CoE Guidelines on the Protection of Victims of Terrorist Acts. Relating to the content of the instruments, some minor differences were identified. The specific CoE Guidelines relating to victims of terrorism contain a provision relating to continuing and emergency assistance and a provision on the possible negative effects of media exposure, which cannot be found in most of the other general victims' rights instruments. Furthermore, provisions relating to restorative justice approaches are not incorporated in all instruments. Devising specific strategies that work in a cross-border context could also require more attention. However, overall, the main bearing of the existing instruments is the same, containing the classical victims' rights such as the right to information and the right to receive compensation. In addition, CoE Recommendation 2006 (8) contains an extensive list of detailed victims' rights, some of them referring to specific measures that need to be taken with regard to certain victims including also victims of terrorism.

Based on this analysis, the question was posed what the added value could be of possible EU standards in the field of victims of terrorism; a question that was studied more in depth in the subsequent chapters. Based on the analysis in chapter 1, the conclusion was drawn that the main added value could relate to the scope of these instruments. The existing instruments restrict the scope of protection to primary and secondary victims, meaning those who were actually harmed and family members and dependants (only the UN Declaration and the UN Basic Principles and Guidelines also cover those who intervened to assist, and the ICC Statute includes also certain categories of legal persons). The question arising then was whether the specific context of terrorist acts, resulting in a large group of tertiary victims and sometimes leading to mass victimisation of primary and secondary victims, would require a broader scope. If the specific group of tertiary victims indeed has specific legal or psycho-social needs, a broader definition could be legitimate, which was subject to study in the subsequent chapters.

In addition, Chapter 2 addresses the legal status of possible future EU standards or recommendations for victims of terrorism, as well as the legal status of other EU instruments. Lastly, the justifications for EU involvement in the field of victims of terrorism were analysed, the main reason being that the establishment of an area of freedom, security and justice must also take due account of the needs of crime victims in the European Union.

## **The Needs of Victims of Terrorism Compared to Victims of Crime**

Chapter 3 compares the needs of victims of terrorism as shown by empirical research to those of victims of crime. The key issue is whether there are empirical reasons to differentiate between victims of terrorism and other victims of crime. For the most part, the needs of direct victims of terrorism are similar to those of other victims of crime, differing not in kind but rather in degree or in possibilities for implementation. On average, the impact of terrorism in a financial, psychological and physical sense may be larger, but definitely not always. Often terrorist victims will require immediate medical and financial assistance, but this will be the case for some victims of crime as well. Similarly, victims of terrorism, like victims of crime, will need to be treated respectfully and provided with information about and participation in their case. Both will need reassurance of their safety, and will need to come to terms with feelings of anxiety and anger they are likely to have after the event.

The main difference appears to lie in the context in which terrorist victimisation occurs, and its audience. Victims of terrorism, by definition, are attacked as representative of a larger group. Acknowledgment of their victimisation entails recognising this fact. This gains even more relevance in situations where the terrorist attack is framed in the context of war. Victims may then feel they are civil casualties of war rather than ‘just’ victims of crime.

The fact that terrorists use violence against direct targets to threaten, frighten and otherwise influence a wider group of indirect or vicarious victims, implies that the audience of the crime transcends the direct victims. Indeed, the effects on vicarious victims in absolute terms may outweigh those of the direct victims. It was shown that symptoms of post-traumatic stress disorder are found in members of the public not present at the site of terrorist attacks and unrelated to those who were. The increased levels of fear in the general public may result in various behavioural reactions, from lower levels of tourist activity, to decreased use of public transport systems and the occurrence of ‘worrying well’. Moreover, research into terror management theory shows the effects of terrorism on public opinion and political preferences. The anger at the attack may lead to a process of vicarious retribution, which can involve backlash attacks on people who in one way or another resemble the terrorists and a general antipathy against those who are seen to belong to the same group.

Chapter 3 then results in two questions. First, it is open to question whether acknowledging the particular situation of terrorist victims, i.e. that they were victimised as representatives of a larger group with the aim of reaching specific political goals, is a sufficient reason for adopting a set of recommendations. Does this public dimension require this type of response as an act of solidarity? Second, do the effects on vicarious victims need to be incorporated in these or other existing recommendations and guidelines and if so in what way?

## **Psycho-social Consequences of Mass Victimisation by Terrorism**

Regardless of the question whether the suffering of victims of terrorism requires a differential response in principle, it is clear that the implementation of assistance after a large-scale terrorist attack will differ from that of an individual crime. Chapter 4 therefore discusses a multi-level response to the psycho-social consequences of mass victimisation by terrorism. On the micro-level there is the support, assistance and therapy for individual and possible victims. A stepped care approach to mass victimisation by terrorism is discussed. The central issue in delivering assistance to victims is related to the fact that where many and even most victims will either show resilience or recover of their own accord, others will develop severe complaints. As subtle personal differences and post-trauma factors may impact these differences, it is not possible to say at a very early stage who will develop complaints and who will not. The challenge therefore is to find ways of matching services to victims' diverse needs. The stepped care approach consists of six components: immediate emergency assistance/psychological first aid, screening and watchful waiting, survivor education, enhancement of social support, coping skills training and interventions for survivors experiencing significant problems.

The fact that the response also targets the meso and macro-levels of society is related to the impact of terrorism beyond its direct victims. It will be shown that the impact of mass victimisation on communities, although this is a risk factor for the development of psychological complaints, is also a resource for resilience, which ties in with victims' needs for social support, but also their desire to help each other. Community-based interventions therefore strive to reinforce and stimulate activities of networks within affected communities themselves. Central in this approach is the development of so-called Information and Advice Centres (IAC) that serve as a one-stop-shop for victims, their relatives, and relief workers alike. The tasks of the IAC evolve in the aftermath of the attack, but in any case it serves to promote resilience in the community, provide support and information for relief workers and initiate and coordinate health research in the afflicted society.

Finally, at the macro-level it is important that information targeting the general public does not have a counterproductive effect on the relief effort. Of course, information is a general need for both direct and vicarious victims alike. However, in disseminating this information, governments run a real risk of doing the terrorists' work for them. Information relating to the attack and further threats will inevitably cause some anxiety. Nevertheless, steps should be taken to ensure that no more fear is caused than necessary and that the public in particular is sufficiently aware of their own possibilities to contribute to the fight against terrorism. Moreover, communication may prevent the process of vicarious retribution in which members of the public avenge the attack by victimising people who show resemblance in some way or another to the terrorists.

The suggested approach is based on the current state-of-the-art in psycho-social knowledge concerning mass victimisation and will be useful in a variety of situations. Nevertheless, it is open to question whether the approach can be applied in

countries with varied cultural backgrounds or where the victim assistance structures and disaster planning necessary for its implementation are less developed. In any case, this implies that the suggested approach may be more useful as an example of good or best practice, rather than a blueprint, and calls into question to what degree it can inform standards for the assistance of victims of terrorism. Finally, the fact that the approach also targets the general public is related to the inclusion of vicarious victims. To what extent should this be included within standards concerning victims of terrorism?

## Access to Justice and Administration of Justice

Chapter 5 examines the situation for victims of terrorism as regards their access to justice and the administration of justice in terrorist cases on the basis of the CoE Guidelines on the Protection of Victims of Terrorist Acts. These guidelines were analysed in the light of case law of the European Court of Human Rights (ECHR). Further indications for the interpretation of access to justice and administration of justice for victims of terrorism were drawn from the EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, the EU Council Framework Decision of 13 June 2002 on combating terrorism, provisions of the International Criminal Court (ICC), and the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Under the CoE Guidelines, ‘access to justice’ implies the right for victims of terrorism to access competent courts in order to bring a civil action in support of their rights. Additionally, legal aid shall be provided in appropriate cases. In interpretation of the Guidelines according to case law of the ECHR, this right of access to competent courts includes the situation where the victim of a terrorist act wants to receive compensation (or other forms of reparation) from the terrorist in the course of the criminal process. This reflects *partie civile* proceedings under Germanic, Romanistic and Nordic jurisdictions. With regard to the provision of legal aid in appropriate cases, the ECHR developed criteria under which the lack of legal aid may constitute a denial of access to court. It does, however, not address the question whether legal aid is to be granted in criminal proceedings other than *partie civile* proceedings. For instance, is legal aid accessible for victims of terrorism with a full status of a party to criminal proceedings? Are there any particularities for granting legal aid in cross-border cases or in cases of mass terrorist victimisation? These aspects are explored on the basis of EU legal instruments and legal provisions of the ICC. Further, both the ‘Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings’ (European Commission) and the ‘Report on European Judicial Systems by the European Commission for the Efficiency of Justice’ (Council of Europe) give indications of the practical relevance of the respective provisions and the implementation in national law of their Member States.

The CoE Guidelines also give indications for defining the administration of justice in terrorist cases. In this context, arbitrary regulations concerning persons suspected of terrorism are discussed against the background of Guantánamo and the Beslan case. Moreover, possible mitigations of punishment are illustrated on the basis of the principal witness regulation in terrorist cases according to Article 6 of the EU Council Framework Decision of 13 June 2002 on combating terrorism. The main focus is put upon the requirement of the adequate position of victims of terrorist acts in criminal proceedings. In this respect, participatory rights of victims in civil and common law jurisdictions as well as under the jurisdiction of the ICC are highlighted and discussed on the basis of research findings. In view of the EU Council Framework Decision on the standing of victims in criminal proceedings and the EU Council Framework Decision on combating terrorism it is argued that the vulnerability of victims of terrorism requires the possibility of giving them a status of parties to criminal proceedings, at least in those EU Member States where national law provides such a status for vulnerable victims. Alternatively, the possibility of (oral) victim impact statements in criminal proceedings and examples of victim participation under the ICC jurisdiction is discussed. Moreover, the possible role of vicarious victims of terrorism in criminal proceedings is presented. Further, the rights to information, to assistance during legal proceedings, and the right to protection are assessed as well as their practical relevance and implementation in national law. The chapter concludes that limited participation rights as well as the lack of implementation of international legal instruments are the main obstacles for victims of terrorism as regards their access to justice and the proper administration of justice in terrorist cases.

## Reparation and Compensation

Chapter 6 addresses reparation and compensation. Reparation entails the following concepts: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, often used in the framework of massive and systematic cases of grave human rights violations. The focus in Chapter 6 is on compensation issues, reporting on the different permanent state compensation schemes for victims of crime in the Member States of the European Union and those that were specifically set up for victims of terrorism. The model of international trust funds, like the trust fund of the International Criminal Court that offers compensation to victims of the worst atrocities was also examined. In addition, the chapter includes information on the ad hoc State compensation fund set up after the 9/11 attacks because of its unique aspects. Furthermore, the role of private remedies, such as insurance, tort law and charity in providing compensation to victims was analysed. Lastly, the different forms of reparation that could serve as an example on how to bring justice to victims of large-scale terrorist acts are presented in Chapter 6.

The following conclusions were drawn. As mentioned in several international instruments, victims should receive *fair, appropriate* and *timely* compensation,



which is *easily accessible*. This need applies as much to victims of ordinary crime as to victims of terrorism (needs *in kind*). The need for reparation in the broader meaning could be more apparent for victims of large-scale terrorist acts than for victims of ordinary crime. Especially the various forms of satisfaction may be important, for instance, in the form of a public acknowledgment of the facts and acceptance of responsibility and commemorations and tributes to the victims. In addition, reparation could see to preventing indirect victimisation of minority communities that may be confronted with a backlash after a terrorist attack. Tertiary victims would also benefit from such reparation programmes, considering that allowing this category access to the regular compensation schemes would be practically impossible.

Chapter 3 assessed that, considering that physical damage and large-scale property damage in case of large-scale terrorist acts are more likely (even in the case of non-fatal terrorist acts), victims' financial needs are acute. It is open to question whether normal procedures for compensation will be sufficiently swift in reaction to large-scale terrorist victimisation, resulting in a large group of both primary and secondary victims. In addition, Chapter 3 further estimated that the costs of murder and manslaughter are by far the highest and that for victims of terrorism the costs of fatal incidents are unlikely to be much different from other victims of crime. Nevertheless, Chapter 3 also acknowledged that the injuries sustained through terrorist acts are on average more severe, and the chances of developing a psychological disorder are higher, which implies that costs of suffering non-fatal terrorist victimisation will be higher. The higher costs are further compounded by the increased likelihood of incurring material damage, due to the methods used by terrorists. The frequent use of explosive devices in terrorist attacks will be likely to cause material damage more often than is usual for personal victimisation for crime. This is further compounded by the fact that 9/11 has had a dramatic impact on insurers' policies vis-à-vis terrorism coverage, which may lead to terrorism being excluded from coverage. These elements illustrate that the needs of victims of large-scale terrorism differ in degree compared to victims of ordinary crime.

Another issue relating to differentiation in degree relates to the possibility that terrorist attacks will result in cross-border victims. As terrorists attacks have not infrequently targeted tourist places, many victims come from abroad. Apart from the other difficulties this may pose for victims and their families, it also adds to the cost of victimisation, making meeting the financial need even more important.

Problems seem to come to the fore also at the implementation level (how should a State deal with, for instance, mass claims?) more than at the normative level (are victims of terrorism entitled to a different form of compensation?). For instance, one can have doubts about the adequacy of State compensation schemes in case of *large-scale* terrorist acts, with regard to procedural matters and with regard to the possibility to receive compensation for property damage. We have seen that in countries confronted with terrorist attacks, specific funds, based on public/private charity gifts, will evolve. However, it is to be discussed whether this will reduce the need to create specific measures providing adequate and prompt compensation schemes. It could be argued that standards for victims of (large-scale) terrorism



should include provisions on different reparation possibilities and the processing of mass claims, in order to strive for a settlement within a reasonable time and to strive for fair and appropriate compensation.

Another issue dealt with in Chapter 6 concerns the level of harmonisation in the EU Member States relating to State compensation schemes. The compensation schemes were divided in three main groups. The first are States that have enacted specific legislation and compensation programmes for victims of terrorism (France and Spain). The second category consists of States that have enacted crime victim compensation schemes, covering also victims of terrorism and the last group includes States that have limited compensation schemes. At a practical level, the Member States show a great diversity in different legal systems and default compensation schemes. Differences within these schemes (whether general or for victims of terrorism) include, for instance, providing full compensation versus adhering to the social welfare approach, and offering compensation for pain and suffering or not.

Other differences within the EU Member States relate to rules with regard to the eligibility requirements concerning cross-border victimisation, especially with regard to EU nationals victimised outside the EU and non-EU residents victimised in a EU Member State. Whether the situation for EU nationals becoming victimised in another EU Member State has changed because of the implementation of the EU Directive on Compensation, requesting States to establish assisting and deciding authorities, which should reduce possible problems relating to cross-border victimisation within the EU area, is not clear yet. Also, it should be discussed whether a clear rule should be established on additional compensation from a victim's home country. Furthermore, the effectiveness of default compensation systems could be enhanced on a European level, with regard to private insurance, tort law and even social security. With strong and well functioning default systems, victims have better financial protection and security of financial protection. With regard to compensation for property damage, we have seen that self-insurance is not an absolute given and that property damage through terrorism attacks is not covered under all private property damage insurances (sometimes explicitly excluded). When necessary, governments could consider providing financial backup as a State reinsurer, as is the case in France and Spain, by embarking upon private/public schemes.

It seems rather difficult to reach equity in all EU Member State compensation schemes, whether they are benefiting victims of crime in general or victims of terrorism in particular. Reasons for this impossibility are first of all of a political kind, but socio-economic and cultural differences among the Member States should also be taken into account when discussing uniform compensation schemes.

A last issue addressed concerns the possible establishment of a European Trust Fund for victims of terrorism. The fundamental question is how the European Union perceives terrorism and the risk of terrorism. So far, the EU considers terrorism as a collectively shared risk and wants *Member States* to ensure that appropriate compensation is available to victims. However, no mention has been made of a European financed compensation scheme which offers *direct compensation* to victims of terrorism, as a sort of supranational compensation fund, based on European

solidarity. A reason that would support such a 'European Solidarity Compensation Fund', is that if terrorism is seen as an important topic in *European* public policy, a unified approach towards victims of terrorism could be justified.

## **Restorative Justice and Victims of Terrorism**

In Chapter 7, the potential of restorative justice for victims of terrorism is explored. Starting point for developing a restorative justice strategy in the context of terrorism are restorative justice principles and values. These form the basis of the framework for restorative justice at the micro-, meso- and macro-level. The perception of restorative justice is to understand crime first of all as harm done to people and communities. It implies an inherent concern for victims' needs and their role in the criminal justice system and encourages offenders to understand the harm and the consequences of their behaviour. A further aim is that the offender accepts his responsibility and tries to repair the harm done to the victim. In this context, a framework for restorative justice that discusses the relation of restorative justice to the criminal justice system is portrayed in this chapter. This is followed by a model of restorative justice on the basis of which a conceptual framework for restorative justice processes could be assessed.

Restorative justice practices like victim-offender mediation, conferencing, circles and victim impact panels offer possibilities to meet victims' needs. The chapter explores what can be learned from the applicability of restorative justice for cases of terrorism by reflecting on other forms of serious violent crime, including hate crime. For instance, research findings on victim-offender mediation in cases of serious violent crime reveal that the most decisive elements of an encounter between victim and offender are communication, the need for information, and the need to gain some sense of closure. The findings show that most of the victims experienced these meetings as powerful and healing. For victims who do not want to engage in a direct face-to-face meeting with the offender, indirect victim-offender mediation is a possible alternative to communicate through an intermediary with the offender. If the victim cannot meet the offender, because he is unknown or dead, victim impact panels offer victims a forum where they can tell their story to an offender who is linked to the victim by a common kind of crime. In cases of terrorism, this could be a member of the same terrorist group or other representatives. Experiences in this respect were made, for instance, in a programme in the context of the Northern Ireland conflict. Moreover, restorative justice oriented practices in the form of symbolic reparation measures, restorative sanctions, and particularly the model of truth commissions were discussed. In these contexts, the limits of restorative justice practices were also illustrated. On the basis of research findings with victims of terrorism it is shown that restorative justice practices may be possible in the context of terrorism, but need to be explored in further research studies. Moreover, it is revealed that vicarious victims are particularly affected by mass terrorist victimisation, which requires a restorative justice response at the

community and the macro-level. In order to find possible solutions for a restorative justice strategy in the terrorism context, comparable situations with terrorist offences were highlighted, by considering the vicarious dimension of terrorism, as well as exploring the applicability of restorative justice for suicide and religious terrorism. In the context of large-conflict situations and intergroup violence, the concept of vicarious retribution is discussed in Chapter 3. In Chapter 7, the role of restorative justice in this context is explored and possible restorative justice responses in a broader communitarian/societal context are assessed.

As regards suicide terrorism, the chapter highlights that a restorative justice response could include the involvement of multiple responsibilities on the terrorist side. As regards religious terrorism, it is argued that a restorative justice response is possible when restorative justice values like respect, mutual care, accountability and trust are respected. Moreover, both parties must be willing to engage in a dialogical process, where the identification of the roles of victim and offender may also be addressed. Case examples of victims of terrorism suggest that restorative justice can play a possible role in cases of terrorism, whereby also the limits of such an approach are illustrated. As regards restorative justice practices at the micro-, meso- and macro-level, it is highlighted that restorative justice principles have to be implemented in any response to terrorism within a restorative justice context. In this respect, a conceptual framework for restorative justice processes was explored. The chapter concludes that traditional restorative justice practices as well as transitional justice mechanism integrated with restorative justice principles could play a role for victims of terrorism and the community in a broader context. In this respect, a global vision for a restorative justice response to terrorism needs to be developed that clearly focuses on victims of terrorism and addresses the micro-, meso- and macro-level. A global vision on responding to terrorism guided by restorative justice principles and values would have the potential to result in concrete programmes for a more balanced approach in 'the fight against terrorism'. Such a vision or strategy can already be observed in large-scale conflict situations and this approach could be transposed in cases of terrorism with a clear focus on the victims of terrorism.

# **Introduction to the Draft EU Recommendation for Assistance to Victims of Acts of Terrorism**

As will be further elaborated in Chapter 1, the aim of this EU funded project was to develop more extensive standards for the aid and assistance to victims of terrorism at the European level. Based on the present study, the researchers and the members of the Steering Committee drafted a first set of standards. These standards were discussed with the experts of the seminars in November 2007 (see Annex I). Based on their comments, a second version was made which was discussed during the workshops at the final conference in March 2008. Moreover, participating organisations at the conference had the opportunity to comment on the draft standards in the plenary. These results were discussed in the third steering committee meeting, on the basis of which the final version of the standards could be drafted.

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, provisions relating to psycho-social assistance (both emergency and continuing 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 and legal aid. In this respect, a more extensive approach than offered in the existing international legal instruments was incorporated in the standards developed in the framework of this project. The compensation provision does not only focus on ensuring adequate financial compensation, but also calls upon States to consider other reparative measures such as commemorations and tributes to the victims. Finally, restorative justice was included in the proposed EU recommendation, which was based on the findings of the literature review. This approach was not explicitly mentioned in the Council of Europe Guidelines on the Prevention of Victims of Terrorist Acts

(2005), though a reference to mediation, as one form of restorative justice practice, can be found in other legal instruments at CoE level.

The process of developing specific standards for victims of terrorism was endorsed during the conference through the adoption of the Tilburg Declaration (see next page). The draft recommendation can be found on page 27.

**TILBURG DECLARATION ON**

**THE DRAFT EU RECOMMENDATION FOR ASSISTANCE  
TO VICTIMS OF ACTS OF TERRORISM**

11 March 2008

We, the Participants,

Having assembled at the Conference on Standards for Victims of Terrorism, organised by the European Forum for Restorative Justice in cooperation with the International Victimology Institute at Tilburg University, the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, the Leuven Institute of Criminology at the Catholic University of Leuven and Victim Support the Netherlands on 10 and 11 March to discuss standards for assistance to victims of terrorism in the European Union,

Grateful for the financial support provided to the organisers by the VICT Programme of the European Commission, Directorate-General Justice, Freedom and Security,

Noting with appreciation interventions made by the Minister of Justice of the Netherlands, Mr E. Hirsch Ballin and a representative of Mr Franco Frattini, Vice President of the European Commission responsible for Justice, Freedom and Security,

Also noting with appreciation statements from representatives of the Council of Europe, United Nations (Department for Political Affairs, New York), the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe, the Belgian Red Cross, the European Forum for Restorative Justice, Victim Support Europe, and the World Society of Victimology,

Also noting with appreciation interventions made by individual experts and persons directly affected by acts of terrorism,

Declare as follows:

We welcome the work done on the literature study by the European Forum on Restorative Justice, the International Victimology Institute at Tilburg University, the Centre for the Study of Terrorism and Political Violence at the University of St Andrews, the Leuven Institute of Criminology at the Catholic University of Leuven and Victim Support the Netherlands.

We also welcome the work done by the said organisations on the draft EU Recommendations for Assistance to Victims of Acts of Terrorism,

We invite the said organisations to finalise the literature study and draft recommendations, taking into account the existing European policies in the field and the results of the deliberations during the Conference, notably during the workshops,

We also invite the said organisations to widely distribute final versions of the literature study and the draft Recommendations included, by presenting them to the European Commission,

We call upon the European Commission, National and Non Governmental Organisations, including those representing victims' interests, to take note of the said documents and consider incorporating elements of the draft Recommendations in their own documents and policies where appropriate. We also call upon other European and international organisations to take note of the present initiative.

Tilburg, the Netherlands, 11 March, 2008

# **Draft EU Recommendation for Assistance to Victims of Acts of Terrorism**

## **Preamble**

Fully aware of the EU Council Framework Decision of 13 June 2002 on combating terrorism, in particular paragraph 8 stating that victims of terrorist offences are vulnerable and therefore specific measures are necessary with regard to them;

Bearing in mind the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and the Council Directive of 29 April 2004 relating to Compensation to Crime Victims;

Having regard to the 1983 Council of Europe Convention on the Compensation of Victims of Violent Crimes (CETS No. 116), the 2005 Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), the 2005 Council of Europe Guidelines on the Protection of Victims of Terrorist Acts and the 2006 Council of Europe Recommendation (2006)8 on Assistance to Crime Victims;

Considering that terrorist acts seriously jeopardise human rights, threaten democracy, aim to destabilise legitimately constituted governments, undermine pluralistic civil societies and challenge the ideals of everyone to lead a life free from fear;

Considering that terrorist acts cause great harm to the victims by injuring them, inflicting psychological damage and causing death;

Considering that terrorist attacks have repeatedly aimed at causing mass casualties, challenging available institutional capacities;

Considering that terrorist acts can have devastating effects on the quality of life of primary and secondary victims and others who have reason to fear to be targeted and the community as a whole;

Aware that the public nature of terrorist victimisation and the targeting of civilians and non-combatants requires a public response based on solidarity with victims and special attention to their needs;

Aware that victimisation by terrorist acts often results in cross-border victimisation, complicating the provision of assistance;

Recognising the important role of associations dedicated to the protection of victims of terrorist acts;

Recognising that restorative justice approaches and processes are increasingly used to meet victims' needs and aware that they can play a valuable role in assisting victims to come to terms with their victimisation;



Adopts the following Recommendation for Assistance to Victims of Acts of Terrorism and invites Member States to implement them and make sure that they are widely disseminated among authorities responsible for the protection of victims of terrorist acts and those who provide care to them.

## **I. Use of Terms**

1. The definition of act of terrorism coincides with the use of the term ‘terrorist offence’ as contained in articles 1 and 2 of the Council Framework Decision of 13 June 2002 on combating terrorism.
2. ‘Victim’ is a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by the terrorist act. The term also includes, where appropriate, dependants or close relatives of the injured or deceased.
3. A ‘first responder’ is a person who intervenes to assist victims in distress or to prevent further victimisation or damage in the immediate aftermath of a terrorist act.
4. A ‘witness’ is a person who could be called to a court or other appropriate forum to provide testimony.
5. ‘Secondary victimisation’ is victimisation that occurs not as a direct result of the terrorist act but as a result of the response of public or private institutions, including the media and individuals, to the victim.
6. ‘Restorative justice’ is a response to crime in which victims have an opportunity to express their needs and concerns at individual or collective level and to actively participate in the proceedings. Restorative justice aims to repair, in so far as possible, the harm suffered and to bring offenders to understand the consequences of their behaviour and accept responsibility.

## **II. Principles**

1. Member States should ensure that all victims, without discrimination on the basis of any kind, such as race, colour, gender, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability, can benefit from services and measures contained in this Recommendation.
2. The granting of these services and measures should not depend on the identification, arrest, prosecution or conviction of the perpetrator(s) of the terrorist act or the involvement of the victim(s) in investigations or proceedings.
3. Member States must respect the dignity, private and family life of victims of terrorist acts and take all necessary steps to avoid secondary victimisation.

## **III. Emergency Assistance**

1. In order to address the immediate needs of the victims, 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 made available. Member States should, when requested by a victim, also facilitate access to spiritual assistance.

2. In cases of mass victimisation, Member States should develop additional procedures and implementation strategies, including the identification of lead agencies.
3. Wherever possible, assistance should be provided in a language understood by the victim.

#### **IV. Continuing Assistance and Support of Victim Involvement**

1. Member States should provide for evidence-based continuing assistance, including medical, psychological, social, material assistance and information services for victims as well as for first responders.
2. Member States should promote and support community-based initiatives, including the formation of groups of victims or relatives with a view to stimulate mutual support, to empower them, and to strengthen solidarity in society.
3. If the victim does not normally reside on the territory of the Member State where the terrorist act occurred, that State should cooperate with the State of residence in ensuring that the victim receives such assistance, including through establishing links between victim support organisations or consular services.

#### **V. Investigation and Prosecution**

1. Member States on whose territory a terrorist act has taken place must launch an effective independent criminal investigation into this act.
2. In this framework, special attention must be paid to the interests of victims without it being necessary for them to make a formal complaint.
3. In cases where, as a result of an investigation, it is decided not to take action to prosecute a suspected perpetrator of a terrorist act, Member States should allow victims to ask for this decision to be re-examined by another competent authority.
4. In appropriate cases, Member States should consider launching independent public inquiries in the aftermath of a terrorist act in order to give full and public disclosure of the background, circumstances and responsibilities.
5. Each Member State shall ensure that the victim of a terrorist act in a Member State other than the one where s/he resides can make a report before the competent authority of her/his State of residence, if s/he was unable to do so in the Member State where the terrorist act was committed. This competent authority shall transmit the report without delay to the competent authority in the jurisdiction in which the act was committed. In addition, each Member State should ensure that its authorities have recourse, as far as possible, to the provision of video conferencing and telephone conference facilities as laid down in the Convention on Mutual Assistance in Criminal Matters of the European Union of 29 May 2000(3).

## **VI. Access to Justice and Administration of Justice**

1. Member States shall, in accordance with their national legislation, bring individuals suspected of terrorist acts to justice and obtain a decision from a competent civilian tribunal within a reasonable time.
2. Member States shall ensure that the position of victims is adequately recognised in criminal proceedings in accordance with domestic law, including by safeguarding the possibility for individual victims and/or associations representing victims' interests to communicate orally or in written form their views and concerns in the proceedings.
3. Member States shall provide effective access to justice for victims of terrorist acts, including through associations representing victims' interests, by providing them with:
  - i. the right of access to competent courts in order to bring a civil action in support of their rights;
  - ii. the status of parties to criminal proceedings in Member States where such possibility exists;
  - iii. the right of access to restorative justice programmes;
  - iv. free legal aid that should be ensured by the State or through special legal aid systems.

## **VII. Compensation and Other Reparative Measures**

### ***A. Compensation***

1. Victims of terrorist acts, and, where appropriate, first responders and dependants or close relatives, should receive fair, appropriate and timely compensation for damage resulting from a terrorist act, including for pain and suffering incurred. When compensation is not available from other sources, in particular through the confiscation of assets of the perpetrators, organisers and sponsors of terrorist acts, the Member State on the territory of which the terrorist act occurred should contribute to the compensation of victims for the consequences of direct material or psychological harm, irrespective of their nationality, either by applying existing provisions for compensation for victims of crime or by establishing a special fund for victims of terrorism.
2. Compensation from the State should be readily accessible to victims, irrespective of nationality. To this end, the Member State on the territory of which the terrorist act occurred should introduce a simple procedure allowing for fair and appropriate compensation within a reasonable time, taking into account special complexities in cases of mass victimisation.
3. Member States whose nationals were victims of a terrorist act on the territory of another Member State should facilitate the use of systems of cooperation as

foreseen in the Council's Directive relating to Compensation to Crime Victims. In addition, administrative cooperation should be encouraged between the competent authorities of Member States and non-Member States to facilitate access to compensation for their nationals.

4. Member States are encouraged to promote the principle that insurance policies should not exclude damages caused by acts of terrorism through consultation with insurance companies.

### ***B. Other Reparative Measures***

Apart from the payment of compensation, Member States are encouraged, depending on the circumstances, to consider taking other measures to mitigate the negative effects of the terrorist act suffered by the victims, their dependants and close relatives as well as first responders. Such other measures could include:

1. The search for the whereabouts of the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims;
2. Commemorations and tributes to the victims and first responders.

## **VIII. Restorative Justice**

1. Member States should promote competent restorative justice programmes that prepare for and support dialogue between victims and perpetrators of terrorism, and/or between members of the communities involved. As a minimum, these processes should allow victims to communicate the full impact of the terrorist acts on their lives and to seek information about the offenders' motives. This dialogue can also take place between those victims or perpetrators who have not been involved in the same terrorist act. Through the involvement of affected communities, the societal consequences of terrorist acts should be recognised and dealt with.
2. Member States should ensure that qualified and/or experienced facilitators are available to assist the parties in these processes.

## **IX. Protection of the Private and Family Life**

1. Member States should take appropriate steps to avoid, as far as possible, the undermining of respect for the private and family life of victims of terrorist acts, in particular when carrying out investigations or providing assistance after a terrorist act as well as within the framework of proceedings initiated by victims.

2. Member States should ensure that private and public institutions which interact with victims provide confidential services, including confidential record systems.
3. Member States should, where appropriate, while recognising the principle of freedom of expression, encourage the media and journalists to adopt self-regulatory guidelines and take appropriate measures to ensure the protection of the private and family life of victims of terrorist acts as well as their relatives and first responders in the framework of their information activities. This protection is especially important in the immediate aftermath of a terrorist attack, when those involved are in a state of shock.
4. Member States shall ensure that victims of terrorist acts have an effective remedy when they raise a plausible claim that their right to respect for their private and family life has been seriously violated.

## **X. Protection of Dignity and Security**

1. At all stages of the proceedings, victims of terrorist acts and their dependants and close relatives, as well as first responders should be treated in a manner which respects their personal security, their rights and their dignity.
2. Member States must ensure the protection and security of victims of terrorist acts as well as those of their dependants and close relatives and first responders and should take measures, where appropriate, to protect their identity, in particular where they intervene as witnesses.

## **XI. Information to Victims and the Public**

1. Member States should provide information, in an appropriate form, to victims of terrorist acts about the act which led to their harm, except where victims indicate that they do not wish to receive such information. For this purpose, States should:
  - i. set up an appropriate mechanism for the provision of information to victims regarding their rights, the existence of victim support bodies, and the possibility of obtaining assistance, practical and legal advice as well as compensation;
  - ii. ensure the provision to victims of appropriate information in particular about the progress of the investigations, decisions concerning prosecution, the date and place of the hearings in court, sentencing decisions including the granting of bail and release from custodial sentence and the conditions under which they may acquaint themselves with the contents of judicial decisions handed down. All information should be provided at the earliest possible stage and with full and clear explanations of the decisions which have been taken.
2. Member States should take steps to prepare an adequate information strategy with a view of minimising undue apprehension, fears and social stigmatisation

among the larger public, bearing in mind the risks of retaliatory action against members of communities associated with the perpetrators of terrorist acts. Such an information strategy should be focused on well-balanced background information in order to achieve the required results.

## **XII. Specific Training for Persons Responsible for Assisting Victims**

1. Member States should encourage specific training for persons responsible for assisting victims, including first responders and consular personnel, as well as granting the necessary resources to that effect.
2. Training should, as a minimum, include:
  - (1) evidence-based knowledge of the possible impact of terrorist acts on victims and first responders;
  - (2) state of the art knowledge and skills on ways to assist victims and first responders and prevent secondary victimisation.

## **XIII. Research and Exchange of Information**

1. Member States should promote, support, and, to the extent possible, fund or facilitate fund-raising for victimological research concerning the impact of terrorist acts on victims, first responders and the public at large, including comparative cross-national and cross-cultural research in order to develop better coping mechanisms and strengthen the resilience of communities to terrorist acts.
2. Member States should encourage all governmental and non-governmental agencies dealing with victims to share their expertise with similar agencies in their country, in the European Union and where needed, elsewhere.

## **XIV. Increased Protection**

Nothing in this Recommendation restrains Member States from adopting more far-reaching services and measures than described in this Recommendation.

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# Chapter 1

## Introduction and Definitions

Rianne Letschert and Ines Staiger

### 1.1 The Aim of the Study

The fight against terrorism is receiving increased attention due to recent worldwide large-scale terrorist acts. Long overdue, and at least since the terrorist attacks of 11 September 2001 in New York and Washington, attention has also been directed to victims of terrorism. However, there is no international legally binding instrument that sufficiently and specifically covers the needs of victims of terrorism. The EU Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) includes victims of terrorism under the broader heading of victims of crime. The same situation regarding victims of terrorism exists at the level of the United Nations.<sup>1</sup> At the level of the Council of Europe, the Committee of Ministers adopted, on 2 March 2005, Guidelines on the Protection of Victims of Terrorist Acts. These guidelines recognise that the suffering of victims of terrorist acts deserves national and international solidarity and support (the guidelines can be found in the appendix to Chapter 2 in the present volume). In addition, a group of experts drafted a report on ‘Victims of Terrorism – Policies and Legislation in Europe’<sup>2</sup> that calls for the development of good practices regarding various issues concerning victims of terrorism, in view of the diversity of approaches in the Council of Europe Member States. In sum, existing legal instruments of international

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R. Letschert  
Tilburg University, International Victimology Institute (INTERVICT),  
5000 LE Tilburg, Netherlands  
e-mail: R.M.Letschert@uvt.nl

I. Staiger (✉)  
C/o Katholieke Universiteit Leuven, Leuven Institute voor, Criminology (LINC), and  
European Forum for Restorative Justice, Herbert Hooverplein 10, 3000 Leuven,  
e-mail: Ines.Staiger@googlemail.com

<sup>1</sup>The UN has adopted the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 that focuses on victims of crime in general.

<sup>2</sup>Albrecht, H.J. and Kilchling, M., Victims of Terrorism Policies and Legislation in Europe, An Overview on Victim related Assistance and Support’, Max Planck Institute for Foreign and International Criminal Law, October 2005, available at [www.coe.int.tjc/](http://www.coe.int.tjc/).

bodies like the EU, the Council of Europe and the UN dealing with victims of terrorism are relatively abstract or include victims of terrorism under the broader heading of victims of crime in general. In addition, on the national level of the EU Member States, policies and legislation vary widely.

Against this background, the European Commission initiated a project with the aim to develop more extensive standards for the aid and assistance to victims of terrorism at the European level. The present study provides the basis from which more extensive standards can be derived. It focuses particularly on developing standards in the field of continuing assistance, access to justice, administration of justice and compensation to victims of terrorism. Moreover, on specific request of the European Commission, the potential of restorative justice for victims of terrorism is addressed. Restorative justice in the context of terrorism is a possible mechanism to break through the circle of violence by responding to terrorism at the micro-, meso- and macro-level. From this perspective, it is not only relevant to study the interpersonal level with the main focus on the particular incident, but also the societal/collective and political level of a restorative justice response to terrorism. Thereby, the victim's pain and suffering can be addressed and reconciliation between estranged communities promoted. For the micro-level, the existing international legal instruments foresee mediation for cases of crime. In this respect, the application of restorative justice practices to cases of terrorism at the micro-level is examined in this study on the basis of which more extensive standards are derived. As regards the meso- and macro-levels, examples can be drawn from experiences with restorative justice oriented programmes in large-scale conflict situations. For instance, the model of the truth commission or restorative programmes in Israel/Palestine can help to conceive a restorative justice approach in the context of terrorism at these levels. These examples can provide a basis for including a restorative justice approach into the standards for assistance to victims of terrorism.

## 1.2 Methodology

A review of available literature, including both published and unpublished studies, as well as a review of existing international legal instruments and relevant case law was conducted. In addition, examples of national legislation and policies relating to victims of terrorism were studied. Furthermore, the review consisted of scrutinizing broadcasting documentaries, as well as library and internet searches. A bibliography is enclosed after each chapter. The researchers contacted colleagues and organisations working in the field regarding new research and publications. Furthermore, the preliminary findings were discussed during two expert seminars that took place in November 2007.

## 1.3 Contemporary Terrorism

The focal point of terrorist activity tends to move around the world. Until the early 1970s, most incidents were in Latin America. Then the focus switched to Europe. In the mid-1980s, most of incidents were in the Middle East. In the first decade of the

twentieth century, terrorist incidents can be found in nearly all parts of the world, but with the Middle East being most prominent. Terrorism has become a global phenomenon.<sup>3</sup> The policy response to terrorism in Western Europe has – until recently – been primarily focused on adjusting police tactics and criminal procedural laws relating to organised crime to the new demands placed on law enforcement.<sup>4</sup> Only a few countries developed specific legislation concerning victims of terrorism, among them the United Kingdom, France and Italy. The large-scale terrorist attacks on 9/11 resulted also in more attention being devoted to victims of terrorist acts. Discussions took place on how their needs could be best accommodated. The Madrid bombings in March 2004 gave further impetus to this process. Albrecht and Kilchling hold that measures taken since then ‘may be compared to such policies adopted in response to the aftermath of mass violence such as state wars or civil wars.’<sup>5</sup> In addition, ‘the developments may also be considered to be part of a recent trend towards general victim of crime policies that branch out into specialized policies devised to meet the needs of particular groups of victims such as victims of trafficking, victims of sexual violence and abuse or victims of traffic accidents.’<sup>6</sup> Following recent mass casualty attacks, a movement of national and international solidarity developed, as will be elaborated in more detail in the following chapters, although political consensus is still fragile.

Nowadays, one of the characteristics of the ‘new terrorism’ appears to be the aim to produce large-scale victimisation in order to provoke maximum public attention, often referred to as ‘catastrophic terrorism’. To illustrate, on 9/11 2001, more than 2,600 people died at the World Trade Center, 125 died at the Pentagon, and 256 died on the four planes, while some 250 others got injured. The Bali bombings of 12 October 2002 killed 202 people, 164 of whom were foreign nationals, and 38 Indonesian citizens. A further 209 people were injured. In Madrid, on 11 March 2004, 191 people were killed. The Beslan School Hostage that began on 1 September 2004 killed 334 civilians, including 186 children and 100 more were wounded.<sup>7</sup> It has been stated that ‘times have changed and we have “progressed” – or

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<sup>3</sup>Human Development Report 1994, Published for the United Nations Development Programme, Oxford University Press, 1994, p. 37.

<sup>4</sup>Albrecht, H.J. and Kilchling, M. *Victims of Terrorism Policies and Legislation in Europe, An Overview on Victim related Assistance and Support*, Max Planck Institute for Foreign and International Criminal Law, October 2005, available at [www.coe.int/tjc/](http://www.coe.int/tjc/), p. 5.

<sup>5</sup>Albrecht, H.J. and Kilchling, M. 2005, p. 5.

<sup>6</sup>Albrecht, H.J. and Kilchling, M. 2005, pp. 5 and 6. Just recently, the CoE commissioned a feasibility study for a convention on domestic violence, in which specific rights for victims should be included. See for the study, Römken, R. and Letschert, R.M. *A Feasibility Study for a Convention against Domestic Violence*, study prepared for the Directorate General of Human Rights and Legal Affairs, CDPC (2007) 09.

<sup>7</sup>These serve as examples. Unfortunately, many more examples can be given, such as the Lockerbie plane crash on 21 December 1988 in which 270 people were killed, or the London Bombings on 7 July 2005 which killed 52 commuters and injured 700. See for terrorism databases: The National Consortium for the Study of Terrorism and Responses to Terrorism at <http://www.start.umd.edu/data/gtd/> and the RAND-MIPT Terrorism Incident Database at <http://www.rand.org/ise/projects/terrorismdatabase/index.html>.

perhaps “regressed” – from individual terror to “mass terror”. Since the terrorism of the late nineteenth century, there appears to be an erosion of moral inhibitions. While an anarchist terrorist would not throw a bomb against the police chief if he was in the company of his wife and children, today – as we saw in Beslan – children are explicitly targeted. They were targeted not despite but because of their innocence, which, presumably, enhances in the reasoning of the perpetrators, the terrorists’ bargaining power.<sup>8</sup>

The latest Europol Situation and Trend Report noted, however, that of the 498 attacks that were carried out in the EU in 2006, the vast majority of them resulted only in *limited material damage and were not intended to kill*. Yet a different conclusion was reached with regard to Jihadist (Islamist) terrorism. The report notes that the failed attack in Germany and the foiled London multiple hijacking plot in the summer of 2006 demonstrate that jihadist terrorists aim at mass casualties.<sup>9</sup> The Europol Report nevertheless advises us that we should be careful not to conclude too quickly that catastrophic terrorism occurs on a frequent scale and that terrorist attacks are always intended to cause mass victimisation.<sup>10</sup>

During the last quarter of the twentieth century, terrorist groups were mainly inspired by secular Marxist or separatist nationalist ideologies.<sup>11</sup> In the last decade, however, proclaimed religious beliefs became increasingly important as the driving force.<sup>12</sup> According to the Europol Report, half of all the terrorism arrests that took place in the EU in 2006 were related to Jihadist (Islamist) terrorism. France, Spain, Italy and the Netherlands had the highest number of arrests of Islamist terrorist suspects. According to the Europol Report, ‘the majority of the arrested suspects were born in Algeria, Morocco and Tunisia and had loose affiliations to North African terrorist groups, such as the Moroccan Islamic Combatant Group and the Salafist Group for Preaching and Combat. However, the suspects involved in the foiled plots reported by the United Kingdom and Denmark were born or raised in EU Member States. Converts, who had been radicalised in Europe, were involved in both cases.’<sup>13</sup>

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<sup>8</sup>Alex Schmid, Magnitudes and Focus of Terrorist Victimisation, in: Dilip K. Das and Peter C. Kratcoski (eds.), *Meeting the Challenges of Global Terrorism: Prevention, Control and Recovery*, Lexington Books, Lanham, 2003, pp. 33–74.

<sup>9</sup>Europol Terrorism Situation and Trend Report, Executive Summary, 2007. See further also Chapter 3, Section 3.1.1.

<sup>10</sup>See also the Human Security Report 2005, War and Peace in the twenty-first century, Human Security Centre, University of British Columbia, Canada, 2005, at p. 40: ‘Data on international terrorism are too unreliable to permit any confident statements about trends.’ See also pp. 42 ff.

<sup>11</sup>See Brian Jenkins in the foreword to *The New Terrorism: Changing Terrorism in a Changing World*, RAND Publications, 1999, p. vii.

<sup>12</sup>See also Ely Karmon, Trends and Threats in Terrorism, in Dilip K. Das and Peter C. Kratcoski, *Meeting the Challenges of Global Terrorism, Prevention, Control and Recovery*, Lanham, Lexington Books, Boulder, New York, Oxford, 2003, pp. 99–115.

<sup>13</sup>Europol Trend Report, 2007, Executive Summary.

Most prominent among the methods used by terrorists inspired by religious belief, are suicide attacks.<sup>14</sup> Since 11 September 2001, these attacks have received increased attention, both by the security systems of States, and in the public debate on terrorism. Suicide attacks are a form of terrorism in which the perpetrator's suicide (or self-sacrifice) is part and parcel of the attack. However, the actual purpose of suicide attacks is not to commit suicide but to get close to a target and kill and injure the maximum number of persons or one particular high-level political figure.<sup>15</sup> The apparent randomness of the victim selection creates a sense of vulnerability in a larger class of indirect victims who identify with direct victims. This 'vicarious' dimension generates shock and fear and spreads apprehension and alarm, thereby creating so-called vicarious or tertiary victims.<sup>16</sup> Modern suicide terrorism is meant to cause devastating physical damage and, as a consequence, feelings of panic and helplessness.<sup>17</sup> Addressing the consequences of this type of terrorism therefore also means discussing its impact on a wider group of secondary and tertiary (or vicarious) victims. Both secular and religiously motivated terrorism use suicide attacks (or martyrdom operations, as they are also called) as a new and apparently effective *modus operandi*.<sup>18</sup> Religiously motivated terrorism offers the perpetrators rich rewards in the hereafter, hero worship for the perpetrator and enhanced esteem for the family of the 'martyr'. It shares many common features with the more secular political terrorism, such as its use of 'performative' violence, that is, violence that serves a theatrical as well as a practical purpose.<sup>19</sup>

Another threat of terrorism in the near or medium term is the development and utilisation of chemical, biological, radiological and nuclear agents for acts of (CBRN) terrorism. The possibility that terrorists might acquire and use nuclear weapons or use contagious biological agents poses a new threat to human security. The mailing of letters containing weapon-grade anthrax spores through the US

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<sup>14</sup>Suicide attacks constitute, however, only 4.6% of all terrorist attacks. So far, there have been approximately 1,500 of such attacks.

<sup>15</sup>Yoram Schweitzer, "Suicide Terrorism: Developments and Characteristics", 21 April 2000, at <http://www.ict.org.il/articles/articlelet.cfm?articleid=112>.

<sup>16</sup>Betty Pfefferbaum, Victims of Terrorism and the Media, in Andrew Silke (ed.), *Terrorists, Victims and Society. Psychological Perspectives on Terrorism and its Consequences*, West Sussex, Wiley, 2003, pp. 175–187 at p. 176.

<sup>17</sup>Zvonimir Paul Šeparović, International Terrorism: Large-Scale Victimisation, in Uwe Ewald and Ksenija Turković (eds.), *Large-Scale Victimisation as a Potential Source of Terrorist Activities*, Amsterdam, IOS Press 2006, pp.20–29 at p. 23. See also Israel Civilian Project, *Burning Flowers – Burning dreams: Consequences of Suicide Bombings on Civilians in Israel 2000–2005*.

<sup>18</sup>Christopher D. Marshall, Terrorism, Religious Violence and Restorative Justice, in Gerry Johnstone and Daniel W. Van Ness (eds.), *Handbook of Restorative Justice*, Cullompton, Willan Publishing, 2007, pp. 372–394 at p. 382; Andrew Silke, The Psychology of Suicidal Terrorism, in Andrew Silke (ed.), *Terrorists, Victims and Society. Psychological Perspectives on Terrorism and its Consequences*, West Sussex, Wiley, 2003, pp. 93–108 at p. 95.

<sup>19</sup>Marshall, Christopher, D. 2007, p. 374.

postal system in the fall of 2001 made governments and the general public concerned that terrorists could use biological or chemical agents as weapons to inflict mass casualties.<sup>20</sup>

The perceived increase in terrorist activities and the use of new methods of producing mass victimisation have serious implications for future consequence management of victims. The UN Counter-Terrorism Strategy (adopted unanimously by the UN General Assembly on 6 September 2006) lists, among conditions conducive to the spread of terrorism the ‘dehumanization of victims of terrorism in all its forms and manifestations.’<sup>21</sup> Therefore, Member States were urged to ‘consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives [...]’.<sup>22</sup> The aspect of dehumanization of victims, as a prelude to terrorist attacks, is an important element that will be further highlighted in subsequent chapters. This specific element might warrant specific legislation and policies regarding victims of terrorism. As Groenhuijsen rightly noted ‘the position of victims in the context of modern terrorism deserves serious attention.’ ‘According to most definitions of terrorism, the individual victims are targeted in order to inspire fear or to make governments move in a certain direction. The question can be asked whether these specifics should affect the way in which national legislation responds to their victims’ immediate and long term needs and interests.’<sup>23</sup> Due to the nature of terrorist targeting – producing atrocities in public – even when a relatively small number of people are directly victimised, fear is struck throughout a large population. Other possible justifications for devising specific policies and legislation for victims of terrorism can be found at a more practical level.

Questions relating to compensation of victims of terrorism appear more complicated compared to compensation in cases of individual ‘ordinary’ crime. For instance, in many cases, the perpetrator either died (due to a suicide attack) or is difficult to capture; catastrophic terrorism produces large numbers of victims which makes it more difficult to come up with an effective and appropriate compensation scheme. Whether the needs of victims of terrorism in the field of victim support and assistance differ from victims of ‘ordinary’ crime also requires further study. It appears that victims of terrorism experience a higher level of distress and different needs, partially due to the magnitude and scope of the events and quite possibly also due

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<sup>20</sup>See Introduction to Biological Warfare Terrorism. Tutorial and Nuclear Terrorism Tutorial, at <http://www.nti.org/>.

<sup>21</sup>Other conditions listed are ‘prolonged unresolved conflicts, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance.’

<sup>22</sup>UN Counter-Terrorism Strategy under I. Measures to address the conditions conducive to the spread of terrorism, para. 8.

<sup>23</sup>Marc Groenhuijsen, International Protocols on Victims’ Rights and some Reflections on Significant Recent Developments in Victimology, in R. Snyman and L. Davis (eds.), *Victimology in South Africa*, Van Schaik Publishers, Pretoria, 2005, pp. 333–351.

to the media attention. It has also been noted that the cross-border or transnational character of many acts of terrorism and the diverse identity of their victims, poses new demands on procedures and organization of victim relief and support schemes.<sup>24</sup> Another key question is: do victims of terrorism have appropriate access to justice and how is the administration of justice dealt with in this context? A novel feature of our approach is that we will also explore the possible utility of restorative justice approaches. Are they also suitable in the framework of terrorism? This study aims to shed new light on these difficult issues. Before addressing them in depth, the nature of this project will be further defined and refined, by examining the definition of terrorism, of victims of terrorism and of restorative justice.

## 1.4 Defining Terrorism

### 1.4.1 *The Various Features of Terrorism*

Terrorism has many different faces and features. To name but a few: the world has been confronted with large-scale attacks leading to multiple casualties (the attacks on 9/11), acts in which non-state and state actors are involved. State sponsored terrorism, a widespread feature of the Cold War period, is not a thing of the past: witness Iran's support for Hizballah in Lebanon. It has been said that terrorism thrives on publicity. Yet in recent years journalists themselves have been targeted, e.g. Daniel Pearl (Wall Street Journal) in Pakistan or Alan Johnston (BBC) in Gaza (the latter was released on 4 July 2007 after 114 days in captivity). Europe has seen transnational terrorism but also continuing local terrorism, e.g. in Spain.<sup>25</sup> Furthermore, countries like Germany or the United Kingdom still have to deal with the consequences of left wing and nationalist terrorism of the 1970s, 1980s and 1990s (RAF, IRA). Typologies of terrorism distinguish between religiously motivated terrorism, left and right wing terrorism, ethno-nationalist or separatist terrorism,

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<sup>24</sup> Albrecht, H.J. and Kilchling, M. 2005 p. 14.

<sup>25</sup> This brief review of the literature will not address the root causes of terrorism. For more information, see Alex Schmid, Why Terrorism, Root Causes, Some Empirical Findings, and the Case of 9/11, Presentation at the Council of Europe Conference, "Why Terrorism? Addressing the Conditions Conducive to the Spread of Terrorism", Strasbourg, 25–26 April 2007, Stream-video accessible through the Council of Europe website. References to the definition of terrorism and the root causes as discussed in the United Nations General Assembly debate "Measures to eliminate international terrorism", October 1–5, 2001, United Nations, New York; at <http://www.reachingcriticalwill.org/political/1com/terror.html>, consulted on 10 August 2005. See further Tore Bjorgo (ed.), *Root Causes of Terrorism, Myths, Realities and Ways Forward*, London, Routledge, 2005 and Sue Mahan and Pamela L. Griset, *Terrorism in Perspective*, second edition, Sage Publications, London 2007.



vigilante terrorism and single issue terrorism – to name but the most important types. Terrorism can be both single-phased (bombing and shooting), that is characterised by punctuated short duration attacks and dual-phased incidents, involving protracted kidnappings, hijackings, and other acts of hostage taking. The different types and forms of terrorism make it difficult to make valid statements that cover all existing forms.

Schmid, adopting a victims' perspective, makes a distinction between focused and indiscriminate terrorism: focused terrorism is characterised by *discriminately choosing victims* who are part of a specific target group that is the principal addressee of the terrorist's message, coercion or intimidation. Indiscriminate terrorism *targets victims* more randomly, hitting people who happen to be in the wrong place at the wrong time and who are not specifically selected for their role in the conflict.<sup>26</sup>

However, in both cases, terrorists seek to obtain leverage. As Bruce Hoffman states: 'Terrorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack. It is meant to instill fear within, and thereby intimidate, a wider "target audience" that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general. [...] Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence and power they otherwise lack to effect political change on either a local or an international scale.'<sup>27</sup>

#### ***1.4.2 Difficulties in Developing a Legal Definition of Terrorism***

Although States generally agree on the importance of fighting international terrorism, important disagreements exist on certain issues, which so far have prevented them from reaching a consensus definition as a basis for joint action as in the case of slavery or piracy.<sup>28</sup> Points of acrimonious debate in the United Nations in the search for a common legal definition of terrorism relate to the relationship

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<sup>26</sup>Alex Schmid, Magnitudes and Focus of Terrorist Victimisation, in U. Ewald and K. Turkovic (eds.), *Large-Scale Victimisation as a Potential Source of Terrorist Activities, Importance of regaining security in post-conflict societies*, IOS Press, Amsterdam, 2006, pp. 3–19, p. 9.

<sup>27</sup>Bruce Hoffman, *Inside Terrorism*, Colombia University Press, 1998, quoted from Scott Gerwehr and Kirk Hubbard, What is Terrorism, Key Elements and History, p. 87, in B. Bongar, Lisa M. Brown, Larry E. Beutler, James N. Breckenridge and Philip G. Zimbardo (eds.), *Psychology of Terrorism*, Oxford University Press, 2007.

<sup>28</sup>Note that the League of Nations already in 1937 drafted a convention in which terrorism was defined as 'all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or group of persons or general public.' This convention, however, never came into existence.



(or lack thereof) between terrorism and anticolonial and national liberation struggles and to the question whether or not the activities of States' armed forces in armed conflicts and in exercise of their official duties should be excluded from any definition of terrorism.<sup>29</sup> For more than a decade the debate has been going on in the United Nations in New York.<sup>30</sup> The United Nations has come up with a provisional draft legal definition of terrorism in its *Comprehensive Convention on International Terrorism* which the Ad Hoc Committee of the Sixth Committee of the General Assembly has been preparing for almost ten years now. The definition contained in this Draft Convention reads as follows.

Art 2. 1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

- (a) Death or serious bodily injury to any person; or
- (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
- (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.<sup>31</sup>

<sup>29</sup>Draft Convention on International Terrorism, Inventory of International Nonproliferation Organizations and Regimes, Center for nonproliferation Studies, 8/11/2006, see <http://cns.miis.edu/pubs/inven/pdfs/intlterr.pdf>.

<sup>30</sup>See also Friedrichs, J., Defining the International Public Enemy: The political struggle behind the legal debate on international terrorism, *Leiden Journal of International Law*, Vol. 19, 2006, pp. 69–91.

<sup>31</sup>In a draft outcome document for the mid-September 2005 High-Level Plenary Meeting of the General Assembly where Heads of States from more than 150 Member States took part, the paragraph on terrorism reads as follows: 'We strongly condemn terrorism in all its forms and manifestations, as it constitutes one of the most serious threats to international peace and security. We welcome the Secretary-General's counter-terrorism strategy and will consider it in the General Assembly with a view to adopting it. We affirm that the targeting and deliberate killing of civilians and non-combatants cannot be justified or legitimized by any cause or grievance, and we declare that any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to carry out or to abstain from any act cannot be justified on any grounds and constitutes an act of terrorism'. – UN Press Communiqué 05/08/2005. Press conference on summit outcome document. Briefing correspondents on the second revision of the draft outcome document. The legal draft definition was negotiated in the Ad Hoc Committee on Terrorism of the 6th Committee of the General Assembly, 29 July 2005, General Assembly, 59th session, Agenda item 148, Measures to eliminate international terrorism, Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, 12 August 2005 A/59/894 Appendix II: Draft comprehensive convention against international terrorism. Consolidated text prepared by the coordinator for discussion, p. 9. See for the latest version, A/59/894, 12 August 2005. Note that, on 8 September 2006, the General Assembly collectively adopted the UN Global Counter-Terrorism Strategy. Part of the strategy is to further the adoption of the convention. For an overview of the UN and the definition issue, see Alex Schmid, Terrorism, The Definitional Problem, *Case Western Reserve Journal of International Law*, Vol. 36, Nos. 2 and 3, 2004, pp.385–395.

The envisaged Comprehensive Convention on International Terrorism would complement the existing framework of more than a dozen international anti-terrorism instruments and would build on key guiding principles already present in recent anti-terrorist conventions and protocols, namely ‘the importance of criminalization of terrorist offences, making them punishable by law and calling for prosecution or extradition of the perpetrators; the need to eliminate legislation which establishes exceptions to such criminalization on political, philosophical, ideological, racial, ethnic, religious or similar grounds; a strong call for Member States to take action to prevent terrorist acts; and emphasis on the need for Member States to cooperate, exchange information and provide each other with the greatest measure of assistance in connection with the prevention, investigation and prosecution of terrorist acts.’<sup>32</sup> In the absence of the United Nations coming to an agreement on a universal legal definition of terrorism, various regional organisations have moved ahead after 11 September 2001.

The EU Framework Decision of 13 June 2002 on combating terrorism contains a definition in Article 11:

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:
  - Seriously intimidating a population, or
  - Unduly compelling a Government or international organisation to perform or abstain from performing any act, or
  - Seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences:
    - (a) Attacks upon a person’s life which may cause death
    - (b) Attacks upon the physical integrity of a person
    - (c) Kidnapping or hostage taking
    - (d) Causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss
    - (e) Seizure of aircraft, ships or other means of public or goods transport
    - (f) Manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons
    - (g) Release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life

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<sup>32</sup>See <http://www.un.org/terrorism/instruments.html>. See also for more information Friedrichs, 2006. Note that the *UN Draft Convention on Justice and Support for Victims of Crime and Abuse of Power* follows the definition contained in para. 3 of UN Resolution 1566. See further <http://www.tilburguniversity.nl/intervict/undeclaration/>.

- (h) Interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life
- (i) Threatening to commit any of the acts listed in (a) to (h)

The Council of Europe (CoE) Parliamentary Assembly in Recommendation (1999) 1426 gave the following definition of terrorism.

Any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public.

In addition, Article 1 of the European Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism gives a very precise definition of ‘terrorist act’ stating that:

(3) For the purposes of this Common Position, ‘terrorist act’ shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aims of:

- i. Seriously intimidating a population, or
- ii. Unduly compelling a government or an international organisation to perform or abstain from performing any act, or
- iii. Seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
  - a. Attacks upon a person’s life which may cause death.
  - b. Attacks upon the physical integrity of a person.
  - c. Kidnapping or hostage-taking.
  - d. Causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss.
  - e. Seizure of aircraft, ships or other means of public or goods transport.
  - f. Manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons.
  - g. Release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life.
  - h. Interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life.
  - i. Threatening to commit any of the acts listed under (a) to (h).
  - j. Directing a terrorist group.
  - k. Participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal

activities of the group. For the purposes of this paragraph, ‘terrorist group’ shall mean a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. ‘Structured group’ means a group that is not randomly formed for the immediate commission of a terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

The Organisation for Economic Co-operation and Development (OECD) has developed a checklist for defining terrorism, mainly for the purpose of compensation.<sup>33</sup> The following elements were listed:

#### Criterion 1 – Means and effects

A terrorist act is:

- An act, including but not limited to the use of force or violence, causing serious harm to human life, or to tangible or intangible property
- Or a threat thereof entailing serious harm;

#### Criterion 2 – Intention

A terrorist act is committed or threatened:

- With the intent to influence or destabilize any government or public entity and/or to provoke fear and insecurity in all or part of the population
- In support of a political, religious, ethnic, ideological or similar goal<sup>34</sup>

On the national level, most States have defined terrorism but some have no specific regulations on terrorism. In the latter States, terrorist actions are punished as common offences. In a number of EU Member States there are specific laws or legal instruments concerning terrorism where the words ‘terrorism’ or ‘terrorist’ are expressly mentioned and where some of their offences are expressly identified. This is the case in France, Germany, Italy, Portugal, Spain and the United Kingdom.<sup>35</sup>

Many existing legal and academic definitions of terrorism have at least three main characteristics in common:

- The intention to cause death or serious bodily harm and/or damage to public or private property
- The targets are often randomly selected persons, in particular civilians and non-combatants

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<sup>33</sup>OECD Checklist of Criteria to Define Terrorism for the Purpose of Compensation, Recommendation of the Council, adopted on 15 December 2004.

<sup>34</sup>OECD Checklist, p. 6, available through <http://www.oecd.org/dataoecd/55/2/34065606.pdf>.

<sup>35</sup>Explanatory memorandum preceding the Proposal for a Council Framework Decision on Combating Terrorism [COM(2001)521 final]. For an overview of definitions, see Annex iii to the OECD Checklist: definitions of terrorism acts for the purpose of compensation in OECD countries and in Singapore.

- The purpose of such an act is to intimidate a population (or a specific segment within the population), or to compel a government or an international organisation to do or to abstain from doing any act or to attempt to destabilise governments or societies

Some of the elements contained in definitions of terrorism show great similarities with elements contained in the legal definition of war crimes, as defined in the Statute of the International Criminal Court:

- i. Wilful killing
- ii. Taking of hostages
- iii. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities
- iv. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives
- v. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, etc.<sup>36</sup>

The relationship between terrorism and armed conflict is complex: terrorism can occur in the context of an ongoing protracted conflict (e.g. the Israeli–Palestinian conflict), it can lead to military intervention and war (e.g. the US ousting of the Taliban regime in Afghanistan after 9/11) or a terrorist attack can occur as a reaction to an intervention (e.g. the Madrid bombings of 11 March 2004). Some countries grant victims of acts of terrorism similar rights and services to those that victims of war are entitled to, thereby recognising the similarity between the two. Seen solely from the direct victims' point of view, it is unclear whether the different frameworks bring with them more or less detrimental or protective consequences.<sup>37</sup>

It is important to contextualise terrorist acts: as Schmid rightly noted, 'groups that engage in tactics of terrorism often emerge from wider social, political or religious movements. Their methods can include legal political activities (like militant demonstrations), illegal activities of a quasi-criminal or political nature (depending on the spectrum of permissible activity within various political systems) and extreme forms of violence which most people consider 'beyond the pale' and which are often referred to as 'acts of terrorism'. While there are grey zones and borderline cases of what is, and what is not acceptable in certain political contexts (during a revolution, under military occupation, against a tyrannical regime), there are certain forms of peacetime political violence and wartime activities which are widely seen as totally unacceptable. These are generally referred to as war crimes in war times or zones of war and acts of terrorism in peacetime or zones of peace. These include unprovoked attacks on civilians, the taking of hostages, and other forms of

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<sup>36</sup>These would, if committed in times of war, be 'war crimes' which fall under the jurisdiction of the International Criminal Court. – Cf. Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*. Transnational Publishers, New Brunswick, NJ, 2004, pp. 347–349 (Art. 8 of the ICC Statute). Note that in 1992, a report for the secretariat of the UN Crime Prevention Branch authored by Alex Schmid, suggested that acts of terrorism could be defined as the 'peacetime equivalents of war crimes'.

<sup>37</sup>See further Chapter 3.

willful killings. What makes terrorism extra-normal is the fact that the violence is usually one-sided and that the victims cannot, through surrender, save their lives. The extra-normality also consists of the fact that unarmed civilians not directly involved in the conflict are one of terrorism's main targets.<sup>38</sup>

### 1.4.3 *Typology of Terrorism*

The above-mentioned definitions are legal definitions and as such only partly overlap with some of the more widely used sociological definitions of terrorism. Schmid developed, in 1988, an academic consensus definition containing 16 elements. The definition reads as follows:

Terrorism is an (1) anxiety-inspiring method of repeated (2) violent action, employed by (semi-) (3) clandestine individual, group, or state actors, for (4) idiosyncratic, criminal, or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The (5) immediate human victims of violence are generally chosen (6) randomly (targets of opportunity) or (7) selectively (representative or symbolic targets) from a target population, and serve as message generators. (8) Threat- and violence-based (9) communication processes between terrorist (organization), (imperilled) victims, and main targets are used to (10) manipulate the main target (audience(s)), turning it into a (11) target of terror, a (12) target of demand, or a (13) target of attention, depending on whether (14) intimidation, (15) coercion, or (16) propaganda is primarily sought.<sup>39</sup>

In addition, Schmid has in his work used five conceptual lenses to analyse terrorism, treating it as crime, as politics by other means, as a form of irregular warfare, as violent communication and as religious fundamentalism.<sup>40</sup> Conceptualising terrorism through different lenses can be useful in order to understand terrorism in all its forms and manifestations. He has also developed a widely used typology of terrorism (see Table 1.1).<sup>41</sup>

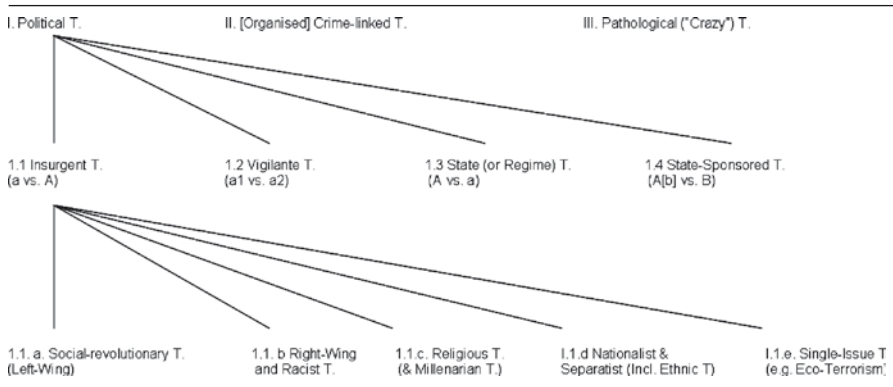
<sup>38</sup>From Alex Schmid, *Conceptual Caveats in the Discussion of (violent) Radicalisation and Terrorism*, on file with the authors. See also Alex Schmid, *E-learning Module I: Definitional, Conceptual, Typological and Theoretical Issues of Terrorism*, pp. 10 ff. On file with the authors.

<sup>39</sup>See Alex Schmid, *Terrorism, The Definitional Problem*, *Case Western Reserve Journal of International Law*, Vol. 36, Nos. 2 and 3, 2004, pp.375–419, p. 382. A briefer definition, deduced from the analysis of some 70 definitions, was developed in 2003 by Leonard Weinberg and Ami Pedahzur, 'Terrorism is a politically motivated tactic involving the threat or the use of force or violence in which the pursuit of publicity plays a significant role.' Leonard Weinberg and Ami Pedahzur, *The Challenges of Conceptualizing Terrorism*, Paper prepared for presentation at the annual meeting of the American Political Science Association, Panel on Empirical Analyses of Terrorism, Philadelphia, August 27–31, pp. 10–11.

<sup>40</sup>Alex Schmid, *Frameworks for Conceptualising Terrorism*. *Terrorism and Political Violence*, Vol. 16, No. 2, Summer 2004, pp.197–221.

<sup>41</sup>Alex Schmid, *Political Terrorism. A New Guide to Actors, Authors, Concepts, Data bases, Theories, and Literature*. Revised, expanded and updated edition under the auspices of the Center for International Affairs, Harvard University. North-Holland Publ. Company, Amsterdam, 1988, p. 48.

**Table 1.1** Typology of terrorism. (Key: A signifies State Actor; a, a1, a2 signifies Non-State Actors)



It would go beyond the scope of this study to thoroughly describe and analyse the different sub-types of terrorism and their relationship to victimisation practices.<sup>42</sup> This brief overview does, however, demonstrate the variety of manifestations of terrorism and the ensuing difficulties to develop a common legal definition of the concept.

### 1.4.4 Some Final Observations

What is lacking at the moment, is international consensus about a legal definition of terrorism that would end controversies such as whether a particular armed group can be considered legitimate ‘freedom fighters’ or unlawful terrorists. International legal definitions covering sensitive topics such as ‘aggression’, ‘corruption’ or ‘organised crime’ tend to be open to controversy and subjective interpretations, which can lead to or result in different perceptions.<sup>43</sup> This also applies to the contested concept of terrorism and explains the difficulties encountered in arriving at a commonly accepted definition. In addition, the diversity and constant changes over time in the manifestations and motivations of terrorism are a source of confusion.

This literature review is not intended to arrive at a definition of terrorism; rather, the aim of this study is to determine the specific needs of victims of terrorism. An important question is whether victims of specific types of terrorism should be addressed in a similar way or whether the specific character of the attack merits different approaches for

<sup>42</sup>For a thorough overview, see Alex Schmid, E-learning Module I: Definitional, Conceptual, Typological and Theoretical Issues of Terrorism, pp. 19 ff. On file with the authors.

<sup>43</sup>Other international concepts have also been subject of discussions on how to define them. To illustrate, international law has not yet been able to come up with a definition of the term ‘national minority’. The OSCE High Commissioner on National Minorities once stated in a keynote address at the opening of the Human Dimension Seminar on National Minorities in 1993 that ‘I would dare to say that I know a minority when I see one’, thereby referring to the well-known elements of this concept and using his common sense.



victim protection schemes.<sup>44</sup> The tension seems most apparent between small-scale terrorism of which an individual is the direct target, such as kidnappings and acts of hostage taking, and large-scale terrorist attacks resulting in many casualties. The situation of an individual hostage taking shows some similarities with ‘ordinary’ crime. Adequate responses provided by the criminal justice system, varying from legal assistance to victim support, could possibly be taken from models developed for victims of ‘ordinary’ crimes. Large-scale terrorist attacks, on the other hand, show similar features as wartime mass victimisations of non-combatants and therefore might require different responses.<sup>45</sup> Moreover, nuclear and biological terrorism might require different approaches and responses to meet victim needs, to the extent possible. Chapter 3 will further explore whether such distinctions should be made.

## 1.5 Defining Victims of Terrorism

Just as it is difficult to agree on a definition of terrorism, it also appears problematic to define the term ‘victims’ in the context of terrorist attacks. The following section will provide an overview of definitions of the term ‘victim’ contained in international legal instruments.<sup>46</sup> However, at the start, it should be noted that the term ‘victim’ in itself gives rise to controversies because it is considered to have a negative connotation. For many bereaved family members, the term ‘victim’ refers to the deceased. They themselves often prefer to be considered ‘survivors’<sup>47</sup>. Considering that international instruments do not use the term ‘survivor’, and for reasons of consistency, we will, however, continue to use the term ‘victim’ throughout this study.

What makes the term ‘victim’ in relation to terrorism difficult to define relates to the variety of audiences that are affected by the act. According to Schmid, terrorism has the following audiences:

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<sup>44</sup>Note that at an OSCE ODIHR Technical Workshop it was discussed whether ‘any differentiation between types of victims should also take into consideration the diversity of terrorist acts that may take place, and should recognise the different socio-political impact of global and local terrorism (e.g. victims of ETA need security and protection in a different form than victims of 11 March bombings; victims of global and local terrorism differ with regard to the potential for reconciliation and participation in potential restorative justice programs). In certain cases, specific targets for terrorists may be identified (because of their political position, job etc.) and this type of victim may require specific forms of assistance or expressions of solidarity.’

<sup>45</sup>Note that a similar distinction is made regarding the perpetrators. Clark McCauley in his essay ‘War versus Justice in Response to Terrorist Attacks’ gives as example the policy of the US Government to classify those who committed the 1993 attack on the WTC as criminals, and those who committed the 9/11 attacks as combatants, in B. Bongar, Lisa M. Brown, Larry E. Beutler, James N. Breckenridge and Philip G. Zimbardo (eds.), *Psychology of Terrorism*, Oxford University Press, 2007, pp. 58–59.

<sup>46</sup>Several scholars have discussed the definition of the victim from a criminological or sociological point of view. For instance, see Ezzat A. Fattah, *Understanding Criminal Victimization*, Prentice-Hall Canada inc. Scarborough, Ontario, Prentice-Hall, 1991, especially Chapter 4 where different types of victims are presented.

<sup>47</sup>This was expressed by several of the participants at the OSCE High-Level Meeting on Victims of Terrorism, held in Vienna in September 2007.



1. The adversary/-ies of the terrorist organization (usually one or several governments)
2. The constituency / society of the adversary/-ies
3. The targeted direct victims and their families and friends
4. Others who have reason to fear that they might be the next targets
5. “Neutral” distant publics
6. The supporting constituency of the terrorist organization
7. Potential sympathetic sectors of domestic (national) and foreign publics
8. Other terrorist groups rivaling for prominence
9. The terrorist and his organization
10. And last but not least: the media<sup>48</sup>

What this list of terrorist audiences shows is the diversity in subjects of victimisation. Although categories 1 to 5 could be qualified as victimised entities, it remains to be seen whether they are all entitled to protection offered by international victims’ rights instruments. Most of these instruments define who falls under the scope of protection (chapter 2 will examine the content of these instruments). The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains the following definition in Articles 1 and 2:

1. “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 rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. [...] The term “victim” also includes, where appropriate, 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 victimisation (emphasis added).

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 uses the same definition as the 1985 Declaration. Legal persons are not entitled to protection under these two documents, contrary to the scope of protection offered by the Rules of Procedure and Evidence for the purpose of the Statute of the International Criminal Court. Rule 85 notes that the notion of victims may also include ‘organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’<sup>49</sup>

The EU Framework Decision on the standing of victims in criminal proceedings contains the following definition in Article 1 (a):

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<sup>48</sup>Alex Schmid, Magnitudes and Focus of Terrorist Victimisation, in Dilip. K. Das and Peter C. Kratoski (eds.), *Meeting the Challenges of Global Terrorism: Prevention, Control and Recovery*, Lexington Books, Lanham, 2003, pp. 33–74.

<sup>49</sup>The Rules of Procedure and Evidence set out general principles and clear descriptions of specific procedures underpinning and supplementing the provisions of the Statute. They are subordinate to the provisions of the Statute.

1 (a) ‘victim’ shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, *directly* caused by acts or omissions that are in violation of the criminal law of a Member State (emphasis added).

The Framework Decision thus limits the scope of protection to natural persons who suffered harm *directly* caused by acts or omissions that are in violation of the criminal law of a Member State. Article 8, however, broadens the scope to some extent in the sense that Member States ‘shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.’ The reason for this limited scope can be derived from the heading of this Framework Decision; it concerns the standing of victims specifically *in criminal proceedings* (see further Chapter 2). Lastly, legal persons do not fall under the scope of protection.<sup>50</sup>

The CoE Guidelines on the Protection of Victims of Terrorist Acts mention in principle 1 that:

States should ensure that any person who has suffered *direct* physical or psychological harm as a result of a terrorist act as well as, in appropriate circumstances, their close family can benefit from the services and measures prescribed by these Guidelines. These persons are considered victims for the purposes of these Guidelines (emphasis added).

This definition does not include economic loss, as included in the UN Declaration and the EU Framework Decision.

Viewing these definitions, it can be noted that not every category of the first five categories of Schmid’s list should qualify as victim entitled to victim’s protection. Only category 3 would fall under the definitions used in these instruments. Where does that leave those who were in another way confronted with the attack? One could think of first responders like the fireman who was involved in the rescue operation in the aftermath of the attack or the man or woman who guides tourists through Madrid who saw his/her income drastically decrease after the bombings in Madrid? Or what about the people who were confronted with the terrorist attack through the media (mainly television images) and show symptoms of PTSD? Only the fireman would fall under the definition enshrined in the UN Declaration (Article 2) and the UN Basic Principles and Guidelines (Article 8), but not under the European instruments.

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<sup>50</sup> The European Court of Justice concluded that the Framework Decision must be interpreted as meaning that in criminal proceedings – in particular in enforcement proceedings following a judgment which resulted in a final criminal conviction – the concept of ‘victim’ for the purposes of the Framework Decision does not include legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State. This judgment followed a reference for a preliminary ruling under Article 234 EC, by the Tribunale di Milano (Italy), concerning the interpretation of Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, page 1) (‘Framework Decision’) and of Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ 2004 L 261, page 15).

The specific characteristics of terrorism, namely the intention to cause death or serious bodily harm to civilians and non-combatants or cause damage to property, with the purpose, inter alia, to intimidate the larger population, might justify the formulation of a broader definition. The following typology of victims made by Schmid may provide further guidance. It distinguishes between primary (also referred to as direct) victims, and secondary (also referred to as indirect or vicarious) victims of terrorism.

Primary victims:

1. Those who are killed by terrorist kidnappers, hostage-takers, gunmen or bombers
2. Those who are injured, mutilated or mentally tortured by terrorists but are ultimately released or liberated
3. Those who are wounded or die in a counter-terrorist rescue operation at the hands of terrorists or armed first responders<sup>51</sup>
4. Those who become mentally or physically handicapped or die (in suicide) in a causal sequel to one or several terrorist events in which they were involved or of which they were direct witnesses

Secondary victims:

1. Those close to persons in the four categories of primary and direct victims: family, dependants, friends and colleagues
2. Those whose names appear on ‘death lists’
3. Those who have otherwise a well-founded reason to fear that they might be a victim in the future
4. Those first responders to acts of terrorism who become traumatized and experience “burn-out”
5. Those who experience income loss or property damage due to acts of terrorism
6. Those whose normal lifestyle is changed by terrorist threats and counter-terrorism measures<sup>52</sup>

Based on this classification proposed by Schmid, and taking into account existing definitions in international instruments, this study proposes the following definition of victims:

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<sup>51</sup>This category should not be confused with victims of counter-terrorism activities. Several countries exclude this category from protection under victims’ legislation.

<sup>52</sup>Alex Schmid, Magnitudes and Focus of Terrorist Victimization, in U. Ewald and K. Turkovic (eds.), *Large-Scale Victimization as a Potential Source of Terrorist Activities, Importance of regaining security in post-conflict societies*, IOS Press, Amsterdam, 2006, pp. 3–19, p. 5. Kratcoski and Das note that ‘the lives of many persons not directly touched by terrorist activities can also be affected. Attacks on cities or airports can result in the loss of millions of tourism dollars and persons whose occupations are linked to the tourist industries, including hotel and restaurant employees, shop owners, travel guides, or persons who work in factories that manufacture items used or purchased by tourists, may experience financial problems; Dilip K. Das and Peter C. Kratcoski, *Terrorist Victimization: Definition, Focus and Impact*, in Dilip, K. Das and Peter C. Kratcoski (eds.), *Meeting the Challenges of Global Terrorism, Prevention, Control and Recovery*, Lexington Books, Lanham, Boulder, New York, Oxford, 2003, pp. 7–29, p. 13. See also Ashraf Mohsen, *Challenges of the Terrorist Phenomenon*, in the same book, p. 120.

- Primary victims: those persons who suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by the terrorist act. Based on the definition in the UN 1985 Declaration and the EU Framework Decision, it was decided to also include those who experience property damage (economic loss) due to violent acts under the category of primary victims as listed above (categories 1 to 4).

We furthermore suggest sub-dividing the large group of secondary victims into two groups, thereby introducing a category of tertiary victims (also referred to as vicarious victims):

- Secondary victims: consists of dependants or relatives of the deceased and first responders to acts of terrorism (see also the definition in the UN Declaration).
- Tertiary victims: All others (see also Schmid's list) not listed under primary and secondary victims could be considered tertiary victims.

Chapter 3 on the needs of victims will further analyse whether certain categories of tertiary victims should also be entitled to some form of protection or special attention, based on available studies that determine the needs of tertiary victims to protection and/or assistance.

## 1.6 Defining Restorative Justice

### 1.6.1 Restorative Justice in Literature

It is problematic to find one ultimate definition of restorative justice mainly because the concept of restorative justice covers a diversified meaning.<sup>53</sup>

However, according to Johnstone and Van Ness, there are three basic conceptions that proposed definitions of restorative justice typically centre on, namely the encounter conception, the reparative conception and the transformation conception.<sup>54</sup> The encounter conception focuses on the importance of stakeholder meetings and the benefits of discussing the crime and partaking in the decision-making process. Thus, the core of the encounter conception is the involvement of victim, offender and – where appropriate – other parties, meeting together in order to discuss what happened and to agree on what should be done about it.<sup>55</sup> The second is the reparative conception, where the focus lies on providing restoration in a broad sense to victims

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<sup>53</sup>Stephan Parmentier, The South African Truth and Reconciliation Commission. Towards Restorative Justice in the Field of Human Rights, in Ezzat A. Fattah and Stephan Parmentier (eds.), *Victim Policies and Criminal Justice on the Road to Restorative Justice*, Leuven University Press, 2001, p. 407.

<sup>54</sup>Gerry Johnstone and Daniel W. Van Ness, The Meaning of Restorative Justice, in Gerry Johnstone and Daniel W. Van Ness (eds.), *Handbook on Restorative Justice*, Cullompton, Willan Publishing, 2007, p. 9; Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice. An Introduction to Restorative Justice*, 3rd edn, Anderson Publishing, Cincinnati, 2006, p. 42.

<sup>55</sup>Gerry Johnstone and Daniel W. Van Ness, 2007, p. 9, Daniel W. Van Ness and Karen Heetderks Strong, 2006, p. 42.

and offenders, resulting from the idea that crime causes harm and that justice must repair that harm. This conception is not limited by the inability or unwillingness of the parties to meet but would need to look for other ways within the criminal justice system to repair the harm caused by the crime.<sup>56</sup> Finally, the transformation conception addresses not simply individual instances of harm but goes beyond that to structural issues of injustice. This conception regards restorative justice as a way of life because it addresses people's relationships and offers a way in which broken relationships can be repaired.<sup>57</sup> This variety of conceptions reflects the problem of finding a commonly accepted definition of restorative justice.

Another approach is to categorise definitions of restorative justice according to purist and maximalist interpretations. According to the purist perspective, restorative justice focuses on restorative practices where parties with a direct stake in the offence try to come to a solution. The maximalist perspective sees this approach as a limitation of the application of restorative justice. The maximalist restorative justice option puts harm and restoration in the centre of the reaction towards crime. Thereby, it is rather outcome oriented and broadens the application of restorative justice from a voluntary restorative response to crime (mostly communication processes) to the possibility of responding to crime with coercive restorative sanctions.<sup>58</sup>

The often cited definition by Marshall reflects the purist interpretation of restorative justice and emphasises a process-based approach of defining restorative justice. According to Marshall '*restorative justice is a process whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. Parties with a stake in an offence include, of course, the victim and the offender, but they also include the families of each, and any other members of their respective communities who may be affected, or who may be able to contribute to prevention of a recurrence.*'<sup>59</sup> This process-based approach of restorative justice is also evident in Zehr's definition. He describes restorative justice as '*a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.*'<sup>60</sup> This definition has to be seen against the background that, according to Zehr, crime is a violation of people and relationships rather than merely a violation of law. Therefore, the most appropriate response to criminal

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<sup>56</sup>Gerry Johnstone and Daniel W. Van Ness, 2007, p. 12.

<sup>57</sup>Daniel W. Van Ness and Karen Heetderks Strong, 2006, p. 42.

<sup>58</sup>See in Lode Walgrave, Extending the Victim Perspective Towards a Systematic Restorative Justice Alternative, in Adam Crawford and Jo Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice. International debates*, Aldershot, Ashgate, 2000, pp. 263, 272.

<sup>59</sup>Marshall, T., The Evolution of Restorative Justice in Britain, (1996) 4(4) *European Journal on Criminal Policy and Research*, p. 37.

<sup>60</sup>Howard Zehr, *The Little Book of Restorative Justice*, Intercourse, Good Books, 2002, p. 37.

behaviour is to repair the harm caused by the wrongful act by providing the victim, offender and the community an opportunity to come together to discuss the event and try to find appropriate ways for reparation.<sup>61</sup> Thus, both Marshall and Zehr emphasise the importance of involving the stakeholders in the restorative justice process. In this respect, McCold and Wachtel point out that the micro-community or personal communities of care of both victims and offenders is included in the restorative processes such as circles and conferencing.<sup>62</sup> The British Restorative Justice Consortium also involves the community in its definition of restorative justice, namely that '*restorative justice seeks to balance the concerns of the victim and the community with the need to reintegrate the offender into society. It seeks to assist the recovery of the victim and enable all the parties with a stake in the justice process to participate fruitfully in it.*'<sup>63</sup> As regards the restorative justice process, Llewellyn and Howse suggest that the main elements of such a process involve voluntariness, truth telling and a face-to-face encounter.<sup>64</sup> Vanfraechem describes these processes as communication processes, including the main models of victim-offender mediation, circles and conferencing.<sup>65</sup>

Adherents of the maximalist perspective of restorative justice do not agree with a purely process-based definition of restorative justice. For instance, Walgrave criticised Marshall's definition because it looks at a process in general, without limiting it to the main aim, namely repairing the harm.<sup>66</sup> In his view, the outcome of the process must be clearly expressed as restorative or reparative. In a later definition, Marshall describes restorative justice as '*a problem-solving approach to crime which involves the parties themselves and the community generally, in an active relationship with statutory agencies. It is not a particular practice, but a set of principles which may orientate the general practice of any agency or group in relation to crime.*'<sup>67</sup> With this definition, Marshall shifts the focus from a solely process-based approach to an approach based upon restorative justice principles, which provides

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<sup>61</sup>Howard Zehr, 2002, pp. 19, 25.

<sup>62</sup>Paul McCold and Benjamin Wachtel, *Community Is Not A Place: A New Look At Community Justice Initiatives*, Paper presented to the International Conference on Justice Without Violence: Views from Peacemaking Criminology and Restorative Justice, Albany, New York, June 5–7, 1997 at <http://www.iirp.org/library/albany.html> (17/07/07).

<sup>63</sup>Cited in Ivo Aertsen, *Slachtoffer-daderbemiddeling. Een onderzoek naar de ontwikkeling van een herstelgerichte strafrechtsbedeling*, Leuven University Press, Leuven, 2004, p. 240.

<sup>64</sup>Cited in Jeff Latimer, Craig Dowden and Danielle Muise, *The Effectiveness of Restorative Justice Practices*, Department of Justice Canada, 2001, p. 1.

<sup>65</sup>Inge Vanfraechem, Community, society and state in restorative justice: an exploration, in Robert Mackay, Marko Bošnjak, Johan Deklerck, Christa Pelikan, Bas van Stokkom and Martin Wright (eds.), *Images of Restorative Justice Theory*, Frankfurt am Main, Verlag für Polizeiwissenschaft, 2007, p. 76.

<sup>66</sup>Lode Walgrave, 2000, p. 259.

<sup>67</sup>Tony F. Marshall, *Restorative Justice: An Overview*, Home Office, London, 1999, p. 5.

for more flexibility.<sup>68</sup> Bazemore and Walgrave define restorative justice from the maximalist perspective as a goal-oriented approach meaning ‘*every action that is primarily oriented towards doing justice by restoring harm that has been caused by a crime.*’<sup>69</sup> However, Walgrave aims at adapting this earlier definition and suggests that ‘*restorative justice is an option for doing justice after the occurrence of an offence which is primarily oriented towards repairing the individual, relational and social harm that is caused by an offence.*’<sup>70</sup> Accordingly, the reparation of harm is the first concern and various practices can be used to achieve that aim, for instance, communication processes, victim assistance, panels, community service and educational projects.<sup>71</sup> The maximalist perspective includes ‘restorative sanctions’ in restorative justice practices. In this context, Wenzel *et al.* point out that in contrast to retributive sanctions, restorative sanctions are more constructive and meaningful in that they oblige the offender to do something for the victim, provide some service to the community, or take part in an educational programme.<sup>72</sup>

These different points of view make it difficult to agree on a working definition, and although some theorists strongly caution against establishing firm definitions of restorative justice, others agree that there is a need to define restorative justice clearly enough to distinguish it from retribution and rehabilitation, from other kinds of alternative justice processes, or from strikingly bad practice.<sup>73</sup>

### ***1.6.2 Restorative Justice in International Legal Instruments***

Restorative justice as such is not defined in any international legal instrument. At EU level, Article 1 (e) of the *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* defines ‘mediation in criminal cases’ as ‘the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person.’<sup>74</sup> At the level of the Council of Europe, *Recommendation No. R (99) 19 of*

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<sup>68</sup>Chapter 7 describes restorative justice principles in detail.

<sup>69</sup>Lode Walgrave, 2000, p. 260.

<sup>70</sup>Cited in Elmar G.M. Weitekamp, Stephan Parmentier, Kris Vanspauwen, Marta Valiñas and Roel Gerits, How to Deal with Mass Victimisation and Gross Human Rights Violations. A Restorative Justice Approach, in Uwe Ewald and Ksenija Turkovi (eds.), *Large-scale victimisation as a Potential Source of Terrorist Activities*, IOS Press, Amsterdam, 2006, p. 226.

<sup>71</sup>Vanfraechem, 2007, p. 77.

<sup>72</sup>Wenzel, M., Okimoto, T.G., Feather, N.T., and Platow, M.J., Retributive and Restorative Justice, (2007) *Law and Human Behaviour*, DOI 10.1007/s10979-007-9116-6.

<sup>73</sup>See in Susan Sharpe, How Large Should the Restorative Justice “Tent” Be? in Howard Zehr and Barb Toews (eds.), *Critical Issues in Restorative Justice*, Willan Publishing, Cullompton, 2004, p.18.

<sup>74</sup>OJ L 164, 22.06.2002, p. 2.



the Committee of Ministers to Member States concerning mediation in penal matters, 'mediation in penal matters' is defined as 'any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).'<sup>75</sup> Thus, the primary focus in both definitions is on mediation, which is only one of the restorative justice practices as mentioned above. Although it becomes clear at least from the explanatory memorandum to the Recommendation No. R (99) 19 that the term 'mediation in penal matters' has a broad meaning, a clear definition of the term 'restorative justice' is not provided.<sup>76</sup> A slightly clearer picture on restorative justice is drawn by the *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.<sup>77</sup> Although the UN Basic Principles do not contain a formal definition of restorative justice either, they provide a definition of restorative justice programmes. Para. 1 of the UN Basic Principles refers to a '*restorative justice programme*' meaning '*any programme that uses restorative processes and seeks to achieve restorative outcomes.*' According to para. 2, '*restorative process*' means '*any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.*'

Under para. 3, '*restorative outcome*' means '*any agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.*'

However, the UN Basic Principles can only provide a general framework that needs to be further incorporated with restorative justice values and principles. This is against the background that a restorative process may produce objectionable outcomes, respectively does not necessarily guarantee a restorative outcome. Further, restorative justice is not limited to situations where all stakeholders are brought together.<sup>78</sup>

The underlying values of a restorative justice approach are based on *respect* for the *dignity* of everyone affected by crime.<sup>79</sup> It is incidental to address the *needs* of

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<sup>75</sup>Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies.

<sup>76</sup>See points A.I. and C.I. of the Explanatory Memorandum in Ivo Aertsen, Robert Mackay, Christa Pelikan, Jolien Willemsens, and Martin Wright, *Rebuilding community connections – mediation and restorative justice in Europe*, Council of Europe Publishing, Strasbourg, 2004, pp. 97–99, 104–105.

<sup>77</sup>ECOSOC Resolution 2002/12 of 24 July 2002. Hereinafter "the UN Basic Principles".

<sup>78</sup>Roche, D., The Evolving Definition of Restorative Justice, (2001) 4(3–4) *Contemporary Justice Review*, 4(3–4) p. 345.

<sup>79</sup>Howard Zehr, 2002, p. 36.



the ‘stakeholders’ and to *empower* them to communicate their thoughts and feelings in an open and honest way. The goal is to build *understanding*, to encourage *accountability* and to provide an opportunity for *repairing harm* or *healing*.<sup>80</sup> Thus, restorative justice is a balanced approach that seeks to involve all parties affected by the crime, namely victims, offenders and the community. It offers a concrete experience for the stakeholders through the choice to participate actively in the justice process, which is in contrast to the rather abstract involvement of the stakeholders in the traditional criminal justice system. In this respect, Braithwaite underlines the importance of restorative justice values as regards restorative justice procedures.<sup>81</sup> On the basis of such a multi-dimensional approach of restorative justice, both process and values are encompassed, which makes it possible to determine whether a programme is restorative and in what ways.<sup>82</sup>

In sum, the following underlying assumptions of restorative justice programmes can be identified: the response to crime should repair as much as possible the harm suffered by the victim; offenders should be brought to understand that their behaviour is not acceptable and that it had consequences for the victim and the community; offenders can and should accept responsibility for their action; victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and the community has a responsibility to contribute to this process.<sup>83</sup>

Chapter 7 will illustrate the possibilities of restorative justice in the context of terrorism from the victim’s perspective. Although there is rarely any notion of restorative justice in the context of terrorism in literature, the current discussion of restorative justice regarding responses to conventional serious crimes and large-scale conflicts can be taken as an incitement. Hence, as regards the micro- and meso-level approach of restorative justice, programmes like victim-offender mediation, family group conferencing and circles as the most common forms of restorative justice in Western industrialised countries will be presented. These programmes or at least some of them are mentioned in international legal instruments and, for instance, at the Council of Europe level their application for victims of terrorism is considered indirectly. The *Committee of Ministers’ Recommendation Rec(2006)8 on Assistance to Crime Victims* is explicitly concerned with victims of terrorism<sup>84</sup>

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<sup>80</sup>Howard Zehr, 2002, pp. 14–16.

<sup>81</sup>John Braithwaite, Principles of Restorative Justice, in Andrew van Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach and Maria Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing, Oxford, 2003, pp. 8, 11, 12.

<sup>82</sup>See also the standards set up by Braithwaite, John Braithwaite, Setting Standards for Restorative Justice, (2002) 42 *British Journal of Criminology*, p. 569; and Benjamin Wachtel and Paul McCold who developed types and degrees of restorative justice practices, see in Weitekamp et al., 2006, p. 233.

<sup>83</sup>United Nations Office on Drugs and Crime Vienna, *Handbook on Restorative Justice Programmes, Criminal Justice Handbook Series*, New York, United Nations, 2006, p. 8.

<sup>84</sup>Council of Europe, ‘Victims – Support and Assistance’, Council of Europe Publishing, Strasbourg, 2006, pp. 71, 83: See preamble and the Explanatory Memorandum.

and refers in para. 13.1 to mediation as stated in the *Committee of Ministers' Recommendation R (99) 19 concerning Mediation in Penal Matters*. As this recommendation does not restrict the application of mediation to any type of crime,<sup>85</sup> restorative justice is not excluded *per se* from cases of victims of terrorism. However, it has to be taken into consideration that restorative justice as a means to solve interpersonal disputes may be redefined for cases of terrorism, taking into account other restorative mechanisms used for instance in large-scale conflict situations,<sup>86</sup> by addressing the community/societal consequences of terrorism as well. In this respect, the model of the truth commission will be discussed on the basis of restorative justice principles and values. The inclusion of restorative justice principles and values at the macro-level can further help to redefine the common response to terrorism. On this basis a multi-layered approach could be developed that does not only address the interpersonal level but also the overall response to terrorism inspired by restorative justice principles and values.

## 1.7 Concluding Observations

The preceding sections have raised more questions than they have answered, questions that need to be addressed when discussing possible standards for victims of terrorism. The difficulty in defining controversial concepts such as terrorism, its victims and restorative justice have become apparent. Section 1.4 demonstrated the wide diversity in terrorist attacks, whereas Section 1.5 showed that terrorism can lead to a large category of victims. Lastly, Section 1.6 examined the different definitions of restorative justice, mainly inspired by the different approaches to restorative justice that can be found likewise in literature and international legal instruments.

An important part of the discussion in the next chapters shall focus on *what scope of protection* should be offered to *which category of victims* (primary, secondary and tertiary victims). The following chapters will further elaborate these two interrelated topics. The analysis will address the question whether victims of terrorism have needs of a *different kind*, i.e. additional or other needs than other victims of crime, whether they *differ in degree*, i.e. whether the consequences of terrorism are more or less severe, making meeting the need in question more or less important. Similarly, the analysis will review whether there are indications that meeting a need of victims of terrorism may require *additional effort in implementation* (Chapter 3).

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<sup>85</sup> See para.3 and 5 of the general principles of the recommendation. However, according to para.9, the decision to refer a criminal case to mediation should be reserved to the criminal justice authorities. Therefore, although the recommendation does not exclude any crime from mediation, national authorities have the possibility to restrict the application of mediation to certain types of crime.

<sup>86</sup> See the examples of restorative justice mechanisms in: Ivo Aertsen, Jana Arsovska, Holger-C. Rohne, Marta Valiñas and Kris Vanspauwen (eds.), *Restoring Justice After Large-scale Violent Conflicts: Kosovo, DR Congo and the Israeli-Palestinian Case*, Willan Publishing, Cullompton, 2008.

Regarding the scope of protection, the focal point will be the three components as already put forward in the introduction: continuing assistance (Chapter 4), access to and administration of justice (Chapter 5), and compensation (Chapter 6). Finally, Chapter 7 will examine the potential of restorative justice in the context of terrorism.

Before doing so, Chapter 2 will provide an overview of developments and activities taking place within international organisations; developments and activities that relate to or that could have an impact on victims of terrorism.

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## Chapter 2

# International Initiatives and Activities Focusing Specifically on Victims of Terrorism, Including Existing International Instruments

Rianne Letschert

### 2.1 Introduction into General Victims' Rights

It is generally known that criminal justice systems around the world feature vast differences. They vary from strictly adversarial systems (e.g. in Anglo-Saxon countries) to more inquisitorial systems in many jurisdictions on mainland Europe. No matter the incompatibilities between the various systems, nowadays they have one thing in common; they all share the ambition of reform on behalf of victims of crime.<sup>1</sup> The roots of these reformist efforts can be traced to the final quarter of the twentieth century. In 1985, two documents were issued urging the international community to enhance the status of victims. The first one is the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>2</sup> The second one is the Council of Europe Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure.<sup>3</sup> Although differences in language and in details cannot be overlooked,<sup>4</sup> the content of the Declaration and the Recommendation are to a large extent overlapping and have subsequently been echoed and expanded on in other international documents of a similar nature, such as the European Union Framework Decision on the standing of victims in criminal proceedings.<sup>5</sup> The most recent – and most comprehensive – example is the Council

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R. Letschert (✉)

Tilburg University, International Victimology Institute (INTERVICT), 5000 LE Tilburg, Netherlands

e-mail: R.M.Letschert@uvt.nl

<sup>1</sup>This part is mainly from M.S. Groenhuijsen and R.M. Letschert, Reflections on the Development and Legal Status of Victims' Rights Instruments, in Groenhuijsen and Letschert, *Compilation of International Victims' Rights*, Wolf Legal Publishers, first edition, 2006.

<sup>2</sup>A/res/40/34, adopted by the General Assembly in 1985.

<sup>3</sup>R(85)11, also adopted in 1985.

<sup>4</sup>The only really substantial difference between these two instruments is that the United Nations Declaration is not confined to victims of crime, but also includes victims of abuse of power. Given the crucial importance of abuse of government power in many regions of the world, this additional element is of major significance.

<sup>5</sup>Council Framework Decision of 15 March 2001 (2001/220/JHA).



of Europe Recommendation (2006)<sup>8</sup> on Assistance to Crime Victims, adopted on June 14, 2006.<sup>6</sup> From these instruments, there appears to be an international consensus regarding the nature and the extent of victims' rights and State obligations in the criminal justice system. Essentially, these involve the following principles:<sup>7</sup>

- The right to respect and recognition at all stages of the criminal proceedings.
- The right to receive information and information about the progress of the case.
- The right to provide information to officials responsible for decisions relating to the offender.
- The right to have legal advice available, regardless of the victims' means. Since 1985, this right has been extended in two ways. Now there is also the right to be reimbursed for expenses incurred as a result of legitimate participation in criminal proceedings.<sup>8</sup> In order to minimise communication difficulties, translation facilities or interpreters should be available to an extent comparable with the measures of this type which are present in respect of defendants.<sup>9</sup>
- The right to protection, for victims' privacy and their physical safety.
- The right to compensation, from the offender and the State.
- The right to receive victim support.<sup>10</sup>
- The right that governments seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure.<sup>11</sup>
- The right that the State shall foster, develop and improve cooperation with foreign States in cases of cross border victimisation in order to facilitate more effective protection of victims' interests in criminal proceedings.<sup>12</sup>

The above-mentioned rights are more or less incorporated in most international instruments in this respect. The rights are all directly or indirectly linked to the way the criminal justice system in the relevant countries should be operated. Some international instruments containing victims' rights go further. For instance, the Trafficking Protocol in Article 6.3 asks States to consider implementing measures to provide for the physical, psychological and social recovery of victims, including the provision of 'appropriate housing (a)' and 'employment, educational and training opportunities (b)'.<sup>13</sup>

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<sup>6</sup>See for other international victims' rights instruments, Groenhuijsen and Letschert, 2006.

<sup>7</sup>See M.S. Groenhuijsen, International Protocols on Victims' Rights and Some Reflections on Significant Recent Developments in Victimology, in R. Snyman and L. Davis (eds.), *Victimology in South Africa* (pp. 333–351). Pretoria: Van Schaik Publishers, 2005.

<sup>8</sup>Art. 7 of the European Union Framework Decision.

<sup>9</sup>Art. 5 of the European Union Framework Decision.

<sup>10</sup>Art. 13 of the European Union Framework Decision calls on Member States to "promote the involvement of victim support systems responsible for organising the initial reception of victims and for victim support and assistance thereafter [...]." For a more detailed account of this see the Statement of Victims' Rights to Standards of Service, issued by the European Forum for Victim Services in 1999.

<sup>11</sup>Art. 10 of the European Union Framework Decision.

<sup>12</sup>Art. 12 of the European Union Framework Decision.

<sup>13</sup>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2000.



In addition, international NGOs such as the European Forum for Victim Services (EFVS)<sup>14</sup> go much further, as can be witnessed from the statement ‘The Social Rights of Victims of Crime’, issued in 1998 (see further Section 2.2.5).

The following section will examine the main activities of and instruments adopted by the United Nations (UN), the Council of Europe (CoE), the Organisation for Security and Co-operation in Europe (OSCE), and the European Union (EU) in the field of terrorism, thereby focusing specifically on activities relating to victims of terrorism, if existing. Attention will also be paid to the victims’ rights incorporated in the Statute of the International Criminal Court and the statements issued by the European Forum for Victim Services, now Victim Support Europe. Section 2.3 will discuss the legal status of possible EU standards for victims of terrorism and analyse the need for EU involvement in this matter.

## 2.2 International Activities and Instruments

### 2.2.1 *The United Nations and Victims of Terrorism*

Thirteen conventions and protocols relating to the prevention of terrorism have been drafted, some under the auspices of the UN, others under the International Civil Aviation Organization or the International Atomic Energy Agency.<sup>15</sup> In these conventions, no specific focus is put on needs of and remedies for victims of terrorist acts. Nevertheless, the UN 1985 Declaration is also applicable to victims of terrorist acts and specifically refers to collective victimisation in Article 1 relating to the definition of ‘victims’. The UN Victims’ Rights Declaration was adopted by resolution of the UN General Assembly. Resolutions of the UN General Assembly are considered to be soft law. Although the UN Declaration is not legally binding, there are many indications that it has actually positively influenced the interpretation of existing texts, and even contributed on its own terms to the subsequent creation of legally binding rules in many countries. This is evidenced, inter alia, by the various monitoring projects undertaken by the UN in the years following the adoption of the Declaration. In that sense, the Declaration could easily be regarded as a catalyst of change and as a presage or a precursor of even more strict norms on a global level. The nature of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is adequately reflected in its official reference. Alongside specific victims’ rights, it also contains ‘basic principles of justice’. Basic principles are usually formulated in a more abstract way compared to individual or collective rights. On the other hand, it is exactly this rather general nature which made the provisions in the Declaration universally appealing.

One of the striking features of the 1985 Declaration is that it covers such a broad range of issues. They vary from truly abstract principles of justice (‘compassion and

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<sup>14</sup>The name has been changed into Victim Support Europe.

<sup>15</sup>See <http://www.un.org/terrorism/index.shtml>.

respect for dignity'), to very specific demands (like training for law enforcement officials). Some items concern the criminal justice system in general (for example, promoting alternative dispute resolution), while others involve details of the sanction system (like restitution as an available sentencing option). There are quite a few parts touching upon concrete, tangible rights and issues. We briefly mention the main components:

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

On the policy level, the UN Member States have expressed, in Resolution 1566, their deep concern with the increasing number of victims, including children, and reaffirm their profound solidarity with victims of terrorism and their families.<sup>17</sup> The Resolution followed the terrible events in Beslan in September 2004. In the same Resolution 1566, it established a working group that was mandated 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 [Security] Council.'<sup>18</sup> However, until now, the Working Group has not been functioning.

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<sup>16</sup>See for more detailed information on the UN Declaration, Willem van Genugten, Rob van Gestel, Marc Groenhuijsen and Rianne Letschert, *Loopholes, Risks and Ambivalences in International Lawmaking; The Case of a Framework Convention on Victims' Rights*, *Netherlands Yearbook of International Law*, October 2007, available also through <http://ssrn.com/abstract=999315>.

<sup>17</sup>See the Preamble of Res. 1566, 2004, adopted by the Security Council at the 5053rd Meeting on 8 October 2004. With regard to children, see also the specific provisions in the UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, UN Res. 2005/20, 22 July 2005.

<sup>18</sup>Res 1566, Paras. 9 and 10.

To consolidate and enhance the ongoing activities of the Member States, a global strategy was adopted on 8 September 2006 to counter terrorism. The strategy forms a basis for a concrete plan of action: to address the conditions conducive to the spread of terrorism; to prevent and combat terrorism; to take measures to build state capacity to fight terrorism; to strengthen the role of the United Nations in combating terrorism; and to ensure the respect of human rights while countering terrorism.<sup>19</sup> Part of the strategy is to ‘consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives [...]’.<sup>20</sup> A specific working group on assisting victims was set up aiming to build solidarity and listening to victims’ needs by facilitating interaction between victims, between victims and Member States, and between Member States.<sup>21</sup>

Lastly, on 9 September 2008, for the first time ever at the global level, victims, Governments, experts and civil society came together to participate in the Secretary-General’s Symposium on Supporting Victims of Terrorism.<sup>22</sup> The purpose of the Symposium was to give victims a human face, to provide a forum for discussing concrete steps to assist victims in coping with their experiences, to share best practices and to highlight measures already taken by Member States and non-governmental organizations to support and empower victims.<sup>23</sup> The following recommendations followed from the symposium:

- Provide a virtual networking, communication and information hub for victims of terrorism, Government officials, experts, service providers and civil society
- Strengthen legal instruments at both the international and national levels, providing victims of terrorism with legal status and protecting their rights
- Establish easily accessible health services that can provide victims with comprehensive support over the short, medium and long term
- Create an international rapid response team for victims’ support
- Provide financial support to victims
- Improve the capacity of the United Nations to assist survivors and families of staff killed or injured in terrorist attacks against it
- Engage in a global awareness campaign supporting victims of terrorism
- Improve media coverage of victims of terrorism<sup>24</sup>

How quickly the recommendations can be implemented will depend to a large extent on the level of support from the UN Member States.

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<sup>19</sup> <http://www.un.org/terrorism/>.

<sup>20</sup> UN Counter Terrorism Strategy under I. Measures to address the conditions conducive to the spread of terrorism, Para. 8.

<sup>21</sup> For more information, see <http://www.un.org/terrorism/workgroup3.shtml>.

<sup>22</sup> For the report see ‘Supporting Victims of Terrorism’ (January 2009), available through [http://www.un.org/russian/terrorism/report\\_on\\_supporting\\_victims\\_of\\_terrorism.pdf](http://www.un.org/russian/terrorism/report_on_supporting_victims_of_terrorism.pdf) (last checked March 2009).

<sup>23</sup> *Ibid.*, p. 2.

<sup>24</sup> *Ibid.*, pp. 26–28.

Another important global instrument is 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’ (hereafter also referred to as the *Van Boven/Bassiouni Principles*)<sup>25</sup> because of its focus on violations with a magnitude similar to most large-scale terrorist acts and the acknowledgment of the collective victimological notion.<sup>26</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 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 enshrined in the 1985 Declaration. The latter category is not mentioned in every general victims’ rights instrument.<sup>27</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’.<sup>28</sup> It entails much more than ‘compensation’, by which international law understands ‘restitution in money’ (see further Chapter 6). 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 pay the State when the latter has already paid the victims. States should furthermore endeavor 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,

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<sup>25</sup>The principles are often referred to as the Van Boven/Bassiouni Principles, referring to the drafters.

<sup>26</sup>They were adopted and proclaimed by the United Nations General Assembly on 16 December 2005, after a 15-year period of negotiation. 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.’

<sup>27</sup>See also Chapter I.

<sup>28</sup>See for more information on the Van Boven/Bassiouni Principles, D. Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Contents* in: K. De Feyter, S. Parmentier, M. Bossuyt & P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerpen: Intersentia 2005, pp. 11–32.

compensation, rehabilitation, satisfaction and guarantees of non-repetition', now laid down in Article 18.<sup>29</sup>

The principles see to providing victims an effective right to a remedy.<sup>30</sup> Following Van Boven, the right to an effective remedy has both a procedural and substantive dimension: 'the procedural dimension is subsumed in the duty to provide "effective domestic remedies" by means of unhindered and equal access to justice.'<sup>31</sup> The substantive dimension entails the 'general principle of law of wiping out the consequences of the wrong committed.'<sup>32</sup> Article 11 states that remedies include: 'equal and effective access to justice; adequate, effective and prompt reparation for harm suffered, access to relevant information concerning violations and reparation mechanisms.' Chapter 5 will provide more information on access to justice issues.

The Basic Principles and Guidelines have thus 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 dignity, ensure safety, physical and psychological well-being and privacy, and the prevention of secondary victimisation). Another example of a classical victims' rights 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 have a right to access. Important also is that Article 24 mentions that victims are entitled to seek and obtain information on the causes leading to their victimisation, and to learn the truth in regard to these violations. The right to learn the truth is not incorporated so prominently in other international victims' rights instruments. For victims of terrorism, this might be an important aspect that needs to be addressed when

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<sup>29</sup>Van Boven 2007, p. 22. See also Pablo De Greiff, Justice and Reparations, in Pablo de Greiff, *The Handbook of Reparations*, The International Center for Transitional Justice, Oxford University Press, 2006, pp. 452–503. See further Chapter 6, Section 6.9 where these different concepts are explained.

<sup>30</sup>See for a thorough overview of remedies for human rights violations, D. Shelton, *Remedies in International Human Rights Law*, Second Edition, Oxford University Press, 2005.

<sup>31</sup>This right can be found in numerous international and regional instruments: Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 39 of the Convention on the Rights of the Child, Article 7 of the African Charter on Human and Peoples' Rights, Article 25 of the American Convention on Human Rights, and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Van Boven also refers to provisions in international humanitarian law, such as Article 3 of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, the Protocol Additional to Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I, Article 91), and the Rome Statute of the International Criminal Court (Articles 68 and 75). See Theo van Boven, *The Right to a Remedy as contained in International Instruments: Access to Justice and Reparation in Treaties and the New United Nations Principles*, forthcoming, Bruylant Publishers, 2007, p. 6.

<sup>32</sup>Van Boven, 2007, p. 7.

guaranteeing the right to information, and thus not only providing information on important developments in the criminal procedure or the availability of services.<sup>33</sup>

Within the UN human rights framework, it is furthermore worth referring to the work of the Special Rapporteur on the promotion and protection of human rights while countering terrorism of the Sub-Commission on the promotion and protection of human rights, whose main task is to ensure the compatibility of counter-terrorism measures with international human rights law. However, the special rapporteur, Martin Scheinin, has indicated that his mandate is wider: '[...] the notion of the "promotion and protection of human rights and fundamental freedoms while countering terrorism" does not merely refer to the risk of human rights violations as a side effect of concrete action in the fight against terrorism. The comprehensive remit of his mandate also includes issues such as sustainable strategies to prevent acts of terrorism, inter alia through addressing the "root causes" of terrorism – or, more appropriately, "conditions conducive to terrorism" – and calling for effective protection for the human rights of victims of terrorism and their families.'<sup>34</sup> In his 2006 report, the special rapporteur notes that he promotes 'a human-rights-based approach to the issue and will return to the matter in his subsequent reports. In his view, victims of terrorism and their families have a human right to an effective remedy, and the corresponding State obligations include a duty to exclude any possibility of impunity for acts of terrorism.'<sup>35</sup>

## 2.2.2 *The International Criminal Court and Victims' Rights*

The Rome Statute, adopted in 1998, is a treaty that set up the International Criminal Court. It entered into force in July 2002. The Court is the first permanent international tribunal which is empowered to prosecute individuals, not States, accused of genocide, war crimes or crimes against humanity. Its jurisdiction also includes the crime of aggression.<sup>36</sup> The court is to be complementary to national judicial systems and will be able to assume jurisdiction for crimes committed after July 2002 only after it determines that a national system is unwilling or unable to prosecute the crimes relevant to the Statute. The Statute has been hailed as 'a milestone in Victimology' because it contains far-reaching provisions which deserve to be mentioned here in that they can serve as a model text for possible future standards for victims of terrorism.<sup>37</sup>

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<sup>33</sup> See also Chapter VII relating to restorative justice.

<sup>34</sup> E/CN.4/2006/98, 28 December 2005, Para. 64.

<sup>35</sup> E/CN.4/2006/98, 28 December 2005, Para. 66.

<sup>36</sup> It should be noted, however, that the States Parties must adopt an agreement setting up a definition of aggression and the conditions under which the Court could exercise its jurisdiction. A review conference will be held in 2009, during which the matter will be discussed.

<sup>37</sup> Marc Groenhuijsen, International Protocols on Victims' Rights and some Reflections on Significant Recent Developments in Victimology, in: R. Snyman and L. Davis (eds.), *Victimology in South Africa*, Pretoria: Van Schaik Publishers 2005, pp. 333–351.

Compared to the procedural rules governing previous International Tribunals (like the former Yugoslavia and Rwanda), the main improvements are in extending the availability of protective measures for victims, expanding their participation, and in better provisions on reparation.<sup>38</sup> For instance, relating to participation, Pre-Trial Chamber I determined that Article 68(3) already makes it possible for victims to participate in the proceedings at the stage of investigation.<sup>39</sup> Another example is the Victims and Witnesses Unit that advises the Prosecutor and the Court on a wide range of appropriate protective measures, security arrangements, counselling and assistance. The Statute proscribes that the Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence (Article 43.6). The ICC also has a Victims' Participation and Reparations Section that is responsible for assisting victims with the organisation of their legal representation before the Court.<sup>40</sup> The ICC has developed standard application forms for reparation to facilitate victims to submit the application before the Court and a booklet explaining how the Court works and the rights that victims have.<sup>41</sup>

The Rome Statute offers a universal model of how the legal system can respect legitimate victims' rights without prejudice to a fair trial for the accused. It transcends the well-known differences between the existing legal traditions, by introducing a procedure which could be agreed upon by representatives from the common law systems as well as from the civil law heritage. On top of that, the Statute with its corollary Rules of Procedure and Evidence, has introduced unique requirements in selecting staff. Every official that could come into personal contact with victims must be trained in victims' issues; for instance, in selecting staff, including judges, attention has to be paid to their expertise in the field of sexual violence. These are major steps forward and it might turn out to be the best model so far to reduce risks of secondary victimisation.<sup>42</sup> In addition, Rule 97 notes that 'taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems appropriate, on a collective basis or both.' Lastly, Rule 98 concerns the setting up of a Trust Fund aiming to provide victims with reparation.<sup>43</sup> More details will be provided in Chapter 6 relating to compensation and reparation.

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<sup>38</sup>Sam Garkawe, Victims and the International Criminal Court: Three Major Issues, *International Criminal Law Review*, 3, pp. 345–365, 2003.

<sup>39</sup>Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo: Public Redacted Version, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, 17 January 2006, see further Anne Marie de Brouwer, Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families, *Leiden Journal of International Law*, Vol. 20, pp. 207–237, at 219, 2007.

<sup>40</sup>See for more information <http://www.icc-cpi.int/victimissues.html>.

<sup>41</sup>See also De Brouwer, 2007, p. 222.

<sup>42</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>43</sup><http://www.icc-cpi.int/vtf.html>.



One of the biggest challenges will be to see in what way the traditional victims' rights (originally designed for individual victims who are victimised by an individual perpetrator) can be applied to the context in which the International Criminal Court operates (a context of mass victimisation with multiple victims and perpetrators). A similar statement can be made with regard to the context of large-scale terrorist attacks. Also in this context it will become especially urgent to define adequate ways to ensure participation rights and compensation measures.

What follows is a brief overview of some recent rulings of the Court regarding, especially, the extent to which victims can claim, and the scope of, participation rights. In a ruling by the Court's Pre-Trial Chamber I of 17 January 2007 relating to the situation in the Democratic Republic of Congo and the participation rights of six victims, the Prosecutor made a distinction between 'situation victims' (worried that the applications from the six applicants could instigate many thousand persons), and a victim who had been personally affected by a 'case' and the accused in such a case. The 'situation' victims are victims of the situation and not necessarily of the alleged crimes of the person facing trial. The Pre-Trial Chamber held that during the stage of investigation of a situation, the status of victim will be accorded to applicants who seem to meet the definition of victims in relation to the situation in question, while at the case stage the status of victim will be accorded only to applicants who seem to meet the definition of victims in relation to the relevant case. To meet the definition in relation to a particular situation, there must be a causal link between the harm suffered by a victim and a crime falling within the jurisdiction of the Court that was committed in the relevant situation. To meet the definition in relation to a particular case, it was held that there must be a sufficient causal link between the harm suffered by a victim and the crimes for which the Chamber has issued an arrest warrant (Para. 21 ff).<sup>44</sup>

On 18 January 2008, the Trial Chamber, delivered the following decision on the criteria for permitting participation by victims in the proceedings in accordance with Article 68 of the Rome Statute ("Statute") and Rule 85 of the Rules of Procedure and Evidence ("Rules"). It noted in para. 91 that 'in relation to the link between the harm allegedly suffered and the crime, whereas Rule 85(b) of the Rules provides that legal persons must have 'sustained direct harm', Rule 85(a) of the Rules does not include that stipulation for natural persons [...], people can be the direct or indirect victims of a crime within the jurisdiction of the Court.'<sup>45</sup> In addition, following Para. 93, the Court rejects the ruling from the Pre-Trial Chamber by stating that the harm needs to result from the 'commission of a "crime within the jurisdiction of the Court" and to add the proposed additional element – that they must be the crimes

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<sup>44</sup>See [http://www.icc-cpi.int/library/cases/ICC-01-04-313\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-313_English.pdf). The Women's Initiatives for Gender Justice noted in a *Request submitted pursuant to rule 103(1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae* 'that the Pre-Trial Chamber should give further consideration to the criteria for determining which victims have a right to participate at different stages of the proceedings. Available through <http://www.iccwomen.org/>.

<sup>45</sup>Trial Chamber I, ICC-01/04-01/06, 18 January 2008, Para. 91.



alleged against the accused – therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court.’

When terrorist acts resulting in mass victimisation, where multiple terrorists and terrorist organisations (with key players inventing the acts) are involved, lead to a court case, the rulings of the judges at the International Criminal Court could provide guidance. In addition, it will be particularly interesting to see how the Court will address the difficult reparation issues lying ahead.<sup>46</sup>

### 2.2.3 *The Council of Europe and Victims of Terrorism*<sup>47</sup>

Within two months of the 9/11 terrorist attacks in the United States, the Council of Europe began to implement a plan of action to combat terrorism, which resulted in the establishment of a Multidisciplinary Group on Terrorism (GMT) dealing with criminal, civil and administrative matters, and in the adoption of an important set of international instruments. The main activities in this field are carried out by the Committee of Experts on Terrorism (CODEXTER) which is made up of governmental experts. CODEXTER is also responsible for coordinating and following up the activities of the Council of Europe against terrorism.<sup>48</sup>

In May 2005, the CoE adopted a Convention on the Prevention of Terrorism which states in Article 13 (protection, compensation and support for victims of terrorism) that ‘each 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 schemes and subject to domestic legislation, inter alia, financial assistance and compensation for victims of terrorism and their close family members.’

More recently, in 2005, the CoE adopted guidelines that focus specifically on victims of terrorism.<sup>49</sup> The guidelines aim to address the needs and concerns of victims of terrorist acts, in identifying the means to be implemented to help them,

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<sup>46</sup>See also Brouwer, A.L.M. de, and Letschert, R.M. (2008). Deelname van slachtoffers in de procedures voor het Internationaal Strafhof: Een papieren tijger. *Delikt en delinkwent*, 10(81), 1143–1163 and Brouwer, A.L.M. de, and Groenhuijsen, M.S. (2009). The role of victims in international criminal procedure. In G. Sluiter and S. Vasiliev (Eds.), *International criminal procedure: Toward a coherent body of law*. London, UK: Cameron May, and Jean-Baptiste Jeangene Vilmer, *Repairing the Irreparable: Reparations to Victims before the International Criminal Court*, preface by Antoine Garapon, Paris: Presses Universitaires de France, March 2009.

<sup>47</sup>For an overview of Council of Europe texts relating to victims of violent crimes, including terrorism, see Compendium of Council of Europe Texts, Protection and Compensation of Victims of Violent Crimes, including Terrorism, September 2007.

<sup>48</sup>[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/fight\\_against\\_terrorism/](http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/).

<sup>49</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 of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers at its 804th meeting (11 July 2002), which address victims compensation issues in Para. XVII.

and to protect their fundamental rights while excluding any form of arbitrariness, as well as any discriminatory or racist treatment.<sup>50</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). In the texts of reference to the guidelines (not to be confused with an explanatory report or memorandum as is explicitly indicated), the definition enshrined in the UN 1985 Declaration is mentioned as an example. However, Section 2 of the definition in this Declaration also refers to ‘victims who have suffered harm, including economic loss’ and ‘persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’ These victims are not covered in the CoE Guidelines (see Chapter 1 on the definition of victims), nor are other tertiary victims as indicated in Chapter 1. Amnesty International and the International Commission of Jurists also referred to this narrow scope in their recommendations to strengthen the then draft CoE Guidelines.<sup>51</sup> The guidelines do not contain the reciprocity principle, which means that victims independent of their nationality fall under the scope of protection offered (contrary to the CoE Convention on Compensation, see further Chapter 6).

The principles are divided in provisions relating to emergency assistance, continuing assistance, investigation and prosecution, effective access to the law and to justice, administration of justice, compensation, protection of the private and family life, protection of dignity and security, information, and specific training for persons responsible for assisting victims.

The guidelines make a distinction between emergency assistance and continuing assistance (principles II and III). Not all international instruments make such a distinction. The UN Declaration only refers to necessary assistance, neither does the CoE Rec. (2006)8 make such a distinction.<sup>52</sup> Both emergency and continuing assistance see to appropriate medical,<sup>53</sup> psychological, social and material assistance.

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<sup>50</sup> Preamble, Para. h.

<sup>51</sup> Recommendations of Amnesty International and the International Commission of Jurists to Strengthen the draft Council of Europe Guidelines on Aid and Protection of Victims of Terrorism, AI Index: IOR 61/022/2004, p. 2.

<sup>52</sup> The Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power makes a distinction between immediate assistance, medium assistance and long-term assistance (Article 8). See for the draft <http://www.tilburguniversity.nl/intervict/undeclaration/>.

<sup>53</sup> The right to assistance may be interpreted as an element of a State’s duty to protect the right to life, see also ECtHR, *Cyprus v. Turkey*, 10 May 2001, Para. 219: “The Court observes that an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual’s life at risk through the denial of health care which they have undertaken to make available to the population generally. It notes in this connection that Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”; see also ECtHR, *L.C.B. v. UK*, 9 June 1998, Para. 36; and ECtHR, *Nitecki v. Poland*, 21 March 2002 (decision on the admissibility, Appl. 65653/01, where the Court recalls that “[...] It cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2”). In OSCE ODIHR Background Paper on Solidarity with Victims of Terrorism, Technical Workshop on Solidarity with Victims of Terrorism, footnote 6.

Also, reference is made to spiritual assistance. With regard to continuing assistance, the guidelines add that regarding victims who normally do not reside on the territory of the State where the terrorist act occurred, that State should cooperate with the State of residence in ensuring that the victim receives such assistance.

Principle IV concerns investigation and prosecution. States are instructed to launch effective official investigations into terrorist acts, thereby paying special attention to victims without it being necessary for them to have made a formal complaint. Lastly, when it is decided not to prosecute a suspected perpetrator, States should allow victims to ask for this decision to be re-examined by a competent authority.<sup>54</sup>

Effective access to the law and to justice and administration of justice are covered in principles V and VI.<sup>55</sup> The first entails that States should provide the right of access to competent courts in order to bring a civil action in support of their rights, and to provide legal aid in appropriate cases. No reference is made to the use of informal mechanisms, as is done in the 1985 UN Declaration (Article 7). Chapter 7, relating to restorative justice, will further elaborate the potential of restorative justice approaches in the context of terrorism.<sup>56</sup> As to administration of justice, States are urged to bring suspects to justice and to obtain a judgment within a reasonable time. Furthermore, States should ensure that the position of the victim is adequately recognised in criminal proceedings. This is not further elaborated, nor is this the case in the more general CoE recommendations on victims of crime.

Guaranteeing effective investigation and prosecution and access to justice become more problematic when it concerns cross-border victimisation. Victims, both primary and secondary, are sometimes no longer in the country where the trial takes place, making it difficult to attend the trial. Investigation and prosecution is also often difficult and may cause further frustration to victims. One of the survivors of the Bali Bombing in October 2002 made an urgent appeal during a High Level Meeting organised by the OSCE in September 2007 to release one of the accused, known as Hambali, from Guantanamo Bay where he is held based on alleged links with the 9/11 attacks. His capture at Guantanamo Bay impedes the victims' access to and participation in a fair trial.<sup>57</sup> These examples illustrate the need for high level international cooperation and devising strategies for victim participation and assistance that work in a cross border context.<sup>58</sup>

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<sup>54</sup> See also Articles 3 and 4 of the UN Basic Principles and Guidelines. The other international instruments (meaning the CoE (2006)8 Recommendation, EU 2001 Framework Decision and the 1985 UN Declaration) have not explicitly incorporated this provision.

<sup>55</sup> See also Article 12 of the UN Basic Principles and Guidelines and Articles 4, 5, 6, 7 of the UN 1985 Declaration. Rec. (2006)8 only refers to effective access to other remedies, meaning civil remedies (Article 7). Other international instruments do not make explicit reference to access to justice.

<sup>56</sup> See also Articles 5 and 9 of the Draft UN Convention.

<sup>57</sup> Representative of the UK Bali Bombing Victims Group, Ms. Susanna Miller, see also <http://ukbbvgbs.co.uk/>.

<sup>58</sup> Note also the Preamble of CoE Recommendation 2006 (8): 'aware of the need for co-operation between states particularly to assist victims of terrorism and other forms of transnational crimes.' See further Chapter V relating to access to justice.

The guidelines contain a rather extensive section on compensation (principle VII). Para. 1 states that victims should receive fair, appropriate and timely compensation for the damages which they suffered. Compensation should be easily accessible (Para. 2 therefore instructs States to introduce a mechanism to enable this). The State on the territory of the terrorist act should contribute to the compensation of the victims for direct psychological or psychological harm, irrespective of their nationality. Considering that compensation will most likely not be available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State will have an important role in providing compensation. Compensation is not only of a pecuniary nature; Para. 4. provides that States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the negative effects of the terrorist acts. Para. XVII of the Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism also address compensation, providing that ‘when compensation is not fully available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State must contribute to the compensation of the victims of attacks that took place on its territory, as far as their person or their health is concerned.’

In all relevant phases (investigation, assistance), States should avoid undermining respect for the private and family life of victims of terrorist acts (principle VIII). In this regard the media is also addressed. Para. 2 asks States to encourage the media and journalists to adopt self-regulatory measures to ensure the protection of family and private life of victims. Not every international instrument relating to victims’ rights contain provisions implying the possible negative effects of media exposure.<sup>59</sup> Chapter 3 will further elaborate this aspect. When respect for the private and family life has been violated, States should ensure an effective remedy.

Principle IX relates to the protection of the dignity and security of victims, thereby providing that victims should be treated in a manner which gives due consideration to their personal situation, their rights and dignity. Furthermore, the protection and security of victims should be ensured, and measures must be taken to protect their identity, in particular when victims intervene as witnesses.

The right to information, or the right not to receive information, is covered in principle X.<sup>60</sup> To ensure this, States should set up information contact points concerning in particular their rights, the existence of victim support bodies, and the possibility of obtaining assistance, practical and legal advice as well as redress or compensation. Next to this, information should be provided on the investigations, the final decision concerning prosecution, the date and place of the hearings and the conditions under which they may acquaint themselves with the decisions handed down. During the OSCE High Level Meeting on Victims of Terrorism, a representative of Hostage UK made an urgent appeal to Governments to set up referral agencies that

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<sup>59</sup> CoE Rec. 2006(8) does cover this aspect in Article 10.9.

<sup>60</sup> Conform Article 6 of the 1985 UN Declaration, Article 24 UN Basic Principles and Guidelines, Article 4 EU Framework Decision, Article 6 CoE (2006)8 Recommendation.

would coordinate the process of providing information. Such agencies should also take up the task to refer people to victims' associations. The terrorist attacks in the recent past have led to an emergence of organised groups of families and friends who have become a powerful voice in counterterrorist policy and legislation, and have become active in addressing the needs of victims of these heinous attacks.<sup>61</sup>

Principle XI<sup>62</sup> sees to specific training for persons responsible for assisting victims of terrorist acts. Lastly, as indicated by Principle XII, the present set of guidelines are minimum standards, therefore not restraining States to adopt more favourable services and measures than described in the guidelines.

Following this short summary of the guidelines, it can be noted that the general bearing of most provisions coincides with provisions contained in other victims' rights instruments. The Explanatory Memorandum to the CoE Recommendation 2006 (8) on Assistance to Crime Victims seems to confirm this by noting in Para. 21 that 'although the crime of terrorism has been prioritised by some countries, [...] the needs of victims of terrorism [are] essentially the same [as] those of victims of other crime.' This raises the question of the added value of this specific set of guidelines for victims of terrorism, especially in the light of the extensive rights included in Recommendation 2006 (8).

Recommendation 2006 (8) contains a wide variety of victims' rights which in some regards are more elaborative 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 organisations in assisting victims.' Furthermore, Article 16.3 emphasises the important role of NGOs in focusing public attention on the situation of victims. More information regarding the role of civil society will be provided in Chapter 3. States are furthermore encouraged to set up specific centres for victims of crimes such as sexual and domestic violence (Article 5.3) but also for victims of crimes of mass victimisation such as terrorism (Article 5.4). In addition, Article 12.3 notes that specialised training should be provided to all persons working with specific groups of victims, including victims of terrorism. That this recommendation contains more detailed provisions also follows from 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 that in one way or another have contact with

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<sup>61</sup>For an overview of the rise of victims groups in the US after terrorist attacks, see Bruce Hofmann and Anna-Britt Kasupski, *The Victims of Terrorism, An Assessment of Their Influence and Growing Role in Policy, Legislation, and in the Private Sector*, Occasional Paper, RAND Center for Terrorism Risk Management Policy, 2007.

<sup>62</sup>Conform Article 16 1985 UN Declaration, Article 14 EU Framework Decision, Article 12 CoE (2006)8 Recommendation.

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.’

Next to these guidelines and recommendations, the CoE Group of Specialists on the Assistance to Victims (PC-S-AV) initiated a study on ‘Victims of Terrorism Policies and Legislation in Europe, an overview on victim related assistance and support’.<sup>63</sup> The results of this study will be presented in Chapter 6 relating to compensation.

Furthermore, as a direct result of the Resolution on Victims of Crime adopted at the 27th Conference of the European Ministers of Justice in 2006,<sup>64</sup> which contained specific and distinctive recommendations as regards future work in the field, the Group of Specialists on remedies for crime victims (CJ-S-VICT) was created.<sup>65</sup> The terms of reference for this group are as follows:

- i. Analyse legislation and practices of member states concerning civil, administrative and other remedies available to victims of crime and identify good practices, in particular concerning:
  - Reducing the risk of secondary victimisation, rehabilitation from crime suffered and ensuring adequate compensation for damage sustained
  - The provision of information on procedures available, existence of simplified procedures and legal aid and advice before, during and after the completion of criminal, civil, administrative or other procedures
  - Meeting the specific needs of vulnerable victims such as children, the elderly and disabled persons
  - The role of publicly or privately financed insurance schemes in ensuring compensation for damage sustained
  - The role of authorities, organisations and persons dealing with and representing victims, particularly with respect to vulnerable victims
- ii. Analyse the specific situation of victims of terrorism offences with respect to compensation for damage sustained and identify good practices as regards the functioning of private and public insurance and compensation mechanisms for victims of terrorism<sup>66</sup>

As a follow up to issue ii. the Group requested Mr. Bernhard Koch to conduct a study on ways to indemnify victims of terrorism. The results of this study will be further examined in Chapter 6 relating to compensation.<sup>67</sup>

<sup>63</sup>This study was performed by H.J. Albrecht and M. Kilchling of the Max Planck Institute for Foreign and International Criminal Law and is available at [www.coe.int.tjc/](http://www.coe.int.tjc/).

<sup>64</sup>[http://www.coe.int/t/dg1/legalcooperation/minjust/mju27/MJU-27\(2006\)Res1E.pdf](http://www.coe.int/t/dg1/legalcooperation/minjust/mju27/MJU-27(2006)Res1E.pdf).

<sup>65</sup>[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/steering\\_committees/cdcj/CJ-S-VICT/](http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/CJ-S-VICT/).

<sup>66</sup>Specific terms of reference for 2007 of the group of specialists on remedies for crime victims, CJ-S-VICT (2007) 1, 8 February 2007.

<sup>67</sup>The CoE Convention on Compensation of Victims of Violent Crime will also be addressed in Chapter VI.

### 2.2.4 *The OSCE and Victims of Terrorism*<sup>68</sup>

One of the main characteristics of the Organisation for Security and Co-operation in Europe (OSCE) has been its comprehensive approach to international peace and security. ‘Comprehensive security’ refers to an approach of security issues from a broad perspective: the OSCE Participating States focus not only on security issues, but consider that political, military, economic, environmental and so-called ‘human dimension’ issues are interrelated and of equal importance to security in Europe. The fight against terrorism and the protection of victims of terrorism is addressed following this comprehensive approach. The most important decision of the OSCE in this field is Permanent Council Decision No. 618 of 1 July 2004 on Solidarity with Victims. The OSCE Participating States recognise ‘that acts of terrorism seriously impair the enjoyment of human rights and that there is a need to strengthen solidarity among participating States for the victims of terrorism and dependants and family members of persons who have died.’ Furthermore, Para. 1 ‘invites the participating States to explore the possibility of introducing or enhancing appropriate measures, subject to domestic legislation, for support, including financial assistance, to victims of terrorism and their families.’ As a follow up, the OSCE Office for Democratic Institutions and Human Rights (ODIHR) organised a Technical Workshop on Solidarity with Victims of Terrorism that took place in Oñati, Spain, on 9 and 10 March 2006. That workshop was intended to follow up the work on victims of terrorism in the OSCE area, in particular the compilation of existing domestic legislation relating to assistance to and compensation for the victims of terrorist acts.<sup>69</sup> Several important discussions took place during this meeting, mainly concerning (1) the scope of protection, (2) the international framework, (3) models of compensation and support and (4) the role of civil society. The most important observations stemming from these workshops will be presented. The working groups that discussed the scope of protection both found that it is desirable to differentiate between victims of terrorism and victims of crime at the political level. The main argument was that victims of terrorism ‘may be seen as “instruments” used by terrorists in order to modify or intervene in the political process. This public dimension requires a public response which may be seen as solidarity.’<sup>70</sup> On the other hand, it was also mentioned that it is almost impossible to differentiate at the legal level, because of difficulties in defining terrorism and the wide diversity in terrorist activities. Regarding the international framework, it was felt that since terrorism is a transnational phenomenon, it must be addressed on

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<sup>68</sup> For a collection of the principal OSCE commitments and primary texts of the global legal framework for action against terrorism, see *OSCE Commitments and International Legal Instruments Relating to Terrorism, A Reference Guide*, July 2003.

<sup>69</sup> See for the final report, ODIHR.GAL/23/06, 25 April 2006, Technical Workshop on Solidarity with Victims of Terrorism, 9–10 March, Oñati, Spain.

<sup>70</sup> Final Report, p. 4.



both the international and the domestic level.<sup>71</sup> The fact that the international legal framework has limited enforceability capabilities was considered a major shortcoming. On the other hand, the adoption of soft law instruments was considered a relevant step in the legal debate at the regional level. The session on models of compensation and assistance gave an overview of various programmes and compensation schemes in different countries. It demonstrated the wide variety in the OSCE Participating States. The last session stressed the importance of victim associations.

In September 2007, a high-level meeting on victims of terrorism took place in Vienna that further discussed some of the issues raised in the technical workshops. The discussion items were as follows: the definition of ‘victim’, victims’ assistance programmes, victims in legal proceedings, and the role of civil society.<sup>72</sup>

The OSCE furthermore sent out a questionnaire to the Participating States in which they were asked to provide an overview of practical support they give to victims of terrorism. A comparative analysis of the results took place in 2008.<sup>73</sup>

### ***2.2.5 Statements Issued by the European Forum for Victim Services / Victim Support Europe***

The ‘statements’ by the EFVS have to be qualified as ‘non law’. They concern victims’ rights in various environments but have been issued by an NGO which is solely engaged in victim advocacy.<sup>74</sup> The ‘statements’ are not supported by any public authority whatsoever. Yet, in reality these documents appear to have functioned in a similar way as the internationally recognised soft law instruments. The member organisations of the EFVS – all of them being national victim support organisations – have used the published statements as a means to lobby for additional victims’ rights and services in their respective countries. Quite successfully, it may be added. The governments in these countries could not escape comparisons of the actual state of affairs with the standards set out in the ‘statements’ by the

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<sup>71</sup> Final Report, p. 7.

<sup>72</sup> The Final report of this meeting is available through the OSCE/ODIHR website.

<sup>73</sup> See Letschert, R.M., and Pemberton, A. (2008). Addressing the needs of victims of terrorism in the OSCE region. *Security and Human Rights*, 19(4), 298–310 and Pemberton, A., and Letschert, R.M. (2009). Victims of terrorism in the OSCE (Organization for Security and Co-operation in Europe) region. Analysis of a questionnaire on the practice of OSCE participating states on solidarity with the victims of terrorism. Report commissioned by the OSCE Office for Democratic Institutions and Human Rights. Warsaw, Poland: OSCE Office for Democratic Institutions and Human Rights.

<sup>74</sup> According to its Constitution, the EFVS was set up to: (a) promote the development of effective services for victims of crime throughout Europe; (b) promote fair and equal compensation for all victims of crime throughout Europe, regardless of the nationality of the victim concerned; and (c) promote the rights of victims of crime in Europe in their involvement with the criminal justice process and with other agencies. For more information, see <http://www.victimsupporteurope.eu/>



EFVS. In Europe, the statements are widely regarded as documents with a substantial symbolic value. According to victim support organisations, they represent the ultimate model for victim oriented reform in legislation and in policy. Like the other soft law instruments, the statements are increasingly regarded as benchmarks and as aspirational standards. However, the fact that they were drawn up by an NGO is reflected in the content of the statements. The EFVS can afford to be less preoccupied with domestic sensitivities or competing interests than is the case with international associations of national governments. Unlike the established bodies in international public law, this NGO has the opportunity to uniquely focus on the best interests of the victim. An example of this is the Statement on the Social Rights of Victims of Crime, which has a scope and a substantive ambition unparalleled by any of the other international instruments.<sup>75</sup> In addition to the classical victims' rights as mentioned in the introduction of this chapter, this statement calls for, *inter alia*, the right to

- Receive recognition by society of the effects of crime
- Have access to health care services
- Have access to appropriate home security measures
- Receive support and protection in the workplace
- Receive support and protection in educational establishments<sup>76</sup>

Regarding compensation, the Statement of Victims' Rights in the Process of Criminal Justice notes in Section 6 that 'in cases of violent crime, victims should receive compensation from public funds for their injuries, emotional distress, loss of earnings and loss of maintenance as soon as possible after a crime has occurred, regardless of whether or not an offender has been identified.' The Statement on the Social Rights of Victims also addresses compensation in Section 8. In addition, Section 10 relating to protection of privacy contains extensive provisions on the media and victims. Para 10(d), for instance, notes that 'media treatment of victims' cases should be the subject of a regulatory charter, produced by the media, the public authorities and victim support services. The European Forum has issued two more statements, one regarding Victims' Rights to Standards of Service and the other relating to the Position of the Victim within the Process of Mediation. The latter document recognises the important impact of the mediation process on victims, but also cautions for potential risks that might occur.<sup>77</sup> This will be further elaborated in Chapter 7.

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<sup>75</sup> From Groenhuijsen and Letschert, 2006, pp. 11–13.

<sup>76</sup> Due to constraints of space further comment on these highly inspirational standards is not possible. It suffices to say that this level of sophistication has not yet been achieved (or even approximated) by even the most advanced countries.

<sup>77</sup> The statements of the European Forum for Victim Services can be found through <http://www.victimsupporteurope.eu/>.

### 2.2.6 *The European Union and Victims of Terrorism*

The most important achievement within the EU in the field of protection of general victims' rights is the adoption of the EU Council Framework Decision on the standing of victims in criminal proceedings (2001). Before that, the issue was dealt with in various green papers and in declarations issued by the European Council and the European Parliament.<sup>78</sup> The adoption of the Framework Decision was initially legitimised by invoking a classical EU right, namely freedom of movement. The link to developing specific provisions for victims of crime was made by arguing that persons who travel to another Member State and become victimised, are in need of special protection (mainly because 'foreign' victims (workers, students or tourists) have no knowledge of the judicial system of the country where they were victimised, may not speak the language etc.).<sup>79</sup>

From the heading of the Framework Decision, it can be derived that the focus is on the position of the victim in criminal proceedings only. Applying this in a strict sense would limit the usefulness of the Framework Decision to victims of terrorism, since, as discussed before, in many cases of terrorism it may be difficult to initiate criminal proceedings (although following the major incidents in the last few years, proceedings did take place). However, Para. 6 of the Preamble notes that 'the provisions of this framework Decision are [...] not confined to attending to the victim's interest under criminal proceedings proper. They also cover certain measures to assist victims before or after criminal proceedings, which might mitigate the effects of the crime.' For instance, Article 13 relating to specialist services and victim support organisations states that Member States 'shall promote the involvement of victim support systems responsible for organising the initial reception of victims and for victim support and assistance thereafter [...]'. Furthermore, the Framework Decision underlines the necessity of the protection of victims' needs to avoid secondary victimisation, not only during the criminal proceedings, but also before or after (Paras 5 and 6 of the Preamble). Notwithstanding Para. 6 of the Preamble, some restrictions were made to limit the scope of applicability to victims who have the status of witnesses or parties to the proceedings (see Articles 5, 6 and 7 that mention communication safeguards, specific assistance in the form of legal aid, and victims' expenses with respect to criminal proceedings, see further Chapter 5 relating to access to and administration of justice).

As mentioned in the introduction, the Framework Decision limits the scope of protection to natural persons who suffered harm *directly* caused by acts or omissions that are in violation of the criminal law of a Member State (Article 1). Article 8, however, broadens the scope in the sense that Member States 'shall ensure a suitable level of protection for victims and, where appropriate, their families or persons

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<sup>78</sup> See for instance the Green Paper on Compensation to Crime Victims, Brussels, COM (2001), 536 final, 28.9.2001. See further Albrecht and Kilchling, 2005, p. 9.

<sup>79</sup> For more information on the background to the adoption of the Framework Decision, see Paul Rock, *Constructing Victims' Rights: The Home Office, New Labour and Victims*, Oxford, Oxford University Press, 2004.

in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.'

A similar line of reasoning is used in Article 10 (2) of the Council Framework Decision on combating terrorism (13 June 2002):

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 (1), each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.

Para. 8 of this Framework Decision furthermore notes that 'victims of terrorist offences are vulnerable, and therefore specific measures are necessary with regard to them.'<sup>80</sup> Also the Framework Decision on the Standing of Victims notes in Article 2.2 that 'each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances.'

Important to note further is that the Framework Decision contains a provision on penal mediation, encouraging Member States to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. Chapter 7 on restorative justice will explore mediation and other practices of restorative justice in relation to terrorism.

Another important document adopted by the EU relating to victims' rights is the EU Directive 2004/80 relating to Compensation to Crime Victims. The content of this directive will be further discussed in Chapter 6 relating to compensation.

In the aftermath of 9/11 and subsequently the Madrid bombing in 2004, the EU accelerated the adoption of policies and initiatives in the field of combating terrorism and finding adequate responses after a terrorist attack. On 13 June 2002, the EU adopted a Framework Decision on combating terrorism in which also a definition of terrorist offences can be found (Article 11). No explicit reference is made to victims of terrorism. However, various EU official statements and programmes acknowledge that victims of terrorism deserve special care to respond effectively to terrorist goals that aim at destroying social solidarity.<sup>81</sup> To illustrate, The Hague Programme on Strengthening Freedom, Security and Justice in the European Union, stresses the need to ensure adequate protection and assistance to victims of terrorism.<sup>82</sup> Furthermore, on 1 December 2004, the Permanent Representatives

<sup>80</sup>It should be noted that the meaning of 'victim' in the Framework Decision on Combating Terrorism appears ambiguous.

<sup>81</sup>For example, see the statement held at the Informal Consultations of the Plenary of the General Assembly on a Counter-Terrorism Strategy; Statement by Minister Alexander Marschik, Deputy Permanent Representative of Austria to the United Nations, on behalf of the European Union: 'We agree that the United Nations can and should promote international solidarity in support of victims, including by exploring the possibility of providing assistance to the victims of terrorist acts and their immediate families, and that States should consider putting in place a system of assistance that would promote the rights of victims and their families.' New York, 11 May 2006.

<sup>82</sup>The Hague programme calls for the establishment of an integrated EU arrangement for crisis management with cross-border effects to be implemented at the latest by 1 July 2006. Adopted on 13 December 2004, Doc. No. 16054/04, p. 20.

Committee and the Representatives of the Commission finalised the EU Solidarity Programme on the Consequences of Terrorist Threats and Attacks.<sup>83</sup> In Para. 34 of the Programme, the Commission expresses its intention to enhance efforts to ‘organise specific training courses relevant for coping with the consequences of terrorist attacks, such as psychological or psycho-social aftercare for victims and responders, interventions in a contaminated environment, etc. (action 4.8).’ Providing adequate information is dealt with in Paras 40 and 41. The Council invites the Commission to develop together with the Member States appropriate initiatives for an optimal coordination of public information by the Member States during cross-border crises (action 4.15).

In 2005, €2 million was allocated for projects proposed by organisations who in one way or another help victims. Several organisations from across the whole Union benefited from these funds, reflecting the shared solidarity that exists across the EU. Moreover, the day 11 March has been declared the European day commemorating the victims of terrorism. In addition, on the occasion of the European Council on 25 March 2004, the instrument of a Counter-Terrorism Co-ordinator was created. The first, Gijs de Vries, stepped down in March 2007 after his 3 year term finished, followed by the Belgian Gilles de Kerchove. His main tasks are to coordinate the work of the Council of the EU in combating terrorism, to maintain an overview of all the instruments at the Union’s disposal, to closely monitor the implementation of the EU Action Plan on Combating Terrorism, and to secure the visibility of the Union’s policies in the fight against terrorism.

Lastly, in a EU Council Secretariat fact sheet called ‘The European Union and the Fight against Terrorism’ of 9 March 2007, several initiatives are listed in response to a possible terrorist attack. It notes, among other things, that the fourth objective of the EU Counter-Terrorism Strategy is to be prepared, in the spirit of solidarity, to manage and minimise the consequences of a terrorist attack, by improving capabilities to deal with the aftermath, the coordination of the response, and the needs of victims. The fact sheet gives an overview of what has already been done within the EU:

- Military assets and capabilities have been identified which could support coordinated EU disaster response efforts. They include strategic transport (air/sea), tactical transport (helicopters), medical units, field hospitals and logistics. Procedures have been finalised for matching transport needs and available military owned or chartered transportation facilities from Member States.
- Several initiatives have been taken to improve consular protection of EU citizens in case of terrorist attacks or natural disasters in third countries. Additional proposals have recently been tabled by the Commission.

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<sup>83</sup>This programme was preceded by the Declaration on Combating Terrorism which also contained a Declaration on Solidarity against Terrorism that confirmed the firm intention of Member States to ‘mobilise all the instruments at their disposal, including military resources, to assist a Member State or an acceding State in its territory at the request of its political authorities in the event of a terrorist attack.’ Doc. No. 7906/04, adopted on 25 March 2004.

- Multinational exercises to test the readiness of Member States to assist each other in case of man-made or natural disasters continue to be held each year (2006: Bulgaria, Denmark/Sweden; 2007: Luxembourg). Lessons learned include the need to improve communication facilities between national capitals and the European Commission. To improve crisis communication among its own services the Commission has set up the ARGUS network.
- A Financial Instrument for Community Action in the field of civil protection (2007–2013) has been created. This will enable the Union to support prevention, preparedness and response to man-made and natural disasters both inside and outside the Union (indicative annual budget: €25 million).
- A pilot project has been launched to help victims of terrorism and their families. Additional funds for support to victims have been set aside under the Programme for the prevention of and fight against crime 2007–2013.
- At the proposal of the Presidency and the Counter-Terrorism Coordinator proposals have been adopted to establish EU Emergency and Crisis Coordination Arrangements (2005). Operating procedures and a manual for crisis coordination arrangements in the Council were agreed (2006) and tested in an exercise involving Permanent Representatives, the Commission, and the Council Secretariat (2006). A follow-up exercise will take place in 2007.

### **2.3 Analysis of the Legal Status of EU Standards for Victims of Terrorism**

The EU can make use of several instruments for legalisation or the formulation of standards. This ‘secondary legislation’ is the third major source of Community law after the treaties (primary legislation) and international agreements. Secondary legislation comprises the binding legal instruments (regulations, directives and decisions) and non-binding instruments (resolutions, opinions, recommendations) provided for in the EC Treaty, together with a whole series of other instruments such as the institutions’ internal regulations and Community action programmes.<sup>84</sup> As referred to before, in the field of victims’ rights the EU has adopted a Framework Decision. Since the entry into force of the Treaty of Amsterdam, decisions and framework decisions have replaced joint actions in the field of police and judicial cooperation in criminal matters. These are legal instruments under Title VI of the Treaty on European Union that are intergovernmental in nature. Decisions and framework decisions are adopted by the Council of the European Union unanimously on the initiative of the Commission or a Member State. The Framework Decision on the standing of victims in criminal proceedings imposes a formal obligation on the EU Member States to make sure their jurisdictions meet the new

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<sup>84</sup> From <http://eur-lex.europa.eu/en/index.htm>.

standards. In case of gaps or discrepancies, either legislation should be introduced or adapted, or policy measures must be taken in order to ensure compliance.<sup>85</sup> In other words, the goals of the Framework Decision are binding, though the Member States are left with some discretion as to the means they prefer to warrant compliance.

Another important document adopted by the EU relating to victims' rights is the EU Directive 2004/80 relating to Compensation to Crime Victims. A directive is a legislative act of the European Union, which requires Member States to achieve a particular result without dictating the means to actually accomplish that goal. It can be distinguished from regulations which are self-executing and do not require any implementing measures. Directives normally leave Member States some leeway as to the exact rules that need to be adopted.

The standards that will be developed in the process of this study will be presented in the form of a recommendation, in the hope that the European Commission or Council will endorse it. A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed (the Member States, other institutions, or in certain cases the citizens of the Union).

The fact that a *soft law* instrument like a recommendation (as it is referred to in international law) lacks formal legal consequences does not necessarily mean that Member States will not aspire to comply with them. If soft law can be more rigorous than one could assume at first sight, the opposite also holds: hard law is not always the most adequate instrument to affect policy and practice. Adopting legally binding documents does not automatically lead to action in terms of adapting national legislation and creating the necessary infrastructure for bringing victims' rights into effect and, if necessary, enforce compliance. Even the implementation of the legally binding European Framework Decision on the standing of victims in criminal proceedings has proven to be difficult (see also Chapter 5 on access to justice). It has been established beyond doubt that many Member States did not create a well-considered and comprehensive legal framework for the transposal of all the relevant rights and duties into domestic law.<sup>86</sup>

In the long-term, the principles contained in the recommendation might be incorporated in a Framework Decision. For both instruments, it should be noted that the mere adoption of rules can only be regarded as a first step in a long march. The

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<sup>85</sup> Contrary to directives, framework decisions will have no direct effect if the implementation period has expired. However, in the *Pupino* case, the European Court of Justice concluded that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. It points out, however, that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by the general principles of law, particularly those of legal certainty and non-retroactivity. Furthermore, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*, Judgment of 16 June 2005, in *Case C-105/03, Pupino*.

<sup>86</sup> See further Van Genugten, Groenhuijsen, Van Gestel and Letschert, October 2007.

second step might then be creating ‘paper compliance’, i.e. adapting domestic legislation. But even that still falls far short of effectively turning the rights included in the international documents into a reality for all victims involved, if it would not be supplemented by purposefully devised proper budgets, plans, aims, objectives, targets and timetables for implementation.<sup>87</sup>

## 2.4 Justifying EU Involvement

Attention for the needs of crime victims in general within the EU became more apparent with the establishment of an area of freedom, security and justice. As stated, ‘with the entry into force of the Treaty of Amsterdam the EU faces the challenge of ensuring that the right to move freely throughout the EU can be enjoyed in conditions of security and justice accessible to all. This challenge involves establishing a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own, and where better compatibility and more convergence between the legal systems of the Member States is achieved. The need to meet this challenge is evident from the ever-increasing number of persons using their right to free movement within the EU, for example, as workers, students or as tourists. The establishment of an area of freedom, security and justice must also take due account of the needs of crime victims in the European Union.’<sup>88</sup>

In such a common space of free movement, justice and security, recognition of crime victims’ needs and comparable legal regulation are required. The EU addressed this by adopting the EU Framework Decision on the standing of victims in criminal proceedings and a Directive relating to Compensation to Crime Victims. The rationale for developing standards for victims (of any crime) thus lies in preventing possible problems and inequalities that may occur because of the fact that a person becomes victimised in another Member State than his own.

The EU’s legitimisation for specific action in the field of victims of terrorism can be derived from its solidarity programme on the consequences of terrorist

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<sup>87</sup> There is some evidence that the existence of a European set of standards could influence domestic policies and possibly legislation. Note from an ODIHR report that ‘participants from the UK highlighted the influence of the international framework in the domestic panorama. The international legal framework on the protection of victims has had a major influence on the Bill of Rights of Northern Ireland. Among other things, the Bill creates the post of Interim Commissioner for Victims and Survivors, who coordinates the delivery of services to victims and survivors across departments and agencies, reviews how well the current funding arrangements in relation to victims and survivor groups are addressing the need and considers the practical issues around establishing a Victims and Survivors Forum. Moreover, a Victims’ Minister has been created to improve the overall coordination. In the UK, on 1 April 2007 the Victims’ Code of Practices for the police will enter into force, establishing tight deadlines for the police to inform victims on the progress of trials’, see OSCE ODIHR Technical Workshop on Solidarity with Victims of Terrorism, Final Report, 9–10 March 2006, Oñati Spain, ODIHR.GAL/23/06, p. 7.

<sup>88</sup> Green Paper Compensation to Crime Victims, Brussels, COM (2001) 536 final, 28.09.2001, p. 6.



threats and attacks which stresses that the consequences of terrorist attacks, especially CBRN attacks, will most likely affect more than one country. In the event of such attacks, mutual assistance and collective action are both a political imperative and a practical necessity.<sup>89</sup> As Albrecht and Kilchling rightly contend, ‘the need to develop a common EU victim of terrorism policy is grounded on equity, solidarity and a rational crime policy that overcomes differences between the systems of crime victim compensation in the member states.’<sup>90</sup> This also applies to crime victim protection schemes in general (covering issues such as access to justice and victim assistance). Among the Member States, there is a growing sense of social and political urgency to develop an effective policy in the field of terrorism. This heightened awareness can provide the needed impetus for European Union initiatives to induce the Member States to better harmonise their approaches. On the domestic level, we are faced with a rather fragmented approach, as will be further demonstrated in Chapter 6. Some EU Member States have specific provisions for victims of terrorism, others provide protection as also applies to victims of crime. At the moment, the EU does not have a set of guidelines that deals with victims of terrorism in a comprehensive, sufficiently detailed and specific way. Given the scale and urgency of the problem, a concerted approach appears necessary and timely. A set of guidelines could enhance uniformity among Member States – a value that is important in and of itself in the EU context and even more acute since the recent expansion of the EU.

## 2.5 Concluding Observations

The preceding sections have analysed the activities undertaken and instruments adopted by the main international organisations in the field of victims of terrorism. An analysis was also made of the more general victims’ rights instruments, which include victims of terrorism. The legal status of possible future EU standards or recommendations for victims of terrorism was examined, as well as the legal status of other EU instruments. Lastly, the justifications for EU involvement in the field of victims of terrorism were analysed. At this stage it seems important to address some preliminary issues that need to be considered when reflecting on the development of specific EU recommendations for victims of terrorism, reflections that follow from the preceding sections or that will be further examined in subsequent chapters.

First of all, the question whether there is a real need to adopt specific standards for victims of terrorism, thereby implying that their needs differ from victims of ordinary crime, should be addressed. Is a sufficient reason the fact that the adoption

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<sup>89</sup> EU Solidarity Programme on the Consequences of Terrorist Threats and Attacks, Doc. No. 15480/04 Brussels, 1 December 2004, p. 4.

<sup>90</sup> Albrecht and Kilchling, 2005, p. 12.



of a set of recommendations would imply an unequivocal recognition of the specific situation of victims of terrorism, that were most often used as an instrument to achieve a certain political goal? This public dimension might require a public response which may be seen as solidarity.<sup>91</sup> In addition, could it be argued that the social and psychological empowerment that could emanate from a specific set of guidelines must not be underestimated, given the scope of the problem? And that, in view of the specific characteristics of the violence and the special types of legal and especially social measures (be it individually-based or community-based) that are necessary to effectively address this form of victimisation, a specific instrument to support victims of terrorism would be of added benefit above and beyond general instruments in support of victims and victims' rights? These questions will be addressed in Chapter 3, where also the distinction will be made between needs of victims and their rights.

Another issue to address concerns the question how these standards would operate in relation to the existing international instruments in this domain. The previous sections have examined the content of these instruments and their relevance in the context of terrorism. Relating to the scope of these instruments, the first chapter analysed the different definitions and posed the question whether the specific context of terrorist acts, resulting in a large group of tertiary victims and sometimes leading to mass victimisation of primary victims would require a broader definition. At this stage, it is still too early to answer this question, as first it needs to be determined whether this specific category has legal or psycho-social needs that would legitimise a broader definition. If that would be the case, the existing international instruments would not suffice since the scope of protection is restricted to primary and secondary victims, meaning those who were actually harmed and family members and dependants (only the UN Declaration and the UN Basic Principles and Guidelines also cover those who intervened to assist, and the ICC Statute includes also certain categories of legal persons).

Relating to the content of the instruments, some minor differences can be identified. The specific CoE Guidelines relating to victims of terrorism contain a provision relating to continuing and emergency assistance and a provision on the possible negative effects of media exposure, which cannot be found in most of the other instruments. In addition, the principle of reciprocity is not incorporated (as is for example the case in the CoE Convention on Compensation). Furthermore, provisions relating to restorative justice approaches are not incorporated in all instruments. Devising specific strategies that work in a cross-border context could also require more attention. However, overall, the main bearing of the existing instruments is the same, containing the classical victims' rights such as the right to information and the right to receive compensation. In addition, CoE Recommendation 2006 (8) contains an extensive list of detailed victims' rights, some of them referring to specific measures that need to be taken with regard to victims including also victims of terrorism.

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<sup>91</sup> Conform the OSCE Final Report, p. 4.

One of the biggest questions, and challenges, appears to be to see in what way the traditional victims' rights (originally designed for individual victims who are victimised by an individual perpetrator) can be applied to the context of large-scale terrorism (a context of mass victimisation with multiple victims and in many cases multiple perpetrators). This might seem more a question of devising specific implementation strategies than developing new standards.

## 2.6 Appendix I

### CoE Guidelines on the Protection of Victims of Terrorist Acts

Adopted by the Committee of Ministers on 2 March 2005

At the 917th meeting of the Ministers' Deputies

Preamble

The Committee of Ministers

- a. Considering that terrorism seriously jeopardises human rights, threatens democracy, aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society and challenges the ideals of everyone to live free from fear
- b. Unequivocally condemning all acts of terrorism as criminal and unjustifiable, wherever and by whomever committed
- c. Recognising the suffering endured by the victims of terrorist acts and their close family and considering that these persons must be shown national and international solidarity and support
- d. Recognising in that respect the important role of associations for the protection of victims of terrorist acts
- e. Reaffirming the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 at the 804th meeting of the Ministers' Deputies, as a permanent and universal reference
- f. Underlining in particular the States' obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life
- g. Recalling also that all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision
- h. Considering that the present Guidelines aim at addressing the needs and concerns of the 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
- i. Considering that the present Guidelines should not, under any circumstances, be construed as restricting in any way the Guidelines of 11 July 2002 adopts the following Guidelines and invites member States to implement them and ensure that they are widely disseminated among all authorities responsible for the fight against terrorism and for the protection of the victims of terrorist acts, as well as among representatives of civil society

## I. Principles

1. States should ensure that any person who has suffered direct physical or psychological harm as a result of a terrorist act as well as, in appropriate circumstances, their close family can benefit from the services and measures prescribed by these Guidelines. These persons are considered victims for the purposes of these Guidelines.
2. The granting of these services and measures should not depend on the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act.
3. States must respect the dignity, private and family life of victims of terrorist acts in their treatment.

## II. Emergency assistance

In order to cover the immediate needs of the victims, States should ensure that appropriate (medical, psychological, social and material) emergency assistance is available free of charge to victims of terrorist acts; they should also facilitate access to spiritual assistance for victims at their request.

## III. Continuing assistance

1. States should provide for appropriate continuing medical, psychological, social and material assistance for victims of terrorist acts.
2. If the victim does not normally reside on the territory of the State where the terrorist act occurred, that State should co-operate with the State of residence in ensuring that the victim receives such assistance.

## IV. Investigation and prosecution

1. Where there have been victims of terrorist acts, States must launch an effective official investigation into those acts.
2. In this framework, special attention must be paid to victims without it being necessary for them to have made a formal complaint.
3. In cases where, as a result of an investigation, it is decided not to take action to prosecute a suspected perpetrator of a terrorist act, States should allow victims to ask for this decision to be re-examined by a competent authority.

## V. Effective access to the law and to justice

States should provide effective access to the law and to justice for victims of terrorist acts by providing:

1. The right of access to competent courts in order to bring a civil action in support of their rights
2. Legal aid in appropriate cases

## VI. Administration of justice

1. States should, in accordance with their national legislation, strive to bring individuals suspected of terrorist acts to justice and obtain a decision from a competent tribunal within a reasonable time.
2. States should ensure that the position of victims of terrorist acts is adequately recognised in criminal proceedings.

## VII. Compensation

1. Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality.
2. Compensation should be easily accessible to victims, irrespective of nationality. To this end, the State on the territory of which the terrorist act happened should introduce a mechanism allowing for a fair and appropriate compensation, after a simple procedure and within a reasonable time.
3. States whose nationals were victims of a terrorist act on the territory of another State should also encourage administrative co-operation with the competent authorities of that State to facilitate access to compensation for their nationals.
4. Apart from the payment of pecuniary compensation, States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the negative effects of the terrorist act suffered by the victims.

## VIII. Protection of the private and family life of victims of terrorist acts

1. States should take appropriate steps to avoid as far as possible undermining respect for the private and family life of victims of terrorist acts, in particular when carrying out investigations or providing assistance after the terrorist act as well as within the framework of proceedings initiated by victims.
2. States should, where appropriate, in full compliance with the principle of freedom of expression, encourage the media and journalists to adopt self-regulatory measures in order to ensure the protection of the private and family life of victims of terrorist acts in the framework of their information activities.
3. States must ensure that victims of terrorist acts have an effective remedy where they raise an arguable claim that their right to respect for their private and family life has been violated.

## IX. Protection of the dignity and security of victims of terrorist acts

1. At all stages of the proceedings, victims of terrorist acts should be treated in a manner which gives due consideration to their personal situation, their rights and their dignity.
2. States must ensure the protection and security of victims of terrorist acts and should take measures, where appropriate, to protect their identity, in particular where they intervene as witnesses.

## X. Information for victims of terrorist acts

States should give information, in an appropriate way, to victims of terrorist acts about the act of which they suffered, except where victims indicate that they do not wish to receive such information. For this purpose, States should:

1. Set up appropriate information contact points for the victims, concerning in particular their rights, the existence of victim support bodies, and the possibility of obtaining assistance, practical and legal advice as well as redress or compensation
2. Ensure the provision to the victims of appropriate information in particular about the investigations, the final decision concerning prosecution, the date and place of the hearings and the conditions under which they may acquaint themselves with the decisions handed down

XI. Specific training for persons responsible for assisting victims of terrorist acts  
States should encourage specific training for persons responsible for assisting victims of terrorist acts, as well as granting the necessary resources to that effect.

#### XII. Increased protection

Nothing in these Guidelines restrains States from adopting more favourable services and measures than described in these Guidelines.

## 2.7 Appendix II

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, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19 April 2005).

#### Preamble

Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular the Universal Declaration of Human Rights at article 8, the International Covenant on Civil and Political Rights at article 2, the International Convention on the Elimination of All Forms of Racial Discrimination at article 6, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at article 14, the Convention on the Rights of the Child at article 39, and of international humanitarian law as found in article 3 of the Hague Convention of 18 October 1907 concerning the Laws and Customs of War and Land (Convention No. IV of 1907), article 91 of Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), and articles 68 and 75 of the Rome Statute of the International Criminal Court

Recalling the provisions providing a right to a remedy for victims of violations of international human rights found in regional conventions, in particular the African Charter on Human and Peoples' Rights at article 7, the American Convention on Human Rights at article 25, and the European Convention for the Protection of Human Rights and Fundamental Freedoms at article 13

Recalling the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power emanating from the deliberations of the Seventh United Nations

Congress on the Prevention of Crime and the Treatment of Offenders, and resolution 40/34 of 29 November 1985 by which the General Assembly adopted the text recommended by the Congress

Reaffirming the principles enunciated in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, including that victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims

Noting that the Rome Statute of the International Criminal Court requires the establishment of “principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation” and requires the Assembly of States Parties to establish a trust fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, and mandates the Court “to protect the safety, physical and psychological well being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”

Affirming that the Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity

Emphasizing 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

Recalling that international law contains the obligation to prosecute perpetrators of certain international crimes in accordance with international obligations of States and the requirements of national law or as provided for in the applicable statutes of international judicial organs, and that the duty to prosecute reinforces the international legal obligations to be carried out in accordance with national legal requirements and procedures and supports the concept of complementarity

Noting further that contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively

Recognizing that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law

Convinced that, in adopting a victim oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large, in accordance with the following Basic Principles and Guidelines

- i. Obligation to respect, ensure respect for and implement international human rights law and international humanitarian law

1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:
    - a. Treaties to which a State is a party
    - b. Customary international law
    - c. The domestic law of each State
  2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:
    - a. Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system
    - b. Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice
    - c. Making available adequate, effective, prompt, and appropriate remedies, including reparation, as defined below
    - d. Ensuring that their domestic law provides at least the same level of protection for victims as required by their international obligations
- ii. Scope of the obligation
3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:
    - a. Take appropriate legislative and administrative and other appropriate measures to prevent violations
    - b. Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law
    - c. Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation
    - d. Provide effective remedies to victims, including reparation, as described below
- iii. Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law
4. In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

iv. Statutes of limitations

6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

v. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also 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.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

vi. Treatment of victims

10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.



## vii. Victims' right to remedies

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
  - a. Equal and effective access to justice
  - b. Adequate, effective and prompt reparation for harm suffered
  - c. Access to relevant information concerning violations and reparation mechanisms

## viii. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:
  - a. Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law
  - b. Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims
  - c. Provide proper assistance to victims seeking access to justice
  - d. Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law
13. 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.
14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

## ix. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious

violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should 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 their obligations.
17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.
18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition.
19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
  - a. Physical or mental harm
  - b. Lost opportunities, including employment, education and social benefits
  - c. Material damages and loss of earnings, including loss of earning potential
  - d. Moral damage
  - e. Costs required for legal or expert assistance, medicine and medical services, and psychological and social services
21. Rehabilitation should include medical and psychological care as well as legal and social services.
22. Satisfaction should include, where applicable, any or all of the following:

- a. Effective measures aimed at the cessation of continuing violations
  - b. Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations
  - c. The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities
  - d. An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim
  - e. Public apology, including acknowledgement of the facts and acceptance of responsibility
  - f. Judicial and administrative sanctions against persons liable for the violations
  - g. Commemorations and tributes to the victims
  - h. Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels
23. Guarantees of non repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:
- a. Ensuring effective civilian control of military and security forces
  - b. Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality
  - c. Strengthening the independence of the judiciary
  - d. Protecting persons in the legal, medical and health care professions, the media and other related professions, and human rights defenders
  - e. Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces
  - f. Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises
  - g. Promoting mechanisms for preventing and monitoring social conflicts and their resolution
  - h. Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law
- x. Access to relevant information concerning violations and reparation mechanisms
24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious

violations of international humanitarian law of the rights and remedies addressed by these Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

xi. Non discrimination

25. The application and interpretation of these Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or ground, without exception.

xii. Non derogation

26. Nothing in these Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Principles and Guidelines are without prejudice to special rules of international law.

xiii. Rights of others

27. Nothing in this document is to be construed as derogating from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

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EU and the Fight Against Terrorism [http://ec.europa.eu/justice\\_home/news/terrorism/index\\_en.htm](http://ec.europa.eu/justice_home/news/terrorism/index_en.htm)

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# Chapter 3

## Needs of Victims of Terrorism

Antony Pemberton

### 3.1 Introduction: Consequences of Terrorist Victimisation and Needs of Victims of Terrorism

Chapter 1 showed a number of key features of terrorism that are relevant for its victims, and the previous chapter discussed the relevant international instruments relating to victims of crime and terrorism. It shows the importance of instruments directed to more general victimisation of crime for victims of terrorism. In particular we would like to stress the following points:

- The existing international instruments covering victims of terrorism closely resemble victims of crime. The comparison of the Council of Europe guidelines concerning victims of terrorism with instruments concerning victims of crime, like the EU Framework Decision, the UN Declaration and the Council of Europe Recommendation on Victims' Assistance reveal that the specified rights are very similar. Both the guidelines and the victims of crime instruments contain provisions relating to the same rights.
- This close resemblance begs the question whether this implies that provisions for victims of crime suffice for victims of terrorism. This is suggested by Recommendation 2006 (8) of the Council of Europe concerning victim assistance. It notes that, although the victim of terrorism has been prioritised in various countries, the needs of victims of terrorism are essentially the same as those of victims of crime, which may be well be taken to imply that structures in place for victims of crime suffice for service delivery to victims of terrorism.<sup>1</sup> But, having said this, the previous chapter also suggests a number of peculiarities of terrorism, which may be relevant for drafting international standards concerning its victims. The two main features are discussed briefly.

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A. Pemberton (✉)  
5000 LE Tilburg INTERVICT, University of Tilburg Netherlands  
e-mail: a.pemberton@uvt.nl

<sup>1</sup>See Albrecht, H.J. & Kilchling, M. (2007), Victims of Terrorism Policies: Should Victims of Terrorism be Treated differently?, *European Journal of Criminal Policy and Research* 13, 13–31.



- Terrorist acts specifically target secondary victims as well as primary victims. Terrorism may be described as politically motivated violence that is perpetrated by individuals, groups or state-sponsored agents and intended to bring about feelings of terror and helplessness in a population in order to influence decision making and to change behaviour.<sup>2</sup> According to Hoffmann it is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist attack, in particular to instil fear within and thereby intimidate a wider ‘target audience’ that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general.<sup>3</sup> The Geneva Declaration on Terrorism of 1987 confirms this by asserting that ‘the distinguishing feature of terrorism is fear and this fear is stimulated by threats of indiscriminate and horrifying forms of violence directed against ordinary people everywhere.’<sup>4</sup> Discussing the full scope of the consequences of terrorism therefore means discussion of the impact on this wider group, frequently termed either tertiary or vicarious victims.
- Terrorist offences often have a high impact on their primary victims. To reach the goal of terrorising the larger target audience, terrorists increasingly resort to tactics intended to make as many casualties and fatalities as possible. Moreover, their targets are regularly symbolic in nature. The nature of terrorism may make meeting victims’ needs more difficult. In the case mass of victimisation, for example, it will require additional effort to reach and service victims’ immediate needs.

This chapter connects the legal analysis of the existing legal instruments relating to victims of terrorism to the ongoing empirical research into these victims. Specifically this implies that we will review the evidence concerning the consequences of terrorism for direct and indirect victims and their subsequent needs. We will link these consequences and needs to the legal instruments by first developing a victimological framework for victims of crime which describes needs and using this framework to analyse the research findings. The relevant question in this analysis is in what way, if any, the needs of victims of terrorism differ from victims of crime. The use of the victimological framework for victims of crime allows us to ascertain with more precision what the special needs of victims of terrorism are compared to this larger group. This has the added advantage of allowing us to draw on the international instruments as described in Chapter 2, but also the provisions in place for victims of crime in our recommendations.

As mentioned in Chapter 1, the analysis will not only cover the question whether victims of terrorism have needs of a *different kind*, i.e. additional or other needs than other victims of crime, but also whether they *differ in degree*, i.e. whether the

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<sup>2</sup>See Moghaddam (2005). The staircase to terrorism: A psychological exploration. *American Psychologist*, 60(2), 161–169; 2007. Moghaddam (2007). The staircase to terrorism: A psychological exploration. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>3</sup>Hoffman (1998). *Inside terrorism*. New York, Columbia University Press.

<sup>4</sup>The Geneva Declaration on Terrorism, UN General Assembly Doc. A/42/307, 29 May 1987.

consequences of terrorism are more or less severe, making meeting the need in question more or less important. Similarly, the analysis will review whether there are indications that meeting a need of victims of terrorism may require *additional effort in implementation*. This analysis will simultaneously address the question in what way the current Council of Europe Guidelines for Victims of Terrorism may be further developed. The use of the victimological framework for victims of crime allows us to ascertain with more precision what the special needs of victims of terrorism compared to victims of crime are.

The contents of this chapter are as follows. In Section 3.2 we will describe the victimological framework. This framework will consist of victimological knowledge concerning the victim of crime both within and outside of the criminal justice system. Needs of victims will be divided into process and outcome factors, with the former primarily addressing the criminal justice procedure. Concluding this section we will compare the victimological framework with the current legal instruments.

In Section 3.3 we will discuss the consequences of terrorism for its primary victims. The general consequences of terrorist victimisation in financial, physical/medical and psychological terms will be addressed. In addition, the particular situation of various vulnerable groups, like children or ethnic minorities will be reviewed. Furthermore, as post-trauma events may shape the consequences of victimisation we will consider a number of features of the reactions of other parties to terrorist victimisation, for example the media or victims' immediate social environment. These consequences will be analysed in respect of the needs that are included in the victimological framework.

The tertiary or vicarious victims are the focus of Section 3.4. Although this group has not been directly targeted, this does not mean that the psychological-emotional consequences are negligible. In fact, it may well be the case that due to the larger size of the group the aggregate consequences for tertiary victims may outweigh those for the direct victims. In addition, the emotional and psychological response to terrorism may have spin-off effects that can lead to, amongst others, further victimisation, e.g. backlash incidents against Arab Americans, or have dire economic consequences. Again the results of Section 3.4 will be analysed against the background of the victimological framework.

## 3.2 The Needs of Victims

In this section we will compare the needs of victims to the existing legal instruments. First of all, we will discuss victim needs in general by developing a victimological framework that draws on victims' needs expressed within and outside of the criminal justice system. It is not necessary for our purposes to discuss the needs of this framework in too much detail; a rather scant and general outline will suffice. The framework primarily serves as a tool to analyse the material on consequences of victimisation by terrorism and to allow comparison between victims of crime and terrorism relating to these needs.

In addition, we will compare the framework with the victims' rights contained in existing instruments. As we shall see, not all victims' needs are covered, but the comparison is intended merely as a statement of fact, not as a normative argument. The fact that certain needs are not covered may well be a simple reflection of the differences between needs and rights. The differences between rights and needs are legion and there are many good reasons to refrain from developing a need into a right.

### 3.2.1 *A Victimological Framework for Victims' Needs*

In the immediate phase after victimisation, emergency assistance is the most pressing matter. In this phase the primary needs from Maslow's needs pyramid are paramount.<sup>5</sup> Survivors need to be safe and secure, receive emergency medical aid, food and drink where necessary and efforts need to be undertaken to prevent further damage.<sup>6</sup> In addition, psychological first aid is often necessary.<sup>7</sup> This is normally not a therapeutic or preventative intervention, but rather should consist of information concerning normal psychological reactions, (skills in) active listening, the understanding of the importance of good physical health, and normal patterns of nourishment and sleep and information concerning the availability of further professional psychological assistance (see Chapter 4).

For the non-immediate needs we turn first to the theoretical framework that is normally used to describe the experiences of victims, but also other participants, in the criminal justice system. This is derived from the concepts of procedural and distributive justice.<sup>8</sup> The central focus of these theories is that the opinion of citizens concerning the legitimacy of authorities, the acceptance of governmental decisions and the extent to which governmental norms are adhered to, relate not only to the outcome (distributive justice) of governmental decisions but also to the way that these decisions are reached (procedural justice), or in other words with

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<sup>5</sup>See Maslow, A. (1948). Some theoretical consequences of basic need gratification. *Journal of Personality*. 16(4), 402–416.

<sup>6</sup>See Alexander, D.A.A. (2005). Early mental health intervention after disasters. *Advances in Psychiatric Treatment* 11: 12–18.

<sup>7</sup>See e.g. Litz, B., Bryant, R. and Adler, A. (2002). Early Intervention for trauma: current status and future directions. *Clinical Psychology: Science and Practice*. 9(2), 112–134. McNally, R.J., Bryant, R.A. and Ehlers, A. (2003). Does early psychological intervention promote recovery from posttraumatic stress? *Psychological Science in the Public Interest*, 4, 45–79. Parker, C.I., Everly, G.S., Jr., Barnett, D., and Links, J. (2006). Establishing evidence-informed core intervention competencies in psychological first aid for public health personnel. *International Journal of Emergency Mental Health*.

<sup>8</sup>See e.g. Wemmers, J.J.M. (1996). *Victims in the criminal justice system*. The Hague, The Netherlands, WODC/Kugler.

the procedure, where the latter is used in a broad sense to denote all contacts with governmental officials.<sup>9</sup>

We will expand the needs associated with the criminal justice system to include those mostly expressed outside of the criminal justice system. The case of many, in fact most, victims, never reaches the criminal justice phase<sup>10</sup> so resolution of their case necessarily takes place outside of the criminal justice system. In addition, much worthwhile, in particularly psychological, research into victims takes place outside of the criminal justice aegis. Finally, all the international instruments, even the specifically ‘criminal proceedings focused’ EU Framework Decision, address victim issues outside of the criminal justice system.

The framework, like the articles of the international legal instruments, categorises and divides needs of victims. In reality, however, the distinction is more problematic: different needs are frequently closely linked. Failure to meet one need may make meeting another need either problematic or even impossible. On the other hand, the various needs may conflict and striking a balance between needs may be an important task. In the discussion we will address a number of the cross-connections between needs.

A point we will stress repeatedly is that needs will differ, not only between victims of different crimes, but also between individual victims of similar or even identical crimes. Most of the needs should be qualified. For one victim meeting a need will be of vital importance, for the other an added bonus. Not all needs will apply to all victims, but rather to many or most.

### 3.2.1.1 Process Factors

The needs of victims relating to the procedure may be divided into three: respectful and fair treatment, information concerning the process and outcome of their cases, and possibilities for participation.<sup>11</sup> The respectful treatment and the receiving of information are both non-controversial. In both the Framework Decision and the Guidelines for Victims of Terrorism reference is made to these features of the procedure and it seems simple common sense that victims prefer being treated respectfully and fairly and receiving or not receiving information if they so wish.

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<sup>9</sup>See the work by Tom Tyler and associates, amongst others, Tyler, T.R. (1990). *Why People Obey the Law*. New Haven, USA, Yale University Press. Tyler T.R. and Lind E.A. (1992). A relational model of authority in groups. *Advances in Experimental Social Psychology*. 25: 115–191, Tyler T.R. and Huo Y.J. (2002). *Trust in the Law*. New York, Russell Sage Found and Tyler, T.R. (2006). Psychological perspectives on legitimacy and legitimation. *Annual Review of Psychology*. 57, 375–400.

<sup>10</sup>See e.g. Goodey, J. (2005). *Victims and Victimology. Research, Policy, Practice*. Harlow, UK, Pearson.

<sup>11</sup>See e.g. Strang, H. (2002) *Repair or Revenge: Victims and Restorative Justice*. Oxford, Oxford University Press. and Malsch, M., (2004) De aanvaarding en naleving van rechtsnormen door burgers: participatie, informatieverschaffing en bejegening. In: de Beer P.T. and Schuyt C.J.M. (eds.). *Bijdragen aan Waarden en Normen*, Amsterdam, Amsterdam University Press.

Two points concerning receiving information merit some additional attention. First of all receiving information only serves a purpose when the victim is capable of understanding this information. Most instruments therefore include provisions that foresee efforts to support victims in understanding this information, for example by offering it in different languages and by offering legal advice and support in making sense of the regularly complicated legal deliberations. Second, the reception of information concerning the content of the criminal justice process also relates to a need for truth-finding for victims of crime. Understanding the reason why one has been victimised plays an important role in cognitive models of post traumatic stress<sup>12</sup>, as ruminating about the event and the reasons for it happening may be seen as a counterproductive coping style, preventing victims from focusing attention on their present avenues for coping with victimisation. Similarly, finding out the truth has been an important driver for the development of the truth and reconciliation commissions in South Africa.<sup>13</sup> However, research into bias and hate crime<sup>14</sup> suggests that knowing the truth about reasons for victimisation does not necessarily have positive effects on recovery. In fact, according to Craig-Henderson and Sloan the knowledge of the reasons for hate crime victimisation, i.e. those relating to core characteristics like race or sexual orientation, have added debilitating effects for victims of these crimes.<sup>15</sup> Those who were attacked because of race, gender or sexual orientation may not fare better when this is confirmed by the offender in a court procedure.<sup>16</sup> Research into the truth and reconciliation commissions confirms that hearing the truth is not necessarily a positive experience for victims.<sup>17</sup> Like receiving information, some victims may prefer not to hear the truth about what happened.

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<sup>12</sup>See specifically Winje, D. (1998). Cognitive Coping: The psychological significance of knowing what happened in the traumatic event. *Journal of Traumatic Stress*. 11(4), 627–643. And more generally Ehlers, A. and Clark, D.M. (2000). A cognitive model of posttraumatic stress disorder. *Behavior Research and Therapy*, 38, 319–345.

<sup>13</sup>See for instance Minow, Martha (1998). *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, Beacon. Gibson, James L. (2002). Truth, justice, and reconciliation: Judging the fairness of amnesty in South Africa. *American Journal of Political Science*. 46(3), 540–556 and Gibson, J.L. (2004). Does truth lead to reconciliation? Testing the causal assumptions of the South African Truth and Reconciliation Process. *American Journal of Political Science*. 48(2), 201–217.

<sup>14</sup>Herek, G., Cogan, J.C. and Gillis, J.R. (2002). Victim experiences in hate crimes based on sexual orientation. *Journal of social issues*. 58(2), 319–339.

<sup>15</sup>Craig-Henderson, K. and Sloan, L.R. (2003). After the hate. Helping psychologists help victims of racist hate crime. *Clinical Psychology: Science and Practice*. 10(4), 481–490.

<sup>16</sup>Pemberton, A., Winkel, F.W. and Groenhuijsen, M.S. (2007). Taking victims seriously in restorative justice. *International Perspectives in Victimology*, 3(1), 4–14. illustrate this in the case of restorative justice procedures.

<sup>17</sup>Allan, A., Allan, M.M., Kaminer, D. and Stein, D.J. (2006). Exploration of the association between apology and forgiveness amongst victims of human rights violations. *Behavioral Sciences and the Law*. 24(1), 87–102.

Participation is a more complicated matter in a number of ways. The often repeated research finding<sup>18</sup> that many victims feel they are lacking sufficient participation in their case as it progresses through the criminal justice system leads to the obvious conclusion that many would prefer a higher level of participation than is currently available,<sup>19</sup> but not that more participation is always in victims' interests or that this can be said to be true for *all* victims. The benefits of increased participation from a procedural justice perspective<sup>20</sup> should be offset against the psychological stress that may accompany this increased participation.<sup>21</sup> This is most obvious in the situation of victims 'participating' as interrogated witnesses,<sup>22</sup> with the term secondary victimisation denoting the phenomenon that the victim may be re-victimised by participation in criminal justice procedures.<sup>23</sup> This is a particular risk for victims of rape and other forms of severe sexual violence, as research by amongst others Campbell, Frazier, Temkin and their respective colleagues shows.<sup>24</sup> But also for other victims of severe crimes, for example co-victims of homicide or victims of stalking, the legal system may be a tremendous burden, to which they would in cases rather minimise their exposure.<sup>25</sup> This is particularly true of those victims who have developed traumatic disorders as a consequence of the event.<sup>26</sup> The article in the Framework Decision relating to victims offering information recognises this, by the provision relating to the fact that victims should not be questioned more often than necessary. However, also in more victim-friendly forms of participation this factor should be taken into account. Research by Edwards and Wemmers and Cyr suggests that given the choice victims prefer the situation where

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<sup>18</sup>Most commonly associated with Shapland J., Wilmore, J. and Duff, P. (1985). *Victims in the Criminal Justice System*, Cambridge, Gower.

<sup>19</sup>E.g. Strang (2002).

<sup>20</sup>See again Tyler (1990) or Röhl, K. (1997). Procedural justice: introduction and overview. In Röhl, K.F. and Machura S. (eds.). *Procedural Justice*, Aldershot, Ashgate.

<sup>21</sup>E.g. Orth, U. (2002). Secondary Victimization of Crime Victims by Criminal Proceedings, *Social Justice Research*, 15(4), 313–325.

<sup>22</sup>Herman, J.L. (2003) The mental health of crime victims: Impact of legal intervention. *Journal of Traumatic Stress*. 16(2), 159–166.

<sup>23</sup>See e.g. Goodey (2005).

<sup>24</sup>See for instance Frazier, P.A., and Haney, B. (1996). Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives. *Law and Human Behavior*. 20: 607–628. Campbell, R.C. (1998). The community response to rape: Victims' experiences with the legal, medical, and mental health systems. *American Journal of Community Psychology*. 26, 355–379. Temkin, J. (2002). *Rape and the legal process* (2nd edition). Oxford, Oxford University Press.

<sup>25</sup>See concerning stalking for example Mullen, P.E., Pathé, M., and Purcell, R. (2000). *Stalkers and Their Victims*. Cambridge, Cambridge University Press, concerning homicide, Rock, P. (1998). *After Homicide*, Oxford, Clarendon Press. Further evidence of the latter is the experience of self-help groups of those bereaved by homicide, collected in Spungen, D. (1998). *Homicide: the Hidden Victims*. Sage, Thousand Oaks, CA.

<sup>26</sup>A point particularly clearly demonstrated by Cheon and Regehr. Cheon, A. and Regehr C. (2006). Restorative justice models in cases of intimate partner violence: Reviewing the evidence. *Victims and Offenders*. 1(4): 369–394.

they are allowed input in the process, in the sense of having their say, but generally prefer decision-making power in their cases to reside elsewhere.<sup>27</sup> In any case, the precise nature of the participation on offer will for a large part determine its usefulness for victims.<sup>28</sup> The discussion concerning the so-called victim impact statements and restorative justice are particularly revealing examples. The former can range from a formal exercise that underlies a claim for compensation, to a flexible means of expression for victims in which they can communicate the wrong committed against them.<sup>29</sup> Across the board support or critique of this type of instruments does not do justice to the variety in justice systems. Similarly and even more heavily debated the victim-oriented benefits and risks of the use of restorative justice procedures are highly dependent on the structuring and matching of these procedures with victims' needs.<sup>30</sup> Chapter 7 will discuss this issue in more detail. This issue is further compounded by differences in the nature of the crime, its context and the victim him or herself.

For certain victims participation may be problematic due to practical reasons, like the geographic distance to the location of the trial. This is especially true for cross-border victims for whom both the obligation to participate (as a witness) and the need to participate may present additional difficulties. Again the international instruments for victims of crime address this extraordinary feature of becoming a victim abroad. Finally the question of victim participation is debated on the grounds of the effects it may have on the right and possibilities of other parties in the procedure, mainly the offender.<sup>31</sup>

### 3.2.1.2 Outcome Factors

Where the relationship between the process and victims' needs is not always straightforward, this relationship is even more complex concerning the outcome of the procedure.

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<sup>27</sup>Edwards, I. (2004). An ambiguous participant: The crime victim and criminal justice decision-making. *British Journal of Criminology*. 44(6), 967–982. Wemmers J. and Cyr. K. (2004). Victims' perspective on restorative justice. How much involvement are victims looking for? *International Review of Victimology*. 11: 1–16.

<sup>28</sup>And this is further compounded by the crime, the context and the personal view of the victim him or herself.

<sup>29</sup>See Roberts, J.V., and Erez, E. (2004). Communication in sentencing: exploring the expressive function of victim impact statements. *International Review of Victimology*. 10: 223–244 and Pemberton, A. (2005). Het spreekrecht en slachtoffers: vergelding of herstel? *Tijdschrift voor Herstelrecht*. 5(3), 34–44.

<sup>30</sup>A good conceptual overview of the main issues, see Groenhuijsen, M.S. (2000). Victim-offender mediation: legal and procedural safeguards. Experiments and legislation in some European jurisdictions. In: *The European Forum for Victim-Offender Mediation and Restorative Justice*, Victim-Offender Mediation in Europe. Making Restorative Justice work, Leuven, Belgium, Leuven University Press.

<sup>31</sup>A recurrent theme in the work of Ashworth, see e.g. Ashworth, A. (2000). Victims' rights, defendants' rights and criminal procedure. In Crawford A. and Goodey J. (eds.). *Integrating a Victim Perspective Within Criminal Justice*. Aldershot, Dartmouth Publishing, pp. 185–206.



Various sources suggest victims' needs concerning the outcome of the criminal justice process; from the reasons of reporting the offence to preferred outcomes of the court procedure.

In the first place, the reasons for reporting crime to the police differ. The decision to report may be caused by a variety of reasons, from insurance requirements to safety of life and limb and the judgment concerning the outcome reflects these differences. Wittebrood provides an overview of the reasons for reporting. It is not surprising that these are correlated with the type of victimisation.<sup>32</sup> For example 73% of victims of sexual crime stated as most important reason that 'the offender must be punished'. This was also the case for 50% of the victims of violent crime. This reason was far less prevalent for victims of property crime, with percentages varying between 11% and 25%. Instead 40% to 70% of these victims mentioned reasons like 'I wanted to retrieve what was stolen' or 'I needed to report for insurance reasons', which was only mentioned by a small minority of victims of personal crime.

However, it is not possible to map the reasons for reporting crime on to the type of crime suffered. Wittebrood's study shows too much variation for this. Even in the group of severe victims of violence the reason for reporting to the police are nuanced. Orth for example distinguishes various functions of courts for victims in his investigation of victims' punishment goals.<sup>33</sup> It could be the desire for retribution, for security or of acknowledgment of the victim status or a combination of all three. The variety in preferences is complicated. Comparable with Winkel's model of victimisation<sup>34</sup> these preferences are related to personal pre-victimisation factors (for example the level of trait vengefulness), factors relating to the crime suffered (with crimes with a high recidivism level leading to higher desire for security)<sup>35</sup> and post-victimisation factors (victims who feel poorly treated by the criminal justice partners will view the outcome of the case in terms of recognition).<sup>36</sup> In any case, in the context of current criminal justice practices, retribution<sup>37</sup>, security (see e.g. the research into domestic violence)<sup>38</sup> and acknowledgment of victimisation<sup>39</sup> all figure as relevant needs for large numbers of victims of crime.

<sup>32</sup>Wittebrood, K. (2006). Slachtoffers van criminaliteit. Den Haag, Sociaal Cultureel Planbureau.

<sup>33</sup>Orth, U. (2004). Does perpetrator punishment satisfy victims' feelings of revenge? *Aggressive Behavior*. 30, 62–70.

<sup>34</sup>Winkel, F.W. (1999) and Winkel, F.W. (2002). Slachtofferhulp bij hardnekkige klachten. Over visie, wite beren, stroop en tegenpolen. Inaugural lecture, Free University Amsterdam.

<sup>35</sup>The case of domestic violence is a common example, for example Stubbs, J. (2002). Domestic violence and women's safety: Feminist challenges to restorative justice. In Strang, H. and Braithwaite, J. (eds.). *Restorative Justice and Family Violence*. New York, Cambridge University Press, pp. 42–61.

<sup>36</sup>As is illustrated by Rock's examination of co-victims of homicide. see Rock, P. (1998). *After Homicide*. Oxford, Clarendon Press.

<sup>37</sup>As is evidenced by the reviews by Miller and Vidmar. See Miller, D.T. (2001). Disrespect and the experience of injustice. *Annual Review of Psychology*. 52, 527–553 and Vidmar, N. (2001). Retribution and revenge. In: Sanders, J. and Hamilton, V.L. (eds.) *Handbook of Justice Research in Law*. Kluwer Academic/Plenum Publishers.

<sup>38</sup>Campbell, J. (2002). Health consequences of intimate partner violence. *The Lancet*. 359, 1331–1336.

<sup>39</sup>See again Shapland et al. (1985) and Strang (2002).



We can review the outcome factors in a broader sense than the criminal justice process to include further, more wide-ranging needs. First of all the victims' need to deal with *feelings of anxiety* and associated mental health problems should be addressed. Anxiety is one of the primary reactions to victimisation and post-traumatic stress disorder is an anxiety-related disorder.<sup>40</sup> A similar observation may be made concerning loss and grief concerning the case of co-victims of homicide<sup>41</sup>. Here the combination of loss and grief may result in complicated or traumatic grief (e.g. Kaltman and Bonanno 2003). The longer term psychological assistance and support of victims primarily targets these types of feelings, emotions and disorders.<sup>42</sup>

Secondly, acknowledgment may extend beyond the criminal justice system. Maercker and Muller (2004) show that *social acknowledgment* in general is important to victims, with victims' recovery being connected to the 'victim's experience of positive reactions from society that show appreciation for the victim's unique state and acknowledge the victim's current difficult situation.'<sup>43</sup> This may be expressed by the closest social relations, but also by more distant members of society, like state authorities or the media. Social acknowledgment of victimisation is related to the extent to which victims represent 'ideal victims' (e.g. Dignan 2005). In a famous essay Nils Christie (1986) described ideal victims – as amongst others – being innocent, having no relationship with the offender, being relatively weak in respect to the offender, and their offender being both evil and more powerful. In both the reactions of the media and the criminal justice system, victims who fit into the mould of the ideal victim are treated with more respect and receive more acknowledgment than those who do not. Victims who are perceived to be culpable in some way, for example because they are related to the offender or were engaged in non-normative, or even illegal or criminal activities themselves are treated with less respect (see e.g. Bennice and Resick 2003). Finally the research into hate crime victimisation suggests that where minority group victims perceive their victimisation to be connected to wider issues of societal stigmatisation they will be likely to attribute the qualities and motives of the perpetrator to a wider group of society by a process also known as the ultimate attribution error (Pettigrew 1979).<sup>44</sup> This will conversely lead to a

<sup>40</sup>See Ehlers and Clark (2000) and Foa, E.B. and Rothbaum, B.O. (1998). *Treating the Trauma of Rape: Cognitive-Behavioral Therapy for PTSD*. New York, Guildford.

<sup>41</sup>See for example Prigerson, H., and Jacobs, S. (2001). Traumatic grief as a distinct disorder: A rationale, census criteria, and a preliminary empirical test. In M. Stroebe, R. O. Hansson, W. Stroebe, and Schut H. (eds.). *Handbook of Bereavement Research: Consequences, Coping, and Care*. Washington, DC, American Psychological Association. Stroebe, M.S. (2001). Bereavement Research and Theory: Retrospective and Prospective American Behavioral Scientist. 44(5), 854–865 and Peterson-Armour, M. (2002). Experiences of co-victims of homicide. *Trauma, Violence and Abuse*. 3(2), 109–124.

<sup>42</sup>See again Foa and Rothboam (1998).

<sup>43</sup>See Maercker, A. & Muller, J. (2004). Social Acknowledgment as a Victim or Survivor: A Scale to Measure a Recovery Factor of PTSD. *Journal of Traumatic Stress*. 17(4), 345–351.

<sup>44</sup>See Craig-Henderson and Sloane (2003). The ultimate attribution error refers to the process in which people attribute socially undesirable actions of out-group members to internal factors, such as motives or dispositions of all out-group members, see Pettigrew, T.E. (1979). The ultimate attribution error: Extending Allport's cognitive analysis of prejudice. *Personality and Social Psychology Bulletin*. 5, 461–476.

perception of less social acknowledgment and may as a consequence have added negative effects for the victims in question (Craig-Henderson and Sloan 2003).

In the third place the *need for security* relates to the trial itself, not only to the incapacitate function of a prison sentence as a consequence of the trial. In a considerable number of cases the victim is also the most important witness in the trial and needs to be protected from possible retaliatory or threatening behaviour from the offender. In addition, the need for security should be extended to include prevention of repeat or secondary victimisation. Davis and Smith (1994) recognised over 10 years ago that a basic need for many victims is the prevention of further victimisation. This relates to the victim of chronic violence, who wishes to end this (see for example stalking victims: Mullen et al. 2000) but also the victim of a burglary who wishes to prevent future property offences (see e.g. Herman and Weisburd 2002; Farrell and Pease 2006).

Similarly, as we already discussed, victims need to *prevent secondary victimisation* in the criminal justice process. In addition to the criminal justice process there are other avenues for secondary victimisation. The first is an unsupportive, victim-blaming reaction of their immediate social surroundings, with Brewin, Andrews and Valentine showing lack of social support to be the strongest post-trauma predictor of PTSD in their meta-analysis.<sup>45</sup> Second is the media. Maercker and Mehr show that the media may have deleterious effects for victims.<sup>46</sup> Conversely victims have a need to protect their privacy vis-à-vis the media.

Fourth the need for *material compensation* may not be restricted to immediate financial damage, although this is an acute concern, especially where victims have suffered physical damage or other severe damages that threaten their primary needs (housing etc.). It may also include need for compensation of more distal financial losses like longer term medical costs, production loss, intangible costs and the like.<sup>47</sup> Moreover material compensation may also serve a more symbolic purpose in addition to meeting victims' direct financial needs. Compensation may be seen as a source of acknowledgment of victim status. Restorative justice theorists like Braithwaite and Strang view this more symbolic function as central.<sup>48</sup> According to Braithwaite foregoing full compensation may serve a particular function, as victims participating 'will prefer mercy to insisting on getting their money back; indeed it

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<sup>45</sup>Brewin, C.R., Andrews, B. and Valentine, J.D. (2000). Meta-analysis of risk factors for post-traumatic stress disorder in trauma-exposed adults. *Journal of consulting and Clinical Psychology*, 69, 748–766.

<sup>46</sup>Maercker, A., and Mehr, A. (2006). What if victims read a newspaper report about their victimization? A study on the relationship to ptsd symptoms in crime victims. *European Psychologist*, 11, 137–142.

<sup>47</sup>Dolan, P., Loomes, G., Peasgood, T. and Tsuchiya, A. (2005). Estimating the intangible victim costs of violent crime. *British Journal of Criminology*, 45, 958–976.

<sup>48</sup>See Braithwaite, J. (1999). Restorative justice. Assessing optimistic and pessimistic accounts. In: Tonry, M. (ed.). *Crime and Justice: A Review of Research*, 25. Chicago. University of Chicago Press, and Strang 2002.

may be that act of grace which gives them a spiritual restoration that is critical for them.' Pemberton et al. (2007) on the other hand stress that for other victims receiving full compensation may add to the symbolic perception of victims.<sup>49</sup>

Finally the urge for retribution may be seen in the wider framework of *feelings of anger*. The perception that one has been treated disrespectfully or insulted is the most common source of anger.<sup>50</sup> It follows that anger is a common response to criminal victimisation as this, at least, involves disrespectful treatment. This resounds in research by Ditton and colleagues who found victims typically reacted with anger rather than fear to victimisation (Ditton, Bannister, Gilchrist, and Farrall 1999; Ditton, Farrall, Bannister, Gilchrist, and Pease 1999).<sup>51</sup> In coping with their feelings of anger victims of transgressions have two main avenues.<sup>52</sup> In the first, a problem-focused coping strategy, the outlet would be to exact retribution against the offender, which maps on to notions of 'just deserts' (Von Hirsch 1993).<sup>53</sup> This is in fact the most prevalent way by which victims and laypeople view criminal justice and punishment.<sup>54</sup> In the second, an emotion-focused coping strategy, victims release their feelings of anger and revenge through a process of forgiveness.<sup>55</sup> Stimulating forgiveness reduces the need for retribution, while feelings of revenge or the observation that insufficient retribution has been exacted may form barriers

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<sup>49</sup>Pemberton, A., Winkel, F.W. and Groenhuijsen, M.S. (2007). Taking victims seriously in restorative justice. *International Perspectives in Victimology*. 3(1), 4–14. See also Tripp, T.M., Bies, R.J. and Aquino, K. (2007). A vigilante model of justice: Revenge, reconciliation, forgiveness and avoidance, *Social Justice Research*, 20(1): 10–34.

<sup>50</sup>For a review see Miller, D.T. (2001). Disrespect and the experience of injustice. *Annual Review of Psychology*. 52, 527–553.

<sup>51</sup>Ditton, J., Bannister, J., Gilchrist, E. and Farrall, S. (1999). Afraid or angry? Recalibrating the 'fear' of crime. *International Review of Victimology*. 6: 83–99 and Ditton, J., Farrall, S., Bannister, J., Gilchrist, E. and Pease, K. (1999). Reactions to victimisation. Why has anger been ignored? *Crime Prevention and Community Safety: an International Journal* 1(3), 37–54.

<sup>52</sup>See Worthington, E. L., Jr., and Scherer, M. (2004). Forgiveness as an emotion focused coping strategy that can reduce health risks and promote health resilience: Theory, review and hypotheses. *Psychology and Health*. 19, 385–405. More generally on coping, see Lazarus, R. (1993). Coping theory and research: past, present and future. *Psychosomatic Medicine*. 55, 234–247.

<sup>53</sup>See Von Hirsch, A. (1993). *Censure and Sanctions*, Oxford, Clarendon Press.

<sup>54</sup>See the research by John Darley and colleagues, for example Darley, J.M. and Pittman, T.S. (2003). The psychology of compensatory and retributive justice. *Personality and Social Psychology Review*. 7, 324–336. Carlsmith, K.M., Darley, J.M., and Robinson, P.H. (2002). Why do we punish? Deterrence and just deserts as motives for punishment. *Journal of Personality and Social Psychology*. 83, 1–16. Carlsmith, K.M. (2006). The roles of retribution and utility in determining punishment. *Journal of Experimental Social Psychology*. 42, 437–451.

<sup>55</sup>See for example Worthington and Scherer (2004); McCullough, M.E., Worthington, E.L., and Rachal, K.C. (1997). Interpersonal forgiving in close relationships. *Journal of Personality and Social Psychology*. 73, 321–336. and Exline, J.J. and Baumeister, R.F. (2000). Expressing forgiveness and repentance: benefits and barriers. In: McCullough M.E. and Thoresen C.E. (eds.). *Forgiveness Theory: Research and Practice*. London, Guildford Press.

for forgiveness.<sup>56</sup> High levels of experienced procedural justice<sup>57</sup>, receiving sincere apologies<sup>58</sup>, and/or voluntary compensation<sup>59</sup> have all been linked to higher levels of forgiveness. Finally anger has been associated with clinical disorders after victimisation. In a recent meta-analysis Orth and Wieland show a strong relationship between anger, hostility and PTSD.<sup>60</sup>

In sum: many victims may have a need for immediate emergency assistance directly after the crime, and for recognition and respectful treatment, information and participation in their case. In addition, they often need acknowledgment, (material) compensation, and protection of their security and privacy and prevention of further harm. Finally they will mostly have to come to terms with their feelings of anxiety, loss and anger.

### ***3.2.2 Comparing the Victimological Framework with the Rights Contained in the International Legal Instruments***

In Chapter 2 we discussed the victims' rights covered by the existing international legal instruments. The following rights and duties were discerned:

- A right to respect and recognition at all stages of the criminal proceedings
- A right to receive information and information about the progress of the case
- A right to provide information to officials responsible for decisions relating to the offender
- A right to have legal advice available, regardless of the victims' means
- A right to protection, for victims' privacy and their physical safety
- A right to compensation, from the offender and the State
- A right to receive victim support
- The duty for governments seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure
- The duty for the State to foster, develop and improve cooperation with foreign States in cases of cross border victimisation in order to facilitate more effective protection of victims' interests in criminal proceedings

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<sup>56</sup>An overview of research may be found in Karremans, J.C., Van Lange, P.A.M., Ouwerkerk, J.W., and Kluwer, E.S. (2003). When forgiving enhances psychological well being: The role of interpersonal commitment. *Journal of Personality and Social Psychology*. 84, 1011–1026.

<sup>57</sup>As shown in research by Karremans, J.C. and Van Lange, P.A.M. (2005). Does activating justice help or hurt in promoting forgiveness? *Journal of Experimental Social Psychology*. 41, 290–297. And Tripp et al. (2007).

<sup>58</sup>See Hill, P.C., Exline, J.J., and Cohen, A.B. (2005). The social psychology of justice and forgiveness in civil and organizational settings. In: Worthington, E.L. Jr. (ed.). *Handbook of Forgiveness*. New York, Routledge.

<sup>59</sup>Again Tripp et al. (2007).

<sup>60</sup>Orth, U. and Wieland, E. (2006). Anger, hostility, and posttraumatic stress disorder in trauma-exposed adults: a meta-analysis, *Journal of Consulting and Clinical Psychology*. 74(4), 698–706.

A brief comparison of victims' needs with victims' rights reveals a close correspondence. Only a few victims' needs are not covered in the list of rights. In particular, the need for immediate emergency assistance, the prevention of repeat victimisation, the need for social support and the need for retribution, relating to the feelings of anger that victims frequently have are not reflected in the rights. However, the first two needs are explicitly contained in the two Council of Europe instruments and the latter two particularly pose problems for translation into rights. The Guidelines for Victims of Terrorism address the issue of immediate emergency assistance and similarly the Council of Europe Recommendation 2006 (8) covers the issue of repeat victimisation. It is not immediately apparent how a need for social support could be reflected in a right. Finally, the victims' need for retribution is mostly seen to be subsumed under society's need for retribution.<sup>61</sup> In this sense this is mostly not seen to be a specific victims' right, but a central focus of the criminal justice system itself.

The other needs are covered in the instruments. The need for respect and recognition, to receive information concerning the case, for material compensation and for protection of safety and physical safety are all explicitly mentioned in the list of victims' rights. The rights concerning the possibility to give information, to obtain legal advice and the promotion of mediation tie in with the victims' need for participation in the case. The duty concerning cross-border victims relates to information provision, participation and prevention of secondary victimisation of this particular group of victims. The research into restorative justice shows that the provision on mediation is also related to victims' feelings of anxiety and anger, with research suggesting that restorative justice-meetings regularly lead to less of both of them (see further Chapter 7).<sup>62</sup> Finally, victim support assists victims in many of their procedural rights, clarifying information, referring victims to legal representation and minimising chances of secondary victimisation (see e.g. Zedner 2002) as well as playing an important role in supporting victims with dealing with their feelings of anxiety and loss.<sup>63</sup> In general, the existing international instruments cover a large part of victims' needs.

This fairly optimistic account should be qualified though. First of all translation of these international instruments into national law is restricted primarily to the countries of the EU and other wealthy nations, which means that the treatment of victims in most countries still falls far short of the requirements of the international instruments. Second, cooperation between jurisdictions, in order to meet

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<sup>61</sup>Again see the 'just deserts' literature, von Hirsch (1993).

<sup>62</sup>For an overview see Sherman, L.W. and Strang, H. (2007). *Restorative Justice. The evidence*. London, UK, The Smith Institute. For a critical discussion of this overview, see Winkel, F.W. (2007). Post-traumatic anger: Missing link in the wheel of misfortune. Inaugural lecture Tilburg University.

<sup>63</sup>See for example Zedner, L. (2002). Victims. In: Maguire, M., Morgan, R., and Reiner, R. (eds.). *The Oxford Handbook of Criminology* (3rd edition), Oxford, Oxford University Press.

the additional problems of cross-border victims, is mainly restricted to the countries in the EU area. Finally, even where national legislation is or should be (in the EU) in place it is still open to question how effective the legal provisions are in ensuring that all or even most victims are reached in practice (e.g. Groenhuijsen and Pemberton 2007; Van Dijk and Groenhuijsen 2007).<sup>64</sup> Research into victims' experience in the criminal justice system<sup>65</sup> and the (mental) health care system<sup>66</sup> suggests that many victims are not reached by the governmental and non-governmental victim assistance and support services and do not receive the support and help that they need.

### 3.3 The Differential Impact of Terrorism and Related Needs

In this section we will discuss the consequences of victimisation by terrorism. As stated earlier the impact of victimisation on an individual victim is the combination of three types of factors.<sup>67</sup> First, of course, there is the *criminal event* itself, which can vary widely in its effects. However, even the exact same event can have very different effects for different victims. This is related to *pre-existing features of the victim*, which can be psychological (e.g. mental illness, prior trauma) but also social-demographic (e.g. their age or ethnic background). Moreover, *events and circumstances in the aftermath* of the event also shape the effects for victims. The extent of media-attention, the criminal justice response and the support of friends, family and society as a whole, all shape the victimisation experience. This means that in discussing the consequences of terrorism we will pay attention to the consequences in general, the consequences for various potential risk-groups and to factors in the aftermath of a terrorist attack that may impact victims of terrorist attacks. In doing this we will also discuss the impact of different types of terrorism.

The central focus of this section is to contrast empirical findings about the consequences of terrorism with those of other victims of crime, with the ultimate goal of discerning implications for their needs. This is the subject of the concluding Section 3.3.4.

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<sup>64</sup>See the work by Marc Groenhuijsen and colleagues, e.g. Groenhuijsen, M.S., and Pemberton, A. (2007). Het slachtoffer in de strafrechtelijke procedure: De implementatie van het Europese kaderbesluit. *Justitiële Verkenningen*. 33(3) 69–92. Van Dijk, J.J.M. and Groenhuijsen, M.S. (2007). Benchmarking victim policies in the Framework of European Union Law. In Walklate, S. (ed.). *Handbook of Victims and Victimology*. Cullumpton, Devon, UK, Willan Publishing.

<sup>65</sup>See the recent results of the International Crime Survey, Van Dijk, J.J.M., Manchin, R., Van Kesteren, J. et al. (2007). The burden of crime in the European Union, Gallup Europe, Brussels.

<sup>66</sup>Winkel, F.W. (2002). Slachtofferhulp bij hardnekkige klachten. Over visie, witte beren, stroop en tegenpolen. Inaugural Lecture, Free University, Amsterdam.

<sup>67</sup>Winkel, F.W. (1999). Repeat victimization and trauma susceptibility: Prospective and longitudinal analyses. In: Van Dijk, J.J.M., van Kaam, R.G.H. and Wemmers, J-A.M. (eds.). *Caring for Crime Victims*. Monsey, New York, Criminal Justice Press, and Winkel 2002.

### 3.3.1 *The Effects of a Terrorist Attack on Victims*

#### 3.3.1.1 Physical/Medical Effects

Van Dijk et al. recently published a survey of criminal victimisation in European Union Member States.<sup>68</sup> According to their figures, 2.8% of the population of the 18 European countries included in their survey is a victim of an assault or threat one time or more in the year preceding the survey, meaning that millions of Europeans are victims of violence each year. The chance of being fatally wounded in these acts of violence is small. The yearly homicide rate in Europe varies between less than one death and eight deaths per 100,000 inhabitants.<sup>69</sup> This suggests that the fatality rate per violent incident is in the realm of one fatality for every 1,000 violent incidents.

A comparison of the amount and lethality of terrorist attacks shows first that terrorism is extremely rare. According to Bogen and Davis there were just over 19,000 events worldwide in the period 1968–2004.<sup>70</sup> Mass victimisation by terrorist attacks is even less frequent. Over 80% of casualties and 90% of fatalities were caused by attacks in which fewer than ten casualties or fatalities occurred.

However, when terrorism occurs its direct physical impact tends to be larger than for crime. In the 19,000 events there were 7,500 which caused one or more casualties (i.e. a victim being harmed or killed). Altogether 86,000 injury victims were implicated in these events of which 25,000 were fatally wounded. The fatality rate is much higher than is normal for trauma victims admitted to hospital.<sup>71</sup> The data analysed by Bogen and Davis reveal a disturbing trend in which the amount of terrorist attacks shows a marked increase. The final years (2003–2004) in their analysis showed both the highest annual event rate as well as the highest casualty rate. The extrapolated data for the period 2003–2007 showed 9.125 (36% of the total since 1968) terrorist events, of which 4.287 (43%) involved 35,397 (43%) casualties, of which 14,492 (43%) fatal. The data are an illustration of the observed trend in terrorist groups to use methods intended to make mass casualties rather than to limit the casualties to direct representatives of the regime.<sup>72</sup> This trend is attributed by a replacement of leftist/nationalist terrorist groups by fundamentalist/religion groups (see also Chapter 1).

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<sup>68</sup>Van Dijk et al. (2007).

<sup>69</sup>See Aebi, M.F., Aromaa, K., Aubuson de Carvalay, B. et al. (2006). *European Source Book of Crime and Criminal Justice Statistics*, third edition, The Hague, Boom Juridische Uitgevers.

<sup>70</sup>Bogen, K.T. and Jones, E.D. (2006). Risks of Mortality and Morbidity from Worldwide Terrorism: 1968–2004, *Risk Analysis*. 26(1), 45–59.

<sup>71</sup>Peleg K, Aharonson-Daniel L, Stein M, Shapira SC. (2003). Terror – severe form of external injury: Pattern of injury in hospitalized terrorist victims. *American Journal of Emergency Medicine*. 21: 258–262.

<sup>72</sup>Hoffman, B. (1998). *Inside Terrorism*. New York, Columbia University Press.



In addition, to the higher chance of fatalities because of terrorism, research suggests that the injuries typically sustained are more severe than of other types of trauma, even if the victim survives, which in turn leads to the necessity of devoting more hospital resources to victims of terrorism. The fact that bombs are the most used tool for terrorist attacks is associated with these more extensive injuries. Moreover, there is research showing that the average age of victims of terrorism is relatively low, which means that the adjusted measures for quality of life increase and the amount of years that additional care will be necessary as well.<sup>73</sup>

Finally the higher injury level has a psychological impact. Injury during violent victimisation is a risk factor for the development of psychological problems (e.g. Blanchard et al. 1995).<sup>74</sup> The severity of injury in victimisation is a predictor of PTSD and other post-traumatic symptomatology. Moreover, according to Fraguas et al. the proportion of injured victims with PTSD symptoms shows less signs of reduction than in non-injured victims.<sup>75</sup>

### 3.3.1.2 Psychological, Behavioural and Social Consequences

#### Post-traumatic Stress: Resilience and PTSD

Post-traumatic stress is a common reaction to (unexpected and sudden) traumatic events such as assaults, serious accidents and disasters. In the aftermath of such an event many victims experience at least some of the following symptoms: re-experiencing the event, repeated and unwanted intrusive thoughts, hyper-arousal, emotional numbing, and avoidance of stimuli which could serve as reminders of the traumatic experience. For most people these symptoms do not last. Within weeks or months symptoms of traumatic stress subside.<sup>76</sup> This resilience in the face of trauma is the most common reaction toward even the most serious events and this has also been demonstrated in the research surrounding the 9/11 terrorist attacks.<sup>77</sup> In addition, a

<sup>73</sup>See again Peleg et al. (2003).

<sup>74</sup>Blanchard, E.B., Hickling, E.J., Mitnick, N., Taylor, A.E., Loos, W.R., and Buckley, T.C. (1995). The impact of severity of physical injury and perception of life threat in the development of post-traumatic stress disorder in motor vehicle accident victims. *Behaviour Research and Therapy*. 33(5), 529–534.

<sup>75</sup>Fraguas, D., Teran, S., Conejo-Galindo, O. et al. (2006). Posttraumatic stress disorder in victims of the March 11 attacks in Madrid admitted to a hospital emergency room: 6-month follow-up. *European Psychiatry*. 21, 143–151.

<sup>76</sup>Bonanno, G.A. (2004). Loss, trauma, and human resilience: Have we underestimated the human capacity to thrive after extremely aversive events? *American Psychologist*. 59, 20–28. Bonanno, G.A. (2005). Resilience in the Face of Potential Trauma, *Current Directions in Psychological Science*. 14(3), 135–138.

<sup>77</sup>Bonanno, G.A., Rennicke, C., and Dekel, S. (2005). Self-enhancement among high-exposure survivors of the September 11th terrorist attack: Resilience or social maladjustment? *Journal of Personality and Social Psychology*. 88(6), 984–998. Bonanno, G.A., Galea, S. and Vlahov, D.A. (2006). Psychological resilience after disaster. *Psychological Science*. 17(3), 181–186.



substantial amount of those who do develop post-traumatic symptoms recover.<sup>78</sup> In other words, severe and long-lasting psychological problems are not an inevitable or even most likely outcome of a terrorist attack.

Nevertheless, as we will discuss at greater length in Section 3.3.4, sub-clinical levels of fear and anxiety are also a relevant factor, due to the behavioural, financial and political consequences that these may have. In addition, recent research into the Oklahoma bombing victims shows that even victims who were emotionally resilient in the face of the attacks show heightened physiological reactivity towards post-traumatic stressors 10 years later.<sup>79</sup>

A large minority of victims do develop post-traumatic stress disorder (PTSD). PTSD is a disorder which may occur following exposure to an extremely traumatic stressor, when a person has directly witnessed situations that result in actual or threatened mortality or physical injury and the individual's response to this situation includes a strong affective component of intense fear, helplessness and/or horror (DSM-IV-TR). Both Kessler and colleagues and Breslau and colleagues show that the prevalence rate of PTSD after victimisation is 15%.<sup>80</sup> As these symptoms occur over a longer period of time, sometimes years, this means that the victims experiencing PTSD have severely impaired social and occupational functioning.<sup>81</sup> Repeating victimisation enlarges the chance for development of PTSD, as is evidenced by victims suffering repeated or multiple<sup>82</sup> or chronic victimisation.<sup>83</sup> In addition to PTSD victims may suffer from co-morbid conditions like acute stress-disorder, depression, burnout, sleep disorders, drug abuse and anxiety disorders.<sup>84</sup> Moreover, in a recent review Orth and Wieland showed a repeated and strong connection

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<sup>78</sup>E.g. Bonanno (2005).

<sup>79</sup>Tucker, P.M., Pfefferbaum, B., North, C.S., et al. (2007). Physiologic reactivity despite emotional resilience several years after direct exposure to terrorism. *American Journal of Psychiatry*. 164: 230–235.

<sup>80</sup>See the large scale epidemiological reviews by Kessler, R. C., Sonnega, A., Bromet, E., Hughes, M., and Nelson, C.B. (1995). Posttraumatic stress disorder in the National Comorbidity Survey. *Archives of General Psychiatry*. 52, 1048–1060. and Breslau, N., Peterson, E.L., Schultz, L.R., and Lucia, V.C. (2004b) Estimating posttraumatic stress disorder in the community: Lifetime perspective and the impact of typical traumatic events. *Psychological Medicine*. 34: 889–898.

<sup>81</sup>E.g. Ehlers and Clark (2000).

<sup>82</sup>See Denkers, A.J.M. and Winkel, F.W. (1996). Reactions to criminal victimization: a field study of the cognitive effects on victims and members of their social network. In: Graham Davies, Mary McMurrin, Clare Wilson and Sally Lloyd-Bostock (eds.). *Psychology, Law, and Criminal Justice: International Developments in Research and Practice*. De Gruyter, Berlin/New York, pp. 374–384.

<sup>83</sup>See the research into victims of stalking and other forms of extreme harassment, e.g. Mullen, P.E., Pathé, M., Purcell, R. (2000). *Stalkers and Their Victims*. Cambridge, Cambridge University Press, and the research into intimate partner violence, e.g. Campbell (2002).

<sup>84</sup>As reviewed in Beutler, L.E., Reyes, G., Franco, Z. Housley, J. (2007). The need for proficient mental health professionals in the study of terrorism. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

between PTSD and anger-related constructs.<sup>85</sup> Ruminating about anger is similar to PTSD in a variety of ways.<sup>86</sup>

Terrorism is a particularly effective traumatic stressor. It not only combines the harm and malevolent intent of other known precursors of PTSD, but in addition, adds the promise that similar events may happen in the future. Terrorism is unique for the difference between the actual and perceived risk of its (re)occurrence.<sup>87</sup> As we have seen the chance of terrorism happening is small, but due to its specific characteristics perception of risk is extremely elevated. We will discuss this perception of risk, which has bearing on the general public in Section 3.3.2. Its relevance here is that perception of future vulnerability is associated with the development of post-traumatic stress disorder, as cognitions like ‘the next disaster will happen soon’ and ‘nowhere is safe’ are prevalent in victims who suffer from this disorder.<sup>88</sup> Therefore this factor significantly contributes to the psychological damage caused by terrorism (e.g. Butler et al. 2007).<sup>89</sup>

Following this it is the intent inherent to terrorist attacks that is the main distinction with disasters. This intent, which inspires enduring fear for future terrorist attacks leads to larger psychological impact of terrorist attacks over and above the havoc caused by disasters.<sup>90</sup> Terrorism defies the sense of causal understanding that is normally found after disasters. It is easier to understand the cause of both a natural or technological disaster and it is also easier to provide information concerning duration and location of this type of disaster.<sup>91</sup> Emergency planners and potential victims can approach an impending event with a sense of knowing what to expect and knowing what to do to diminish ill effects or not be affected at all. This is not the case with terrorism. Terrorist attacks, almost by definition, are intended to be unexpected, with place and time of the event unknown and the harm inflicted intentionally. This is the main mechanism by which terrorist attacks can achieve their goal of pervasive threat and dread. Instead of being able to attribute the damage caused to natural, physical causes, the most clear causal explanation for the victims is the malevolent intent of the perpetrator who is normally not known to the victims. As the goals (beyond inciting fear) are normally unclear to victims, they are commonly left without much information about who the intended target was, whether they themselves fit the profile and what the likelihood and method of future attacks will be. A clear indication of this is that two-thirds of the victims of mass violence catastrophes

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<sup>85</sup>Orth and Wieland (2006).

<sup>86</sup>Sukhodolsky, D.G., Golub, A., and Cromwell, E.N. (2001). Development and validation of the anger rumination scale. *Personality and Individual Differences*. 31, 689–700.

<sup>87</sup>Slovic, P. (2002). Terrorism as hazard. A new species of trouble. *Risk Analysis*. 22(3), 425–426.

<sup>88</sup>See again Ehlers and Clark (2000).

<sup>89</sup>Butler, L.D., Morland, L.A. and Leskin, G.A. (2007). Resilience in the face of terrorism. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>90</sup>See Breckenridge, J.N. and Zimbardo, P.G. (2007). The strategy of terrorism and the psychology of Mass-Mediated fear. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>91</sup>Again Slovic 2002.

present with severe psychological damage due to the event compared with 34% of those suffering a naturally occurring disaster.<sup>92</sup>

However, a Galea et al. review suggests that the difference in results following natural and man-made disasters may also reflect variation in sampling frames.<sup>93</sup> In their comparison of man-made disasters (including mass violence and terrorism) with natural disasters they showed the former having a higher proportion of direct victims, due to the fact that it is easier to discern direct and indirect victims in the case of man-made disasters and violence than it is in the case of natural disaster. As level of exposure is an important predictor of traumatic sequelae, with Galea et al. showing a 30–40% range of PTSD in those directly exposed and a 5–10% range for the general population, this may well account for some or all of the difference. The 30–40% PTSD range in disasters is equivalent to what is found in reviews specifically devoted to terrorism. A review of studies of the prevalence of PTSD among people who had witnessed a terrorist attack showed that on average 28% develops PTSD.<sup>94</sup> A Laugharne et al. review of the studies after 9/11 showed that between 20% and 38% of those directly exposed developed PTSD.<sup>95</sup> Assessment of the reactions to the Madrid bombing attacks showed 26% of direct victims presenting with PTSD.<sup>96</sup> Direct comparison furthermore, revealed terrorism victims to have more elevated levels of PTSD than victims of motor vehicle accidents. Shalev and Freedman found 37.8% of the terrorism victims to develop PTSD against 18.7% of the MVA-victims.<sup>97</sup>

The studies into the mental health of victims following terrorism have also shown the co-morbid disorders that are normally found after victimisation in general. Acute stress disorder,<sup>98</sup> depression<sup>99</sup> drug and substance abuse<sup>100</sup> and burnout and

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<sup>92</sup>Norris, F.H., Friedman, M.J., Watson, P.J., Byrne, C.M., Díaz, E., and Kaniasty, K. (2002). 60,000 disaster victims speak: part I. An empirical review of the empirical literature, 1981–2001. *Psychiatry*. 65(3), 207–239.

<sup>93</sup>Galea, S., Nandi, A. and Vlahov, D. (2005). The epidemiology of post-traumatic stress disorder after disasters. *Epidemiological Reviews*. 27, 78–91.

<sup>94</sup>Gidron, Y. (2002). Posttraumatic stress disorder after terrorist attacks. A review. *Journal of Nervous and Mental Disease*. 190, 118–121.

<sup>95</sup>Laugharne, J., Janca, A. and Widiger, T. (2007). Posttraumatic stress disorder and terrorism. 5 years after 9/11. *Current Opinion in Psychiatry*. 20, 36–41.

<sup>96</sup>Miguel-Tobal, J.J., Cano-Videl, A. Gonzales-Ordi, H. (2006) PTSD and depression after the Madrid March 11 train bombings. *Journal of Traumatic Stress*. 19(1), 69–80.

<sup>97</sup>Shalev, A.Y. and Freedman, S. (2005). PTSD following terrorist attacks: a prospective evaluation. *American Journal of Psychiatry*. 162, 1188–1191.

<sup>98</sup>Bleich, A., Gelkopf, M., and Solomon, Z. (2003). Exposure to terrorism, stress related mental health symptoms and coping behaviours under a nationally representative sample in Israel. *Journal of the American Medical Association*. 290(5), 612–620.

<sup>99</sup>Galea, S., Ahern, J., Resnick, H., et al. (2002). Psychological sequelae of the September 11 terrorist attacks in New York City. *New England Journal of Medicine*. 346: 982–987. Miguel-Tobal et al. (2006).

<sup>100</sup>Boscarino, J.A., Adams, R.E. and Galea, S. (2006). Alcohol use in New York after the terrorist attacks: A study of the effects of psychological trauma on drinking behaviour. *Addictive Behaviours*. 31, 606–621.

sleep disorders<sup>101</sup> all were found in terrorist victims, with depression being the most common after PTSD.

As far as we know the relationship between anger and PTSD in terrorism victims is yet to be assessed. Still it seems likely that this association exists. Not only do Orth and Wieland find the correlation for a wide range of traumatic stressors, they further show particularly marked effects to be found in incidents similar to terrorism. Victims who have experienced war as civilians are more likely to show anger-related symptoms in addition to PTSD.<sup>102</sup> Furthermore, as we will discuss in Section 3.4.2 available public opinion research indicates that a larger proportion of the general public tends to react to terror attacks with anger than with fear.<sup>103</sup>

### 3.3.1.3 One-Off Versus Ongoing Terrorism

Repeating victimisation enhances the chances of developing psychological problems. This is also the case for terrorism. This is shown by studies concerning the particular situation of Israel and Palestine where attacks on both sides are likely to be repeated.<sup>104</sup> What is most notable about ongoing terrorist activity in comparison with one-time terrorist attacks in terms of PTSD prevalence is that those exposed to repeated and ongoing violence are at larger risk of developing PTSD. In the 9/11 studies prevalence rates of PTSD in the general population of New York City were between 7.5% and 11%.<sup>105</sup> Shalev et al. found prevalence of PTSD twice as high in two Jerusalem suburbs after nearly a year of escalating hostilities.<sup>106</sup> The Middle-East studies did not reveal the exposure effect (see above). Those indirectly exposed had roughly the same chance of developing PTSD as those that were directly exposed, which suggests that the ongoing nature of the terrorist violence and the associated threat affect the target group no matter what their exposure is.

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<sup>101</sup>Whalley, M.G. and Brewin, C. (2007). Mental health following terrorist attack. *British Journal of Psychiatry*. 190, 94–96.

<sup>102</sup>Orth and Wieland (2006), see also Novaco, R.W., and Chemtob, C.M. (2002). Anger and combat-related posttraumatic stress disorder. *Journal of Traumatic Stress*. 15, 123–132.

<sup>103</sup>Smith, T.W., Rasinski, K.A. and Toce, M. (2001). America rebounds. A national study of public response to the September 11th terrorist attacks. Chicago, NORC.

<sup>104</sup>See Shalev and Freedman (2005), Bleich et al. (2003), Bleich, A., Gelkopf, M. Melamed, Y. and Solomon, Z. (2006). Mental health and resiliency following 44 months of terrorism: a survey of an Israeli national representative sample. *BMC Medicine* 2006, 4:21 doi:10.1186/1741-7015-4-21; Shalev, A.J., Tuval, R., Frankiel-Fishman, S. et al. (2006). Psychological Responses to Continuous Terror: A Study of Two Communities in Israel. *American Journal of Psychiatry*. 163, 667–673; Soloman Z. and Lavi T. (2005). Israeli youth in the second Intifada: PTSD and future orientation. *Journal of the American Academy of Child and Adolescent Psychiatry*. 44, 1167–1175; Lavi T. and Soloman, Z. (2005). Palestinian youth in the second Intifada: PTSD and future orientation. *Journal of the American Academy of Child and Adolescent Psychiatry*. 44(11), 1176–1183.

<sup>105</sup>E.g. Galea et al. (2005); Laugharne et al. (2007).

<sup>106</sup>Shalev et al. (2006).

This does not mean that all victims will have equal chances of developing PTSD. For example studies found differences in a comparison of Palestinian and Israeli youth, with Palestinians reporting higher levels of PTSD and other traumatic complaints.<sup>107</sup> In addition, Bleich and colleagues found both Arab ethnicity and immigrant status to be added risk factors for the development of complaints.<sup>108</sup>

However, even in the situation of ongoing terrorism resilience is the most prevalent outcome. Bleich et al. show evidence of habituation and coping in high-exposure populations.<sup>109</sup>

### 3.3.1.4 Hostage Taking, Suicide and CBRNE-Terrorism

Three kinds of terrorism warrant additional discussion. First there is suicide terrorism, which is a particularly lethal type. In Israel, although suicide attacks account for only 0.5% of the total number of terrorist acts, they do constitute 59% of civilian fatalities.<sup>110</sup> The attacks are expected to have additional psychological consequences as well. This is due to the incomprehensible self-sacrifice inherent to these attacks, which is further compounded by the near impossibility in gathering answers to the motives of the perpetrator and the extreme difficulty in taking preventative measures.<sup>111</sup> In addition, suicide terrorism prevents the possibility of achieving justice, in the sense of the apprehension and trial of the offender.

Second there is the possibility that terrorist attacks will utilise chemical, biological, radiological, nuclear and high-yield explosives (CBRNE). The fact that these weapons are designed to cause mass casualties and severe disruption seems to mesh well with observed trends in terrorist activity (see above). In addition, to their possibility for massive physical harm these weapons will have additional psychological and behavioural consequences, which will extend well beyond the primary victims of the terrorist attack. We will return to this subject in Section 3.4.

At this point in the discussion we will stress the peculiar nature of a CBRNE-attack. Its very nature inspires terror due to the fact that people will not be able to sense the agent, either by sight, taste, smell or feeling. This means that people will not know whether or not they have been directly exposed, or in other words, are a direct victim or not. In addition, an attack with a chemical, biological or radiological agent will have the added disadvantage of the possibility of contagion. People will therefore fear each other, as they might be infected by each other.<sup>112</sup>

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<sup>107</sup>Compare Soloman and Lavi (2005) and Lavi and Soloman (2005).

<sup>108</sup>Bleich et al. (2006).

<sup>109</sup>Bleich et al. (2003).

<sup>110</sup>As is shown by figures from the Israeli Defense Forces, quoted in Merari, A. (2007). Psychological aspects of suicide terrorism. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>111</sup>See Atran, S. (2003). Genesis of suicide terrorism. *Science*. 299(5612), 1534–1539.

<sup>112</sup>See Sullivan, G.R. and Bongar, B. (2007). Psychological consequences of actual or threatened CBRNE terrorism. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

This extends the psychological reach of this type of attack, as is evidenced by the anthrax attacks in the United States after 9/11.<sup>113</sup>

Thirdly there are various instances in which terrorists have taken hostages. At the moment of writing this report, the Taliban have just released the remainder of the South Koreans they took hostage in Afghanistan. In recent years there have been a number of incidents in Iraq, but also in both Beslan and Moscow in Russia in which terrorists resorted to hostage taking. Generally speaking a hostage incident is any incident in which people are held by another person or persons against their will, usually by force or coercion and demands are being made by the hostage taker.<sup>114</sup>

Hostage taking has a substantial impact on the hostages. Even years after the experience a third of the victims still suffer from extensive post-traumatic stress symptoms, sufficient for a diagnosis of PTSD<sup>115</sup>. Moreover, family members of those taken hostage also suffer extensively, with half of them still showing signs of stress-related symptoms years after the crime.<sup>116</sup> Victims of hostage taking, in particular of prolonged kidnapping, may also suffer from signs of Hostage Identification Syndrome (HIS), more popularly known as the Stockholm Syndrome, in which they start identifying with their hostage takers.<sup>117</sup> It is, however, highly debatable whether it is correct to speak of a syndrome, as normal social processes may well explain most situations of HIS.<sup>118</sup>

The impact of hostage taking is also evident from research of a more qualitative nature.<sup>119</sup> Further confirmation of the substantial impact is given by research into other forms of chronic captivity and violence<sup>120</sup>, which have

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<sup>113</sup>See Hoffman, B. (2002). Rethinking terrorism and counterterrorism since 9/11. *Studies in Conflict and Terrorism*. 25, 303–316.

<sup>114</sup>See McMains, M.J. and Mullins, W.C. (2001). Crisis negotiations: managing critical incidents and hostage situations in law enforcement and corrections (2nd edition). Cincinnati, Ohio, Anderson.

<sup>115</sup>See Van der Ploeg, H.M. and Kleijn, W.C. (1989). Being held hostage in the Netherlands: a study of long term aftereffects. *Journal of Traumatic Stress*. 2(2), 153–169.

<sup>116</sup>See Van der Ploeg and Kleijn 1989.

<sup>117</sup>See Wilson, M. (2003). The psychology of hostage taking. In: Silke, A. (ed.). *Terrorists, Victims and Society: Psychological Perspectives on Terrorism and Its Consequences*. Chichester, UK, Wiley. Giebels, E., Noelanders, S. and Vervaeke, G. (2005). The Hostage Experience: implications for negotiation strategies. *Clinical Psychology and Psychotherapy*. 12, 241–253.

<sup>118</sup>See Wilson (2003) and Giebels et al. (2005).

<sup>119</sup>Speckhard, A., Tarabrina, N., Krasnov, V., and Mufel, N. (2005). Stockholm effects and psychological responses to captivity in hostages held by suicide terrorists. *Traumatology, the International Journal*. 11(2), 121–141. Speckhard, A., Tarabrina, N., Krasnov, V., and Mufel, N. (2005). Posttraumatic and acute stress responses in hostages held by suicide terrorists in the takeover of a Moscow theater. *Traumatology, the International Journal*. 11(1), 3–21. Moscardino, U., Axia, G., Scrimin, S. and Capello, F. (2007). Narratives from caregivers of children surviving the terrorist attack in Beslan: Issues of health, culture, and resilience. *Social Science & Medicine*. 64, 1776–1787.

<sup>120</sup>E.g. Herman, J. L. (1992). Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma. *Journal of Traumatic Stress*. 5(3), 377–391.

received more extensive research attention, like the experiences of prisoners of war<sup>121</sup>, torture<sup>122</sup> or chronic domestic abuse<sup>123</sup>.

### 3.3.1.5 Loss and Grief

The fact that terrorism has a high fatality rate means that many survivors of terrorism have to grieve the loss of loved ones. For many people the death of a loved one is the most stressful experience of their life.<sup>124</sup> However, there are many differences in the way that people react to the death of loved ones. In general, like with post-traumatic stress, resilience is the most frequent reaction.<sup>125</sup> However, between 10% and 20% of bereaved people suffer from distress and depression that may last for years. Those who suffer sudden violent loss may suffer from a condition described by Prigerson et al. as traumatic grief and by others as complicated grief.<sup>126</sup> This condition is a combination of traumatic distress, similar to PTSD, and separation distress, which is manifested by persistent mourning, yearning and loss-related anguish and withdrawal. This condition is not yet part of the catalogue of the Diagnostic and Statistical Manual of Mental Disorders (DSM), although Prigerson et al. have defined consensus criteria concerning this condition. In any case research indicates that complicated reactions to the death of a loved one are associated with sudden loss<sup>127</sup> or violent death.<sup>128</sup> The violent, random nature of terrorism suggests that those bereaved after terrorism may well suffer from complicated or traumatic grief.

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<sup>121</sup>Engdahl, B., Dikel, T. N., Eberly, R., and Blank Jr., A. (1997). Posttraumatic stress disorder in a community group of former prisoners of war: A normative response to severe trauma. *American Journal of Psychiatry*. 154, 1576–1581.

<sup>122</sup>See the research by Basoglu and colleagues. Basoglu, M., Paker, M., Paker, O., Ozmen, E., Marks, I., Incesu, C., Sahin, D., Sarimurat, N. (1994) Psychological effects of torture: A comparison of tortured with non-tortured political activists in Turkey. *American Journal of Psychiatry* 151:76-81. Basoglu M & Paker M. (1995). Severity of trauma as predictor of long-term psychological status in survivors of torture. *Journal of Anxiety Disorders* 9:339-350.

<sup>123</sup>For example Campbell (2002), or Golding, J. M. (1999). Intimate partner violence as a risk factor for mental disorders: a meta-analysis. *Journal of Family Violence* 14, 99–132.

<sup>124</sup>E.g. Bonanno, G.A. and Kaltmann, S. (1999). Toward an integrative perspective on bereavement. *Psychological Bulletin*. 125, 760–776.

<sup>125</sup>Bonanno et al. (2005).

<sup>126</sup>Prigerson, H.G., Shear, M.K., Jacobs, S.C., Reynolds, C.F., III, Maciejewski, P.K., Davidson, J.R., et al. (1999). Consensus criteria for traumatic grief. A preliminary empirical test. *British Journal of Psychiatry*. 174, 67–73. Boelen, P.A., Van den Hout, M.A. and Van den Bout, J. (2006). A cognitive-behavioral conceptualization of complicated grief. *Clinical Psychology: Science and Practice*. 13, 109–128. Ehlers, A. (2006). Understanding and treating complicated grief. What can we learn from post-traumatic stress disorder? *Clinical Psychology: Science and Practice*, 13, 135–140.

<sup>127</sup>Sanders, C.M. (1993). Risk factors in bereavement outcome. In Stroebe, M.S., Stroebe, W. and Hansson, R.O. (eds.). *Handbook of Bereavement: Theory, Research and Intervention*, Cambridge, Cambridge University Press.

<sup>128</sup>Kaltman, S., and Bonanno, G.A. (2003). Trauma and bereavement: Examining the impact of sudden and violent deaths. *Journal of Anxiety Disorders*. 17, 131–147.



In addition, particular instances of terrorist attacks may severely interfere with needs of grieving relatives. Attacks involving explosives and/or airplanes have particularly gruesome features for the bereaved. It may be extremely difficult to identify the bodies of the deceased persons, which can result in misidentification, which in turn may lead different families to attempt to claim the same body. In addition, it may lead to lasting uncertainty about the fate of the primary victims.

In a recent study Neria et al. (2007) confirmed the problematic features of grief after terrorist attacks (see also Pfefferbaum et al. 2001).<sup>129</sup> They studied grieving reactions of those who had lost a loved one in the World Trade Centre attack, 3 years after the attack. They showed very high levels of complicated grief, with as much as 43% of their sample suffering from this condition. Moreover complicated grief had a overlap with depression, PTSD, suicide ideation and anxiety. In particular those who had lost a child, females and those who had watched extensive television coverage surrounding 9/11 were at risk.

### 3.3.1.6 Financial Consequences

The calculation of the financial consequences of victimisation by crime is a complicated matter due to the numerous factors that are associated with victim costs after crime. The costs of murder and manslaughter are by far the highest; these are estimated to be a number of millions of dollars or euros.<sup>130</sup> For most other violent crime average costs are much lower, with Brand and Price finding an average cost of 19,000 English pounds per violent incident.

For victims of terrorism the costs of fatal incidents are unlikely to be much different from other victims of crime, but as we have seen the injuries sustained are on average more severe, and the chances of developing a psychological disorder are higher, which implies that costs of suffering non-fatal terrorist victimisation will be higher. The higher costs are further compounded by the increased likelihood of incurring material damage, due to the methods used by terrorists.<sup>131</sup> This is obvious in the case of 9/11 which lead to over \$30 billion of insured damage, of which billions to property or the Madrid bombings which caused over €5 million worth of property damage. But the frequent use of explosive devices in terrorist attacks will be likely to cause material damage more often than is usual in cases of personal victimisation after crime.

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<sup>129</sup>See Neria, Y., Gross, R., Litz, B., Maguen, S. et al. (2007). Prevalence and psychological correlates of complicated grief among bereaved adults 2.5–3.5 years after September 11th attacks. *Journal of Traumatic Stress*. 20(3), 251–262, see also Pfefferbaum, B., Call, J.A., Lensgraf, S.J. et al. (2001). Traumatic grief in a convenience sample of victims seeking support services after a terrorist incident. *Annals of Clinical Psychiatry* 13(1), 19–24.

<sup>130</sup>See Dolan et al. (2005); Miller, T.R., Cohen, M.A., and Wiersema, B. (1996). Victim costs and consequences: A new look. Washington, DC: U.S. National Institute of Justice. and Brand, S. And Price N. (2000). The Economic Costs of Crime, Home Office Research Study, 217.

<sup>131</sup>As was shown by Bogen and Davis (2006).



A final issue is related to the possibility that terrorist attacks make cross-border victims. As terrorist attacks often, but not always, target places that are visited by many tourists, either specific tourist destinations (Bali, Sharm-el-Sheikh) or major cities (Madrid, London, New York) many direct victims come from abroad. Apart from the other difficulties this may pose for victims and their families it also adds to the cost of victimisation.

As physical damage and large-scale property damage are more likely, even in the case of non-fatal terrorist acts, victims' financial needs are acute. It is open to question whether normal procedures for compensation will be sufficiently swift in reaction to terrorist victimisation. This is further compounded by the fact that 9/11 has had a dramatic impact on insurers' policies vis-à-vis terrorism coverage, which may lead to terrorism being excluded from coverage.<sup>132</sup> This will be more extensively discussed in Chapter 6 relating to compensation issues.

### 3.3.1.7 Summary

Terrorism is a rare occurrence and mass victimisation as a consequence of terrorism even more so. Yet when a terrorist act is committed, the physical/medical, psychological and financial consequences are likely to be grave. The chances of fatalities and casualties are high, with injuries likely to be severe. The financial damage as a consequence is already large, but terrorism regularly damages property as well as people, which adds to this effect.

The psychological consequences of terrorism are similar to other crimes, but again of a larger detrimental magnitude. Levels of PTSD and co-morbid disorders are higher, and the higher chance of fatalities – and the circumstances of these fatalities – makes complicated grief prevalent. This is particularly the case for ongoing terrorism and for victims of hostage taking. It seems likely furthermore, that both suicide terrorism and CBRNE-terrorism will have added impact.

Having said this, most people show resilience in the face of terrorist trauma, even in the case where a loved one has passed away. Most victims do not develop PTSD or other disorders and others recover. Nonetheless, even in many of these cases there is a psychological impact of terrorism. Victims will regularly be more vulnerable to future events and the sub-clinical effects of anxiety may also have far-reaching effects.

## 3.3.2 Risk Groups

A variety of factors have been linked to heightened or special impact of terrorism, predominantly concerning psychological factors. We have already seen that direct exposure to the terrorist attack (for one-off terrorist attacks) is a risk factor for the

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<sup>132</sup>Kunreuther, H. and Michel-Kerjan, E. (2004). Challenges for terrorism risk insurance in the United States. *Journal of Economic Perspectives*. 18(4), 201–214.

development of PTSD and that prolonged trauma exposure like in Israel and Palestine is a risk factor. In this section we will discuss another four issues: previous mental illness or trauma, female gender, minority status and children. We will discuss the differential impact that traumatic experience has for these groups and the available evidence concerning differential impact of terrorist victimisation. A word of caution is needed when interpreting the results. Meta-analyses of risk-factors of PTSD have shown robust results, but have also shown individual predictors of PTSD and other psychological problems rarely to be strong.<sup>133</sup>

### 3.3.2.1 Prior Trauma or Mental Disorder

Those who were experiencing mental illness before a traumatic event happened or have a prior history of mental illness are at risk for developing psychological problems.<sup>134</sup> Similar results have been found in the studies surrounding 9/11.<sup>135</sup> As was discussed previously, experiencing prior trauma is a risk factor, which is also revealed by research that shows prior terrorist attacks make victims more vulnerable in the future, even when they showed resilience and did not develop psychological complaints.<sup>136</sup>

### 3.3.2.2 Gender

One of the most pervasive findings in research into PTSD is that women have a higher chance of developing the disorder than men.<sup>137</sup> According to Kessler et al. epidemiological review lifetime prevalence of PTSD in women is about twice the rate of that in men (10.8% versus 5%).<sup>138</sup> Solomon et al. find this may be attributed to women's higher sense of threat and lower sense of self-efficacy as well as their tendency to use less effective coping strategies.<sup>139</sup> These results have also been found in research into terrorism victims with women exhibiting more short-term

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<sup>133</sup>See Brewin et al. (2000) and Ozer, E.J., Best, S.R., Lipsey, T.L., and Weiss, D.S. (2003). Predictors of posttraumatic stress disorder and symptoms in adults: A meta-analysis. *Psychological Bulletin*. 129, 52–73.

<sup>134</sup>Yehuda, R. (2002). Post-traumatic stress disorder. *New England Journal of Medicine*. 346, 108–114. McNally, R.J., Bryant, R.A. and Ehlers, A. (2003). Does early psychological intervention promote recovery from posttraumatic stress? *Psychological Science in the Public Interest*. 4, 45–79.

<sup>135</sup>E.g. Beutler et al. (2007).

<sup>136</sup>E.g. Tucker et al. (2007).

<sup>137</sup>For a recent meta-analytic review see Olf, M. Langeland, W. Draijer, N. and Gersons, B.P.R. (2007). Gender differences in posttraumatic stress disorder. *Psychological Bulletin*. 133(2), 183–204.

<sup>138</sup>Kessler et al. (1995).

<sup>139</sup>Solomon, Z., Gekkopf, M., and Bleich, A. (2005). Is terror gender-blind? Gender differences in reaction to terror events. *Social Psychiatry and Psychiatric Epidemiology*. 40, 947–954.

distress in a sample of 9/11 victims<sup>140</sup> and victims of the attack on the Pentagon<sup>141</sup> and more long-term post-traumatic distress in response to the Japanese sarin gas attack and series of bombings in France.<sup>142</sup>

### 3.3.2.3 Effects on Children

To a large extent the consequences of terrorist victimisation for children and adolescents closely mirror those of adults.<sup>143</sup> Increased level of exposure or length of exposure are strong risk factors for the development of psychological problems.<sup>144</sup> Indirect exposure to terrorist events may also have adverse effects.<sup>145</sup> Girls are at higher risk for developing PTSD than boys.<sup>146</sup> For older children moreover, reactions and symptoms show increasing likeness to those of (young) adults.<sup>147</sup>

Children and young people's reactions to victimisation in general and terrorism in particular do have some peculiarities. First of all children in the schoolgoing age groups are at increased risk of developing psychological sequelae.<sup>148</sup> Secondly, children react in different ways according to their age. Older children may exhibit

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<sup>140</sup>Cohen-Silver, R., Holman, E.A., McIntosh, D.E et al. (2002). Nationwide longitudinal study of psychological responses to September 11. *Journal of the American Medical Association*. 288(10), 1235–1244.

<sup>141</sup>Grieger, T.A., Fullerton, C.S., and Ursano, R.J. (2003). Posttraumatic stress disorder, alcohol use, and perceived safety after the terrorist attack on the pentagon. *Psychiatric Services*. 54, 1380–1382.

<sup>142</sup>Kawana, N., Ishimatsu, S., Matsui, Y., Tamki, S., and Kanda, K. (2005). The chronic posttraumatic stress symptoms in victims of Tokyo subway sarin gas attack. *Traumatology, the International Journal*. 11(2). And Verger P., Dab W., Lamping D.L., Loze J-I., Deschaseaux-Voinet C., Abenheim L., and Rouillon F. (2004). The psychological impact of terrorism: an epidemiologic study of posttraumatic stress disorder and associated factors in victims of the 1995–1996 bombings in France. *American Journal of Psychiatry*. 161, 1384–1389.

<sup>143</sup>For overviews see Fremont, W.P. (2004). Childhood reactions to terrorism-induced trauma: a review of the past 10 years. *Journal of the American Academy of Child and Adolescent Psychiatry*. 43(4), 381–392; Pine, D.S., Costello, J. and Masten, A. (2005). Trauma, proximity and developmental psychopathology. The effects of war and terrorism on children. *Neuropsychopharmacology*. 30, 1781–1792. And Williams, R. (2006). The psychosocial consequences for children and young people who are exposed to terrorism, war, conflict and natural disasters. *Current Opinion in Psychiatry*. 19, 337–349.

<sup>144</sup>See also Hoven, C.W., Duarte, C.S. Lucas, C.P. et al. (2005). Psychopathology among New York City Public School Children 6 Months After September 11. *Archives of General Psychiatry*. 62, 545–552 and Comer, J.S. and Kendall, P.C. (2007). Terrorism. The psychological impact on youth. *Clinical Psychological Science and Practice*. 14, 179–212.

<sup>145</sup>Pfefferbaum, B., Call, J., and Sconzo, G. (1999). Mental health services for children in the first two years after the 1995 Oklahoma City terrorist bombing. *Psychiatric Services*. 50, 956–958.

<sup>146</sup>E.g. Hoven et al. (2005).

<sup>147</sup>E.g. Fremont (2004).

<sup>148</sup>Norris et al. (2002); Fremont (2004).

conduct disorders, alcohol and substance abuse or become violent themselves.<sup>149</sup> Young children may exhibit regressive behaviours, like bed-wetting, increased fear of the dark, separation anxiety and the like. Moreover, children in younger age groups will have increasing difficulty in expressing their feelings and problems, which may lead to the expression of psychological problems in physical dysfunctioning. Thirdly and related to this, parents will not always recognise traumatic symptoms in their children. Not only may parents misinterpret symptoms, children may also actively try to ‘protect’ their own parents from their reactions to victimisation. Because of this the problems facing children may be overlooked by their parents and other caregivers. Covell et al. show service utilisation of young victims to be significantly lower than for adults and Fairbrother et al. revealed that only 27% of the children who had severe post-traumatic stress reactions after the attacks received counselling services.<sup>150</sup> Moreover, mental health problems after terrorism in children have shown to be poor predictors of mental health utilisation.<sup>151</sup> Instead parents’ mental health problems were predictors of their children’s use of mental health services.<sup>152</sup> Delivering counselling through schools is therefore an important avenue, with most (58%) of surveyed New York children receiving counselling through school after 9/11.<sup>153</sup> Fourth the damage to and reaction of the child’s parents is important. Children of parents who are fatally or severely injured are more symptomatic.<sup>154</sup> But also parents suffering adverse psychological consequences increase the risk for children. Stuber et al. (2005) showed parents with PTSD to be more likely to have children with behavioural problems and Koplewicz et al. (2002) showed a clear correlation between parents and children’s

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<sup>149</sup>See Solomon et al. (2007); Hoven et al. (2005); Pfefferbaum, B. Stuber, J. Galea, S. and Fairbrother, G. (2006). Panic reactions to terrorist attacks and probable posttraumatic stress disorder in adolescents. *Journal of Traumatic Stress*. 19(2), 217–228.

<sup>150</sup>See Covell N.H., Donahue S.A, Allen G., et al. (2006). Use of Project Liberty counseling services over time by individuals in various risk categories. *Psychiatric Services*. 57, 1268–1270 and Fairbrother, G. Stuber, J., Galea, S. et al. (2004). Unmet need for counseling services by children in New York City after the September 11th attacks on the World Trade Center: Implications for pediatricians. *Pediatrics*. 113(5), 1367–1376.

<sup>151</sup>See Stuber, J., Fairbrother, G., Galea, S. et al. (2002). Determinants of counseling for children in Manhattan after the September 11 attacks. *Psychiatric Services*. 53, 815–822. Pfefferbaum, B., Sconzo, G. M., Flynn, B.W., Kearns, L.J., Doughty, D.E., Gurwitch, R.H., et al. (2003). Case finding and mental health services for children in the aftermath of the Oklahoma City bombing. *Journal of Behavioral Health Services and Research*. 30, 215–227.

<sup>152</sup>Stuber et al. (2002).

<sup>153</sup>Stuber et al. (2002).

<sup>154</sup>See Pfefferbaum, B., Call, J., and Sconzo, G. (1999). Mental health services for children in the first two years after the 1995 Oklahoma City terrorist bombing. *Psychiatric Services*, 50, 956–958. Brown, E.J., and Goodman, R.F. (2005). Childhood traumatic grief: An exploration of the construct in children bereaved on September 11. *Journal of Clinical Child and Adolescent Psychology*. 34, 248–259. And Allwood M., Bell-Dolan D., Husain, S. (2002). Children’s trauma and adjustment reactions to violent and nonviolent war experiences. *Journal of the American Academy of Child and Adolescent Psychiatry*. 41, 450–457.

levels of PTSD.<sup>155</sup> As terrorist victimisation may impact parents and children alike, this is a particularly probable situation in the case of terrorism. Supporting and helping parents cope with the consequences of terrorism will therefore by implication serve to help children.

### 3.3.2.4 Cultural Differences

Terrorism affects large cross-sections of the population. As the population of most Western countries shows a certain amount of cultural diversity, it is relevant to review some of the salient differences in consequences of terrorist victimisation for people with a minority status.<sup>156</sup> Results from a study after 9/11 demonstrate that Hispanic and African Americans show higher levels of anxiety and fear for future attacks than average<sup>157</sup> and elevated levels of PTSD.<sup>158</sup> In addition, minorities groups in the United States are mostly less affluent and suffered larger economic consequences as a result of 9/11. Thiel de Bocanegra and colleagues showed particularly marked effects, both psychological and economic in a study of displaced Chinese garment industry workers in New York after 9/11.<sup>159</sup>

Information concerning terrorist threats may be more easily misinterpreted by those not sufficiently fluent in the language and also this lack of fluency limits the possibilities for asking for follow-up information. In the United States, but also in other Western countries, minorities mostly have less access to formal support and health care systems. Although it may be suggested that many minority group members compensate for this by establishing stronger family and other informal social support links, there is evidence to the contrary. Chiriboga suggests that the immigration experience may leave many minorities with a more rather than less fragmented family. In addition, expectations between younger and older generations about appropriate levels of bidirectional social support may differ sharply.<sup>160</sup> The difficulty in accessing health care systems is likely to be pronounced for illegal immigrants.

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<sup>155</sup>See Stuber, J., Galea, S., Pfefferbaum, B., Vandivere, S., Moore, K., Fairbrother, G., et al. (2005). Behavior problems in New York City's children after the September 11, 2001 terrorist attacks. *American Journal of Orthopsychiatry*, 75, 190–200 and Koplewicz, H.S., Vogel, J.M., Solanto, M.V., Morrissey, R.F., Alonso, C.M., Abikoff, H., et al. (2002). Child and parent response to the 1993 World Trade Center bombing. *Journal of Traumatic Stress*, 15, 77–85.

<sup>156</sup>An overview of key issues, may be found in Chiriboga, D. (2007). Cultural considerations. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>157</sup>Boscarino, J.A., Figley, C.R., and Adams, R.E. (2003). Fear of terrorism in New York after the September 11 terrorist attacks: Implications for emergency mental health and preparedness. *International Journal of Emergency Mental Health*, 5, 199–209.

<sup>158</sup>Galea et al. (2002).

<sup>159</sup>Thiel de Bocanegra, H. and Brickman (2004) Mental health impact of the World Trade Center attacks on displaced Chinese workers. *Journal of Traumatic Stress*, 17(1), 55–62. Thiel de Bocanegra, H. Moskalenko, S. and Chan, P. (2005). PTSD and depression among displaced Chinese workers after the world trade center attack: A follow-up study. *Journal of Urban Health*, 82(3), 364–369.

<sup>160</sup>Chiriboga 2007.

The difficulties of minority groups to access necessary health care are particularly problematic due to the traumatic background of some minority groups, for example asylum seekers and other immigrants who have left countries at war.<sup>161</sup> Kinzie et al. showed asylum seekers, particularly of Bosnian and Somalian descent to exhibit elevated post-traumatic reactions to the World Trade Center attack.<sup>162</sup> Screening procedures may have unfortunate reminders of the process of granting asylum status.

According to an American Psychological Association Fact Sheet from 2004 there are two final points to be considered. First there is the subject of ethnocultural allodynia, which relates to the fact that many members of ethnic minorities present with a history of multiple experiences with bias and discrimination, which may lead to extraordinary sensitivity to racist and discriminatory cues.<sup>163</sup> Craig-Henderson and Sloan show this feature of minority groups to be one of the main reasons for the added impact of hate crime.<sup>164</sup> Carter extends this to define race-based traumatic stress as peculiar instance of trauma.<sup>165</sup> Following his reasoning, with discrimination being traumatic in itself, hate crimes may well be seen as repeated victimisation. Similarly, it may be hypothesised that terrorist attacks that victimise minority groups for reasons such as racism will have added detrimental impact (e.g. Hall 2005, who likens hate crime to terrorism in this respect).<sup>166</sup>

Second and finally there are members of minority groups who in some way resemble the perpetrators of terrorism. After 9/11 the general opinion in the US towards immigrants and immigration took a downward turn.<sup>167</sup> Furthermore, members of minority groups may be the target of retaliation or be called on to explain the behaviour or apologise.<sup>168</sup> In Section 3.4.2 we will return to this subject when we discuss vicarious retribution. For now it is necessary to stress the added detrimental effects. The results from the studies into the London 7 July bombings show that being Muslim was a strong indicator of substantial stress in a survey of the general public.<sup>169</sup> Although a follow-up study failed to demonstrate this effect,

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<sup>161</sup>See Weinstein H.M., Sarnoff R.H., Gladstone E. & Lipson J.G. (2000). Physical and psychological health issues of resettled refugees in the United States. *Journal of Refugee Studies*, 13:303–327.

<sup>162</sup>Kinzie, J.D., Boehnlein, J.K., Riley, M.A. et al. (2002). The effects of September 11 on Traumatised Refugees: Reactivation of Posttraumatic Stress Disorder. *Journal of Nervous Disease*. 190, 437–441.

<sup>163</sup>Comas-Diaz, L., and Jacobsen, F.M. (2001). Ethnocultural allodynia. *Journal of Psychotherapy Practice and Research*. 10(4) 246–252.

<sup>164</sup>Craig-Henderson and Sloan (2003).

<sup>165</sup>Carter, R.T. (2007). Racism and psychological and emotional injury. *The Counseling Psychologist*. 35(1), 13–105.

<sup>166</sup>Hall, N. (2005). *Hate Crime*. Cullumpton, Devon, UK. Willan Publishing.

<sup>167</sup>See Esses, V.M., Dovidio, J.F., and Hodson, G. (2002). Public attitudes toward immigration in the United States and Canada in response to the September 11, 2001 ‘Attack on America’. *Analyses of Social Issues and Public Policy*. 2(1), 69–85.

<sup>168</sup>See also the report ‘Policies on Integration and Diversity in some OSCE Participating States’ – An Explanatory Study prepared by the Migration Policy Group, regarding all countries, the conclusion was drawn that the ‘war on terror’ mainly affected Muslim immigrants, problematising their ability to integrate into liberal Western societies.’

<sup>169</sup>Rubin, G.J., Brewin, C.R., Greenberg, N. et al. (2005). Psychological and behavioural reactions to the bombings in London on 7 July 2005: cross sectional survey of a representative sample of Londoners. *British Medical Journal*. doi:10.1136/bmj.38583.728484.3A

it did show that being Muslim was a significant factor in experiencing negative changes as a consequence of the attack.<sup>170</sup>

### 3.3.2.5 Summary

Like other potential traumatic stressors the effects of terrorism are mediated by features of victims prior to the terrorist acts. We have seen that prior history of trauma or prior or current mental disorders are risk factors as well as female gender. On both counts research into terrorism shows similar results.

Many children and young persons have a higher risk for the development of psychological problems following trauma. Terrorism poses additional threats. The effects of terrorism on the young victims' close surroundings, of which the parents are the most important, can have further detrimental effects. Not only can parents' own problems impact their children, but as support from the parents is one of the main protective factors, parents' trauma may diminish their possibility to support children. Furthermore, parents may not adequately assess their children's stress reactions, which is associated with their lower rate of access to mental health services. Particularly for younger children who will most likely not be able to express their symptoms verbally this may lead them to be 'forgotten' victims. In the mental health response therefore special attention needs to be paid to child victims; they are at higher risk for developing psychological problems, but are more difficult to reach.

A similar observation applies to members of minority groups. Health literacy is lower in many of these groups, meaning that they are less likely to utilise mental health facilities. Again this contrasts with research showing members of minority groups to be at higher risk for developing problems after terrorist attacks. This is also related to the possibility that minorities, like asylum seekers, have experienced similar trauma in the past. Finally, and this will be discussed in more detail in Section 3.4, minority victims may not be recognised as victims, but rather as perpetrators due to the resemblance between certain minority group members and terrorist attackers and subsequently become the victim of backlash attacks.

### 3.3.3 Post-trauma Factors

Post-trauma factors impact the severity and consequences of psychological trauma<sup>171</sup> and may lead to additional financial consequences as well. We will discuss the absence or involvement of social support, the effects of media attention

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<sup>170</sup>Rubin, G.J., Brewin, C.R. Greenberg, N. et al. (2007). Enduring consequences of terrorism: 7-month follow-up survey of reactions to the bombings in London on 7 July 2005. *British Journal of Psychiatry*. 190, 350–356.

<sup>171</sup>See Brewin et al. (2000); Ozer et al. (2003).



and the criminal justice process. We will furthermore, discuss terrorism and its relationship to war.

The aftermath of terrorist acts may also have an impact on other features of victims' well-being. The attack on the World Trade Center, but also other terrorist attacks lead to negative economic consequences, due to for example the decrease in tourism (Frey et al. 2007).<sup>172</sup> Direct victims may also suffer adverse consequences which are related to these spin-off effects. However, in absolute terms these effects will be largest for vicarious victims, so we will discuss these effects in Section 3.4.

### 3.3.3.1 Social Support

In reviews by Brewin et al. (2000) and Ozer et al. (2003) social support emerged as one of the most important post-trauma predictors of the development of psychological disorder after traumatic events. In particular lack of social support serves as a risk factor for the development of PTSD.

The need for social support is also evident in the aftermath of terrorist attacks. The fact that many terrorist acts impact whole social units, from families and neighbourhoods to cities and countries is an opportunity for the development of social support structures, as we will discuss in Chapter 4. Additional evidence of this is the strong impetus to form special interest and support groups of victims of terrorist attacks. However, the fact that people react in differing ways to victimisation can also provide barriers for social support. Research into survivors of homicide for example shows that differences in coping reactions between family members can provide an additional burden (Rando 1996) and even lead to break-up or divorce. The survivors of fatal terrorist attacks may be confronted with similar problems.<sup>173</sup>

### 3.3.3.2 Media Attention

Victims of severe crimes regularly become the focus of media attention. This is particularly true for victims of severe forms of sexual violence and murder (e.g. Rock 1998). This attention is mostly, but definitely not always, unwanted. There are many examples of victims who have actively sought media attention. Although it is often asserted that media attention may cause victims additional trauma this has not been the focus of much research. In fact Maercker and Mehr have been the first to study this issue in a thorough way.<sup>174</sup> They found some evidence of psychological distress due to media attention, in particular – but not only – when the media portrayal had a negative tone. Qualitative

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<sup>172</sup>Frey, B.S., Luchinger, S. and Stutzer, A. (2007). Calculating tragedy: assessing the costs of terrorism. *Journal of Economic Surveys*. 21(1), 1–24.

<sup>173</sup>See Rando, T. (1996). Complications in mourning traumatic death. In K. Doka (), *Living with grief after sudden loss: Suicide, homicide, accident, heart attack, stroke* (pp. (139–160). Washington, DC : Hospice Foundation of America.

<sup>174</sup>Maercker and Mehr (2006).



research into homicide<sup>175</sup> and statements by associations of survivors of homicide does suggest that the exposure to media can be a severely distressing experience for victims.

It is clear that victims of terrorism will be the focus of media attention. The extent and the intrusiveness of this attention can pose a hazard and in any case serve as a source of distress for victims, as is shown by the testimony of survivors of various terrorist attacks and disasters.<sup>176</sup> Crelinsten shows the impact of media attention to hostage taking to be particularly intense (Crelinsten 1992).<sup>177</sup> The large level of attention and the possibility that the victimisation may have taken place in another country, both suggest that the media will often be the first to learn and to disseminate information concerning the victims, which may provide further distress for victims.

Nevertheless, to the relative dearth of research into media effects it is not clear whether the position of victims of terrorism in these cases is different from victims of severe crime. In the case of victims of homicide the media attention may have the additional burden of revealing negative information about the person who died, which does not seem likely in terrorist cases. Where the media attention in cases of terrorism may be more extensive, it may be less likely to have a negative tone concerning victims. Hewitt (1992) and Crelinsten (1997) suggest that media portrayal of terrorism victims often depicts victims as national symbols of innocence and heroism whose victimisation must be avenged.<sup>178</sup> On the other hand changing perspectives on the terrorist act may have similar effects on victims as similar shifts in public opinion concerning the justification of war may have for veterans (e.g. Wessely et al. 2003).<sup>179</sup> In any case it appears victims of terrorism should have recourse to the same protective measures vis-à-vis the media that is afforded to other victims.

A different matter is the effect of media attention for terrorist events as a reminder and therefore a risk factor for direct victims of terrorism.<sup>180</sup> The large-scale media coverage may serve as a source of exposure to victims, repeatedly confronting them with images and memories of the traumatic event. Although evidence of this effect of the media is not directly available, the fact that media may serve as a source of primary traumatisation lends credence to this possibility.

In addition, some research has been done into the effects of government information after 9/11, specifically focusing on the system of terror alerting that the US government put in place. Terror alerts serve as specific reminders of the terrorist attacks and, in part due to characteristics of various terrorist alert systems, incite

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<sup>175</sup>Rock (1998).

<sup>176</sup>E.g. Canadian Resource Centre for Victims of Crime 2007.

<sup>177</sup>See Crelinsten, R. (1992). Victims' perspectives. In D. L. Paletz & A. P. Schmid (Eds.), *Terrorism and the media* (pp. 208–238). Newbury Park, CA.: Sage.

<sup>178</sup>See Hewitt, C. (1992) Public's perspective In D. L. Paletz & A. P. Schmid (Eds.), *Terrorism and the media* (pp. 174–207). Newbury Park, CA.: Sage. and Crelinsten, R. (1997). Television and terrorism: Implications for crisis management and policy-making. *Terrorism and Political Violence*, 9, 8–32.

<sup>179</sup>Wessely, S., Unwin, C., Hotopf, M., Hull, L., Ismail, K., Nicolaou, V. & David, A. (2003) Is recall of military hazards stable over time? Evidence from the Gulf War. *British Journal of Psychiatry* 183, 314–322.

<sup>180</sup>Pfefferbaum, B. (2003). Victims of terrorism and the media. In: Andrew Silke (ed.). *Terrorists, Victims and Society. Psychological Perspectives on Terrorism and Its Consequences*, West Sussex, Wiley.

fear themselves. McDermott and Zimbardo show that the American system of terror alerts (the well-known colour-coded green–yellow–orange–red-system) has particular effects in this respect.<sup>181</sup> They cite a study by Kramer et al. who show that in a study of relief workers increased terror alerts lead to heightened symptoms of anxiety.<sup>182</sup> More remarkably, however, this research showed lowering the level of alerts to lead to similar symptoms. In other words, both attention to higher and to lower alert status frightens people. We will return to this matter in Section 4.1.6 on terror management theory (TMT), and suggest more victim-friendly ways of disseminating information in Chapter 4.

### 3.3.3.3 Criminal Justice Procedure

In Section 3.2 we discussed the benefits of involvement in the criminal justice procedure. As Herman states victims may stand to gain substantially from engagement in the criminal legal system, adding to their safety, their sense of power, acknowledgment, restitution and trust.<sup>183</sup> Furthermore, the criminal justice system is an important avenue for victims to find the answers to questions relating to the reasons for their victimisation or the victimisation of their loved ones. Providing victims with an opportunity to participate in the criminal justice procedure in a manner that reflects and respects their position is therefore an important focus of many victim-focused amendments to the criminal justice system and there is no reason to suspect that these needs will differ for victims of terrorism. A particularly striking instance of the importance victims of terrorism may place on the trial of the perpetrator may be found in the statement of the representative of the UK Bali Bombing Victims Support Group at the recent High Level Meeting on victims of terrorism convened by the OSCE. She spoke out against the detaining of one of the perpetrators of this attack in Guantanamo Bay, as this prohibits an open court case.

With the benefits of participation come risks as well and it is no small wonder that the term secondary victimisation was initially coined to describe the position of victims vis-à-vis the criminal justice system.<sup>184</sup> At this moment there is a relative dearth of empirical research into the effects of the criminal justice procedure on survivors of extreme forms of violence,<sup>185</sup> in particular compared to the growing literature on victims of sexual and domestic violence.<sup>186</sup> This is true for homicide

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<sup>181</sup>McDermott, R. and Zimbardo, P.G. (2007). The psychological consequences of terrorist alerts. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>182</sup>Kramer, M. Brown, A. Spielman, L. et al. (2004). Psychological reactions to the national terror-alert system. Poster number 4227. Presentation to the American Psychological Association.

<sup>183</sup>Herman, J.L. (2003) The Mental Health of Crime Victims: Impact of Legal Intervention. *Journal of Traumatic Stress*. 16(2), 159–166.

<sup>184</sup>See Herman (2003) and Goodey (2005).

<sup>185</sup>Herman (2003).

<sup>186</sup>E.g. Temkin (2002) or Buzawa, E.S. and Buzawa, C.W. (2002). *Domestic Violence. The Criminal Justice Response*. 3rd edition. Newbury Park, California Sage.

in general,<sup>187</sup> and for terrorism in particular. Nevertheless, Rock's in-depth qualitative study of homicide survivors reveals investigation and prosecution in cases of murder to be particularly taxing and this ties in with similar findings suggested by the available research into sexual and domestic violence.<sup>188</sup> This is related to the impact of the event, but also to some inevitable features of the procedure in homicide cases (Rock 1998). The fact that the body of the victim is considered to be – and treated like – evidence is at odds with the needs of grieving victims. The particularly gruesome features of terrorist bomb attacks may add to this. The trial is a long process, in which many potentially painful details are revealed, with the suspect and his legal representation often having a direct reason for painting the victim in unflattering colours.

Due to the high fatality and casualty rates of terrorism it would make sense to compare the effects of trials of terrorism suspects to those of homicide suspects. This is difficult due to the lack of research into the experience of these groups in crime cases. However, a number of differences are apparent. In the first place rates of prosecution of perpetrators are different. Homicide clear-up and prosecution rates are mostly much higher than comparable rates for non-fatal victimisation.<sup>189</sup> This differs for terrorist acts, where the perpetrator more frequently escapes being brought to justice than for 'normal' cases of homicide. Moreover, in the situation of suicide terrorism the perpetrator is already dead as a consequence of the terrorist act. As we have already seen that suicide terrorism is still a relatively rare occurrence amongst terror accidents, but do make up a disproportional part of the fatalities, this is not an unlikely scenario. This feature has an obvious negative effect on victims, who in most cases do place a lot of importance on seeing the offender receiving punishment for the crime he committed and often prefer to be informed and participate in this process. On the other hand it does mean that some of the troubling aspects of the criminal justice procedure for severe victims of violent victimisation as described above may be avoided.

Second, we can speculate that two of the more problematic features identified in Rock's research, namely the uncovering of painful information concerning the victim's conduct or the impetus for the defence council to attempt to shift the blame on the victim, seem less likely in terrorist cases, where the victim and the perpetrator were unknown to each other.

Third, and maybe most important for the structuring of the proceedings, there is the mere fact that terrorism regularly involves a large number of victims. This is uncommon for homicide. This can make participation in a court case problematic due to the fact that most countries impose restrictions on the number of victims that can take part in a single court case. Possibilities to participate either through victim impact statements or the adhesion procedure are often bound to a maximum.<sup>190</sup>

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<sup>187</sup>Peterson-Armour 2002.

<sup>188</sup>See Temkin (2002) and Buzawa and Buzawa (2002).

<sup>189</sup>Aebi et al. (2006).

<sup>190</sup>See Brien, M.E.I. and Hoegen, E.H. (2000). *Victims of Crime in 22 European Countries*. Nijmegen, the Netherlands, Wolf Legal Publishers.

### 3.3.3.4 Terrorism and Its Relationship to War

The complexities of the effects of criminal justice for victims are compounded by the question, also briefly touched upon in Chapter 1, whether a terrorist act is framed as a criminal event or as an act of war.<sup>191</sup> The relationship between the terrorist act and war may be that it can be seen in the context of an ongoing war or conflict (e.g. the Israeli–Palestinian conflict), whether the victims’ country retaliates by going to war (e.g. the US after 9/11) or whether the terrorist attack is seen as a reaction to a war (e.g. Spain after 3/11).<sup>192</sup> Seen solely from the direct victims’ point of view it is unclear as yet whether the difference in framing has additional detrimental or protective consequences, but it is not a large leap of logic to hypothesise that this issue will shape the victims’ expectations concerning the appropriate State response to and the social acknowledgment of their situation. For example victims in these situations can prefer to be seen as either combatant casualties themselves and receive compensation similar to that given to soldiers who are wounded or killed in combat. They may furthermore, see the war as a possibility for revenge that will exceed the possibilities that the criminal justice system offers. The possibility however, that many victims will oppose the war may well add to their burden. Victims have their loss further compounded by the guilt they feel at their government’s response. They may also blame their own government for their loss if they feel that it is the government’s own actions that have precipitated the attack.

### 3.3.3.5 Summary

In this section we have reviewed the post-trauma factors. Social support is an important factor and both pre-disaster planning and post-terrorist interventions should strive to build social support (see Chapter 4). The fact that families may react in very different ways to their victimisation can strain the amount of support they can provide to each other.

The effects of media reporting about terrorism is another relevant factor. The media may (re)traumatise victims through the reminders or confrontation with the terrorist events. For victims furthermore, the effects of media exposure may have detrimental effects, which is due to the intrusive and massive attention given to terrorism and its victims. Media exposure does not have to be a negative experience though, with victims seeking publicity themselves, and the media providing a form of social acknowledgment to victims.

For victims of terrorism the criminal justice process is a further relevant factor. First of all it is relevant that victims of terrorism are less likely to be involved in the

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<sup>191</sup>See the following essay by McCauley: McCauley, C. (2007). War versus justice in response to terrorist attacks: competing frames and their implications. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*. Oxford, Oxford University Press.

<sup>192</sup>In these cases it may be either considered a warcrime or a peacetime equivalent of a warcrime.

criminal justice procedure than victims of similar severe violent acts, due to differences in clear-up rates and the possibility of suicide terrorism, which is a particularly lethal form of terrorism. The fact that a criminal justice procedure is less likely has disadvantages for victims. From both a procedural point of view as well as from various outcomes of the criminal justice process of which finding out the truth may be an important one, it is preferable that a trial does take place. However, for victims of these severe crimes, the trial may be a very taxing experience, even though victims of terrorism may be spared some of the particular burdens of court cases for co-victims of homicide or victims of severe violence. The fact that terrorism may affect many victims at the same time places restrictions on their access to the criminal justice procedure (see Chapter 5).

Finally, terrorism may be framed as an act of war, in addition to being a crime. The fact that terrorism may be seen (as) in the context of an ongoing conflict, as a precursor to war or a reaction to a war might well impact victims' self-definition. It is not clear whether this will serve as a protective or an additional detrimental factor.

### ***3.3.4 The Needs of Victims of Terrorist Attacks***

In this section we will review the consequences of terrorist victimisation for its primary victims. In this final subsection we will analyse the results using the framework developed in Section 3.2. We will discuss what the findings mean for the various victim needs, i.e. immediate emergency assistance, recognition and respectful treatment, information, participation, acknowledgment, (material) compensation, security and prevention of future harm, feelings of anxiety and loss and finally feelings of anger and retribution.

#### **3.3.4.1 Immediate Emergency Assistance**

The large physical impact of terrorist attacks on victims makes immediate emergency assistance of great importance. Receiving medical first-aid is literally a life or death matter for many terrorism victims. Providing for this emergency assistance may be difficult due to the large number of casualties and the additional damage to property and infrastructure. Advance disaster planning is therefore a necessary component in meeting the needs of victims of terrorism.

#### **3.3.4.2 Recognition and Respect**

For victims of terrorism, like victims of crime, recognition and respectful treatment should be inherent in the governmental and societal responses. This respectful treatment should be tailored to victims' individual circumstances and allow for choices where appropriate. For example victims should be allowed to choose

whether or not they receive information and whether they participate in various guises in the criminal justice process.

### **3.3.4.3 Information**

Victims of terrorism will need the same sort of information as victims of crime, in the case of the criminal justice procedure (the inquiry, the apprehension of the offender etc.), possibilities for receiving compensation and avenues for support. The information needs go beyond the criminal justice system. In the immediate aftermath of the attack, in particular when it is an attack of a large magnitude, victims will need to find out whether their loved ones are safe, whether additional attacks are imminent and in the case of CBRNE-attack what the symptoms of victimisation are. In addition, victims may need information as to where to find emergency relief and assistance and what avenues they can take to help themselves and others.

### **3.3.4.4 Participation**

The need for participation in the criminal justice system is similarly complex as it is for victims of severe crime, being an important need *and* an additional burden at the same time. Likewise the position of cross-border victims should receive similar concern as is the case for victims of crime. In the case of mass victimisation practical concerns may make participation more difficult, and special measures may be necessary to ensure that victims feel they have been sufficiently acknowledged in the trial procedure.

Participation may also relate to non-criminal justice features, with many victims wanting to connect to other victims in self-help groups or play a role in other supporting activities.

### **3.3.4.5 Acknowledgment**

Victims of terrorism are attacked as a representative of a larger group. Acknowledging victimisation by terrorism entails recognition of this fact. The acknowledgment of victimisation may be problematic for victims who are seen to have some relationship to the perpetrators. Where most terrorist victims will meet the criteria for being an 'ideal' victim, this is not the case for victims of the same origin as the perpetrators, who may well be the targets of backlash incidents. In the situation where terrorism is framed in terms of war, in addition to criminal justice, needed acknowledgment may follow suit. In the situation of ongoing terrorism victims may feel they are civil casualties of war, rather than or in addition to, victims of crime. Victims who feel their government's actions have precipitated the attack may feel it appropriate that their own government recognises this.

### **3.3.4.6 Material Compensation**

The financial impact of terrorist victimisation is likely to be large, due to the combination of physical, mental and property damage. In contrast with this larger need it is less likely that the victims will be able to recoup their damages from the perpetrator. Furthermore, insurance companies may have clauses that exclude victims of terrorism. The need for material compensation by either insurance or criminal injuries compensation is therefore likely to be greater on average than for victims of crime, although individual victims of crime may suffer larger damages. Like victims of crime, cross-border victims may be at a disadvantage in applying for damages. Due to the large immediate impact of terrorist attacks timing of compensation is important, with victims needing financial support in the direct aftermath of the attack.

### **3.3.4.7 Security**

Like victims of crime, victims of terrorism will need assurance that they will not be the target of additional attacks and will want to be informed of governmental action to prevent further victimisation. Furthermore, they will need some information about steps they can take themselves to prevent further victimisation. It should be noted that governmental possibilities to assure victims of their future safety are more limited than they are for victims of crime, due to the differences in perceived risk of terrorism and crime, and in particular the perceptual differences in possibilities to control this risk. Nevertheless, it bears repeating that in general the chances of repeated direct victimisation are much smaller for victims of terrorism, due to its rare and random occurrence.

Secondary victimisation in the criminal justice procedure does not seem more likely for victims of terrorism than it does for other victims of crime and victim blaming reactions from their surroundings do also seem rather less than more likely. Secondary victimisation by the media may be a concern however, due to the massive media attention, which means that victims of terrorism need similar possibilities for management of the media that should be available for victims of severe violence, like homicide.

For those victims with a similar background as the perpetrators, secondary victimisation on all counts is a real possibility, as they may be treated more like perpetrators than victims.

### **3.3.4.8 Feelings of Anxiety and Loss**

The impact of terrorism on victims' anxiety and related disorders (PTSD, ASD and co-morbid disorders) and their feelings of loss in the case of bereaved victims is more extensive than on average for victims of crime, in part due to the motivation for the terrorist act, and this larger impact is in particular the case for suicide, CBRNE-terrorism and hostage taking. Certain groups, psychiatric patients,

those who experienced earlier trauma, and children, women and minorities are at heightened risk. Continuing assistance after terrorist attacks should therefore address screening for symptoms, and heightened awareness in mental health and other professionals who are likely to be in contact with victims. In particular those working with possibly affected children, like teachers, should be made aware of the fact that the children's parents may have been victimised as well, which makes it more difficult for them to deliver support to their children.

In spite of this, the research shows that the situation of victims of terrorism is only different by degree from that of victims of other crimes. There are more victims at the same time and the chances of developing a disorder from PTSD to complicated grief are elevated. Victims of crime, in particular the more violent crimes, will also suffer from these conditions. In any case these features of terrorism do stress the need for ongoing assistance and support. In Chapter 4 we will provide a more extensive description of the support needed for victims of terrorism.

### 3.3.4.9 Anger, Retribution and Forgiveness

The consequence of terrorist victimisation on the anger of its direct victims has not yet received much attention. However, as both surveys of the general population and the consequences of victimisation in general and warlike victimisation in particular show evidence of strong reactions of anger in victims, it is likely that anger will be an important factor for victims of terrorism as well. In certain instances possibilities for retribution will be limited, due to the lower clear-up rates and the suicidal nature of the attack. The situations where the terrorist attack is linked to a war (either an ongoing war, war as reaction to the attack or the attack in reaction to war) may on the one hand provide possibilities for retribution not open in the criminal justice procedure, but on the other hand not be supported by victims and be seen as either unjust or an overreaction.

## 3.4 Vicarious Victims and the Intergroup Context

Terrorism's unique feature lies in the fact that it uses violence against direct targets to threaten, frighten and otherwise influence a wider group of indirect or vicarious victims. The Geneva Declaration on Terrorism confirms this by asserting that 'the distinguishing feature of terrorism is fear and this fear is stimulated by threats of indiscriminate and horrifying forms of violence directed against ordinary people everywhere.' It is likely that terrorists will be able to get their message across to their target audience.<sup>193</sup> The attention the media pays to terrorist attacks, combined

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<sup>193</sup>Gerwehr, S. and Hubbard, K. (2007). What is terrorism? In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.



with features of successful terrorist attacks (their vividness, their ‘fear content’, the apparent clarity of the message the terrorists wish to convey, the credibility of future attacks, the emphasis on loss) makes it likely that the target audience will take note of the attack and, to a certain extent, will be affected by the attack, unfortunately mostly in a way intended by the terrorists. Moreover, new trends in terrorism – more violent incidents, anonymous acts and attacks on media personnel – have been linked to the role the media plays. The first because of the prolonged, extensive coverage, the second due to speculation in the media for the reasons for the attack and the third due to the direct victims’ profession.<sup>194</sup> Not only is it the intention of the terrorist, the so-called vicarious victims feel targeted by the terrorist violence. This is particularly evident in the 9/11 attack, in which the targets were viewed as symbolic representations of America. In one of the many studies in the aftermath of 9/11 the percentage of Americans who stated that further terrorist violence may occur to them increased from 36% to 80%. Dimaggio and Galea state that effective post-terrorism public health initiatives require the recognition that behavioural consequences are, in fact, the intention of the terrorists.<sup>195</sup>

In this section we will discuss the effects of terrorism on vicarious or tertiary victims. The main focus is the emotional response (be that anxiety or anger) to the attacks, but as we shall see the emotional response has spin-off effects toward other consequences as well. We will discuss the consequences in terms of anxiety and anger in turn.

### **3.4.1 Vicarious Anxiety**

In this section we will discuss fear and anxiety reactions to terrorism in the general public. This will entail discussing the traumatic effects of terrorist attacks on those who were not present at the site of the attack, the reasons for the perceptions of terrorism as a higher risk than is warranted by its actual occurrence and the consequences this fear of terrorism inspires in the wider audience. Finally the ongoing research into the so-called terror management theory is relevant as it suggests a number of political consequences of (the fear of) terrorist attacks and reminders of this fear.

#### **3.4.1.1 Vicarious Traumatization**

After 9/11 between 7.5% and 11% of the inhabitants of New York developed post-traumatic stress disorder. As quoted before, the chances of developing PTSD

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<sup>194</sup>Pfefferbaum et al. (2003).

<sup>195</sup>Dimaggio, C. and Galea, S. (2006). The behavioral consequences of terrorism: A meta-analysis. *Academic Emergency Medicine*. 13, 559–566.

were related to exposure level, with those directly exposed, i.e. being either directly victimised or witnessing the attack, having much elevated levels of PTSD compared to those only indirectly exposed,<sup>196</sup> who nevertheless showed elevated levels of PTSD as a consequence of 9/11. In fact across the United States people not present on-site or with a direct relationship to those who were directly victimised showed stress reaction to the attack (Schuster et al. 2001).<sup>197</sup> Galea, Vlahov and colleagues expanded their initial survey to the five boroughs of NYC and the New York metropolitan area.<sup>198</sup> The results indicated a marked decrease in symptom prevalence as time progressed, suggesting a resolution of PTSD for more than two-thirds of those meeting the original criteria in the first 6 months. Approximately a quarter of the interviewees were 'directly exposed' to the attacks, and the prevalence of PTSD was higher for this group than for the other residents. Even amongst the less (or indirectly) exposed, however, the prevalence of early PTSD was not trivial. In absolute terms the number of indirectly exposed New Yorkers that developed PTSD as a result of the attacks equalled the number that were directly exposed. Similar results were shown in Madrid. Miguel-Tobal and colleagues show that the net burden of psychopathology in the aftermath of a terrorist event in a densely populated urban area may be as high among persons who are not directly affected by the disaster as amongst those who are.<sup>199</sup> A comparison of the research in Madrid with that in the United States after 9/11 furthermore suggests that the impact in the general public is directly related to the magnitude of the terrorist attack, with Madrid showing lower PTSD-prevalence rates (2.3%) than New York.

A number of the factors associated with PTSD in direct victims have also been ascertained in indirect victims. Both female sex, previous or current mental health problems and level of exposure (see below) have been demonstrated to lead to elevated PTSD-levels. In addition to the direct effects on PTSD, terrorist attacks can also negatively influence protective factors for PTSD, so that consequences of future victimisation may be more severe (Weinstein et al. 2000). Troubling is moreover Starkman's finding that a massive terrorist attack may lead to a sharp increase in suicide attempts in vicarious victims, with her research showing a 49% increase in suicide attempts in a district of the United States in the 2 years following 9/11 compared to the 2 years preceding 9/11.<sup>200</sup>

The chances of being distressed by a terrorist attack are moderated by the perceived likeness with the victims. Wayment showed this factor to be an important mediator

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<sup>196</sup>See Galea et al. (2002).

<sup>197</sup>See Schuster et al. (2001).

<sup>198</sup>Galea, S., Vlahov, D., Resnick, H., Ahern, J., Susser, E., Gold, J., et al. (2003). Trends of probable post-traumatic stress disorder in New York City after the September 11 terrorist attacks. *American Journal of Epidemiology*. 158, 514–524.

<sup>199</sup>Miguel-Tobal et al. (2006).

<sup>200</sup>Starkman, M.S. (2006). The terrorist attacks of September 11, 2001, as psychological toxin. *Journal of Nervous and Mental Disease*. 194, 547–550.

of the effects of 9/11 on those only indirectly exposed.<sup>201</sup> Furthermore, those with jobs similar to victims in the attacks (e.g. flight attendants) showed more signs of distress and vicarious traumatisation.<sup>202</sup>

### 3.4.1.2 Traumas from Television Viewing

The fact that direct exposure is not necessary to be traumatised by terrorist attacks is evidenced by a number of studies that reveal a correlation between media exposure of 9/11 and the development of traumatic sequelae. Blanchard and colleagues showed that rates of possible ASD and PTSD were elevated until 3 months after the event in surveyed college students who had not personally witnessed the terrorist attacks.<sup>203</sup> A year later rates of probable PTSD were no longer elevated, but rates of symptoms of post-traumatic stress still were. The effects were moderated by the distance that the student lived from New York and the amount of television viewed was in part related to the levels of probable PTSD.

Ahern and colleagues reviewed the effects of television viewing of 9/11 on the development of traumatic sequelae and found a clear correlation with television viewing, partly because those most distressed view more television.<sup>204</sup> Pfefferbaum showed that children who experienced heavy television exposure to an event, presented with similar PTSD-levels as children who actually knew someone who died or got injured.<sup>205</sup> Ahern et al. revealed that sensationalist reporting contributed to detrimental effects.<sup>206</sup>

In a recent study by Bernstein and colleagues a causal link was established.<sup>207</sup> In a representative sample of residents of the NYC metropolitan area, persons who

<sup>201</sup>See Wayment, H.E. (2004). It could have been me: vicarious victims and disaster-focused distress. *Personality and Social Psychology Bulletin*. 30, 515–529.

<sup>202</sup>See Beutler et al. (2007).

<sup>203</sup>Blanchard, E.C., Kuhn, E., Rowell, D.L., Hickling, E.J., Wittrock, D., Rogers, R.L., Johnson, M.R., and Steckler, D.B. (2004) Studies of the vicarious traumatisation of college students by the September 11th attacks: effects of proximity, exposure and connectedness. *Behaviour Research and Therapy*. 42, 191–205. Blanchard, E.B., Rowell, D., Kuhn, E., Rogers, R., and Wittrock, D. (2005). Posttraumatic stress and depressive symptoms in a college population one year after the September 11 attacks: The effect of proximity. *Behaviour Research and Therapy*. 43 (1), 143–150.

<sup>204</sup>See Cohen-Silver, R., Holman, E.A., McIntosh, D.E et al. (2002). Nationwide longitudinal study of psychological responses to September 11. *Journal of the American Medical Association*. 288(10), 1235–1244; Ahern, J., Galea, S., Resnick, H., Kilpatrick, D., Bucuvalas, M., Gold, J., et al. (2002). Television images and psychological symptoms after the September 11 terrorist attacks. *Psychiatry*. 65, 289–300; Ahern, J., Galea, S., Resnick, H. and Vlahov, D. (2004). Television Images and Probable Posttraumatic stress disorder after September 11 the role of background characteristics, event exposures, and perievent panic. *Journal of Nervous and Mental Disorder*. 192, 217–226; Schuster, M.A., Stein, B.D., Jaycox, L. H. et al. (2001) A National survey of stress reactions after the September 11, 2001, terrorist attacks. *New England Journal of Medicine*. 345:1507–1512.

<sup>205</sup>Pfefferbaum 2003.

<sup>206</sup>Ahern et al. 2002

<sup>207</sup>Bernstein, K.T., Ahern, J., Tracy, M., Boscarino, J.A., Vlahov, D. and Galea, S. (2007). Television watching and the risk of incident probable posttraumatic stress disorder: a prospective evaluation. *Journal of Nervous and Mental Disease*. 195, 41–47.

watched more than 12 h of anniversary television coverage 1 year after the September 11, 2001, terrorist attacks were more than three times as likely to report symptoms consistent with new-onset PTSD and there was a dose-response relation between hours of anniversary footage seen and new-onset probable PTSD. This relation was robust to adjustment for typical television viewing and other covariates known to be associated with risk of PTSD. The impact of television transcends that of other media, in particular print media (Cho et al. 2003).<sup>208</sup>

### 3.4.1.3 Fear of Terrorism

Terrorist attacks often have a particularly salient quality (e.g. Grieger et al. 2003), which is largely enhanced by the amount of media, political and societal attention the attacks receive. As people assess risks not only by their actual occurrence, but by more heuristic mechanisms, like the availability heuristic (the widely observed tendency to assign a higher perceived predictability to vivid, easily imagined event<sup>209</sup>) or the affect heuristic (giving more weight to recent, easily imagined, highly arousing events)<sup>210</sup>, those threatened by terrorism are prone to more anxiety, fear and associated problems than their actual risk on being victimised merits. In addition, the greater weight of negatively valued input results in a negativity bias. Negative information is seen to be more informative and influential than positive information, with the upshot of negative messages concerning risk to be seen as more trustworthy than positive messages. The fears that are caused by terrorist attacks may be enhanced by social amplification, which is common when there is ambiguity doubt or misinformation, which promote fear and instigate rumour.<sup>211</sup>

Two factors of risk assessment are relevant to the subjective risk of further victimisation: *dread risk*, which relates to a continuum from low (controllable, non-catastrophic, decreasing in risk, generating little risk for future generations) to high (non-controllable, catastrophic, increasing in risk) and *unknown risk* which also represents a continuum from low (well-known, observable, non-novel events) to high (poorly understood, novel, delayed or persisting effect). In addition, perceived malevolent intent is important.<sup>212</sup> It is clear that terrorism is both a dread and an

<sup>208</sup>Cho, J., M.P. Boyle, H. Keum, M.D. Shevy, D.M. McCleod, D.V. Shah and Z. Pan (2003). Media, terrorism and emotionality: emotional differences in media content and public reactions to the September 11th terrorist attacks. *Journal of Broadcasting and Electronic Media*. 47(3), 309–327.

<sup>209</sup>See Tversky, A. and Kahneman, D. (1974). Judgment under Uncertainty. Heuristics and Biases. *Science*. 185, 1124–1131.

<sup>210</sup>See Slovic, P. and Weber, E.U. (2002). Perception of Risk Posed by Extreme Events. Paper downloaded from [http://www2.sfu.ca/media-lab/archive/2004/226jan2004/notes/slovic\\_wp.pdf](http://www2.sfu.ca/media-lab/archive/2004/226jan2004/notes/slovic_wp.pdf)

<sup>211</sup>See Kasperson, R.E., Renn, O. and Slovic, P. et al. (1988). The social amplification of risk. *Risk Analysis*. 8, 177–187. And Breckenridge, J.N. and Zimbardo, P.G. (2007). The strategy of terrorism and the psychology of Mass-Mediated fear. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. and Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>212</sup>See also Breckenridge and Zimbardo (2007).

unknown risk, and is caused by malevolence. CBRNE-terrorism, due to its specific characteristics (see Section 3.3.1.4) is a particularly effective fear-inducer.

The fear of terrorism has a number of behavioural reactions, which translate into real economic damages for the countries that suffer terrorist attacks. Frey et al. show, in their overview, that due to the extended fear effects of terrorism, tourism, (foreign) investment, saving and consumption, the stock markets and in particular urban economies are negatively impacted.<sup>213</sup> It is beyond the scope of this report to discuss their findings in detail, but this does stress the importance of adequate information focused on the general public, with the aim of providing a realistic risk analysis of terrorism, without unnecessarily frightening the public.

The remainder of this section will focus on other behavioural reactions to terrorism. First there is the phenomenon of worrying well in which people who were not victimised present with victim-like symptoms. Second there is fear of public transport systems. Finally the relevant features of terror management theory and findings from the ongoing research into this theory are discussed.

#### 3.4.1.4 Worrying Well

CBRNE-terrorism will have the added effect of creating large numbers of people who suffer from mass sociogenic illness<sup>214</sup> also described as ‘worried well’. In these situations, people seek treatment out of fear or concern although they have not been exposed to a chemical/biological agent<sup>215</sup>, often with symptoms resembling actual exposure in some way. These outbreaks of multiple unexplained symptoms in response to an unobservable environmental contagion, real or imagined, are denoted by a host of somatic symptoms with no apparent physical cause.<sup>216</sup> The case of radiological poisoning cited in Pastel in Goiana Brazil provides some insight into what may happen when a terrorist attack with a CBRN-missile will take place. 249 people were actually affected but 5,000 of a further 125,000 people screened presented with similar symptoms.<sup>217</sup> This last feature makes screening difficult. The publicised features of anthrax, which caused millions of Americans distress and anxiety, were symptoms like fever, chills, nausea, coughing, which are all also features of common sickness like influenza or a severe cold.

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<sup>213</sup>See Frey et al. (2007).

<sup>214</sup>See Bartholomew, R. and Wessely, S. (2002). Protean nature of mass sociogenic illness. From possessed nuns to clinical and biological terrorism fears. *British Journal of Psychiatry*. 180, 300–306.

<sup>215</sup>Hyams, K.C., Murphy, F.M. and Wessely, S. (2002). Responding to chemical, biological, or nuclear terrorism: The indirect and long-term health effects may present the greatest challenge. *Journal of Health Politics, Policy, and Law*. 27, 273–291. Beaton, R. Stergachis, A. Oberle, M. et al. (2005) The Sarin Gas Attacks on the Tokyo Subway? 10 years later/Lessons Learned. *Traumatology*. 11(2), 103–119.

<sup>216</sup>Pastel, R. (2001). Collective behaviors: Mass panic and outbreaks of multiple unexplained symptoms. *Military medicine*. 166(12) 44–46.

<sup>217</sup>Pastel 2001.

### 3.4.1.5 Fear of Public Transport Systems

Gigerenzer showed that the terrorist attacks of 9/11 increased fear of flying and thereby avoidance of using air transport for medium to long distance trips.<sup>218</sup> As these flights were replaced by car trips, and travelling by car has a higher mortality rate per mile than air transport, Gigerenzer calculated that the number of people that died as a consequence of switching from air to road is larger than the number of people who died in the four fatal flights of 9/11. Rothschild in addition, estimated that even if terrorists had attacked one plane a month in the USA, the chances of meeting a terrorist would have been 540,000 to 1.<sup>219</sup> In addition to the effects on mortality the economic effects on the airline travel industry were large. Ito and Lee show that the temporary effects of 9/11 on demand for air travel were a decline of 30% and there was a structural decline of 7%.<sup>220</sup> The effects would then add up to billions of dollars. However, Gigerenzer showed that the Madrid bombings did not have similar effects.<sup>221</sup> The use of trains after the bombings did temporarily drop, but in 2 months time the use of trains was up to pre-attack levels.

### 3.4.1.6 Terror Management Theory

A peculiar instance of the consequences of fear in the context of terrorism is offered by the ongoing research into terror management theory.<sup>222</sup> TMT concerns the impact that the awareness of the inevitability of death has on our lives. This uniquely human awareness creates the potential for existential terror. The core proposition of TMT is that the main avenue by which people control this existential terror is culture. According to Pyszczynski, Greenberg and Solomon ‘cultures convince people that they are beings of enduring significance living in a meaningful reality.’<sup>223</sup> Because of this TMT implies that to maintain psychological equanimity, people must sustain faith in a cultural worldview, which gives order, meaning, stability and permanence

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<sup>218</sup>See Gigerenzer, G. (2004). Dread risk, September 11, and fatal traffic accidents. *Psychological Science*. 15, 286–287. Gigerenzer, G. (2006). Out of the frying pan into the fire: Behavioral reactions to terrorist attacks. *Risk Analysis*. 26(2), 347–351.

<sup>219</sup>See Rothschild, M. (2001). Terrorism and You—The Real Odds, Policy Matters, AEI-Brookings Joint Center for Regulatory Studies, available at <http://www.aei-brookings.org/policy/page.php?id=19#top>.

<sup>220</sup>Ito, H. and Lee, D. (2005). Assessing the impact of the September 11 terrorist attacks on U.S. airline demand. *Journal of Economics and Business*. 57(1), 75–95.

<sup>221</sup>Gigerenzer (2006).

<sup>222</sup>Greenberg, J., Solomon, S., and Pyszczynski, T. (1997). Terror management theory of self-esteem and social behavior: Empirical assessments and conceptual refinements. In Zanna, M.P. (Ed.). *Advances in experimental social psychology* (Vol. 29, pp. 61–139). New York: Academic Press. Pyszczynski, T., Solomon, S., and Greenberg, J. (2003). *In the Wake of 9/11: The Psychology of Terror*. Washington, DC, American Psychological Association.

<sup>223</sup>See Pyszczynski et al. (2003).

to reality. In addition, people need to believe that they are significant contributors to this worldview, by living up to the standards implied by it. According to TMT this process is a pivotal contribution to people's self-esteem.

The importance of TMT for fear of terrorism lies in its explanation of why is it so difficult to peacefully coexist with people who do not share our worldviews. According to TMT the confidence in our own worldview is bolstered by cohabiting with others who share this worldview, which therefore contributes to our self-esteem and possibilities to stave off the existential terror. However, the existence of other cultural worldviews poses a continuous threat to the belief we have in our own cultural worldview. We therefore respond to other cultures with attempts to convert, derogate, assimilate, accommodate or in some instances annihilate them. In the presence of clear reminders of our own death (which in TMT studies is commonly referred to as mortality salience), which give rise to existential terror and therefore to efforts to control this, people exhibit tendencies to defend their own worldview, while simultaneously reacting more negatively to other, rival ways of viewing the world.

Over 250 empirical studies have tested and supported hypotheses related to TMT, a number of which have focused on the consequences of 9/11. In the terms of TMT the attacks on the World Trade Center and the Pentagon should have particularly strong effects for a number of reasons.<sup>224</sup> Of course there is the large amount of fatal casualties and there is the terrorists' intention to incite fear in a mass audience. Due to the same features of terrorism which make it a particularly effective traumatic stressor, it is also a similarly effective reminder of death. In addition, 9/11 specifically targeted iconic representations of the cultural worldview of Americans. Both in objective and symbolic terms, 9/11 therefore has a high level of mortality salience.

This has had a number of consequences that are predicted by TMT. First of all nationalism and patriotic sentiment were intensified.<sup>225</sup> Support for the president of the United States reached unprecedented levels, with reminders of 9/11 showing increased support for George W. Bush.<sup>226</sup> The political consequences of TMT have also been documented in other countries.<sup>227</sup> Second, dissent was less tolerated. Landau and colleagues show that reminders of death led to more negative responses toward people who suggested the terrorists may have had legitimate reasons for committing the attack. Third, reactions to people who are different were shown to be more negative.<sup>228</sup> This hostility was directed at Arab Americans, but not restricted to this group. In the aftermath of 9/11 reports of violence against Hispanic, Chicano and Native Americans also increased.<sup>229</sup> Fourth, increased mortality salience severely

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<sup>224</sup>See Pyszczynski et al. (2003).

<sup>225</sup>See Pyszczynski et al. (2003).

<sup>226</sup>See Landau, M. J. Solomon. S. Greenberg. J. et al. (2004). Deliver us from evil: The effects of mortality salience and reminders of 9/11 on support for President George W. Bush, *Personality and Social Psychology Bulletin*. 30(9), 1136–1150.

<sup>227</sup>Pyszczynski, T. (2004). What are we so afraid of? A terror management theory perspective on the politics of fear. *Social Research*. 71(4), 827–848.

<sup>228</sup>Landau et al. (2004).

<sup>229</sup>Pyszczynski et al. (2003).



increased support for extreme military solutions. In a study by Pyszczynski and colleagues it led to increased support for using nuclear retaliation against Iran.<sup>230</sup> Fifth, there was an increased need for national heroes as representatives of one's cultural worldview.<sup>231</sup> Sixth, there was also an increased desire to help. Jonas and colleagues show that mortality salience increases altruistic tendencies<sup>232</sup> In the aftermath of 9/11 there were numerous examples of people spontaneously offering help to those directly afflicted by the attack.

### 3.4.1.7 Summary

In this section we reviewed some of the evidence concerning the impact of terrorist attacks on vicarious or tertiary victims. We have shown that large-scale terrorist attacks can have a detrimental effect on the mental health of people, even if they were not at the site of the terrorist attacks and have no direct relationship with those who were directly targeted. The effects are smaller for individual vicarious victims, the risk of developing PTSD and co-morbid disorders is four to six times lower than it is for those directly impacted, although these percentages are elevated for those who either closely resemble the direct victims or live close by the site of the attack. Nevertheless, due to the fact that the group of people affected is much larger, the mental health implications of vicarious traumatisation may outweigh those of direct traumatisation. Mental health professionals throughout afflicted countries should therefore be included in the response to terrorism.

The attack with a CBRNE-weapon will furthermore have the consequence that vicarious victims will present with symptoms similar to 'real' victims. Although there is no evidence yet of mass panic or hysteria following the attacks (like the sarin attack in Tokyo or the anthrax attacks in the United States) evidence from similar events suggests that first level pediatricians will have to reckon with reasonably large numbers of people presenting with mass sociogenic illness.

Sub-clinical levels of fear are also important. Due to characteristics of terrorist attacks (dread risk, unknown risk, malevolent intent) people are likely to overestimate the risk of reoccurrence and adjust their behaviour accordingly. Not only does this mean that the economic consequences of the reaction to terrorism by the frightened general public will outweigh the direct consequences of terrorism, but this also may lead to additional casualties due to the fact that people may choose risky behaviour that appears less risky. In the aftermath of 9/11 people chose to drive rather than fly

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<sup>230</sup>Pyszczynski, T., Abdollahi, A., Solomon, S., et al. (2006). Mortality salience, martyrdom, and military might: The great Satan versus the axis of evil. *Personality and Social Psychology Bulletin*, 32(4), 325–337.

<sup>231</sup>Pyszczynski et al. (2003).

<sup>232</sup>Jonas, E. Schimel, J. Greenbert, J., et al. (2002). The Scrooge effect: Evidence that mortality salience increases prosocial attitudes and behavior. *Personality and Social Psychology Bulletin*, 28(10), 1342–1353.



which probably led to as many if not more deaths due to the larger chance of dying whilst driving than were implicated in the 9/11 planes.

Finally the research into terror management theory shows that both the terrorist attack itself and reminders of it may influence people's political opinion and their views on people who represent different cultures.

### 3.4.2 Vicarious Anger

Most of the psychological research into victimisation by terrorism has focused on the effects on PTSD and disorders that are commonly associated with it. The attention for anger reactions has been relatively scant, as we already saw in Section 3.3.3.1.

However, anger was the dominant reaction of the American public to 9/11. According to Smith et al. (2001) 65% of Americans and 73% of New Yorkers reported being angry in the aftermath of the attacks on the World Trade Center and the Pentagon.<sup>233</sup> A year on anger was still the most prevalent reaction, although percentages have dropped to 43% and 42% respectively, although this drop may be accounted for by changes in question wording.<sup>234</sup>

There are a number of reasons for the necessity to include anger after victimisation in this review. In the discussion in Section 3.3.4.9 we have already shown anger to be related to justice-related concepts like retribution, but also to forgiveness, which relates to the discussion on restorative justice in Chapter 7. Furthermore, the division between fear and anger is both relevant to the assessment of future risk and desired government response of terrorism. Lerner and Keltner show that anger is related to a more optimistic assessment of risks, while fear is associated with more pessimistic appraisals. In addition, anger rather than fear appears to be related to more optimistic accounts of the country's relative military capability.<sup>235</sup> This assessment influences preferred government action. Skitka et al. make this apparent in the title of their article '...anger wants a fight. Fear wants them to go away.'<sup>236</sup> Those who are predominantly angry concerning terrorism will be supportive of warlike activities, while predominantly anxious people might prefer disengaging strategies. Moreover, anger – as we will show below – may also be directed at inhabitants of one's own

<sup>233</sup>Smith, T.W., Rasinski, K.A., and Toce, M. (2001). *America rebounds. A national study of public response to the September 11th terrorist attacks.* Chicago, NORC.

<sup>234</sup>See Rasinski, K.A., Berkold, J., Smith, T.W., et al. (2002). *America Recovers.* Chicago, NORC.

<sup>235</sup>Lerner, J. S., and Keltner, D. (2001). Fear, anger, and risk. *Journal of Personality and Social Psychology.* 81, 146–159.

<sup>236</sup>Skitka, L.J., Bauman, C.W., Aramovich, N.P. and Scott-Morgan, G. (2006). Confrontational and preventative policy responses to terrorism: Anger wants a fight and fear wants "Them" to go away. *Basic and Applied Psychology.* 28(4), 375–384. See also Lerner, J.S., Gonzalez, R.M., Small, D.A., and Fischhoff, B. (2003). Effects of fear and anger on perceived risks of terrorism: A national field experiment. *Psychological Science.* 14, 144–150. Huddy, L., Feldman, S., and Cassese, E. (2007). On the distinct political effects of anxiety and anger. In: Crigler, A et al. (eds.). *The Political Dynamics of Feeling and Thinking,* University of Chicago Press.

country, who for whatever reason resemble the perpetrators of the attack. Anger and associated aggressive behaviour may be directed at these people.

We are therefore of the opinion that mechanisms of coping with vicarious anger are important to address in this report. In this section we will discuss the two dominant ways of coping with anger, placed in an intergroup context. As we discussed in Section 3.3.4.9, coping with anger can follow a problem-focused path, which entails retaliating or exacting retribution against the object of our anger.<sup>237</sup> Emotion-focused coping will entail releasing feelings of anger and vengefulness through a process of forgiveness.<sup>238</sup> Both vicarious retribution and intergroup forgiveness are therefore of interest in this section. Some of the research into these phenomena has taken place in situations of ongoing terrorism, but the discussion will also draw on the experiences with apartheid or genocide.

### 3.4.2.1 Vicarious Retribution

In a recent review article Lickel and colleagues describe the phenomenon of vicarious retribution.<sup>239</sup> This refers to the situation where a member of a group commits an act of aggression toward members of an outgroup for an assault or provocation that had no personal consequences for him or her. Their work draws on the General Aggression Model,<sup>240</sup> on literature on displaced aggression and intergroup emotions and contact theory.<sup>241</sup> The concept of vicarious retribution is relevant for the understanding of escalation and spreading of conflict and intergenerational and intractable rights. In our context it is both relevant to the understanding of ongoing terrorism as well as backlash acts against members of the outgroup as punishment for one-off terrorist events and is related to the framing as either war or crime. It therefore merits further discussion.

Lickel and colleagues model vicarious retribution as a chain of four cognitive-affective processes. First is the initial event construal. In this the vicarious victim considers what has happened, whether it is relevant for him or her, and who is to blame for what happened. First of all the event has to be construed as the act of an outgroup member toward an ingroup member. This entails applying possible outgroup-ingroup relationships to the event. In certain situations this division has gained chronic salience, where there is a pattern of ongoing violence, like in Israel and Palestine or formerly in Northern Ireland. But also when this pattern is lacking people may construe the event along group lines. This is dependent on the context

<sup>237</sup>E.g. Worthington and Scherer (2004), Hill, Exline and Cohen (2005).

<sup>238</sup>Worthington and Scherer (2004).

<sup>239</sup>Lickel, B. Miller, N., Stenstrom, D.M. et al. (2006). Vicarious retribution: The role of collective blame in intergroup aggression. *Personality and Social Psychology Review*. 10, 372–390.

<sup>240</sup>See Anderson, C.A. and Bushman, B.J. (2002). Human aggression. *Annual Review of Psychology*. 53, 27–51.

<sup>241</sup>Pettigrew, T.F. (1998). Intergroup contact theory. *Annual Review of Psychology*. 49, 65–85.

(i.e. white versus black crime) or on the nature of the incident. The latter is the case when the act of violence is directed against an iconic figure of the ingroup, like the US-flag or the White House. Of relevance is furthermore the intention of the person who committed the act. If prior experiences or expectancies are linked to intergroup hostility, it is likely the act will be construed along these lines. Of course this is even more evident when the intergroup connection is either stated or directly related to the act. All of this is evidenced in the recent terrorist attacks by Al Qaeda in Europe and the United States. Most of their actions target iconic, large urban infrastructures and are mostly accompanied by suggesting their intentions; in addition, previous experiences with this terrorist organisation will suggest the relevance of the intergroup context. Moreover, the work into terror management theory suggests that incidents of a large enough scale, with sufficient reminders of death, will make cultural divides more salient and therefore add to the possibility that events will be construed along the lines of group identification.

The second step in the Lickel et al. (2006) model is ingroup identification, which is linked to anger and aggressive tendencies after harm to ingroup members. Feelings of group pride and group member empathy (with much emphasis placed on the common humanity of group members), with many so-called second-order emotions (Yzerbyt et al. 2001; Demoulin et al. 2004) strengthen the links with the direct ingroup victims.<sup>242</sup> On the other hand there are two linked tendencies that support retaliation against outgroup members. First of all the chances of being punished by ingroup members after retaliating are small. Second, those who do not retaliate or concur with retaliatory ideas may be considered deviant. Again this may be related with research into terror management theory that shows dislike for divergent opinions in the aftermath of 9/11.

Third, a process of outgroup entitativity takes place. Entitativity refers to the perception that a group is a united and coherent whole. The higher outgroup entitativity is perceived to be, the more likely any member of the outgroup will be blamed for the event. Suicide terrorism poses an additional opportunity for this process, as the actual perpetrator is no longer available, others like him may well be blamed. According to Lickel et al. outgroup entitativity proceeds by a process of infrahumanisation.<sup>243</sup> In the perception of the ingroup, outgroup members 'lose' secondary human emotions (guilt, love, admiration, etc.) and are left with primary, not-exclusively human emotions. This process leaves the outgroup at once more similar (similar lack of emotions) and more cohesive as the primary emotions left allow attribution of a similar sense of purpose to the outgroup. Where the ingroup is seen as more commonly human, the outgroup is seen as less human.

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<sup>242</sup>See Yzerbyt, V., Corneille, O., and Estrada, C. (2001). The interplay of subjective essentialism and entitativity in the formation of stereotypes. *Personality and Social Psychology Review*. 5, 141–115 and Demoulin, S., Leyens, J.Ph., Paladino, M.P., Rodriguez, R.T., Rodriguez, A.P., and Dovidio, J.F. (2004). Dimensions of “uniquely” and “non-uniquely” human emotions. *Cognition and Emotion*. 18, 71–96.

<sup>243</sup>See also Haslam, N. (2006). Dehumanization: an integrative review. *Personality and Social Psychology Review*. 10(3), 252–264.

In addition, entitativity is accompanied with causal inferences about commission (the other outgroup members helped commit the act) and omission (where they did not directly support they definitely did not do anything to prevent it from happening).<sup>244</sup> Finally these heuristics are linked to dispositional inferences about the outgroup members. ‘Fundamentalist Muslims are always...’ etc.

This leads, in the final step, to vicarious retribution in which ingroup members retaliate against outgroup members who were not personally responsible for the actions that led to the initial event. This may mean backlash against minorities, but as is evidenced in the aftermath of 9/11 it may also lead to war. According to Lickel et al. there are a number of moderators of tendencies toward vicarious retribution. First of all there is (perceptions of) group power. The stronger the group is the more likely vicarious retribution is. This is evidenced by the correlation between anger after 9/11, appraisal of risk and willingness to fight.<sup>245</sup> Second and third are the relevance of the provocation to the group’s defining qualities and the public nature of the event, which both will be the case after a terrorist attack. Finally leadership may enhance or decrease tendencies for vicarious retribution. In the aftermath of both 9/11 and the London Underground bombings the president of the United States respectively the prime minister of the UK tried to prevent process of outgroup entitativity by emphasising that the attacks were the work of small groups of terrorists, for which the larger Islamic community bears no responsibility. However, in other messages the United States government did increase the tendency for vicarious retribution. The infamous ‘you are either for us, or against us’ and ‘Axis of Evil’ quotes by president Bush for example can be easily construed along the lines of vicarious retribution, with many Americans until this day showing signs of misinformation. Not only conscious attempts of the leadership may influence vicarious retribution, but the work into terror management theory suggests unconscious reminders as well. The particular use of terror alert systems in the United States may well have the unintended consequence of leading to heightened levels or feelings of vicarious retribution, by their ‘terror management’ effects, again emphasising the importance of difference of cultures.

### 3.4.2.2 Intergroup Forgiveness

Lickel and colleagues proceed to suggest ways of defusing vicarious retribution, which is similar to Cairns and colleagues’ work into intergroup forgiveness.<sup>246</sup>

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<sup>244</sup>See Lickel, B., Schmader, T., and Hamilton, D.L. (2003). A case of collective responsibility: Who else was to blame for the Columbine High School shootings? *Personality and Social Psychology Bulletin*. 29, 194–204.

<sup>245</sup>See Skitka et al. (2006).

<sup>246</sup>See Cairns, E., Tam, T., Hewstone, M. et al. (2005). Intergroup forgiveness and intergroup conflict: Northern Ireland a case study. In: Worthington, E.L. Jr. (ed.). *Handbook of Forgiveness*, New York, Routledge.

Central is the importance of decategorising the outgroup and recategorising. The relevance of outgroup membership for the attack may be diminished by a clear distinction between the perpetrators and other outgroup members. In the immediate aftermath of the attack this may well be achieved by merely emphasising this difference. The attempts of both Bush and Blair to differentiate the attackers from other Muslims are examples of decategorisation. Recategorising would then entail stressing common features of the outgroup and ingroup versus the perpetrators of the attack. A common feature may be that both ingroup and other outgroup members are victims of the perpetrators.

For longer standing conflicts this may well not be sufficient and it may take more effort to change the perception of outgroup entitativity. Here preparatory work is needed to rehumanise the outgroup. Pettigrew (1998) suggests that five conditions play a role: learning about the outgroup, reappraising the ingroup, generating affective ties, changing behaviour and in sum offer possibilities for fostering friendship between the hostile groups.<sup>247</sup> Finally, the groups should be allowed to develop common identity (both victims of violence) or an overriding concern (how to live together in the future). Both the work of Cairns et al. in Northern Ireland and Staub and colleagues in Rwanda show that better understanding of the causes of perpetration, the effects of victimisation, combined in an empathic context can foster healing and forgiveness at the same time.<sup>248</sup> Similar processes are revealed in one of the most researched examples of the combination of justice and forgiveness in an intergroup context: the Truth and Reconciliation Commissions in South Africa.<sup>249</sup> Those South-Africans who accepted the truth presented at the commissions may be said to be reconciled, at least in the sense that they had more racial understanding, respect for other races and employed less stereotypes than those who did not. The TRC may therefore have added to the process of rehumanising the outgroup, and in addition, may have gone some way to recategorising, by the development of a collective memory and identity.

### 3.4.2.3 Summary

Compared to the literature on anxiety after victimisation, relatively scant attention is paid to anger. This is also the case for anger after terrorist victimisation. Nevertheless, anger was the most prevalent reaction to the 9/11 terrorist attacks in surveys of the

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<sup>247</sup>See Pettigrew 1998 and also Hewstone, M., Rubin, M., and Willis, H. (2002). Intergroup bias. *Annual Review of Psychology*. 53, 575–604.

<sup>248</sup>See for overviews Staub, E. (2005). Constructive rather than harmful forgiveness, reconciliation and ways to promote them after genocide and mass killing. In: Worthington, E.L. Jr. (ed.). *Handbook of Forgiveness*. New York. Routledge. Staub, E. (2006). Reconciliation after genocide, mass killing, or intractable conflict: Understanding the roots of violence, psychological recovery, and steps toward a general theory. *Political Psychology*. 27(6), 867–894.

<sup>249</sup>See e.g. Minow (1998); Gibson (2002 and 2004); Allan et al. (2006).

American public. Moreover, anger after terrorism is associated with both support for warlike activities after terrorist acts and backlash attacks on members of the same ethnic or cultural background as the perpetrators. The process that leads to vicarious retribution is of importance to this. The work concerning this construct suggests that to prevent additional harm the outgroup should be decategorised by government communication or other measures. The perpetrators should be distinguished from the ethnic or cultural group to which they belong and a common identity between the ingroup members and the outgroup members should be established. This is the case in the immediate reaction to one-off terrorist attacks, but also for the de-escalation of long-standing conflicts.

### ***3.4.3 The Needs of Vicarious Victims of Terrorist Attacks***

In this section we have discussed the consequences of terrorist attacks for the vicarious, indirect victims. The members of the target audience of the terrorist attacks, the ones the terrorists hope to influence with their act. Where we contrasted the needs of direct victims of terrorism with those of crime in the previous section to ascertain what the additional needs of victims of terrorism may be, the inclusion of vicarious victims in itself is related to the unique characteristics of terrorism. The importance of addressing their needs therefore is a feature that is typical of terrorist attacks. We will discuss the needs relating to their feelings of anxiety and anger.

#### **3.4.3.1 Dealing with Feelings of Anxiety**

We have seen that vicarious victims may suffer from severe traumatic sequelae as a consequence of a terrorist attack. This suggests that the need for mental health assistance will extend beyond the direct victims. Mental health practitioners and others (for example teachers) should be aware of warning signs that someone is experiencing severe anxiety in the aftermath of a terrorist attack.

Furthermore, victims may 'worry well' and present with symptoms like those of biological agents used in a terrorist attack. Medical and mental health personnel need to be able to discern worried well victims from those who have really been victimised by direct contact with the agent.

Due to characteristics of terrorist attacks (dread risk, unknown risk, malevolent intent) people are likely to overestimate the risk of being victimised by terrorism and adjust their behaviour accordingly. As we have seen this adjustment may have adverse economic and physical consequences. In any case vicarious victims need reliable government information concerning their risk and avenues for them to lower their risk and to gain a sense of control concerning their own possibilities for diminishing the chances of renewed terrorist attacks.

This also implies that government warnings concerning terrorism should be used with caution. The research into terror management shows that continuous reminders

of terrorism frighten people and influence them in a variety of ways, not in the least as to their political preferences. If the threat level is vague and it is unclear what the behavioural implications of the warning are, it may be wise to reconsider them.

#### **3.4.3.2 Anger, Retribution and Forgiveness**

Like with victims in general, anger is the most frequent response of vicarious victims of terrorism to the act. These feelings of anger extend far beyond the actual perpetrators of the terrorist act, which in turn may lead to various, mostly unwanted, consequences. The nature of terrorist attacks often makes differences between cultures and ethnic groups salient and may lead to backlash activities against members of the same or even only similar ethnic groups as that of the perpetrators. Moreover, feelings of anger after terrorist attacks are associated with support for warlike activities.

The feelings of anger and associated need for retribution or revenge in the wider group of vicarious victims may therefore lead to additional victimisation. Apart from the moral objections that we may have against this, we would also suggest that allowing processes of vicarious retribution to go unchecked may well have detrimental consequences for the initial victims themselves and has the additional drawback of increasing support for the terrorist attackers within their ethnic group.

### **3.5 Concluding Observations**

This chapter set out to provide insight into the needs of victims of terrorism by placing them in the context of the more general needs of victims of crime. The two main European bodies developing international instruments for victims, the Council of Europe and the European Union, have differing opinions about the degree to which the needs of victims of terrorism resemble the needs of victims of crime and whether, by extension, instruments for victims of crime suffice for victims of terrorism. Where the European Union sets them aside by defining victims of terrorism as at least particularly vulnerable victims, the Council of Europe specifically states that victims of terrorism do not differ from victims of crime.

The results of the empirical studies in this chapter provide evidence for both points of view. In general it is clear that in many ways, for primary and secondary victims, victimisation by terrorism is *not* a fundamentally different experience than victimisation by other forms of violent crime. In both cases victims need information, should be treated respectfully and with recognition for their circumstances and have a qualified need for participation in their criminal justice cases. In both cases victims need to cope with their feelings of anxiety, post-traumatic stress and anger, want to receive compensation for the damages they suffered, have a need to be reassured concerning their safety, and be protected from further harm and secondary victimisation. Many of the instruments and procedures developed for victims of crime are equally important for victims of terrorism.



However, this does not imply that victimisation by terrorism is not different at all from victimisation by other forms of crime. The fact that victims of a terrorist act are victimised as a representative of a larger group – in an often political context – does have implications, in particular when it concerns mass victimisation. In any case it implies that acknowledging victims' suffering in these cases will entail recognition of the fact that they were victimised as a member of the larger target audience, rather than as individuals. In Chapter 6 we will return to this matter when we discuss the possibility of reparations for victims of terrorism. In addition, this acknowledgment may come in the form of a heroic portrayal of victims of terrorism by the mass media. However, for victims who bear some similarity to the perpetrators of terrorist acts, as is the case for instance for Muslims in the United States or United Kingdom, the political context may lead to a more negative societal response, as they may seem to be associated with the perpetrators. The political context also means that others, not directly implicated, will feel victimised by the terrorist act. The victimisation experience is therefore a less individual matter than it is in the context of crime, which has implications for the assistance of victims and also specifically for restorative justice approaches as will be shown in Chapter 7.

The impact of terrorist acts in general is larger than is the case for other forms of crime. Both the physical impact, in terms of casualties and fatalities and the psychological impact, for instance the chance of developing post-traumatic disorder, are, on average, larger. Moreover, in cases of mass victimisation by terrorism implementing measures to meet victims' needs requires additional attention. Providing emergency assistance and continuing assistance in these situations requires additional effort and much of Chapter 4 will be devoted to discussing an approach to the delivery of support and assistance in these situations. Similarly, reassurance of safety and participation in the criminal justice procedure has its additional complexities in these situations and the same is true for compensation issues, which is further compounded by the fact that recouping the damages from perpetrators or insurance providers is often more difficult in cases of terrorism. In Chapters 5 and VI we will return to these issues when we discuss access to and administration of justice and compensation.

The most striking difference between terrorism and ordinary crime becomes apparent in its audience. In terrorist acts, the primary and secondary victims serve as a means to victimise a wider group of so-called vicarious victims. This chapter has repeatedly shown that terrorism often succeeds in this goal and the consequences for this group of victims should be taken into account when considering policies for victims of terrorism. The mental health problems caused by large-scale attacks, or even by relatively small-scale attacks with peculiar features like the anthrax letters in the United States, extend far beyond the direct victims, with many people who are not in any way connected to the direct victims suffering from traumatic symptomatology or from symptoms of 'worrying well'. People also experience traumatic symptoms from merely viewing a mass casualty act of terrorism on television, with sensationalist reporting adding to the deleterious effects. Also government responses to the direct threat of terrorism may have the additional and unwanted consequence of instilling further fear within their own population and by



implication doing part of the terrorists' work for them. The sub-clinical levels of fear and anxiety are also important. The chances of terrorism happening are often very small, but the public's perception of this risk is markedly different in the aftermath of a terrorist act. Terrorist acts have all the features (dread risk, unknown risk and malevolent intent) that lead to a greatly exaggerated subjective experience of the risk of its occurrence. The fear instilled by terrorist acts leads to a whole number of economic, behavioural and political consequences in this wider group, which may outweigh on aggregate the consequences for the direct victims. Not only the consequences relating to fear and anxiety should be addressed. The public also experiences elevated levels of anger. This anger has consequences for the desired governmental response and the public's own actions. Anger with the attack is an important precursor of support for warlike activities. Moreover, processes of so-called vicarious retribution, in which members of the public strike back at people they perceive to be responsible by association with the terrorist acts, may lead to more innocent people being victimised in the aftermath of the attack. Addressing this wider societal anger in the aftermath of terrorist attacks may prevent further harm. Some strategies to address this will be discussed in Chapters 4 and 7 respectively, on continuing assistance and restorative justice.

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# Chapter 4

## Psycho-Social Assistance

Antony Pemberton

### 4.1 Introduction

In the previous chapters we addressed legislation for victims of terrorism and their needs. The following chapters will discuss specific interventions that relate to the needs of victims of terrorism. These chapters are divided according to the main headings of the CoE Guidelines for Victims of Terrorism, with Chapter 5 discussing access and administration of justice, Chapter 6 discussing compensation, Chapter 7 discussing restorative justice principles and practices. The current chapter focuses on emergency and continuing assistance.

The Guidelines for Victims of Terrorism state amongst others ‘in order to cover the immediate needs of the victims, states should ensure that *appropriate* (medical, psychological, social and material) emergency assistance is available free of charge to victims of terrorism.’ Similarly, ‘states should provide for *appropriate* continuing medical, psychological, social and material assistance for victims of terrorist acts.’ An appropriate response in our view is one that has a scientific evidence base and preferably has been shown in practice to reach the intended results. In this chapter we will discuss elements of such a response, in which we will focus on the psychological and social needs of victims of terrorism. Immediate medical and material assistance should be addressed in disaster aid plans which also apply to the situation of mass victimisation by terrorism, while longer term material assistance and compensation is the subject of Chapter 6.

This approach will specifically relate to victims of mass victimisation by terrorism. The reason for focusing on this is that for victims of small-scale terrorist attacks there is no or hardly any difference in the psycho-social response, with any differences falling within the realm of the individually tailored response that is

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A. Pemberton (✉)  
5000 LE Tilbug INTERVICT, University of Tilburg Netherlands  
e-mail: a.pemberton@uvt.nl

most appropriate for victims.<sup>1</sup> As the response to mass victimisation draws on interventions that have a strong evidence base for individual victimisation by crime as well, the relevant elements can of course be applied to the situation of small-scale terrorist attacks. This is particularly true of the individual level approach that is outlined in Section 4.4.2.

Many of the themes from the chapter on needs resound in this chapter. Paramount is the understanding that victims will react in very different ways to the same event. Some victims may need extensive support or even therapy, while others will be able to cope by themselves or with minimal help. Matching victims' exact needs with needed support is therefore a central task in the assistance response to victims of terrorism.

The approach to the psycho-social response to mass victimisation of terrorism is multilevel by nature.<sup>2</sup> On the micro-level there is the support, assistance and therapy for individual and possible victims. In Section 4.2 we will discuss a 'stepped care' approach that incorporates the current knowledge in psychology concerning the aid to victims of mass victimisation. The fact that mass victimisation terrorism affects larger segments of society is the focus of the next two subsections. In Section 4.3 we will discuss the meso-level. It will be shown that the impact of mass victimisation on communities, although this is a risk-factor for the development of psychological complaints, is also a resource for resilience, which ties in with victims' needs for social support, but also their desire to help each other. Finally, in Section 4.4 we will discuss the macro-level, the societal response. This will consist primarily of information and communication to the general public. As we have seen, information concerning the terrorist attack is a need for primary, secondary and tertiary victims alike; sufficient attention to the needs of direct victims in the communication with the general public will not only serve the interests of those victimised, but will also lead to less anxiety and anger with the so-called vicarious or tertiary victims. The approaches of the different levels intersect at various points. The relevance of including them all is that for the most effective results the response at the different levels should be in-sync. As already noted in Chapter 3 this is not necessarily the case. For example information from the national government concerning

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<sup>1</sup>E.g. Winkel, F.W. (1999). Repeat victimisation and trauma susceptibility: Prospective and longitudinal analyses. In: Van Dijk, J.J.M., van Kaam, R.G.H. & Wemmers, J-A.M. *Caring for Crime Victims*. Monsey, New York, Criminal Justice Press. and Winkel, F. W. (2002). *Slachtofferhulp bij hardnekkige klachten. Over visie, witte beren, stroop en tegenpolen*. Inaugural lecture, Free University Amsterdam.

<sup>2</sup>Gersons, B.P.R. (2001). Multilevel crisisintervention after disruption of communities by disaster, 17th annual meeting, *International Society of Traumatic Stress Studies*, New Orleans, 6–9 December 2001. Smeets, E.C. & De Ruijter, A. (2006). Community-based interventions. Working draft. Amsterdam, Impact. Gersons, B.P.R. (2007). Passing by or staying? Community-based interventions related to victims of terrorism. Paper presented at the OCSE High Level Meeting on Victims of Terrorism, Vienna, 14 September 2007.



terrorism may well incite fear in the direct victims and general public alike, thereby effectively counteracting efforts at the individual and community levels to reduce anxiety.

## 4.2 A Stepped Care Approach to Mass Victimisation of Terrorism

The central issue in delivering assistance to victims is related to the fact that where many and even most victims will either show resilience or recover of their own accord, others will develop severe complaints. As subtle personal differences and post-trauma factors may impact these differences it is not possible to say at a very early stage who will develop complaints and who will not. The challenge therefore is to find ways of matching services to victims' diverse needs.<sup>3</sup> In existing literature there is growing consensus that the use of 'stepped care' approach is needed. In this approach general supportive, non-intrusive, measures are combined with methods to ascertain who is in need of more extensive support and aid.<sup>4</sup> This is not only achieved by screening, triage and the like, by psycho-social workers, but also by ensuring that target populations are aware of the possibilities open to them and therefore have the opportunity to access them when they feel this is necessary or appropriate.

The stepped care approach consists of six components (see Ruzek et al. 2007): immediate emergency assistance/psychological first aid, screening and watchful waiting, survivor education, enhancement of social support, coping skills training and interventions for survivors experiencing significant problems. It goes beyond the scope of this report to discuss the approach in too much detail, the literature mentioned earlier will provide the reader with a more extensive comprehension of the concepts and strategies than may be offered here. We will discuss the steps in order. In addition, we will discuss some of the main constraints to full implementation of this approach that have been discussed in existing literature.

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<sup>3</sup>Ruzek, J.I., Maguen, S. & Litz, B.T. (2007). Evidence-based interventions for survivors of terrorism. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. & Zimbardo, P.G. (eds.) *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>4</sup>See the following overviews of the extensive research literature on this subject: Ruzek et al. (2007). Foa, E.B., Cahill, S.P., Boscarino, J.A. et al. (2005) Social, psychological, and psychiatric interventions following terrorist attacks: Recommendations for practice and research. *Neuropsychopharmacology*, 30, 1806–1817. Beutler, L.E., Reyes, G., Franco, Z. & Housley, J. (2007). The need for proficient mental health professionals in the study of terrorism. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. & Zimbardo, P.G. (eds.) *Psychology of Terrorism*, Oxford, Oxford University Press. National Institute for Clinical Excellence. (2005). Posttraumatic stress disorder. The management of PTSD in adults and children in primary and secondary care. Gaskell and the British Psychological Society. Downloaded from: <http://guidance.nice.org.uk/CG26/guidance/pdf/English/?template=download.aspx>.

### **4.2.1 Emergency Assistance/Psychological First Aid**

Recent reviews offer a large number of recommendations concerning the immediate aftermath of a terrorist attack.<sup>5</sup> In essence these recommendations can be summarised in five ‘commandments’. An emergency response to a mass terrorist attack should meet basic primary needs first, should help victims and survivors to resume normal life as quickly as possible, look on the population and the community as a resource rather than an added problem that needs to be managed, should provide clear and accurate information and should avoid some of the treatment ‘myths’ that surface repeatedly in the literature surrounding ongoing support to victims of crime in general, and victims of terrorism in particular. We will discuss these ‘commandments’ in order.

#### **4.2.1.1 Meeting Primary Needs**

As Miller stated,<sup>6</sup> in the direct aftermath of an attack physical care equals psychological care. It is of paramount importance to ensure basic survival; physical and safety needs must be met. The central objective should be to provide victims with safety, adequate shelter, immediate medical assistance, food and drink and to help them locate their loved ones. In this respect the reaction to a terrorist attack should closely mirror that of other large-scale disasters and advance disaster planning is a similar necessity. Likewise, ensuring sufficient hospital capacity, sufficient(ly) trained emergency personnel will be necessary to treat the medical problems of those directly afflicted. This is not a moot point, as research shows that a large-scale disaster involving many severely injured victims will even exceed the medical capacity of large proportions of Western societies (e.g. Rubinson et al. 2005). The added problem that the terrorist attack is not only a disaster, but an intentional crime as well, does mean that police and emergency personnel may not only be called on to coordinate and manage activities on site, but also to secure law and order where necessary. After the first incident the attack may well not be over.

#### **4.2.1.2 View the Population as a Resource**

The mistaken underlying assumption in disaster response is often that the population will need to be managed as, due to their panic reaction, they should not be expected to act rationally and in their own interest. This is at odds, though, with the actual reaction to terrorist attacks and other disasters by those who experience them.

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<sup>5</sup>Foa et al. (2005); Beutler et al. 2007; Brandon, S.E. & Silke, A.P. (2007). Near- and long-term psychological effects of exposure to terrorist attacks. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. & Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>6</sup>Miller, L. (2002). Psychological interventions for terroristic trauma: symptoms, syndromes and treatment. *Psychotherapy: Theory/Research/Practice/Training*, 39(4), 283–296.

A clear and vivid example is the reaction of those in the direct vicinity of the World Trade Center in New York, as the images of New Yorkers walking away from the attack site in a calm and orderly fashion will be familiar to us all.

Even when direct victims do exhibit panic reactions – which is often the case – like after 9/11, where 17% experienced a panic attack,<sup>7</sup> the group will normally act quite rationally in the aftermath of a terrorist attack.<sup>8</sup> Often before emergency personnel arrive, those experiencing the attack will have set up an informal organisational structure of their own. Natural ‘leaders’ will emerge swiftly and in certain other situations the organisational structure already in place, like a business or school, will provide the blueprint for natural organisation by victims. Tapping into these natural processes will allow the formal emergency response to be more flexibly adapted to the local situation and will also give the direct victims a sense of self-efficacy, that will be absent in the case where their own efforts are sidetracked in favour of a standardised formal professional response.

Apart from being a more effective immediate response this approach has the added benefit of establishing structures in the affected population that can also serve the more long-term response, while the sense of self-efficacy is a protective factor for the development of psychological problems in itself.<sup>9</sup> The connection that is established between emergency personnel and the targeted population can also be used for follow-up help and support.

Drawing on the community and the organisational structures in place signals the need to include the notions of community-based support and intervention systems in the advance preparation for the attacks. This entails the inclusion of businesses and schools. In addition, in Section 4.3.3 we will discuss the importance of drawing on community leaders for communication with the victimised community.<sup>10</sup>

#### 4.2.1.3 Accurate and Swift Information

There is an obvious need for information in the immediate aftermath of an attack.<sup>11</sup> Two types of information are of the essence. In the first place of course there is information as to the extent and the type of attack. What hit us? Will it happen

<sup>7</sup>Boscarino, J.A., Galea, S., Adams, R.E. et al. (2004). Mental health service and psychiatric medication use following the terrorist attacks in New York City. *Psychiatric Services* 55, 274–283.

<sup>8</sup>Gal R., Jones F.D. (1995). A psychological model of combat stress. In: Jones F.D., Sparacino LR, Wilcox VL, et al. (eds.). *War Psychiatry*. Office of Surgeon General, Walter Reed Army Institute of Research: Washington, DC.

<sup>9</sup>See for the importance of self-efficacy in general: Bandura A. (1997) *Self-Efficacy: The Exercise of Control*. New York: Freeman and in particular in the situation of victims of terrorism Schaap, I. A. Van Galen, F.M. et al. (2005). Resilience. Impact. Amsterdam. [http://www.impact-kenniscentrum.nl/download/file\\_1163776605.pdf](http://www.impact-kenniscentrum.nl/download/file_1163776605.pdf).

<sup>10</sup>Laraque, D., Boscarino, J.A., Battista, A., et al. (2004). Reactions and needs of tri-state area pediatricians following the events of September 11: implications for children’s mental health services. *Pediatrics* 113, 1357–1366.

<sup>11</sup>Foa et al. 2005.

again? In the second place the information needs to be seconded by accurate information that serves as immediate practical guidance for those in the fray of the attack site and that suggests specific actions.

In the dissemination of information the local community plays a central role. As much of the information is needed in real-time and on the spot of the attack, local media, schools, community centers and businesses need to be enlisted in the information effort. In particular steps need to be taken almost immediately for the development of Information and Advice Centers (IAC) (see also Sections 4.3.3 and 4.3.4) which should provide information to those directly affected as well as serve as a public center for secondary and tertiary victims. The IAC will develop into a front office for service delivery.<sup>12</sup>

#### 4.2.1.4 Resuming Normal Life

Although the possibilities for this may be limited, especially in cases where the attack has caused massive disruption of the infrastructure, the targeted population should be supported in resuming their normal routines as soon as possible. That first entails encouraging people to get sufficient rest. The stress associated with the attack, coupled with the need and wish of many people to play an active role in the assistance effort, can easily lead to exhaustion. For those who just experienced a massive traumatic experience, sufficient rest furthermore may protect from psychological complaints in the longer run. In the slightly longer run, victims should be encouraged to return to work and school. To aid the return to normality victims need psycho-education that explains their reactions to the traumatic experience and assures them that distress is a normal reaction.<sup>13</sup> In addition, victims need reassurance of their strengths, as well as avenues to assert their own self-efficacy, as suggested above.

#### 4.2.1.5 Avoid Myths

Unfortunately a number of treatment myths are associated with the immediate psychological support of victims of large-scale disasters and attacks. Current evidence from well-conducted trials and research debunks these myths and with increasing certainty it is possible to advise not to follow them.<sup>14</sup> Four treatment myths are particularly pervasive. The first two concern the traumatic consequences

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<sup>12</sup>Gersons 2001; Smeets and De Ruijter 2006.

<sup>13</sup>Litz, B. T. & Gray, M.J. (2004). Early intervention for trauma in adults. In B. Litz (ed.). *Early Intervention for Trauma and Traumatic Loss*, New York, Guildford.

<sup>14</sup>Beutler et al. 2007.

of experiencing disaster and the necessity of early clinical psychological intervention to prevent trauma. As we have already seen in Chapter 3 most victims, even those who experience severe trauma, do not develop psychological complaints as a consequence. In other words, people are mostly resilient towards the consequences of trauma (Bonanno 2004).<sup>15</sup> This does not mean that these victims will not be severely distressed or anxious, but these reactions are a normal and healthy reaction to the experience they have been through and not signs of psychological disorder. Moreover and secondly, a large part of the support that victims need in the immediate aftermath of a disaster should not be offered by professional psychologists, but rather by the surroundings of victims themselves. The role of mental health professionals lies preferably in the stimulation of these processes. There is no current evidence to support claims that victims should receive professional psychological interventions within the first days of the attack. Instead an overkill of professional supporters at the site of a disaster may well stand in the way of processes in which victims regain a sense of self-efficacy and control. Mental health professionals can play a vital and important role in the immediate aftermath, in coaching, offering advice, supporting relief workers and many other ways, but not through the offering of psychological interventions.

The third myth relates to the practice of critical incidents stress debriefing (CISD), which is currently the most widely offered intervention to victims in the direct aftermath of a traumatic experience. It involves one session, which usually occurs one or a few days after the event (within 72 h), in which – either in a group or individually – victims are encouraged to describe their thoughts, feelings and behaviour during the event. This emotional ventilation is coupled with psycho-education. Although the developers of CISD, Mitchell and Everly, suggest that positive protective effects of debriefing on the development of traumatic complaints are well-established, the contrary is true.<sup>16</sup> Both meta-analyses by Van Emmerik and colleagues,<sup>17</sup> McNally and colleagues<sup>18</sup> and the Cochrane review by Rose and colleagues<sup>19</sup> suggest that psychological debriefing is not effective in preventing traumatic complaints and a recent randomised controlled trial by Sijbrandij and her colleagues<sup>20</sup> (2006) shows that for a subsection it is counterproductive.

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<sup>15</sup> Bonanno, G. A. (2004). Loss, trauma, and human resilience: Have we underestimated the human capacity to thrive after extremely aversive events? *American Psychologist*, 59, 20–28.

<sup>16</sup> Quoted in Beutler et al. (2007).

<sup>17</sup> Van Emmerik, A. A., Kamphuis, J. H., Hulsbosch, A.M., & Emmelkamp, P.M.G.(2002). Single session. debriefing after psychological trauma: a meta analysis. *Lancet*, 360, 766–771.

<sup>18</sup> McNally, R. J., Bryant, R. A. & Ehlers, A. (2003). Does early psychological intervention promote recovery from posttraumatic stress? *Psychological Science in the Public Interest*, 4, 45–79.

<sup>19</sup> Rose, S., Bisson, J. & Wessely, S. (2001). Psychological debriefing for preventing post traumatic stress disorder (PTSD) (Cochrane review). Cochrane library, 3. Oxford University Press, Update Software.

<sup>20</sup> Sijbrandij, M., Olf, M., Reitsma, J.B., Carlier, I.V.E., & Gersons, B.P.R. (2006). Emotional or educational debriefing after psychological trauma. *British Journal of Psychiatry*, 189, 150–155.

Victims suffering from severe hyperarousal symptoms fare considerably worse in the debriefing group than in the control group. Except for the poor results the base assumptions of debriefing fly in the face of current theories of the development and protective factors toward PTSD.<sup>21</sup> Moreover, Gersons suggests that the use of debriefing may have a number of additional drawbacks.<sup>22</sup> In the first place it may wrongly suggest that all that is needed to prevent trauma is a one-session meeting, which may have the added detrimental effect of preventing the development of more full-blown and effective approaches to trauma. On the other hand it may suggest that this is all psychology has to offer to victims,<sup>23</sup> while this is definitely not the case.

A final point is related to the theoretical background. Many people are under the impression that failure to talk the experience through in the aftermath of trauma is a risk factor, with CISD explicitly stimulating people to return to the experience and vent their emotions about what happened. However, while this may be natural and positive for some, for others it may be counterproductive. As McNally et al. suggest it is not uncommon for people to experience emotional numbing or dissociation in the aftermath of a disaster, as people may need to avoid reliving the experience immediately after the disaster.<sup>24</sup> This is not a maladaptive coping effort, as it is not associated with a higher chance of developing complaints, nor is it additionally protective to attempt to entice those victims who do react in this way to discuss their experiences and emotionally vent them in the immediate aftermath of the event.

## 4.2.2 *Screening and Watchful Waiting*

### 4.2.2.1 **Who Needs Help**

After the immediate assistance phase the most pressing question is how to reach those who are in need of further aid. Most people will not need additional psychological treatment and resources are limited, which also implies that weighing options therefore should include reviewing their comparative evidence base. However, it is no sinecure to ascertain who is in need of further help. Early warning signals of the

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<sup>21</sup> Foa, E.B. and Rothbaum, B.O. (1998). Treating the Trauma of Rape: Cognitive-Behavioral Therapy for PTSD. New York, Guilford. and Ehlers, A. & Clark, D.M. (2000). A cognitive model of posttraumatic stress disorder. *Behavior Research and Therapy*, 38, 319–345.

<sup>22</sup> Gersons 2007.

<sup>23</sup> A mistake famously made by well-known victimologist Ezzat Fattah, see Fattah, E.A. (1999). From a handful of dollars to tea and sympathy: The sad history of victim assistance. In van Dijk, J.J.M., van Kaam, R.G.H. & Wemmers J.-A.M. (eds.). *Caring for Crime Victims* (pp. 187–206). Monsey, NY: Criminal Justice Press.

<sup>24</sup> See McNally et al. 2003.

development of later problems are yet to be found. Beutler and colleagues suggest some gross indicators of risk.<sup>25</sup> Based upon known risk and protective factors they suggest an initial focus on those victims who have suffered a particularly gruesome experience: severe exposure and destruction or traumatic loss; experience of traumatic events or a current or prior history of mental health treatment and a lack of social support, not having close family and friends to talk to. The earlier efforts to establish systems of social support in communities should prioritise inclusiveness. Efforts should be made to ascertain those members of the community who are alone, as they may be the ones for whom social support or follow-up help may be particularly important.

The additional risks for children and ethnic minorities (see Chapter 3) suggest that materials should be available in a variety of languages, but also specifically prepared for children. In addition, organisations that reach these groups, like schools, organisations of ethnic minorities and/or religious organisations should be included in the relief effort.<sup>26</sup>

#### 4.2.2.2 Watchful Waiting

The separation of those who do and those who do not need follow-up is ongoing throughout the aftermath of the attack. It is therefore important that a system of outreaching contact is established. Preferably victims should be recontacted at various points in time in a non-stigmatising fashion. A combination of probes into signs of traumatic symptoms with other information is an example of good practice. Moreover, written material about effective ways of coping can be provided to direct victims. Those offering ongoing support to victims in various ways should be made aware of signs of psychological problems, so that they can ensure that victims are aware of the possibilities for referral if they should so wish. This watchful waiting is particularly relevant because symptoms that may be established later on in the process, after two weeks to a month, can serve as clear warning signs of the development of psychological problems.<sup>27</sup>

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<sup>25</sup> Beutler et al. 2007.

<sup>26</sup> See also Stein, B.D. Tanielian, T. L. Vaiana, M.E. et al. (2003), The role of schools in meeting community needs during bioterrorism. *Biosecurity and bioterrorism: biodefense strategy, practice and science*, 1, 273–281.

<sup>27</sup> See for example Litz and Gray (2004). Wohlfarth, T.D., Winkel, F.W. & Van den Brink, W. (2002). Identifying crime victims who are at high risk for PTSD. Developing a practical referral instrument. *Acta Psychiatrica Scandinavica*, 105, 451–460. Winkel, F.W., Wohlfarth, T. & Baluw, E. (2004). Police referral to Victim Support: The predictive value of the RISK (10) Screening instrument. *Crisis: The Journal of Intervention and Suicide Prevention*, 25, 118–127. Brewin, C.R., Rose, S., Andrews, B. et al. (2002). Brief screening instrument for PTSD. *British Journal of Psychiatry*, 181, 158–162.



### **4.2.3 Public Education**

#### **4.2.3.1 Reaching Those Who Need Help**

Like the direct contact with primary victims of the attack, use of (local) media and the Internet may be seen as an attempt to reach those who are in need of help. Information should be made available that supports survivors in identifying the circumstances under which they should consider seeking assistance. In addition, it should show victims where and how they can access follow-up services. Finally, it should increase awareness in others, like primary health care physicians, but also those working in schools, businesses and the like as to the symptoms of PTSD and associated disorders and how to make referrals.

#### **4.2.3.2 Psycho-Education**

In addition to reaching those who need help media may also serve as avenues for stimulating self-help and protective behaviour. In the first place the message that distress and associated symptoms are a normal post-trauma response that only amounts to a disorder and needs treatment under certain circumstances should be re-emphasised. Not only does this provide reassurance to those experiencing these often unsettling symptoms, it may well assist in protecting victims from thoughts associated with the onset of PTSD. Ehlers and Clark show that seeing post-traumatic responses as signs of the onset of madness are associated with development of PTSD.<sup>28</sup>

Furthermore, advice could be given to the public to seek out each other and keep an eye on those in the community without much social support. Not only does this help prevent people from developing psychological problems, but it also makes access to support and assistance when this is the case easier and matches the general feeling of wanting to assist others that is prevalent in the aftermath of a large-scale attack.

Finally, it should be stressed that it is important to limit exposure, in particular of children and young people to repeated reminders of the event. If children are already anxious, limits on the amount of time spent watching television coverage of the event may well prevent (re)traumatisation.

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<sup>28</sup>See Ehlers and Clark 2000.

#### 4.2.4 *Enhancement of Social Support*

At various points in the previous subsections we have stressed the importance of social support, which is the strongest post-event protective factor.<sup>29</sup> Moreover, the immediate social surroundings are the first place people will turn to for help in the aftermath of trauma.<sup>30</sup> Developing the potential of the community itself to provide the assistance needed and to discern when help of professional sources needs to be enlisted, are important factors. As stressed repeatedly it is important to work with natural supportive networks. Victims should be connected to each other, and self-help groups should be facilitated. Those who are socially isolated should be identified and, if appropriate, steps should be taken to reach out to them so that they can access the assistance they need. Finally, as we will discuss in Section 4.4.3 a set of community-based interventions should be utilised, to strengthen the resilience of the community as a whole.

#### 4.2.5 *Coping Skills Training*

So far most of the elements of stepped care have assumed that mental health workers only spend little time with direct victims, either in the direct aftermath or recontacting them a short while after the event to provide them with follow-up information. In the case that there are more contact moments with those experiencing significant post-event problems, Ruzek and colleagues suggest providing victims with a relatively simple coping skills training.<sup>31</sup> Such guidance can help victims learn how to take steps to support their own recovery. This education can consist of anxiety management (breathing training and relaxation), challenging maladaptive thoughts, anger management and problem-solving skills. The results of this approach are yet to be systematically assessed, although a randomised controlled trial of elements of this approach in Israel did result in a marked reduction in anxiety.<sup>32</sup> This approach furthermore is theoretically well grounded and matches the goals and methods of the other elements of the stepped care approach.

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<sup>29</sup> Brewin, C.R., Andrews, B. & Valentine, J. D. (2000). Meta-analysis of risk factors for posttraumatic stress disorder in trauma-exposed adults. *Journal of Consulting and Clinical Psychology*, 69, 748–766 and Kaniasty K. (2005). Social support and traumatic stress. *PTSD Research Quarterly*, 16, 1–8.

<sup>30</sup> Luce, A. & Firth-Cozens, J. (2002). Effects of the Omagh bombing on medical staff working in the local NHS trust: A longitudinal survey. *Hospital Medicine*, 63, 44–47.

<sup>31</sup> Ruzek et al. 2007. See also Somer, E., Tamir, E., Maguen, S. et al. (2005). Brief cognitive-behavioral phone-based intervention targeting anxiety about the threat of attack: a pilot study. *Behaviour Research and Therapy*, 43, 669–679.

<sup>32</sup> See Somer et al. (2005).

## 4.2.6 *Interventions for Victims Experiencing Significant Problems*

### 4.2.6.1 **Effective Treatments**

The results of scientific reviews,<sup>33</sup> randomised controlled trials<sup>34</sup> and clinical guidelines<sup>35</sup> all suggest that effective ways of treating both acute and chronic PTSD are prolonged exposure<sup>36</sup> and cognitive behavioural therapy.<sup>37</sup> Prolonged exposure (PE) is derived from approaches to phobia and involves a number of sessions in which the client is confronted in a graduated fashion to reminders of the traumatic event or similar situations. Cognitive behavioural therapy (CBT) focuses on the maladaptive thoughts that are associated with the onset with PTSD, but involves elements of exposure as well.<sup>38</sup> Victims suffering from acute or chronic PTSD stand to benefit considerably from the use of these therapies. Moreover Duffy and colleagues recently revealed the efficacy of CBT in the case of victims of terrorism in Northern Ireland.<sup>39</sup>

### 4.2.6.2 **Promising or Developing Therapies**

In addition to the therapies that have considerable empirical support, there are a number of approaches that show great promise and may well be considered effective after additional RCT's have been conducted. Both have their own advantages if they were shown to be as effective as PE and CBT. First there is Eye Movement Desensitization and Reprocessing<sup>40</sup> (EMDR) which has shown to be effective in the

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<sup>33</sup> Beutler et al. 2007; Foa et al. 2005.

<sup>34</sup> For instance Ehlers, A. Clark, D.M., Hackmann, A. et al. (2005). Cognitive therapy for post-traumatic stress disorder: development and evaluation. *Behaviour Research and Therapy*, 43(4), 413–431.

<sup>35</sup> See NICE 2005. In addition, Institutes Impact and Trimbos are preparing a guideline in the Netherlands that will contain similar advice.

<sup>36</sup> Foa and Rothbaum 1998.

<sup>37</sup> Harvey, A.G., Bryant, R.A., & Tarrier, N. (2003). Cognitive behaviour therapy for posttraumatic stress disorder. *Clinical Psychology Review*, 23, 501–522.

<sup>38</sup> See Harvey et al. (2003). Litz, B.T, Bryant, R.A. & Adler, A.B. (2002). Early interventions for trauma. Current status and future directions. *Clinical Psychology: Science and Practice*, 9, 112–134.

<sup>39</sup> Duffy, M., Gillespie, K. & Clark, D.M. (2007). Post-traumatic stress disorder in the context of terrorism and other civil conflict in Northern Ireland: randomised controlled trial. *British Medical Journal*, 11 May 2007, doi: 10.1136/ bmj.39021.846852.BE.

<sup>40</sup> Shapiro, F. (1995). *Eye Movement Desensitization and Reprocessing: Basic Principles, Protocols, and Procedures*, New York, Guilford Press.

treatment of chronic PTSD<sup>41</sup> but not yet in the treatment of acute PTSD,<sup>42</sup> although questions are raised whether this is not merely due to the elements it has in common with Prolonged Exposure.<sup>43</sup> Structured writing therapy is similar to cognitive behavioural therapy,<sup>44</sup> although the mere fact that it utilises written techniques as a part of the therapy, allows its adaptation to the Internet.<sup>45</sup> This may lower the barrier for accessing support and enlarges the geographical reach of a given programme. Finally, comparable therapies for complicated grief are still in development. At this moment there is accumulating evidence for a cognitive approach to complicated grief<sup>46</sup>, but further trials will be needed before this may be said to reach the level of the interventions for PTSD.

### 4.2.7 Constraints and Complications

The implementation of the stepped care approach in the aftermath of a terrorist attack may not be straightforward. Ruzek and colleagues discuss a number of obstacles.<sup>47</sup>

First there are a number of obstacles that apply to more general services for victims of crime. For example the evidence-based services discussed in the previous subsections may not be available to the extent necessary to deal with a mass victimisation event or even individual victims of crime or other traumatic events. The development of treatment that can be administered through the Internet may be part of the solution to this problem as this will make it easier to develop services with full geographical coverage, without the added costs. However, even in these

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<sup>41</sup> See NICE (2005), Seidler, G.H. & Wagner, F.E. (2006) *Comparing the efficacy of EMDR and trauma-focused cognitive-behavioral therapy in the treatment of PTSD: a meta-analytic study*, *Psychological medicine*, 36, 1515–1522.

<sup>42</sup> Silver, S.M., Rogers, S., Knipe, J. et al. (2005). EMDR therapy following the 9/11 terrorist attacks, *International Journal of Stress Management*, 12, 29–42.

<sup>43</sup> Davidson, P. R., & Parker, K. C. H. (2001). Eye movement desensitization and reprocessing (EMDR): A meta-analysis. *Journal of Consulting and Clinical Psychology*, 69, 305–316.

<sup>44</sup> See Van Emmerik, A.A.P. (2005). Prevention and treatment of chronic posttraumatic stress disorder. Unpublished PhD-thesis Leiden University.

<sup>45</sup> See the 'Interapy'-program, for example Lange A., Rietdijk, D. Hudcovicova, M. et al. (2003). Interapy. A controlled randomized trial of the standardised treatment of posttraumatic stress through the Internet. *Journal of Consulting and Clinical Psychology*, 71, 901–909.

<sup>46</sup> Shear, M.K., Frank, E., Houck, P.R. & Reynolds C.F. III (2005). Treatment of complicated grief. A randomized controlled trial. *Journal of the American Medical Association*, 293, 2601–2608. Boelen, P.A., van den Hout, M.A. & van den Bout, J. (2006). A cognitive-behavioral conceptualization of complicated grief. *Clinical Psychology: Science and Practice*, 13, 109–128. Ehlers, A. (2006). Understanding and treating complicated grief. What can we learn from posttraumatic stress disorder? *Clinical Psychology: Science and Practice*, 13, 135–140.

<sup>47</sup> Ruzek et al. 2007.

cases, advance planning for terrorist emergencies and adequate services for victims of crime will entail investing in evidence-based treatment in many cases.

Even when treatment is available many victims for whom treatment would be helpful may choose not to use it, due to the stigma that surrounds therapeutic approaches. In part due to the unfamiliarity with modern psychological approaches, many people who would benefit from psychological support do not access available mental health care.<sup>48</sup> Finally the interaction between psycho-social assistance and the legal system often presents difficulties, in part due to the unfamiliarity of those working in both systems to the practices and procedures of the other.<sup>49</sup>

Specific for the aftermath of a large-scale terrorist attack there are a number of additional considerations. First of all there is the context of ongoing threat, which we discussed in Chapter 3. The governmental response to this ongoing threat and the communication surrounding this response may well be ill-suited to the needs of victims in the aftermath of an offence. In Section 4.4.3 we will discuss a number of possible avenues for reducing this counterproductive effect, but even when governments follow this advice it is very likely that others, be they political or media actors will disseminate messages that will counteract the ongoing psychological relief effort. In addition, this restricts the possibilities to prevent outbreaks of OMUS in the general population, which may be achieved by realistic, scientific information concerning symptoms and probabilities, rather than sensationalist reports about individual cases or possibilities.

### 4.3 Community-Based Interventions

A recent EU-funded project into an appropriate psycho-social response to terrorist attacks has resulted in the development of a plan for the provision of community-based interventions.<sup>50</sup> This work presents the state-of-the-art knowledge in the organisation of a psycho-social relief effort after a large-scale terrorist attack. It draws primarily on the experience in the UK, the Netherlands and the United States, but the general phrasing does allow its usage in a far wider set of countries. Nevertheless it should be stressed that various elements of the approach may need to be adapted to local realities. In any case the blueprint for community-based interventions should be developed in advance. We will provide a summary of the

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<sup>48</sup> See Winkel (2002) for victims in general and Smith, D.W., Kilpatrick, D.G. Falsetti, S.A. (2002). Postterrorism services for victims and surviving family members: Lessons from Pan Am 103, *Cognitive and Behavioral Practice*, 9, 280–286. and Lee, A., Isaac, M. & Janca, A. (2002). Post-traumatic stress disorder and terrorism. *Current Opinion in Psychiatry*, 15(6), 633–637, for victims of terrorism in particular.

<sup>49</sup> See Herman, J.L. (2003). The mental health of crime victims: impact of legal intervention. *Journal of Traumatic Stress*, 16(2), 159–166.

<sup>50</sup> See Smeets and de Ruijter 2006.

main elements of this approach; the Information and Advice Centers; the support of relief workers; community-based communication (see Sections 4.3.1 through 4.3.3); the reinforcement of community-based initiatives and the use of health research in turn.

### ***4.3.1 One-Stop Shop: Information and Advice Centers***

Central to the community-based response is the development of Information and Advice Centers (IAC) in the immediate aftermath of an attack. An IAC is a central place where victims, surviving relatives, relief workers and others involved can obtain answers to their questions arising out of the attack. It consists of a front-office where victims are received and a back-office where various supporting organisations may be found.

The tasks and functions of the IAC evolve in the aftermath of an attack. In the immediate short term it primarily provides information and advice to those directly affected, to those working in the emergency relief effort and the authorities. Furthermore it facilitates access to support processes and coordinates relief help, the collection of disaster related data, either for information purposes or future analysis and refers those in need of more extensive help. The IAC in other words plays a vital role in delivering the stepped care, discussed under Section 4.2. In the following sections we will discuss various aspects of these processes in more detail.

In the medium term the back-office may be devolved back to the organisations initially included in the center and the IAC functions primarily as a front-office for them. Both the information (especially important in the case of missing persons) and referral functions remain and additional tasks may be included. In the medium term legal procedures may commence and the IAC can play a role in coordinating and facilitating the activities to the benefit of victims in both criminal and civil procedures. The IAC can stimulate the development of self-help groups of those affected and facilitate their functioning.

It should be expected that the IAC, definitely in the case of a disaster of extensive magnitude, will exist – in a limited form – for a number of years. This will depend on community needs and for example the duration of legal processes.

### ***4.3.2 Supporting Relief Workers: Both Professionals and Volunteers***

Luckily mass disasters are extremely rare events and mass terrorist attacks even more so. For those providing support and relief to the affected population this rarity does mean, however, that without guidance the unfamiliarity with the phenomenon may pose a risk for adequate service delivery, but also for relief workers themselves.

In the first place, this implies that advance planning for relief efforts should foresee in back-up guidance and advice systems. The relief workers should be able to fall back on expert and experienced practitioners at the IAC for practical advice, support and coaching about the situations that confront them. Moreover, those conducting the relief effort will have a continuous need for relevant information about the attack and combining both information functions will make for a more effective and efficient service delivery.

In the second place, although relief workers (victim) support personnel and the like are accustomed to dealing with victimisation, the severity and extent of the impact of a mass terrorist attack may overwhelm even the most experienced of them. Guarding relief workers' own well-being and preventing secondary traumatisation or compassion fatigue should therefore be incorporated into the advance disaster planning.<sup>51</sup> The aforementioned coaching and support functions additionally serve as protective factors and should include advice on prevention of compassion fatigue, which most importantly includes appropriate scheduling of relief workers, as lack of rest is an important predictor of the development of compassion fatigue.

### ***4.3.3 Reinforcing and Stimulating Activities of Networks in the Community***

The activities concerning the development and reinforcement of social support also evolve during time. In the immediate aftermath of a terrorist attack the most pressing concern for victims is to connect to their loved ones, their family and closest friends. The IAC focuses on connecting victims with each other and can serve as a meeting point for victims to meet each other. In the slightly longer term the IAC should take steps to compensate for disappeared social organisations and the gaps in support that may result as a consequence. An IAC can achieve this in part by providing an opportunity for victims and affected communities to reconnect in itself but also by including community members in the discussion on how to ascertain what gaps there are and in what ways they should be addressed. In addition, the IAC should provide emotional support for those who need it, particularly for some unfortunately inevitable tasks that a mass victimisation disaster necessitates, like identifying deceased family. Finally the IAC should stimulate a gradual transition from the so-called 'honeymoon' stage, in which everyone is willing to help each other, to normality.

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<sup>51</sup> In which support workers start demonstrating traumatic symptoms themselves, See Figley, C.R. (ed.), *Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those Who Treat the Traumatized*, New York, Brunner/Mazel.



In the medium term a large-scale attack will lead to a decrease in social support.<sup>52</sup> The damages to social structures and property as well have a negative impact on social activities in the affected community. Moreover, as we have already discussed in the case of children, socially stressed or traumatised people may well negatively affect each other at a time when they need each other most. Finally, as we have stressed at various points, there is the possible divisiveness between various ethnic and cultural groups, in particular when those resembling the perpetrators are also members of a local community.

Smeets and de Ruijter therefore suggest that the IAC should actively stimulate group cohesiveness rituals concerning grieving as well as other social activities. In particular the community should be included in its own rebuilding. Furthermore supporting self-help and pressure groups should be stimulated.<sup>53</sup> Both the rituals and support groups will often be important in the long term as well. Memorials and similar activities may occur until many years after the event.

#### **4.3.4 Health Research**

The impact and the long-lasting consequences of a large-scale attack or disaster, coupled with both the relative dearth of empirical findings and the necessity to adapt general approaches to local situations stress the importance of undertaking research in affected communities. This health research should commence in the immediate aftermath of the event and provide an actual picture of the (mental) health needs in the affected population. This research will have to be repeated in the course of the aftermath as the conditions will change over time, and research can provide important follow-up information. Providing accurate information will moreover counterbalance the tendency for sensationalist reporting and media speculation that often occurs in the aftermath of a terrorist attack.

### **4.4 Information and Communication**

In Chapter 3 various instances of the importance and consequences of information and communication for primary and secondary victims were discussed. The following central points were raised:

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<sup>52</sup>Kaniasty, K. & Norris, F. (2004). Social support in the aftermath of disasters, catastrophes, and acts of terrorism: Altruistic, overwhelmed, uncertain, antagonistic, and patriotic communities. In: Ursano R., Norwood A. & Fullerton C. (eds.). *Bioterrorism: Psychological and Public Health Interventions*. Cambridge, Cambridge University Press.

<sup>53</sup>See also Paez, D., Besabe, N. et al. (2007) Social Sharing, Participation in Demonstrations, Emotional Climate, and Coping with Collective Violence After the March 11th Madrid Bombings, *Journal of Social Issues*, 63(2), 323–337.

- *Information is a basic need for victims.* In the protocols for victims of crime receiving information about the ongoing criminal justice procedure is defined as a right for victims. Likewise for victims of terrorism information concerning their rights and in this eventuality the court case is of great importance. Beyond the criminal justice system victims need information about the opportunities for receiving assistance and support. The latter is not only a need for primary and secondary victims but for tertiary victims as well. Furthermore many victims will need to know the truth concerning the events. What happened and for what reason are questions they will want to have answered, whether or not a trial takes place. In the case of CBRNE-attack in addition, (potential) victims will need to know whether they have been victimised, what steps they can take to prevent victimisation and what they should do once they have become victimised.
- *Information and communication about terrorism is central to terrorist objectives.* A central feature of terrorism is that it uses violence against its direct targets to influence a wider set of indirect targets. This means that communication concerning the terrorist attack is a vital element of terrorism. Without communication about the attack the wider group would not be influenced. It is in the terrorists' interest therefore to receive as much media attention as possible and terrorist strategies are increasingly shaped towards this goal.
- *Communication and the resulting fear and anger concerning terrorism may be more damaging than the act itself.* Moreover, much of the damage caused by terrorist attacks is not caused by the attack itself, but by the way the public reacts to communication (either government or media) concerning the attack. Sensationalist reporting and intrusive media approaches may have negative consequences for both direct and vicarious victims. Moreover, in Chapter 3 we saw that fear of terrorism may well prove to be more damaging financially (and in certain instances even physically or psychologically) than terrorism itself. In addition, we discussed instances of government information that lead to more rather than less fear and anxiety concerning terrorism. Finally, we showed that processes of vicarious retribution may lead to further victimisation of those who are seen to be similar to terrorists.

This section focuses on government information concerning terrorism, towards both direct victims, and the so-called tertiary or vicarious victims which in this case is synonymous to the information for the general public. An important consideration is that the government information to the general public also has an impact on the direct victims of terrorism. A set of general recommendations will be offered, which will also consider in brief the manner in which the wider context of media attention to terrorist acts may be approached.

Of course government information is not the only avenue, or often even the most important avenue of information that reaches victims. The mass media and in particular the televised media are of great importance in this respect.<sup>54</sup>

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<sup>54</sup>E.g. Crelinsten (1997).

The suggestions in this section strive to obtain a set of policy objectives. In the first place their implementation will lead to less rather than more fear of terrorism, in part by aiming to increase actual and perceived manageability, meaningfulness and comprehensibility of the terrorist attack. Providing information should be part of a counterterrorist strategy, not only by enlisting the population to prevent terrorist attacks, but also because an effective information strategy will minimise the spin-off effects caused by fear of terrorism. Second, information should counter tendencies for vicarious retribution. By specifically focusing on recommendations relating to this construct and intergroup theory in general, information can be helpful in preventing backlash victimisation. Finally, information should help victims and potential victims to take steps in accessing appropriate assistance and support, in either a legal or a psychological sense, and offer the public avenues to help or protect themselves.

#### 4.4.1 *Combating Fear and Anxiety*

Surrounding terrorism there is likely to be a mass of government information in response to the priority of and the need for information in the general public. However, as McDermott and Zimbardo state governments run the real risk of doing part of the terrorists' work for them, if they are not mindful of the consequences communication concerning terrorism may have.<sup>55</sup> This is the case if the main consequence of government information concerning terrorism is enhanced fear of terrorism. McDermott and Zimbardo and others<sup>56</sup> discuss a number of recommendations by which governments can balance the need for information with the concern for inciting fear and anxiety in the general public and in direct victims of terrorism in particular. Specifically governments should:

- *Provide scientifically credible risk information that anticipates the needs of special populations.* Due to inherent features of terrorism (i.e. dread risk, unknown risk and malevolent intent) people are prone to (severely) overestimate the likelihood and severity of terrorist attacks. Governments therefore do not

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<sup>55</sup> McDermott, R. & Zimbardo, P.G. (2007). The psychological consequences of terrorist alerts. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. & Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>56</sup> Foa et al. 2005; Crelinsten 1997; Boscarino, J.A., Figley, C.R., Adams, R.E. (2003). Fear of terrorism in New York after the September 11 terrorist attacks: implications for emergency mental health and preparedness. *International Journal of Emergency Mental Health*, 5, 199–209.; Breckenridge, J.N. & Zimbardo, P.G. (2007). The strategy of terrorism and the psychology of Mass-Mediated fear. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. & Zimbardo, P.G. (eds.). *Psychology of Terrorism*, Oxford, Oxford University Press. Slone, M. (2000). Responses to media coverage of terrorism. *Journal of Conflict Resolution*, 44, 508–522.

have to convince people of the importance of combating terrorism, and stressing realistic information about *probabilities* rather than catastrophic information about *possibilities* is called for. Instead governments should provide accurate information about the believed likelihood of an attack and its impact. This should be accompanied by information concerning the individual risk of being victimised by terrorism, which on all counts is very low, and does not amount to anything like the health hazard of some common behaviours, like obesity or smoking. The information should where necessary address local concerns, in particular in the situation where the attack or threat has different implications for different segments of society. Special populations may also need different information, for example children or ethnic minorities. In addition, the information should preferably be disseminated in a fashion that allows people to interact, i.e. ask for follow-up or more detailed information. An obvious manner for this is through the use of Internet.

- *Exercise care with warnings.* The help and vigilance of the civilian population is a necessary element of a counterterrorist strategy, and civilians have a right to know when they are in a situation of increased danger. Warnings of terrorist threats are therefore a necessary and inevitable part of the fight against terrorism. However, warnings should be applied with caution. We have stressed the effects of reminders of terrorist attacks, which may have spin-off political effects. In addition, the warnings may increase fear in the population. That is in part inevitable: negative information concerning the possibility of terrorist threat will cause people concern. But for another part it may be avoided. Warning information should preferably stress magnitude of risks, the type and place of threat and the specific actions that are taken to combat the threat (of course taking into account that not all actions can be disseminated to the public). If a system using threat levels is employed it should be clear to the public what the various levels of the system mean. On the other hand if the threat is vague and it is unclear which, if any, public actions are called for, the warning should be reconsidered. Informing people of a possibly catastrophic event (if that is what is communicated), which is nevertheless vague without options for them to take action to protect themselves, will have the predominant effect of frightening people. Finally, after a warning and a period of heightened risk, follow-up concerning the warning should be disseminated.
- *Unmask the anonymous perpetrator.* Breckenridge and Zimbardo state that the unknown is inherently more frightening than the known.<sup>57</sup> Providing the public with information about the perpetrators, even if this is relatively scant may therefore help to combat anxiety. Breckenridge and Zimbardo stress that the information on the specific terrorists should highlight their pedestrian qualities and their weaknesses, preferably than exaggerate their strength. Instead of creating a supervillain endowed with an unwarranted sense of capability a realistic assessment

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<sup>57</sup> Breckenridge and Zimbardo 2007.

of the perpetrators strength is preferable. For example: circulating the mere fact that Al Qaeda is an organisation of probably only 5,000 people may greatly reduce the anxiety concerning its capability for menace.<sup>58</sup>

- *Recognise the role and impact of mass media reporting in the aftermath of terrorism.* We have seen that media reporting in the aftermath of terrorist acts can have deleterious effects on primary and secondary victims (see Chapter 3). Similar to the situation of victims of crime the mass media should be urged to develop guidelines that safeguard the needs of victims of terrorism in the aftermath of crime, that foresee in the protection of their privacy and in addition recognise the value of cooperating with specialised services for victim assistance and support in helping victims to deal with the media attention they receive.

However, as we also saw in Chapter 3, the impact of media extends well beyond the direct victims. The manner in which the media reports acts of terrorism, with much attention paid to emotional and empathic knowledge (what did it feel like to be involved in what happened) rather than factual knowledge (what happened) or explanatory knowledge<sup>59</sup> (why did this happen) contribute to the experience of vicarious traumatisation, discussed in Chapter 3. This is the phenomenon in which people not related to the direct victims show signs of post-traumatic stress, merely from viewing an event (extensively) on television. Mass media should be encouraged to acknowledge this consequence of reporting terrorist acts and possible avenues – like warnings against overextensive, repetitive viewing of the footage of the terrorist attack<sup>60</sup> – for mitigating these effects should be contained in the aforementioned media guidelines.

Although governmental influence on the content of media reporting should not be overestimated, it should not be underestimated either. Governmental officials serve as a primary source for factual and explanatory information, and are gatekeepers to the information on what is happening and what is being done in a crisis situation.<sup>61</sup> The content and emotional tone of government information therefore is an essential element in the spin the mass media attaches to a terrorist attack. Following the earlier recommendations will go a long way to diminish possible negative effects of media attention. Moreover, governments may also use the characteristics of media reporting to get across positive messages. Foa et al. (2005) suggest the communication of resilience, for example, and also in the prevention of vicarious retribution the government may find an ally in the media.

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<sup>58</sup> See McCauley, C. (2007). War versus justice in response to terrorist attacks: competing frames and their implications. In: Bongar, B., Brown, L.M., Beutler, L.E., Breckenridge, J.N. & Zimbardo, P.G. (eds.) *Psychology of Terrorism*, Oxford, Oxford University Press.

<sup>59</sup> See Ericson, R.V., Baranek, P.M. & Chan, J.B.L. (1991), *Representing Order: Crime, Law and Justice in the News Media*, Toronto, University of Toronto Press.

<sup>60</sup> See Pfefferbaum (2003).

<sup>61</sup> E.g. Crelinsten (1997).

#### 4.4.2 *Preventing Vicarious Retribution*

Some of the recommendations that concern combating fear and anxiety may also serve to prevent vicarious retribution and backlash victimisation of minority groups. Providing accurate information concerning the perpetrators may have the added upshot of showing that they are not a representative group or ‘army’ fighting in the name of a larger outgroup, to whom minority members of the attacked society may also belong. Based upon the work surrounding vicarious retribution and wider notions of intergroup reconciliation two avenues for defusing this phenomenon are suggested. One relates to actions that ingroup leadership can take, the other to actions that representatives of the outgroup can take.

- *Decategorise and recategorise.* Ingroup leaders, such as president Bush after 9/11 or prime minister Blair after the London bombings have regularly taken steps to decategorise the outgroup. To prevent ingroup members from extending the responsibility for the attack from the perpetrators to the outgroup of which they are a member they have communicated a sharp demarcation between them. In both cases the outgroup was decategorised. According to Lickel and colleagues a further step is also important. In *recategorising* common features of the other outgroup members (bar the perpetrators) and ingroup members are communicated.<sup>62</sup> They suggest stressing that a common feature is that they are both victims of the perpetrators.
- *Organise outgroup support for this strategy in advance.* Simultaneously to the efforts to decategorise and recategorise, representatives of outgroup members can aid this process by expressing their differences with the perpetrators. Lickel and colleagues discuss the expression of either anger, shame and guilt about the attack and sympathy for the victims as possibilities. A clear expression of both anger and sympathy by an outgroup representative like an ethnic or religious leader of an ethnic minority will support the decategorising and recategorising efforts by ingroup leaders. Moreover, a number of authors recommend recruiting ethnic and/or religious leaders in the communication strategy to prevent fear of further attacks. It seems that these pre-existing structures can also be utilised to pre-arrange prevention of vicarious retribution strategies.

#### 4.4.3 *Communicating to (Potential) Victims*

National government communication also serves many purposes towards the (potential) victims of the attack. In previous (sub)sections we have repeatedly discussed the importance of the provision of information. In this subsection we will discuss four of the main issues.

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<sup>62</sup>Lickel, B. Miller, N., Stenstrom, D.M. et al. (2006). Vicarious retribution: The role of collective blame in intergroup aggression. *Personality and Social Psychology Review*, 10, 372–390.

- *Dissemination of information like for crime victims.* The international instruments call for various types of information to be made available to crime victims. These requirements should apply without limitation to victims of terrorism as well. Amongst others information concerning the course of the criminal justice system, the rights, duties and possibilities for participation therein and for compensation of damages incurred, the possibilities for additional legal advice, support and assistance should be available, preferably in an outreaching fashion.
- *Creation and development of One-Stop Shop for information and advice (Information and Advice Center).* For more extensive attacks with a larger magnitude, the creation of central Information and Advice Centers is advisable. The number of victims, the impact of the event on individual victims, the additional need for clear and concise information on what happened suggest the creation of temporary One-Stop Shops for meeting victims' needs. According to Smeets and De Ruijter these centers should not only provide victims with information and advice, but amongst others also provide them with psychological first aid and referral possibilities, and where appropriate to play a central role in communicating with the press.<sup>63</sup>
- *Plan for realistic psychological reactions.* Breckenridge and Zimbardo state that fear management programs should avoid focusing on relatively unlikely phenomena like mass hysteria or panic.<sup>64</sup> In Section 4.2.1 it was shown that most affected populations do not exhibit mass panic reactions to the event and even when a substantial minority of those affected do exhibit panic attacks, the group as a whole should be expected to act rationally. Instead realistic fear management programs should emphasise the probability of for example 'worried well' patients presenting at local clinicians. In addition, those in contact with risk-groups should be made aware of the symptoms and probable consequences of vicarious traumatisation. Amongst others this will amount to stressing that some symptoms of even quite unsettling anxiety are to be expected in the general public, but that when these symptoms are maintained over a longer period or do not decrease in severity, adequate referral systems are in place.
- *Communicate resilience.* Many community-based interventions that are suggested after a terrorist attack aim to boost resilience, as was discussed in Section 4.3. Stimulating the public to organise itself in such a way that social support and self-efficacy are enhanced are important public health goals, as social support is one of the most important protective factors for the development of psychological sequelae. The importance of resilience should also be an element of communication. Foa and colleagues specifically suggest the invocation of historical examples of public resilience and the demonstration of enthusiasm for public-initiated action in schools, businesses and other organisations.<sup>65</sup>

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<sup>63</sup> See Smeets and De Ruijter 2006 and Section 4.3.

<sup>64</sup> Breckenridge and Zimbardo 2007.

<sup>65</sup> See Foa et al. (2005).



## 4.5 Concluding Observations

This chapter discussed a set of psychological interventions designed to alleviate the post-traumatic stress in populations afflicted by mass terrorism. The central reason for focusing on this is that the psycho-social response to individual victims of terrorism does not differ from that to victims of severe crime. In addition, elements of the mass victimisation response (for example the individual psychological therapies for victims suffering from PTSD) are derived from research into individual victims of crime and can be used for similar victims of terrorism.

Central tenet of the response concerns the wide disparity of victims' reactions to the same event. For some the consequences will be severe, for others – and luckily most – the effects will wear off reasonably soon. Central to the stepped care approach, discussed in Section 4.2, therefore is matching victims' needs to interventions. In essence this is done in two ways: on the one hand by establishing links between health care professionals and victims and on the other hand by ensuring that victims have access to information on symptoms that signal the need to enlist these services and the possible avenues to reach the needed assistance and aid.

In the discussion we mentioned effective treatment for victims with severe traumatic problems, like cognitive behavioural therapy and prolonged exposure. However, not all methods that are used in the aftermath of trauma have a similar evidence base. In particular, research is increasingly showing psychological interventions in the immediate aftermath of a traumatic event to be either non-effective or even counter-productive. This is particularly evident of Critical Incident Stress Debriefing, but as a general principle we would urge the use of interventions that have a sufficient scientific base showing their effectiveness in the assistance of victims.

Except for the more individual response, Gersons' multilevel approach also includes responses at the community and the societal level. In the community response (see Section 4.3) the installation of Information and Advice Centers or organisational structures with a similar function plays a central role. They function as a focal point for victims and those providing services to them, and serve as information collection and dissemination functions. Moreover, they are specifically intended to stimulate the community's own effort to recover from the terrorist attack, in both working with the community and providing facilities for community activities. The exact set-up of the IACs is an example of good practice, but we would stress that the importance of a structure that enables the community to play a substantial role in its own recovery and the recognition of the people in the community, should be considered a resource that can be drawn on, rather than a problem to be managed. Finally, there is the societal response, to which governmental communication is key. The research in Chapter 3 showed the governmental response to be able to assist the relief from anxiety and anger in victimised populations, but also to have detrimental effects on the emotions of the attacked community members. The powerful emotions of both anger and anxiety connected with communication surrounding terrorism should be recognised in governmental communication. The suggestions in Section 4.4 are possible avenues for this. In any case we would

emphasise the importance of the research into risk perception of terrorism. People are already prone to overestimate the chances of terrorist attacks happening, without knowing how they can contribute to preventing reoccurrence of terrorist attacks. Information therefore should stress probabilities rather than possibilities and, moreover, suggest courses for members of the community to take action.

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# Chapter 5

## Access to Justice and Administration of Justice

Ines Staiger

### 5.1 Introduction

This chapter aims to provide an overview of existing international legal instruments concerning aspects of access to justice and administration of justice and their relevance for victims of terrorism. As the CoE Guidelines on the Protection of Victims of Terrorist Acts is the main international legal instrument explicitly concerned with victims of terrorism (however not binding to its Member States), it will form the basis for the analysis in this context. Moreover, the CoE guidelines will be interpreted in the light of case law of the European Court of Human Rights. Further, the EU Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and the EU Council Framework Decision of 13 June 2002 on combating terrorism will be analysed. Moreover, relevant provisions of the 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and those of the International Criminal Court (ICC) are presented. The focus will be put particularly on participatory rights of victims at international and national levels. Finally, it will be explored in how far these provisions have gained practical relevance through their implementation into national legislation of the Member States. A possible detriment of these findings is that these provisions only apply in cases where the terrorist is apprehended and a trial is initiated against the accused terrorist or terrorist group. Nevertheless, such provisions are needed for a fair trial against terrorists in order to secure that victims' needs and rights are ensured. In this respect, it is not only important to see which provisions exist on paper, but also in how far they have gained practical relevance in the respective legislation of EU Member States.

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I. Staiger (✉)

Katholieke Universiteit Leuven, Leuvens Instituut voor Criminologie (LINC),  
and European Forum for Restorative Justice, Herbert Hooverplein 9, 3000 Leuven, Belgium  
e-mail: Ines.Staiger@googlemail.com

## 5.2 Access to Justice

The term ‘access to justice’ defies precise definition. According to Parker, it covers a wide variety of issues including the accessibility of court processes for resolving disputes or mutual rights and responsibilities, the availability of adequate legal representation in criminal trials, access to more informal legal processes, and the availability of legal advice and public legal education.<sup>1</sup> The access to justice movement has advocated more substantive reforms of law and legal procedures to ensure that the interests of the poor, minorities, and diffuse public interests can be taken into account, in addition to promoting a broad range of alternative dispute resolution methods and intra-organisational complaints handling mechanisms to avert legal processes altogether.<sup>2</sup> Parker suggests that the reason for this extensive range of concerns is that while the term ‘access to justice’ has been used mainly in relation to the legal system, the ‘justice’ to which it refers has been taken by reformers to mean much more than legal justice, as there might be discrepancies between the claims of substantive justice and the formal legal system.<sup>3</sup>

In this chapter, however, ‘access to justice’ will be determined on the basis of the Council of Europe *Guidelines on the Protection of Victims of Terrorist Acts*.<sup>4</sup> Herein, it was recognised that the suffering of victims of terrorist acts deserves national and international solidarity and support. The guidelines underline the State’s obligation to take all measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist violence, also referring to the provisions laid down in the European Convention on Human Rights as well as to decisions of the European Court of Human Rights.<sup>5</sup> At EU level, the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings<sup>6</sup> and Article 10 of the Council Framework Decision of 13 June 2002 on combating terrorism<sup>7</sup> are of relevance as regards victims of terrorism. Finally, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>8</sup> provides a basic framework for victims’ rights at UN level (see further Chapter 2).

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<sup>1</sup>Christine Parker, *Just Lawyers. Regulations and Access to Justice*, Oxford University Press, 1999, p. 30.

<sup>2</sup>Parker, 1999, p. 31.

<sup>3</sup>Parker, 1999, p. 31; Louis Schetzer, Joanna Mullins, Roberto Buonamano, *Access to Justice and Legal Needs – A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW*, Law and Justice Foundation of New South Wales, 2002, p. 5. In this respect, see Chapter 7 on restorative justice.

<sup>4</sup>Adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies. Hereinafter ‘the guidelines’.

<sup>5</sup>H.J. Albrecht and M. Kilchling, Victims of terrorism policies: should victims of terrorism be treated differently? (2007) 13 *European Journal of Criminal Policy and Research*, 13–31, at p. 16.

<sup>6</sup>OJ L 82, 22.3.2001, pp. 1–4. Hereinafter ‘the EU Framework Decision’.

<sup>7</sup>OJ L 164, 22.6.2002, pp. 3–7.

<sup>8</sup>Adopted by General Assembly resolution 40/34 of 29 November 1985. Hereinafter ‘the UN Declaration’.



### **5.2.1 Legal Standards on Access to Justice at the Levels of the Council of Europe, the EU and the UN**

The CoE guidelines provide under Principle V effective access to the law and to justice. The guidelines state that:

States should provide effective access to the law and to justice for victims of terrorist acts by providing: (i) the right of access to competent courts in order to bring a civil action in support of their rights, and (ii) legal aid in appropriate cases.

#### **5.2.1.1 The Right of Access to Competent Courts in Order to Bring a Civil Action in Support of Terrorist Victims' Rights**

The right of access to justice comprises the right of access to competent courts, which is a component of the right to a fair trial, embodied in Article 6 of the European Convention on Human Rights (ECHR) and the European Court of Human Rights interpretation thereof.<sup>9</sup> In the light of case law of the European Court of Human Rights, the right to bring a civil action to competent courts refers foremost to the competence to institute civil proceedings in support of a civil right.<sup>10</sup> With regard to criminal proceedings, the decisive factor for the applicability of Article 6 (1) of the ECHR is, according to the Court, whether the criminal proceedings affect the civil component, i.e. Article 6 of the ECHR applies to proceedings relating both to the criminal charge and to the civil component of the case.<sup>11</sup> Furthermore, the Court held that Article 6 of the ECHR may be applicable for a claim regarding financial as well as symbolic reparation: it suffices if the outcome of the proceedings is decisive for the civil right in question.<sup>12</sup> Thus, Article 6 (1) of the ECHR does not confer the right to victims to initiate criminal proceedings, if

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<sup>9</sup>Case of *Golder v. United Kingdom* (1975) Eur. Court HR, Application No. 4451/70, 21 February 1975, § 36. According to Article 6 (2) of the Treaty on European Union, the EU respects the fundamental rights of the European Convention on Human Rights and Fundamental Freedoms. Moreover, all EU Member States are parties to this Convention. The fundamental rights of the convention are a general principle of law for EU law. See Christoph Grabenwarter, *Europäische Menschenrechtskonvention*, München, C.H. Beck, 2nd edn, 2005, pp. 25, 28.

<sup>10</sup>Case of *Golder v. United Kingdom* (1975) Eur. Court HR, Application No. 4451/70, 21 February 1975, § 36.

<sup>11</sup>*Case of Perez v. France* (2004) Eur. Court HR, Application No. 47287/99, 12 February 2004, § 67.

<sup>12</sup>*Case of Perez v. France* (2004) Eur. Court HR, Application No. 47287/99, 12 February 2004, § 65; *Case of Helmers v. Sweden* (1991) Eur. Court HR, Application No. 11826/85, 29 October 1991, § 29.

there is no civil component of the case involved.<sup>13</sup> Further, Article 6 of the ECHR does not confer any right to private revenge or to an *actio popularis*.<sup>14</sup> Hence, vicarious victims will not be able to institute proceedings in this context (see further section on The role of tertiary/vicarious victims in criminal proceedings). Moreover, the right of access to court is not absolute but subject to limitations. The State has a margin of appreciation in making such regulations but the limitations applied must not restrict or reduce the access left to the individual in such a way as or to such an extent that the very essence of the right is impaired.<sup>15</sup> Thus, in interpretation of the guidelines on the basis of Article 6 (1) of the ECHR, victims of terrorist acts may bring a civil action in support of a claim for financial or symbolic reparation in the context of a civil or criminal proceeding.<sup>16</sup> This reflects the *partie civile* proceeding that can be assumed by all victims in Germanic, Romanistic and Nordic jurisdictions.<sup>17</sup> This means that if a victim of terrorism is entitled under private law to claim compensation from the offender for the material or moral losses caused by the terrorist act, he/she may present the claim in criminal court. This has the advantage that victims do not need to go through the possible harmful experience of another civil proceeding for claiming financial or other reparation and that they profit from the burden of proof which lies within the prosecution service. In contrast, in common law jurisdictions, *partie civile* proceedings are unknown.<sup>18</sup> Here, compensation from the offender to the victim may be awarded in the course of the criminal proceedings in the form of a compensation order, which is a penal sanction. Further, in cases where the terrorist is not apprehended or dead, the option of state compensation may become of relevance (see Chapter 6 on compensation).

Another aspect of victims' of terrorist rights to access to justice may be addressed by the need for *reparation in cases of mass victimisation through terrorist*

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<sup>13</sup>However, Section B Article 7 of the Council of Europe Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure offers victims the possibility to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings. It has to be considered, however, that the right to institute private prosecution is often restricted by various conditions and limitations in Member States' legislation. See Marion Brienen and Ernestine Hoegen, *Victims of Crime in 22 European Criminal Justice Systems. The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Nijmegen, WLP, 2000, p. 16. The possibility to ask for a re-examination of such a decision is also expressed under Principle IV para. 3 of the guidelines.

<sup>14</sup>*Case of Perez v. France* (2004) Eur. Court HR, Application No. 47287/99, 12 February 2004, § 70. More information on the right to reparation can be found in Chapter 2.

<sup>15</sup>Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, London, Sweet and Maxwell, 2nd edn., 2004, p. 76.

<sup>16</sup>This provision reflects the situation of victims in continental European jurisdictions to bring a civil claim in the course of criminal proceedings as the *partie civile* or by way of the adhesion principle.

<sup>17</sup>Brienen and Hoegen, 2000, p. 27.

<sup>18</sup>Brienen and Hoegen, 2000, p. 28.

*attacks* (see Chapters 2 and 6). The notion of collective reparations has resonance in the context of mass violations of human rights and humanitarian law:<sup>19</sup> as gross violations of individual and group rights entitle victims to an effective legal remedy and to reparation, it would appear that in situations of widespread suffering, collective solutions might prove practical or appropriate. Such a situation may be translated to situations of mass terrorist victimisation. Collective reparations fall into two broad categories, those requiring financial implications, and those of more symbolic or rights-based nature.<sup>20</sup> Regarding collective forms of symbolic reparation, for instance the South African Truth and Reconciliation Commission recommended symbolic reparation measures like national remembrance days, memorials, monuments, museums and commemorative plaques.<sup>21</sup> This aspect is supported by Rohne's findings on Israeli/Palestinian victims, where most of the Israeli victims wished for a memorial (see Chapter 7).

### 5.2.1.2 The Permissibility of Court Fees

Court fees are permitted according to the European Court of Human Rights if the very essence of the right to access to court is not impaired.<sup>22</sup> The European Commission for the Efficiency of Justice (CEPEJ), set up by the Council of Europe, found that court fees must be paid to start a case in criminal proceedings in ten Member States of the Council of Europe.<sup>23</sup> The CEPEJ found that this is mainly the case when the victim claims for (financial) compensation from a criminal offender,<sup>24</sup> i.e. in way of *partie civile* proceedings. However, nine of the ten States allowed exceptions to the payment of court fees. This is linked, for instance, to the victim's financial situation or the type of case.<sup>25</sup> This reflects case law of the European Court of Human Rights concerning civil cases, where the permissibility of court fees depends on the amount, the financial situation of the person concerned, the stage of

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<sup>19</sup>Collective Reparations: Concepts & Principles, p. 1 at <http://www.redress.org/PeacePalace/CollectiveReparationsMG.pdf>

<sup>20</sup>See in Chapter 6 on compensation.

<sup>21</sup>Chris Cunneen, Exploring the Relationship between Reparations, the Gross Violation of Human Rights, and Restorative Justice, in Dennis Sullivan and Larry Tiftt (eds.), *Handbook of Restorative Justice*, New York, London, Routledge, 2006, pp. 355–368, at p. 363. See also Article 18 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*; adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>22</sup>This includes also the request of a court for advance payment: Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention. Handkommentar*, Baden–Baden, Nomos, 2006, p. 114.

<sup>23</sup>European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems – Edition 2006 (2004 data)*, Strasbourg, Council of Europe, 2006, p. 49.

<sup>24</sup>European Commission for the Efficiency of Justice (CEPEJ) 2006, p. 49.

<sup>25</sup>European Commission for the Efficiency of Justice (CEPEJ) 2006, p. 49.

the proceedings, and the chances of success of the case. Depending on the situation, financial aid may be provided.<sup>26</sup> Further, if court fees constitute a manifest impediment to justice, the Council of Europe *Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice*,<sup>27</sup> stipulates the reduction or abolishment of court fees under Section D Articles 11 and 12 in civil matters. Thus, under these circumstances, victims of terrorism may be exempted from paying court fees if they bring a civil action in civil or criminal proceedings.

### 5.2.1.3 Legal Aid in Appropriate Cases

Neither the guidelines nor Article 6 of the ECHR do guarantee legal aid as such. However, according to case law of the European Court of Human Rights, lack of legal aid may constitute a denial of access to court under certain circumstances.<sup>28</sup> The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.<sup>29</sup> In the case of *Airey v. Ireland*, the Court held that, although the Convention contains no provision on legal aid for civil disputes, since Article 6 (3) (c) of the ECHR deals only with defendants' rights in criminal proceedings, and despite the absence of a similar clause for civil litigation, Article 6 (1) of the ECHR may compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to Court either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case.<sup>30</sup> The Court states further that while the Convention obliges the States to secure an effective right to access to court, the States may select the method of securing this right, whether by providing legal aid in civil cases, by simplifying the procedural requirements or through other means.<sup>31</sup> Thus, the right of access to a court must not only exist in theory, it must also be effective. This means, for example, that if a poor litigant wishes to bring court proceedings of complex legal nature, the State must provide legal aid in civil

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<sup>26</sup>Meyer-Ladewig, 2006, p. 114.

<sup>27</sup>Adopted by the Committee of Ministers on 14 May 1981 at its 68th Session.

<sup>28</sup>Reid, 2004, p. 79.

<sup>29</sup>Clare Ovey and Robin White, *The European Convention on Human Rights*, Oxford University Press, 4th edn, 2006, p. 171; *Case of Steel and Morris v. United Kingdom* (2005) Eur. Court HR, Application No. 68416/01, 15 February 2005, § 61.

<sup>30</sup>*Case of Airey v. Ireland* (1979) Eur. Court HR, Application No. 6289/73, 9 October 1979, § 26.

<sup>31</sup>*Case of Airey v. Ireland* (1979) Eur. Court HR, Application No. 6289/73, 9 October 1979, § 26.

matters if this is indispensable for an effective access to the Court.<sup>32</sup> Thus, in the light of the interpretation of Article 6 (1) of the ECHR, the guidelines must guarantee legal aid for victims of terrorism in civil proceedings or in *partie civile* proceedings depending on the criteria as set out by the European Court of Human Rights.

In summary, the guidelines provide victims of terrorism the possibility to enforce their interests for financial or symbolic reparation by way of civil or *partie civile* proceedings, whereby they may be exempted from court fees under certain circumstances and benefit from legal aid in appropriate cases. Hence, when looking at the status of victims in criminal proceedings, the guidelines are restricted to ensuring terrorist victims' rights in *partie civile* proceedings only.

Findings by Kilchling, Kaiser and Staiger-Allroggen reveal, however, that crime victims are not only motivated by enforcing a civil action, but rather have other interests – such as the interest of satisfaction and protection of being blamed or denounced – to be considered as well.<sup>33</sup> It was also recognised by Judge Song in his separate opinion of a decision by the International Criminal Court (ICC) that victims have not only an interest in receiving reparations, but also in receiving justice.<sup>34</sup> Further, in the case of *The Prosecutor v. Thomas Lubanga Dyilo* it is stated that the victims' legal representatives argue that 'the interests of victims in participating in the proceedings are diverse, and include, inter alia, obtaining reparations, expressing their views and concerns, verifying facts, protecting their dignity during the hearings and securing recognition as victims.'<sup>35</sup> They further aimed at giving victims participation rights in all hearings, including procedural rights.<sup>36</sup> It is discussed in the following section whether legal aid may be granted for victims in case they do not aim at bringing a civil action before the court but when they aim at enforcing their interest of satisfaction and protection in the criminal proceeding. This is possible in some civil law jurisdictions by way of accessory prosecution.<sup>37</sup>

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<sup>32</sup>Ovey and White, 2006, p. 171.

<sup>33</sup>Cited in Kai-Yuan Wu, *Die Rechtsstellung des Verbrechensopfers im staatlichen Strafverfahren am Beispiel der Nebenklage*, Frankfurt am Main, Peter Lang Verlag, 2007, pp. 52, 55–57.

<sup>34</sup>See in Decision on victims' participation of 18 January 2008, Situation in the Democratic Republic of The Congo *In The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, § 18.

<sup>35</sup>See in Decision on victims' participation of 18 January 2008, Situation in the Democratic Republic of The Congo *In The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, § 39.

<sup>36</sup>See in Decision on victims' participation of 18 January 2008, Situation in the Democratic Republic of The Congo *In The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, §§ 41, 43. The defence suggested that such participatory rights would essentially afford the same rights as the prosecution and the defence and could in consequence create an imbalance in the trial, see § 52 of the decision.

<sup>37</sup>See Brienen and Hoegen, 2000, pp. 27–29. The victim can play the role of the so-called 'auxiliary prosecutor' in Austria, Germany, Liechtenstein, the Nordic jurisdictions and Portugal (status of 2000).

### 5.2.1.4 Legal Aid by Way of Accessory Prosecution

As mentioned above, the guidelines do not explicitly provide legal aid by way of accessory prosecution. The same is true for Article 6 (1) of the ECHR. It is rather that the rulings of the European Court of Human Rights must be seen in the light of legal aid in civil proceedings; respectively in criminal proceedings with a civil component. In this respect, the European Court of Human Rights points out that there are no detailed provisions similar to those in Article 6 (2), (3) of the ECHR for civil disputes. However, the Court draws attention to Recommendations Nos. R (83) 7 on Participation of the Public in Crime Policy,<sup>38</sup> R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure,<sup>39</sup> and R (87) 21 on Assistance to Victims and the Prevention of Victimisation (replaced by Recommendation Rec(2006)8 on assistance to crime victims<sup>40</sup>), which specify the rights which victims may assert in the context of criminal law and procedure.<sup>41</sup> However, neither of these recommendations refers explicitly to the victim's right to legal aid as a party in criminal proceedings in other cases than *partie civile* proceedings. This is also the case with the UN Declaration.<sup>42</sup>

At EU level, under Article 6 of the EU Framework Decision 'each Member State shall ensure that victims have access to [...], where appropriate, legal aid [provided free of charge where warranted] [...], when it is possible for them to have the status of parties to criminal proceedings.' Thus, the EU Framework Decision does not restrict the provision of legal aid to the civil component of the case. The wording of the text rather suggests a broader approach, thus including cases where the victim aims at enforcing the interest of satisfaction and protection in criminal proceedings ('auxiliary prosecutor'). However, according to the wording of the text, crime victims have only access to free legal aid if EU Member States provide them with the status of parties to criminal proceedings and if the circumstances of the case require such access.<sup>43</sup> Moreover, recital 9 of the EU Framework Decision does not oblige the Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings.

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<sup>38</sup> Adopted by the Committee of Ministers on 23 June 1983 at the 361st meeting of the Ministers' Deputies; Article 29 states that access to justice should be established through legal aid.

<sup>39</sup> Section D Article 9 states that the victim should be informed of possibilities of obtaining legal assistance and advice.

<sup>40</sup> Article 7.1 shall ensure victims' access to all civil remedies through legal aid in appropriate cases.

<sup>41</sup> *Case of Perez v. France* (2004) Eur. Court HR, Application No. 47287/99, 12 February 2004, § 72. Regarding criminal proceedings, Article 6 (2) and (3) of the ECHR confers rights only to the defendant.

<sup>42</sup> Paragraph 6(c) of the UN Declaration provides proper assistance to victims throughout the legal process; the status of the victim is, however, not clearly defined.

<sup>43</sup> See also Article 1 (c) stating that 'criminal proceedings' shall be understood in accordance with the national law applicable.

The question remains whether a different approach applies to victims of terrorism. According to recital 8 of the EU *Council Framework Decision of 13 June 2002 on combating terrorism*, ‘victims of terrorist offences are vulnerable, and therefore specific measures are necessary with regard to them.’<sup>44</sup> If ‘legal aid’ could be categorised under ‘specific measures’, the vulnerability of victims of terrorism would require those EU Member States that allow crime victims a status of parties to criminal proceedings, to grant them automatically free legal aid, and not only in cases where this is ‘appropriate’.<sup>45</sup>

According to recital 3 of the EU Council Framework Decision, ‘measures’ refer to the assistance to and protection of victims. Under Article 6 of the EU Council Framework Decision, legal aid is categorised as specific assistance to victims for improving their access to justice. Hence, it could be argued that under the EU Framework Decision the criterion of ‘appropriateness’ does not apply to victims of terrorism due to their vulnerability. Accordingly, victims of terrorism could have automatically access to free legal aid provided that they can obtain the status of parties to criminal proceedings under the respective national law of the EU Member States.<sup>46</sup>

Consequently, at EU level, free legal aid may be provided for victims of terrorism with a status of a party, for instance in cases when they act as *partie civile* in criminal proceedings or when they have the status of ‘auxiliary prosecutor’ in criminal proceedings according to the national law of the respective EU Member State. In principle, this approach does also apply to victims of terrorism in cross-border cases or in cases of mass terrorist victimisation. However, a different approach has to be considered in those EU Member States that do not provide victims with a status of a party to criminal proceedings. This will be discussed in the following sections.

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<sup>44</sup>When looking at the situation of crime victims under the EU Council Framework Decision, Article 2 (2) provides ‘specific treatment’ only to ‘particularly vulnerable’ victims. Consequently, the scope of application for specific measures is extended to victims of terrorist offences according to recital 8 of the EU *Council Framework Decision of 13 June 2002 on combating terrorism* due to their categorisation as vulnerable (but not as *particularly* vulnerable). This is in contrast to the situation at CoE level (see Section 5.3).

<sup>45</sup>Otherwise, the criteria for granting legal aid developed by the European Court of Human Rights could be taken into account at a minimum.

<sup>46</sup>For instance under German law (§ 397a (1) StPO), a legal representative is automatically appointed by the state for those crime victims who have the status of a party to criminal proceedings (i.e. ‘auxiliary prosecutor’/ *Nebenkläger*). This is the case if a serious intentional violent act makes the victim ‘worthy of protection’. In this case, the costs for legal representation are automatically covered by the State and are not subject to other preconditions. For less serious criminal acts, but where the criteria for an accessory prosecution are still applicable, the *Nebenkläger* can apply under certain conditions for financial aid for his/her legal representation (§ 397a (2) StPO). See also France with regard to *partie civile* proceedings: France excluded the resource concept from the conditions for access to judicial aid for certain offences considered particularly serious: Report from the Commission on the basis of Article 18 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings {SEC(2004)102} /\* COM/2004/0054 final/2\*/. EUR-Lex – 52004DC0054R(01) – EN, p. 7.



### 5.2.1.5 Legal Aid in Cross-Border Cases

A further issue in the context of victims of terrorism is the cross-border relevance of terrorism, and therefore, legal aid in cross-border cases may be of particular importance.<sup>47</sup> The *Green Paper from the Commission* lists the obstacles for legal aid applicants in a Member State other than their own.<sup>48</sup> The main obstacle is that legal aid systems are territorial, in the sense that legal aid is granted only in respect to proceedings in that State.<sup>49</sup> Equal treatment as regards granting legal aid may depend on the nationality, residence, or presence of the applicant in the State of litigation.<sup>50</sup> Additionally, obstacles for obtaining legal aid were found in the link to the applicant's financial situation that may vary from country to country, the review of the merits or chances of success of the proceedings concerned, the lack of information on the availability in other Member States, possible extra costs of cross-border litigation, and language difficulties. In response to this Green Paper, the Council of the EU has adopted the *Directive of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes*, which applies in cross-border disputes, to civil and commercial matters, whatever the nature of the court or tribunal.<sup>51</sup> Thus, cases are encompassed where victims of terrorism could apply for legal aid with regard to *partie civile* proceedings. The Directive aims at providing minimum standards in cross-border disputes on adequate levels of legal aid for citizens involved in cross-border cases, including the provision for costs related to the cross-border nature of the dispute, such as costs for interpretation, translation of documents, travel costs and costs for an additional lawyer.<sup>52</sup> However, neither this Directive nor Article 11 of the EU Framework Decision provide a solution to the case when crime victims resident in or as a national of a Member State where accessory prosecution or *partie civile* proceedings are possible, want to apply for legal aid in order to act as a party to criminal proceedings when the respective Member State does not allow such a status. Thus, further research is required on terrorist victims' needs to act as a party to criminal proceedings in the different Member States.

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<sup>47</sup>See also Article 11 of the EU Framework Decision, which provides for appropriate measures for victims resident in another Member State.

<sup>48</sup>Commission of the European Communities, *Green Paper From The Commission. Legal aid in civil matters: The problems confronting the cross-border litigant*, COM(2000) 51 final, p.3.

<sup>49</sup>For an overview of legal aid schemes in the Member States of the Council of Europe, which includes all the Member States of the EU, see: European Commission for the Efficiency of Justice (CEPEJ), 2006, p. 49.

<sup>50</sup>Commission of the European Communities, COM(2000) 51 final, p.7.

<sup>51</sup>OJ L 26, 31.1.2003, p. 43.

<sup>52</sup>See Articles 7 and 8 of the Directive.

### 5.2.1.6 Legal Aid in Cases of Mass Victimization

In cases of mass terrorist victimisation, a large group of victims of terrorism may need legal aid provided that they have participatory rights that go beyond that of a mere witness status. In this respect, Rule 90 of the Rules of Procedure and Evidence of the International Criminal Court (RPE) serves as an example for legal representation of a number of victims.<sup>53</sup> From the perspective of the court, a joint legal representation has the advantage that it reduces the risk of a conflict of interest through the presence of various legal representatives of victims during the trial.

<sup>54</sup> However, from the victims' perspective, in cases where conflicts of interest or specialised point of views are unavoidable, a common representation of victims is not appropriate. Then, additional representation for victims in those cases is required.<sup>55</sup> It is important that the approach to common legal representation is flexible and depends on whether the victims under consideration have common interests.<sup>56</sup> In a recent decision, the court held that the views of victims and the accused's right to a fair and expeditious trial have to be taken into consideration for a joint representation.<sup>57</sup>

Under Rule 90 (5) of the RPE, 'a victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.' What is 'appropriate' is defined in Regulation 113 (2) of the Regulations of the Registry,<sup>58</sup> that sets out that 'in determining whether to grant such assistance, the Registrar shall take into account, inter alia, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of pro bono advice and assistance.' It also notes that regulations 130–139 apply *mutatis mutandis*, thereby referring to indigence criteria. In this respect, Olivier and Ferstman point out that it is rather difficult to

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<sup>53</sup>Adopted by the Assembly of States Parties, First Session, New York, 3–10 September 2002, Official Record, ICC-ASP/1/3. Legal instruments of the ICC do only apply to victims of genocide, crimes against humanity and war; see Rule 85 of the RPE and Article 5 of the Rome Statute of the ICC.

<sup>54</sup>International Criminal Court: Third Seminar on Counsel Issues, The Hague, 23–24 May 2005 at [http://www.icc-cpi.int/defence/defconsultations/semdef\\_052005.html](http://www.icc-cpi.int/defence/defconsultations/semdef_052005.html) (12/02/2008).

<sup>55</sup>The Legal Representation Team of the Coalition for the International Criminal Court (CICC), Submission of the 4th session of Assembly of States Parties, Comments on the organization and resources of legal representation for victims and defendants at the ICC, November 2005, p.8.

<sup>56</sup>See in Decision on victims' participation of 18 January 2008, Situation in the Democratic Republic of The Congo In *The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, § 48.

<sup>57</sup>Decision on victims' participation of 18 January 2008, Situation in the Democratic Republic of The Congo In *The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, § 126.

<sup>58</sup>ICC-BD/03-01-06. Date of entry into force: 6 March 2006.

apply indigence criteria to group claims due to administrative reasons.<sup>59</sup> Further, it is recommended to define the criteria of ‘special needs of the victims’ in a case of separate legal representation rather than for the funding of common legal representation. As regards pro bono advice, Olivier and Ferstman stress that ‘while it is probable that some organisations have the capacity and will agree to represent some victims on a pro bono basis, this possibility cannot be a basis for the financing of victims’ representation.’ This is due to the often lengthy proceedings before the ICC, which usually requires coverage of the costs of representation.<sup>60</sup> Thus, a pro bono legal representation should rather be an exception in order to guarantee legal aid to every victim. The same argumentation can be applied for terrorist proceedings, especially in cases of mass terrorist victimisation, where a large number of victims may need to be represented. Moreover, in order to avoid decisions of discretion, the Victims’ Rights Working Group suggests that in circumstances of victims with financial means in a group represented by a common legal representative, it needs to be determined whether those that do have means have to cover the entire costs or only a proportion.<sup>61</sup> According to this perspective, the criteria for legal aid in cases of joint representation are to be determined according to the criteria as set out for separate legal representation.<sup>62</sup> Hence, the approach of the ICC as regards mass victimisation could be taken into account for those EU Member States that do not offer victims of terrorism a status of a party to criminal proceedings. In the other EU Member States, victims of terrorism could benefit from legal aid free of charge due to their vulnerability as discussed above.

### 5.2.1.7 Legal Advice

The Council of Europe refers in its ‘texts of reference used for the preparation of the guidelines on the protection of victims of terrorist acts’<sup>63</sup> to Recommendation (93) 1 of the Committee of Ministers to Member States on Effective Access to the Law and to Justice for the Very Poor.<sup>64</sup> Under Article 1 of this recommendation,

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<sup>59</sup>Clémentine Olivier and Carla Ferstman, *Ensuring the Effective Participation of Victims before the International Criminal Court*, REDRESS, London, 2005, p. 9.

<sup>60</sup>Olivier and Ferstman, 2005, p. 9.

<sup>61</sup>Victims Rights Working Group, Strategy Meeting on the Development of structures and procedures for victims at the International Criminal Court, 6–7 December 2002, Summary of Proceedings and Final Recommendations, Issued January 2003, p. 17.

<sup>62</sup>However, see the critical comments of the CICC in this context: The Legal Representation Team of the Coalition for the International Criminal Court (CICC), November 2005, pp. 5 ff.

<sup>63</sup>Council of Europe, Human Rights and the Fight against Terrorism – The Council of Europe Guidelines, Strasbourg, Council of Europe Publishing, 2005, p. 57.

<sup>64</sup>Adopted by the Committee of Ministers on 8 January 1993 at the 484th meeting of the Ministers’ Deputies.

*access to the law implies access to legal advice*, and the costs for legal advice shall be defrayed for the very poor through legal aid. Such an explicit provision is not foreseen at EU level, as Article 6 of the EU Framework Decision does not provide legal advice free of charge. It is rather the decision of the EU Member States in how far they offer free legal advice.

## **5.2.2 The Practical Relevance of These Provisions and Their Implementation in National Law**

### **5.2.2.1 The Right of Victims of Terrorist Acts to Access to Competent Courts in order to Bring a Civil Action in Support of Their Rights**

In contrast to common law jurisdictions, the victim has the right in continental European jurisdictions to bring a civil claim in the course of criminal proceedings as the *partie civile* or through the adhesion principle.<sup>65</sup> A practical example of the possibility to enforce a financial claim in criminal proceedings is the *Adhäsionsverfahren* in German Law.<sup>66</sup> It is possible to ‘adhere’ a civil proceeding to the criminal proceeding of the same case if the victim makes such an application. However, this proceeding has not achieved much practical relevance. This is due to the lack of information for victims, the lack of interest of lawyers to file such an application in the criminal proceeding, and the lack of interest of judges to deal with financial claims in the course of criminal proceedings.<sup>67</sup> However, research by Kilchling showed that the majority of victims would prefer to claim reparation in criminal proceedings.<sup>68</sup> Therefore, victims need to be informed about the possibilities to bring a civil action in the course of criminal proceedings by information sheets and by information through the public prosecutor at the moment of preferment of charges.<sup>69</sup>

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<sup>65</sup>Jo Goodey, *Compensating Victims of Violent Crime in the European Union with a Special Focus on Victims of Terrorism. Discussion Paper*, Vienna, The National Center for Victims of Crime, 2003, p. 7.

<sup>66</sup>§§ 403 – 406c StPO.

<sup>67</sup>Claudia Keiser, *Die Stellung des Opfers im deutschen Strafrechtssystem*, in ERA (ed.), *ERA-Forum*, Trier, ERA, 2002, pp. 39–44, at p. 44. The additional problem of state compensation in cases where the offender is insolvent or not available otherwise, will be dealt with in the following chapter. In the Netherlands, in contrast, the adhesion proceeding seems to have more practical relevance, see seminar report of the project (unpublished document).

<sup>68</sup>Cited in ‘Bericht der Kommission für Opfer- und Zeugenschutz im Strafverfahren’ (1999), p. 52. <http://www.jum.baden-wuerttemberg.de/servlet/PB/show/1193133/OSK%20Schlussbericht.pdf> (12/02/2008).

<sup>69</sup>‘Bericht der Kommission für Opfer- und Zeugenschutz im Strafverfahren’ (1999), p. 58.

In cases of mass terrorist victimisation, the practical implementation of granting access to all victims of terrorism has to be considered according to the settings of the court. The Spanish trial in the case of the Madrid Bombings serves as a good example in this respect. In this case, the court room did not offer enough space for the high number of victims and victim associations who wanted to attend the trial. The court therefore placed the victims in the basement by broadcasting the trial live.<sup>70</sup> Another example for cases where a high number of victims wish to participate in court proceedings is the example of the ICC. It shows that victims can be represented by a joint legal representation provided that there is no conflict of interests (see above).

### 5.2.2.2 Legal Aid in Appropriate Cases

Concerning the EU level, the European Commission stated in its report that in March 2003, all of the then 15 EU Member States except Ireland, the United Kingdom, the Netherlands and Belgium did provide for the possibility of meeting lawyers' expenses if the victim brings *partie civile* proceedings.<sup>71</sup> However, Italy and Luxembourg have stipulated in their legislation that the victim's lawyer's expenses can only be charged to the offender. According to the European Commission, such refunding of the expenses of the victim as party is unreliable where it is not covered by the State in the event of the offender's insolvency. Consequently, the financing of legal aid must be provided by the State in order to fulfil the requirements of the EU Framework Decision.

In this context, the Council of Europe encourages its Member States to develop legal aid systems beyond the European Convention on Human Rights and the case law of the Court of Strasbourg.<sup>72</sup> In this respect, the CEPEJ provides in its report on

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<sup>70</sup>See seminar report of the project (unpublished document).

<sup>71</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 7. However, it has to be considered that in comparison with the translation of the German and English text of the report, no difference was made between *Nebenklage* and *partie civile* proceedings. '*Partie civile* proceeding' was translated with '*Nebenklage*' in the German translation of the report by the European Commission, the latter providing the victim with more extended rights in criminal proceedings. See for Article 7 at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0054:DE:HTML\(12/02/2008\)](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0054:DE:HTML(12/02/2008)).

Moreover, the practical relevance of legal assistance to the victim under Art. 6 of the Council Framework Decision could not be assessed by the European Commission, as the report did not extend to the assessment of this Article 6 according to Article 17 of the EU Council Framework Decision. The report is criticised by scholars, see e.g. M.S. Groenhuijsen and A. Pemberton, *Het slachtoffer in de strafrechtelijke procedure. De Implementatie van het Europees Kaderbesluit, Justitiële Verkenningen*, Vol. 33(3), 2007, pp. 69–91.

<sup>72</sup>In this context, the Council of Europe has adopted Recommendation No. R (93) 1 of the Committee of Ministers to member states on effective access to the law and to justice for the very poor, and Recommendation No. R (81) 7 of the Committee of Ministers on measures facilitating access to justice.

European Judicial Systems an overview of matters covered by legal aid and the type of legal aid in criminal and non-criminal cases. In its report on European Judicial Systems, the CEPEJ defined legal aid as ‘aid given by the State to persons who do not have sufficient financial means to defend themselves before the court or to start a court proceeding.’ Moreover, legal aid might also consist in legal advice.<sup>73</sup> However, the CEPEJ does not provide an exclusive overview of cases where legal aid is provided for victims in criminal proceedings. Therefore, only a general conclusion can be drawn, namely that in 2004, 44 of 47 Member States offered legal aid to finance the cost of representation in criminal proceedings, and 38 Member States offered legal aid to finance the cost of representation in other than criminal cases. The financing of legal advice for criminal cases is foreseen in 37 countries.<sup>74</sup> Hence, in most of the countries, a person who does not have sufficient financial means can be assisted by a lawyer free of charge in criminal cases. However, there may be restrictions for granting legal aid, according to the type of cases concerned<sup>75</sup> (see also the criteria developed by case law of the European Court of Human Rights as discussed above).

Further, according to the perspective of the Coalition for the International Criminal Court for cases of joint legal representation of victims before the ICC, a clearly determined budget for victims’ legal representation and adequate resources for victims’ legal representation must be guaranteed.<sup>76</sup> This is against the background that the legal representative’s clients are usually far from where they themselves are situated, and living in different countries and/or beyond borders and regions. A similar situation would apply for victims of terrorism in cross-border cases, where these obstacles would have to be taken into account for their joint or separate legal representation.

In conclusion, the budget for legal aid must be clearly determined and provided by the State or through special legal aid systems in order to ensure terrorist victims’ access to legal aid free of charge.

## 5.3 Administration of Justice

### 5.3.1 *Legal Standards on the Administration of Justice at the Levels of the Council of Europe, the EU and the UN*

Principle VI of the guidelines concerns administration of justice. The guidelines state that

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<sup>73</sup>European Commission for the Efficiency of Justice (CEPEJ), 2006, p. 45.

<sup>74</sup>European Commission for the Efficiency of Justice (CEPEJ), 2006, p. 45. It has to be taken into consideration that these cases concern mainly legal aid for defendants.

<sup>75</sup>European Commission for the Efficiency of Justice (CEPEJ), 2006, p. 47.

<sup>76</sup>The Legal Representation Team of the Coalition for the International Criminal Court (CICC), November 2005, p. 8.

(1) States should, in accordance with their national legislation, strive to bring individuals suspected of terrorist acts to justice and obtain a decision from a competent tribunal within a reasonable time. (2) States should ensure that the position of victims of terrorist acts is adequately recognised in criminal proceedings.

### 5.3.1.1 Individuals Suspected of Terrorist Acts Should Be Brought to Justice<sup>77</sup>

According to international legal instruments, the guidelines do not foresee for victims of terrorism the right to initiate criminal proceedings. This is why the competence of the state is particularly stressed. Amnesty International and the International Commission of Jurists recommend that the manner in which suspected perpetrators are brought to justice must be consistent with the requirements of Articles 5 and 6 of the ECHR and Paragraph 6 of the UN Declaration. Consequently, they recommend that States must take effective measures to bring individuals reasonably suspected of such acts to justice, within a reasonable time, in competent, independent and duly constituted civilian tribunals in proceedings which meet international standards of fairness.<sup>78</sup> The underlying principles are relevant in order to undermine arbitrary regulations concerning persons suspected of terrorism on the one hand, and possible mitigations of punishment on the other hand.

With regard to the first point, it should be ensured that suspected terrorists face a trial before competent, independent and duly constituted civilian tribunals in order to prevent a situation like Guantánamo in Europe.<sup>79</sup> Moreover, it should be guaranteed that suspects actually face such a trial without being absolved from responsibility as happened in the Beslan case.<sup>80</sup> Further, the European Court held in the *Tepe v. Turkey* case that a thorough and effective investigation is required, which

<sup>77</sup>The notion of 'justice' is narrowed to the formal criminal justice system.

<sup>78</sup>Recommendation of Amnesty International and the International Commission of Jurists to Strengthen the draft Council of Europe Guidelines on Aid to and Protection of Victims of Terrorism at [http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/\\$File/IOR6102204.pdf](http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/$File/IOR6102204.pdf) (04/07/2007).

<sup>79</sup>For human rights abuses in Guantanamo see: <http://web.amnesty.org/library/index/engAMR510442007> (26/07/07), and [http://www.welt.de/politik/article1086995/Briten\\_verlangen\\_Freilassung\\_von\\_Gefangenen.html](http://www.welt.de/politik/article1086995/Briten_verlangen_Freilassung_von_Gefangenen.html) (07/08/07). See also the remarks in Chapter 2 regarding the accused of the Bali Bombings in October 2002 who is held in Guantanamo Bay. See further the remarks of the rapporteur McNamara of the Committee on Legal Affairs and Human Rights that the American administration has strayed into unlawful actions in its zeal to pursue a world-wide campaign against terrorism, Council of Europe, *Guantánamo: violation of human rights and international law?*, Strasbourg, Council of Europe Publishing 2007, p. 71, § 76.

<sup>80</sup>See: <http://eng.kavkaz-uzel.ru/newstext/engnews/id/1188208.html> (24/07/07); and <http://www.pravdabeslana.ru/appeal.htm> (07/08/07). In the Beslan case, suspected militiamen were amnestied without the court having investigated all the materials of the case. It has to be noted that the Beslan case mainly concerns aspects of counter-terrorism measures.



is capable of leading to the identification and punishment of those responsible.<sup>81</sup> In this respect, comparison can be drawn again to the Beslan case, where the victims have filed a complaint before the European Court of Human Rights because of lack of proper investigation of the case.<sup>82</sup> This requirement further implies that information relevant for criminal proceedings is fully disclosed by the investigation. Such a default is suspected in the terrorist case concerning the assassination of Siegfried Buback and his companions by the German Red Army Fraction (RAF).<sup>83</sup>

With regard to the aspect of undermining mitigations of punishment, the fair trial principles of Article 6 (1) of the ECHR may be undermined by applying special regulations to suspected terrorists according to Article 6 of the EU Council Framework Decision of 13 June 2002 on combating terrorism.<sup>84</sup> An example of such a provision in national legislation gives the German principal witness regulation and its draft extension. This (draft) regulation provides a reduction of penalties or might lead under certain circumstances to non-imposition of a penalty for offenders who provide information for the investigation of the crime or for the prevention of an offence.<sup>85</sup> Although the principal witness profits only from these regulations in case that his/her information has resulted in an actual success of the investigation, several arguments can be found against this provision. Such a provision cannot exclude the risk that offenders may make use of the principal witness regulation by (wrongly) incriminating others in order to escape their own accountability.<sup>86</sup> For instance, RAF terrorists who escaped to the German Democratic Republic used the then-principal witness regulation for a reduced sentence by incriminating already imprisoned RAF terrorists. A further example is the Palestinian terrorist Souhaila Andrawas who was involved in the kidnapping of the Landshut

<sup>81</sup> *Case of Tepe v. Turkey*, judgment of 9 August 2003 (final), Application no. 27244/95, § 195.

<sup>82</sup> See: <http://eng.kavkaz.memo.ru/newstext/engnews/id/1190911.html> (23/07/07).

<sup>83</sup> See: <http://www.rp-online.de/public/article/aktuelles/politik/deutschland/431526> (30/07/07).

<sup>84</sup> Article 6 reads: *'Each Member State may take the necessary measures to ensure that the penalties referred to in Article 5 may be reduced if the offender: (a) renounces terrorist activity, and (b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to: (i) prevent or mitigate the effects of the offence; (ii) identify or bring to justice the other offenders; (iii) find evidence; or (iv) prevent further offences referred to in Articles 1 to 4'*.

<sup>85</sup> *Gesetzentwurf der Bundesregierung: ... Gesetz zur Änderung des Strafgesetzbuchs – Strafzumessung bei Präventions- und Aufklärungshilfe (...StrÄndG)* at <http://www.bundesjustizministerium.de/files/-/2101/RegE%20Kronzeugenregelung.pdf> (05/07/2007). However, the minimum sentence for offences sentenced with life imprisonment is 10 years. As regards terrorist organisations, § 129a StGB will remain of relevance.

<sup>86</sup> *Stellungnahme des Deutschen Anwaltvereins durch den Strafrechtsausschuss zum Referentenentwurf eines ... Gesetzes zur Änderung des Strafgesetzbuchs (...StrÄndG = Kronzeugenregelung)* – Strafzumessung bei Präventions- und Aufklärungshilfe (§ 46b StGB-E) des Bundesministeriums für Justiz vom 18.04.2006 at <http://www.anwaltverein.de/03/05/2006/39-06.pdf> (05/07/2007).

airplane. She received a reduced sentence because she incriminated another person for terrorist activities, although she was psychologically unstable and made several contradictory statements.<sup>87</sup> A similar unstable witness was admitted as principal witness in a German legal proceeding against suspected Al-Qaeda terrorists.<sup>88</sup> The German legislator approves a principal witness regulation because it results in more efficient proceedings, a higher investigation quota and cost effectiveness.<sup>89</sup> A further positive aspect for advocates in favour of this regulation is that suspected terrorists will be offered an incentive for a comprehensive testimony. However, there is no clear-cut corrective for perjury on the part of the principal witness.<sup>90</sup> In this way, a proper administration of justice is challenged as the role of the court is to ensure the facts of the case as close to truth as possible. Moreover, findings on victims of terrorism suggest that the finding of truth is a crucial element for their understanding of the crime and their ability to deal with it.<sup>91</sup>

### 5.3.1.2 Suspects Must Be Judged Within a Reasonable Time

Although Article 6 (1) of the ECHR requires that judicial proceedings be expeditious, the more general principle of proper administration of justice, which means that the quality of the trial must be guaranteed, must also be taken into consideration.<sup>92</sup> In the case of *Mutimara v. France*<sup>93</sup> the European Court of Human Rights held that the length of the proceedings concerning the examination of a complaint against a person who allegedly was involved in the genocide that took place in Rwanda was in breach of Article 6 (1) of the ECHR. The court held that the complexity of the case, the conduct of the applicant and that of the competent authorities,

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<sup>87</sup>A. Maurer, § 129b und Kronzeugenregelung: *Alte Instrumente in neuem Gewand* at <http://www.cilip.de/ausgabe/70/129b.htm> (05/07/2007).

<sup>88</sup>D. Cziesche, G. Mascolo, *Troubles with Germany's Star Terror Witness* at <http://www.spiegel.de/international/spiegel/0,1518,335170,00.html> (05/07/2007).

<sup>89</sup>Gesetzentwurf der Bundesregierung at <http://www.bundesjustizministerium.de/files/-/2101/RegE%20Kronzeugenregelung.pdf> (05/07/2007).

<sup>90</sup>Stellungnahme des Deutschen Anwaltvereins at <http://www.anwaltverein.de/03/05/2006/39-06.pdf> (05/07/2007).

<sup>91</sup>See for instance the cases of Michael Buback, Patrick von Braunmühl (see in Chapter 7) and Beslan (see above). See also the desperate seek for truth by the victims of Pan Am 103: Bruce Hoffman and Anna-Britt Kasupski, *The Victims of Terrorism: An Assessment of Their Influence and Growing Role in Policy, Legislation, and the Private Sector*, Santa Monica, RAND Corporation, 2007, pp. 15 ff.

<sup>92</sup>J-P. Jean and H. Pauliat, *An Evaluation of the Quality of Justice in Europe and its Developments in France*, (2006) 2 *Utrecht Law Review* 44–60, at p. 47.

<sup>93</sup>Para. 69 of the judgment, cited in Council of Europe, *Human Rights and the Fight against Terrorism – The Council of Europe Guidelines*, Strasbourg, Council of Europe Publishing, 2005, pp. 58–59.

and the circumstances of the case have to be taken into account and have to be weighed against the judgment in reasonable time.<sup>94</sup> Expeditious, therefore, does not mean precipitate, and speed is not always a token of quality, it may even call into question the basic safeguards of a fair trial.<sup>95</sup> According to the Court's judgment in *Mutimara v. France*, 'reasonable' time should be understood as the time necessary to arrive at a result. From a victims' perspective, a long delay of proceedings may cause secondary victimisation and represents a source of psychological stress for crime victims.<sup>96</sup> Therefore, it is necessary to balance victims' interests in expeditious proceedings with the need for quality of justice.

### 5.3.1.3 The Position of Victims of Terrorist Acts in Criminal Proceedings

The guidelines state that 'States should ensure that the position of victims of terrorist acts is adequately recognised in criminal proceedings.' In this respect, the above-mentioned CoE recommendations are of relevance as they ensure some important rights to victims, like the right of information and assistance in the context of criminal proceedings. However, the recommendations do not imply that victims are to be treated in a manner equivalent to that of a party to criminal proceedings or that victims have other participation rights. Further, the guidelines restrict the victim's status of a party to *partie civile* proceedings. In this context, the European Court of Human Rights recognises that victims' rights must go beyond being able to bring civil actions in legal proceedings. In this respect, the court refers to the above-mentioned CoE recommendations in order to safeguard a balance between the rights of the parties and the rights of victims.<sup>97</sup> However, these rights do not imply any participation rights for crime victims. Moreover, under Article 6 (1) of the ECHR, only prosecution and defence are considered as a *party* to criminal proceedings with rights to participate actively in the proceedings.<sup>98</sup> Thus, neither crime victims in general nor victims of terrorism in particular do have the status of a party to criminal proceedings at CoE level. It is rather that victims of terrorism can only have the status of *partie civile* in criminal proceedings. Consequently, as neither the guidelines nor case law of the European Court of Human Rights provides a status of a party to criminal proceedings for victims of terrorism, this is left to the Member States. The same is true for provisions of the UN Declaration<sup>99</sup> and the EU Framework Decision for victims of crime in general.

<sup>94</sup>Para. 74 of the judgment, cited in Council of Europe (2005), pp. 58–59.

<sup>95</sup>Jean and Pauliat, 2006, p. 47.

<sup>96</sup>U. Orth, Secondary Victimization of Crime Victims by Criminal Proceedings, (2002) 15 *Social Justice Research*, 313–325, p. 316.

<sup>97</sup>*Case of Perez v. France*, judgment of 12 February 2004, Application No. 47287/99, § 72.

<sup>98</sup>Meyer-Ladewig, 2006, p. 123; Reid, 2004, p. 100.

<sup>99</sup>See Paragraph 6 (b) with reference to presenting victims' views and concerns, and Paragraph 4 with the provision for access to the mechanisms of justice.

Article 2 (1) of the EU Framework Decision states that each Member State shall ensure that victims have a real and appropriate role in its criminal legal system.<sup>100</sup> This article follows up the eighth recital, which reads ‘the rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be understood, the right to be protected at the various stages of procedure and the right to have allowance made for the disadvantage of living in a different Member State from the one in which the crime was committed.’ This provision announces the general aim of ensuring a real status for victims in criminal proceedings.<sup>101</sup> This implies that the victim’s role should go beyond that of a mere witness by supplying evidence. This becomes apparent through the provision of Article 3 of the EU Framework Decision, whereby each Member State shall safeguard the possibility for victims to be heard during proceedings in addition to supplying evidence. This does, however, not impose an obligation on EU Member States to ensure that victims will be treated in a manner equivalent to that of a party to proceedings.<sup>102</sup> In so far, there is consistence between the provisions of the EU Framework Decision and case law of the European Court of Human Rights.

When looking at national legal systems of EU Member States, it becomes apparent that the position of victims differs in their criminal justice systems. In many countries, the two most traditional and essential positions that legally can be accorded to a victim in the context of criminal proceedings are that of a witness and of an injured party. The victim of a crime is often considered to only have a ‘party-like status’, the ‘real’ parties being the public prosecutor and the defendant.<sup>103</sup> The latter aspect is particularly true in common law jurisdictions that do not offer victims a formal legal position and where victims cannot act as civil claimant (*partie civile*) in adhesion to the criminal process.<sup>104</sup> In contrast, in some of the civil law jurisdictions (e.g. Austria, Germany, Liechtenstein, the Nordic jurisdictions and Portugal) the victim can participate more actively as a party to the criminal proceedings in the role of the so-called ‘auxiliary prosecutor’.<sup>105</sup>

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<sup>100</sup>OJ L 82, 22/03/2001, pp. 1, 2.

<sup>101</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 3.

<sup>102</sup>See recital 9 of the EU Council Framework Decision.

<sup>103</sup>Ivo Aertsen, *The Duties of the Public Prosecutor in the Criminal Field towards Victims and Witnesses, and particular those that are Juveniles, Report for the Co-operation Programme to Strengthen the Rule of Law*, Conference of Prosecutors General of Europe (CPGE), 7th session, 26 June 2006, p. 4.

<sup>104</sup>Jessica Almquist, *The Place and Role of Victims of Terrorist Acts in Relation to National and International Jurisdictions*, in Delphine Pennewaert (ed.), *Proceedings of The Study Days held in October 2005 – Promotion of Resources for Victims of Terrorist Acts and their Families*, Red Cross Belgium, 2005, p. 15.

<sup>105</sup>See Brienen and Hoegen, 2000, pp. 27–29. The status of the so-called ‘auxiliary prosecutor’ enables the crime victim to participate actively in the proceedings by joining the state’s prosecution. In contrast, in *partie civile* proceedings the victim traditionally is only a party to the proceedings if s/he has lodged a complaint and requested compensation for the damage suffered (civil claimant).

From a criminological point of view, the ‘adequate’ position of victims in criminal proceedings has to be measured against the needs of victims in criminal proceedings. According to Strang, victims want to be treated respectfully and fairly.<sup>106</sup> Thibaut and Walker found that control over both the decision-making process and control over outcome made people feel that they had been treated fairly. Subsequent research found that control over process was more important than control over the outcome when victims assessed the fairness of legal procedures.<sup>107</sup> Research by Kilchling reveals that a majority of victims of serious crime (61%) would like to have more control over the proceedings and more than half of all victims would wish a more active participation in criminal proceedings.<sup>108</sup> This corresponds with findings by Rohne on Israeli/Palestinian victims (see Chapter 7). Kilchling further found that those victims with a need for a more active role in criminal proceedings experienced not being taken seriously by the criminal justice system, which must be seen against the background of secondary victimisation by the justice system.<sup>109</sup> From these findings follows the need of victims of crime to participate in their case, with a position that goes beyond that of a simple witness status. This corresponds with the viewpoint of legal representatives of victims in *the case of The Prosecutor v. Thomas Lubanga Dyilo* as discussed above. Moreover, the court held in this case that the participation by victims should encompass their personal interests in an appropriately broad sense and not be restricted to reparation issues.<sup>110</sup> This does, however, not give them a status of parties to criminal proceedings, but this recent decision broadens the participatory rights of victims.

## Participation

As mentioned before, the debate on direct victim involvement in criminal proceedings results from the variation among justice systems. Although the importance of full victim participation in mediation and civil proceedings is widely recognised, the position of victims is different as regards criminal proceedings in many

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<sup>106</sup>Heather Strang, *Repair or Revenge: Victims and Restorative Justice*, Oxford University Press, 2002, p. 13. See also Chapter 3 for a comprehensive overview of victims’ needs.

<sup>107</sup>Strang, 2002, p. 14.

<sup>108</sup>Michael Kilchling, Opferinteressen und Strafverfolgung, in Günther Kaiser (ed.), *Kriminologische Forschungsberichte aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Band 58*, Freiburg, edition iuscrim, 1995, pp. 291, 297. See also the findings of the victim support organisation “Opfer gegen Gewalt”, cited in Wu, 2007, p. 21.

<sup>109</sup>Kilchling, 1995, pp. 297, 299.

<sup>110</sup>Decision on victims’ participation of 18 January 2008, Situation in the Democratic Republic of The Congo In *The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, §§ 98, 106, 108, 118. For instance, the Trial Chamber considers granting victims the right to initiate procedures on application or request, by bearing in mind the rights of the accused to a fair and expeditious trial.

jurisdictions.<sup>111</sup> Moreover, some research suggests that victim participation places an unwanted burden on the victims themselves and may cause the victims anxiety.<sup>112</sup> However, the same is true where victims serve solely as witnesses and are not more actively involved in the proceedings.<sup>113</sup> The question is rather that the possibility of active victim participation is offered to the victim and s/he can choose whether to play an active role in the proceedings or not. This makes the difference to the status of a victim as a witness, which is a position that cannot be voluntarily chosen by the victim. However, another argument against the strengthening of the victim's position in criminal proceedings is the presumption of innocence of the defendant under Article 6 (2) of the ECHR. While giving the victims rights to actively participate in criminal proceedings, it is argued that thereby the position as a victim is already presumed which may have negative effects for the defendant's rights.<sup>114</sup> Yet, empirical research revealed that the crime victim's status of a party does not affect or only marginally affect the defendant's rights.<sup>115</sup> Moreover, when looking at the essence of the principle of equality of arms, victims' rights have to be balanced with offenders' rights and vice versa. This is against the background that from a criminological point of view, crime has not only a societal dimension but includes a personal dimension as well, namely the perspective that crime is a conflict between victims and their offenders that should not be deliberately taken away from them.<sup>116</sup> This viewpoint supports the perspective that victims should play a substantive role in criminal proceedings.

In the following, an overview of possibilities for victim participation is presented that reflects these different perspectives in the respective jurisdictions, where participation rights for victims of crime in general are either limited or include full procedural rights.

### *Participation for Victims of Crime in General*

The EU Framework Decision provides for the right to be heard during proceedings under its Article 3 (1); and in Para 6 (b) of the UN Declaration, it is stated that 'the views and concerns of victims should be allowed to be presented and considered in appropriate stages of the proceedings where the victims' personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.' This provision corresponds with Article 68 (3) of the

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<sup>111</sup>UNODCCP, *Handbook on Justice for Victims*, New York, UNODCCP, 1999, p. 37.

<sup>112</sup>UNODCCP, 1999, p. 36.

<sup>113</sup>See findings by Orth and Richter, cited in Wu, 2007, p. 18.

<sup>114</sup>Salditt, cited in O. Tolmein, *Erniedrigte und Vereidigte – Wieviel Schutz brauchen Opfer vor Gericht? – Der Strafverteidigertag streitet in Mainz* at <http://www.ra-tolmein.de/cms2/documents-upload/pdf/1153414692.pdf> (12/02/2008).

<sup>115</sup>Niedling (2005) cited in Wu, 2007, p. 57.

<sup>116</sup>See Christie, cited in Strang, 2002, p. 9.

Rome Statute of the ICC.<sup>117</sup> In both of the two latter provisions the victim's participatory rights are subsidiary to the rights of the accused.

### *Victim Impact Statements*

In this context, one of the strategies to increase victim participation has been, for instance, the use of victim impact statements, which represent a means of providing victims with a voice at sentencing, which is used in some national jurisdictions.<sup>118</sup> However, according to research findings by Erez, and Davies and Smith the inclusion of victim input in proceedings had little effect on the criminal justice system and on victims' satisfaction.<sup>119</sup> This was mainly due to victims' expectations about their capacity to influence sentences via (written) victim impact statements. Therefore, Roberts and Erez suggest in later research findings that victims should be made aware of the communicative value of the statements<sup>120</sup> If victims are encouraged to view the statement as an exercise in communication for the court and the offender, they are less likely to be disenchanting than if they are encouraged to see the statement as a way of influencing the sentencing decision. Roberts and Erez suggest that victims of serious personal injury offences should be encouraged to deliver the statement orally at the time of sentencing. Davies and Smith also argue that allowing the victim to make oral statements to the court at sentencing (victim allocution) would offer a more effective way to promote victim satisfaction through participation.<sup>121</sup> Roberts and Erez point out that moving away from an approach which emphasises impact towards the expressive function will redirect the concept and practice of the victim impact statement and bring it back to its original course to provide victims with a voice in the sentencing process.<sup>122</sup> Thus, the communica-

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<sup>117</sup>Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Article 68 (3) reads as follows: *'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.'*

<sup>118</sup>Victim Impact Statements are used in Europe mainly in common law jurisdictions.

<sup>119</sup>Cited in Strang, 2002, p. 13; Robert C. Davis and Barbara E. Smith, *Victim Impact Statements and Victim Satisfaction: An Unfilled Promise?* in Peggy M. Tobolowsky (ed.), *Understanding Victimology*, Cincinnati, Anderson, 2000, pp. 269–284 at p. 283.

<sup>120</sup>J.V. Roberts and E. Erez, *Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements*, (2004) 10 *International Review of Victimology*, 223–244, pp. 235, 238. The communicative value is also of particular importance for victims taking part in victim-offender mediation in the context of severe violence, see Chapter 7.

<sup>121</sup>Davis and Smith, 2000, p. 283.

<sup>122</sup>Roberts and Erez, 2004, p. 239.



tive element would provide for an active participation of victims and would ensure their right ‘to be heard’ or ‘to present their views and concerns’ in the criminal proceeding. This communicative need is also expressed by Israeli/Palestinian victims according to findings by Rohne (see Chapter 7). Thus, victim allocution would be the first step for improving crime victims’ participation rights. However, participation in the form of victim impact statements or victim allocution is limited to the stage of sentencing and does not confer significant procedural rights on the victim to participate actively throughout the whole criminal justice process.

### *Victim Participation Under ICC Jurisdiction*

Under the jurisdiction of the ICC, victims, respectively their legal representatives, have more extended rights than expressing their views and concerns. The Rome Statute of the ICC gives victims of genocide, crimes against humanity and war not only the right to put their views and concerns directly to the judges, but also to participate in hearings before the court with (restricted) questioning rights of witnesses through their legal representatives.<sup>123</sup> Article 68 (3) of the Rome Statute provides for participation by victims whenever their personal interests are affected, which is not limited to an interest in receiving reparations.<sup>124</sup> However, the ICC judges decide when and how victims will be able to exercise this right in order to balance participation rights of the victims with the rights of the accused or a fair and impartial trial. Thus, the participatory rights of victims or their legal representatives are dependent on the decision of the judges, which reveals that victims have not a status of a party to the proceedings before the ICC.<sup>125</sup> Hence, although the participation rights of victims under the Rome Statute of the ICC are quite extended, victims still have a subordinate role compared to the status of the defendant.<sup>126</sup>

### *Victim Participation in National Jurisdictions*

Another strategy to increase participatory rights of victims can be found in some national jurisdictions, where victims are given the status of parties to criminal

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<sup>123</sup>See Article 68 (3) of the Rome Statute of the ICC, and Rule 91 of the Rules and Procedures and Evidence of the ICC. In a recent decision, the ICC tends to broaden questioning rights for victims, see Decision on victims’ participation of 18 January 2008, Situation in the Democratic Republic of The Congo In *The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, § 108.

<sup>124</sup>Decision on victims’ participation of 18 January 2008, Situation in the Democratic Republic of The Congo In *The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06, § 98.

<sup>125</sup>See also Claude Jorda and Jérôme de Hemptinne, The Status and Role of the Victim, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume II, Oxford University Press, 2002, p. 1405.

<sup>126</sup>However, there is a tendency of the ICC to broaden participatory rights of victims, see Decision on victims’ participation of 18 January 2008, Situation in the Democratic Republic of The Congo In *The Case of The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/04-01/06.

proceedings.<sup>127</sup> This is against the background of criminological research findings that reveal that victims wish to have control over the process.<sup>128</sup> In Germany, for instance, the institute of the *Nebenklage* (accessory prosecution) offers crime victims a secured legal status for the protection of their interests. Moreover, it serves as a control function of the public prosecution.<sup>129</sup> According to findings by Kilchling, victims expressed the need for significant procedural rights, which implies a status of a party to criminal proceedings.<sup>130</sup> He found that victims of serious crime prefer a position where they obtain rights to information, access to files and the right to be heard.<sup>131</sup> A majority of those victims expressed the need to have rights of questioning witnesses as well as the right to file a submission.<sup>132</sup> These rights can be realised if victims have the status of a party under national law. In Germany, for instance, the status of *Nebenkläger* ('auxiliary prosecutor') gives the victim a number of full procedural rights: to be present during the whole proceeding, either in person and/or through a legal representative; to refuse a judge or expert witnesses; question witnesses; object against decisions of the presiding judge and contest the permissibility of questions; offer evidence; make statements, including the final statement; have access to files through a legal representative, and a right to appeal.<sup>133</sup> As regards the right to appeal, crime victims are not limited to bare information rights concerning the outcome of their case as this is currently the case under international legal instruments.<sup>134</sup> Research findings reveal that victims with a status of a party to criminal proceedings are more satisfied with the procedures than other victims.<sup>135</sup> However, such a status is limited to the above-mentioned jurisdictions, and still not accepted in all the EU Member States.

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<sup>127</sup>In Austria, Germany, Liechtenstein, the Nordic jurisdictions, and Portugal, the victim can play the role of the so-called 'auxiliary prosecutor': Brien and Hoegen, 2000, p. 28. The notion of 'auxiliary prosecutor' is, however, rather mistakable in the English translation.

<sup>128</sup>Strang, 2002, p. 14.

<sup>129</sup>See Rieß, cited in Wu, 2007, p. 52.

<sup>130</sup>Kilchling, 1995, pp. 297, 304.

<sup>131</sup>Kilchling, 1995, pp. 295.

<sup>132</sup>Kilchling, 1995, pp. 298.

<sup>133</sup>See § 397 StPO.

<sup>134</sup>See, for instance, Section D Article 9 of the CoE Recommendation R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure that does not establish a duty to notify victims of the outcome of the case; it only says that victims should be informed how to find the court's decision. Under Article 6 (5) of CoE Recommendation Rec(2006)8 on assistance to crime victims, victims should be kept informed of and it should be ensured that victims understand the verdict of the competent court and, where relevant, the sentence. According to Article 4 (2) (c) of the EU Framework Decision, victims should be informed of the court's sentence.

<sup>135</sup>Wu, 2007, p. 57.

### *Participation for Victims of Terrorism*

It is evident that the reasoning for (or against) participation rights for victims of crime in general can be applied to victims of terrorism as well. This is why Amnesty International and the International Commission of Jurists recommend that victims of terrorist acts must have an adequately recognised place in criminal proceedings, in a manner consistent with the rights of the accused to a fair trial.<sup>136</sup>

Moreover, the demand for victims of terrorism for a status of a party to criminal proceedings could be based on the following arguments: first, victims of terrorism face more than other victims the risk of being excluded from the trial on grounds of Article 6 (1) 2 of the ECHR, which offers the possibility to exclude the public from all or part of the trial if the interests of national security require so.<sup>137</sup> Consequently, if victims of terrorism are not able to act as a party to criminal proceedings, they may be barred from the trial in such cases. Another argument is the aspect of vulnerability of victims of terrorism. The status of vulnerability of victims of terrorism according to recital 8 of the EU Council Framework Decision of 13 June 2002 on combating terrorism could be seen as a provision that could heighten the position of victims of terrorism in criminal proceedings. As discussed above, this provision refers to specific measures with regard to victims of terrorism under the EU Council Framework Decision, including terrorist victims' families affected by terrorist acts under Article 10 (2) of the EU Council Framework Decision of 13 June 2002 on combating terrorism. In principle, this provision does not imply a status of a party to criminal proceedings.

However, when taking national law as an example, it could be considered that the aspect of vulnerability determines in itself an argument for a status of a party for victims of terrorism. For instance under German law, injured persons who seem particularly worthy of protection can apply for the position of auxiliary prosecutor, which offers these victims the possibility to obtain the status of a party to criminal proceedings.<sup>138</sup> Here, the 'worthiness of protection' is determined according to the respective offence. The same is true for the determination of vulnerability.

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<sup>136</sup>Recommendation of Amnesty International and the International Commission. Thereby it is even urged to grant victims of terrorism the possibility of a status of parties to criminal proceedings.

<sup>137</sup>Additional requirement for the exclusion of the public is the principle of proportionality: Rainer Grote and Thilo Marauhn (eds.), *EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Tübingen, Mohr Siebeck, 2006, p. 698. See for instance the German terrorist case against Mzoudi, where the public should be excluded as precondition that the US Ministry of Justice would agree in providing confidential interrogation material for the proceedings in Germany at <http://www.123recht.net/printarticle.asp?a=8010> (12/02/2008).

<sup>138</sup>See § 397a (1) StPO. The status of 'auxiliary prosecutor' is interlinked with the importance of the seriousness of the offence: Lutz Meyer-Goßner, *Strafprozessordnung*, München, C.H. Beck, 2005, p. 1292; Friedrich-Christian Schroeder, *Strafprozessrecht*, München, C.H. Beck, 2007, p. 229. This is why victims of offences against property are excluded from applying for the status of 'auxiliary prosecutor'.

According to Albrecht, the impact of terrorist acts creates amongst others a sense of vulnerability, and this impact is comparable to that of ‘ordinary’ violence.<sup>139</sup> Thus, the impact of the respective offence is a decisive element for determining if victims are considered to be vulnerable. This corresponds with the categorisation of vulnerable victims under the CoE Recommendation Rec(2006)8 on Assistance to Crime Victims, where victims are considered vulnerable either by virtue of their personal characteristics or *of the type of crime they have been exposed to*.<sup>140</sup> However, victims of terrorism are not considered vulnerable under CoE legal instruments, which is in contrast to the EU perspective.<sup>141</sup> It is only under the EU *Council Framework Decision of 13 June 2002 on combating terrorism* that victims of terrorism are considered vulnerable.

Consequently, it could be considered that victims of terrorism obtain the status of parties to criminal proceedings on the basis of their vulnerability, at a minimum in those national laws of EU Member States that foresee the possibility for vulnerable victims to have a status of parties to criminal proceedings.<sup>142</sup>

### Alternatives to Direct Participation in Criminal Proceedings

The question arises whether victims of terrorism would need to participate in person in the proceedings if they would have full participatory rights under national law. The decisive advantage over the witness status is that the victim as a participant has the choice whether to participate in the criminal proceedings or not.<sup>143</sup> Alternatively, the victim is entitled to be represented by a legal representative, and does not need to appear in court in person to ensure his interests. Moreover, victim support organisations could represent victims similar to the way this can be done before the ICC (see above). If these participatory rights for victims of terrorism could be applied in all EU Member States’ national legislation, victims of terrorism in cross-border cases would not need to travel to the competent court in

<sup>139</sup>Hans-Jörg Albrecht, *Compensation and Support for Victims of Terrorism*, p. 2 at <http://law.msc.huji.ac.il/law1/criminology/events/Albrecht.pdf> (12/02/2008).

<sup>140</sup>See para. 59 of the explanatory memorandum to the CoE Recommendation Rec(2006)8 on Assistance to Crime Victims with reference to Article 3.4 of that Recommendation.

<sup>141</sup>The opinions of the seminar participants of the project also differed in this respect. Thus, further research on the question of the vulnerability of victims of terrorism is needed. The findings of Chapter 3 suggest, however, supporting such an approach.

<sup>142</sup>It has to be taken into consideration that such an approach would only be possible in civil-law systems; see Alphons Orié, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC*, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume II*, Oxford University Press, 2002, p.1446.

<sup>143</sup>This does not affect, however, the witness status; i.e. a victim-witness is still obliged to appear before court if this is requested.

person but could be (jointly) represented by a lawyer. The same would apply to victims of mass terrorist victimisation.<sup>144</sup>

### *The Role of Tertiary/Vicarious Victims in Criminal Proceedings*

Chapter 3 describes fear and anxiety reactions to terrorism in the general public and tertiary/vicarious victims' needs related to these feelings. The findings suggest reliable information concerning the risk of renewed terrorist attacks and possible needs for retribution and revenge. These needs can be partially met by offering tertiary victims, i.e. the general public, the possibility of attending criminal proceedings against terrorists. Article 6 (1) of the ECHR implies the right to a fair and public hearing, and thereby the right of the public to attend a trial.<sup>145</sup> However, it also provides the possibility to exclude the public from the trial under the circumstances mentioned in Article 6 (1) 2 of the ECHR.<sup>146</sup> In this respect, the position of tertiary victims in criminal proceedings is similar to that of primary and secondary victims in those Member States that do not foresee special participatory rights for these victims.

Chapter 3 further discusses the impact of terrorist acts on vicarious victims. It is concluded that especially large-scale terrorist attacks can have a detrimental effect on vicarious victims' mental health. Although the findings suggest that vicarious victims in general experience lower levels of distress than primary and secondary victims of terrorism, it is argued that terrorist acts have a similar impact on vicarious victims as on direct victims. This impact may also create a sense of vulnerability for vicarious victims of terrorism. Therefore, it is questioned whether this vulnerability would allow them to have a status of a party to criminal proceedings. As discussed above, the determination of vulnerability or 'worthiness of protection' has the potential for allowing victims of serious violent crime a status of a party to criminal proceedings in some jurisdictions of EU Member States. However, for instance under the German code of criminal procedure, this status is reserved only to primary victims and in exceptional cases to the family of the primary victim.<sup>147</sup> This is in line with the role of the criminal procedure to enforce the interest of punishment of the state for the sake of the protection of the individual's legally

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<sup>144</sup>Another possibility could be the use of modern technologies as mentioned in the seminar report.

<sup>145</sup>Grote and Maruhn, 2006, p. 695.

<sup>146</sup>Article 6 (1) 2 of the ECHR reads: 'Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial if the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

<sup>147</sup>See § 395 StPO.

protected right and the general public.<sup>148</sup> Moreover, it is necessary to distinguish the individual's right to take legal action from an *actio popularis*. According to the European Court of Human Rights, a victim must show that he/she has been directly affected by the act in question.<sup>149</sup> This is not the case by way of the *actio popularis*. Moreover, as discussed above, Article 6 of the ECHR does not confer a right to an *actio popularis*. As vicarious victims of terrorism are affected indirectly by the terrorist act and do not have a close bond to the direct victim, their active involvement before court would reflect the situation of an *actio popularis*. Accordingly, the scope of claimants could hardly be restricted. However, restorative justice could offer other possibilities of participation for vicarious victims of terrorism (see Chapter 7).

#### 5.3.1.4 The Right to Information

Victims are only able to realise their rights if they are given respective information in a language they understand. This requirement is contained in Article 4 (1) of the EU Framework Decision and in Article 6 of Recommendation Rec(2006)8 on Assistance to Crime Victims. According to Strang, victims want more information about both processing and outcome of their case.<sup>150</sup> If an offender has been arrested, victims wish to be kept informed by the criminal justice authorities on the course of the criminal proceedings.<sup>151</sup> Research on victim notification indicates that victims who are kept informed by authorities feel that they had an opportunity to express their wishes, that their wishes had been taken into consideration, and that they had some degree of influence over the outcome of the case.<sup>152</sup> Amnesty International and the International Commission of Jurists recommend incorporating the provisions under Paragraph 6 (a) of the UN Declaration that victims and their families shall be informed of their role and the scope, timing and, upon their request, the progress and the disposition of such proceedings.<sup>153</sup> This should include

<sup>148</sup>See BVerfG, Beschluss vom 25.9.2003 - 2 BvR 1337/03.

<sup>149</sup>This decision refers to the system of individual petition provided under Article 34 of the ECHR that excludes applications by way of *actio popularis*. The Court held that the concept of victim must, in theory, be interpreted autonomously. Therefore, in order for an applicant to be able to claim to be a victim of a violation of the Convention, he must be able to show that he has been directly affected by the impugned measure. See *Case of Bic and others v. Turkey* (2006) Eur. Court HR, Application No. 55955/00, 2 February 2006, Final 03/07/2006, § 19.

<sup>150</sup>Strang, 2002, p. 10.

<sup>151</sup>Jo-Anne M. Wemmers, *Victims in the Criminal Justice System*, Den Haag, Ministerie van Justitie, WODC, 1996, p. 19.

<sup>152</sup>UNODCCP, 1999, p. 38.

<sup>153</sup>Recommendation of Amnesty International and the International Commission of Jurists at [http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/\\$File/IOR6102204.pdf](http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/$File/IOR6102204.pdf) (04/07/2007).

information of the possibility of mediation or other restorative justice initiatives. Research has shown that some victims of terrorism would have opted for restorative justice practices if they would have been informed of it.<sup>154</sup>

Further, Principle X para. (i) of the guidelines provides for information on obtaining assistance, practical and legal advice as well as on redress and compensation through appropriate information points. Article 4 of the EU Framework Decision includes information on protection issues, legal aid, and at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released. Except in cases where the victim does not want to receive any information regarding the conduct and outcome of the criminal proceedings, including information of the release of the prosecuted or sentenced person as set out in Article 4 (4) of the EU Framework Decision and Principle X of the guidelines, should information not be provided.

Research on victims of terrorism has shown that they want to be informed of the release of the offender irrespective of the potential danger to the victim. Victims of RAF-terrorism, who had not been informed of the release of the sentenced terrorists, felt angry and treated without respect for their dignity, which caused secondary victimisation to these victims.<sup>155</sup> This need corresponds with general research findings by Shapland who described the need for information as a need for a respected and acknowledged role in the criminal justice system.<sup>156</sup>

Further, crime victims should be informed of the possibility to have the status of a party to criminal proceedings where this is possible. Research findings by Staiger-Allroggen reveal that every third crime victim did not know about the possibility of accessory prosecution in Germany.<sup>157</sup> Thus, information should include information about the crime victim's position as 'auxiliary prosecutor' in Member States where this is possible.

### 5.3.1.5 The Right to Assistance During Legal Proceedings

The guidelines do not explicitly provide assistance during legal proceedings for victims of terrorism. The provision of 'legal aid in appropriate cases' implies, however, legal assistance by a lawyer. However, assistance by victim support organisations or otherwise is of particular importance for victims who cannot afford a lawyer throughout the criminal proceedings.<sup>158</sup> In Article 5.2 of Recommendation

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<sup>154</sup>See in Chapter 7.

<sup>155</sup>Anne Siemens, *Für die RAF war er das System, für mich der Vater – Die andere Geschichte des deutschen Terrorismus*, München, Piper Verlag, 2007, p. 67; Spiegel-Online, 'Wie kann man einen Menschen zum Schwein machen?' <http://www.spiegel.de/politik/deutschland/0,1518,481776,00.html> (31/07/07).

<sup>156</sup>Cited in Wemmers, 1996, p. 20.

<sup>157</sup>Staiger-Allroggen, cited in Wu, 2007, p. 55.

<sup>158</sup>This is especially the case for witnesses and victims who do not have the status of a party.



Rec(2006)8 on Assistance to Crime Victims reference is made to victim support services, which should provide victims with free emotional, social and material support before, during and after the investigation and legal proceedings.<sup>159</sup> At EU level, Article 13 (2) (c) of the EU Framework Decision contains provisions for assistance during criminal proceedings. By providing assistance during criminal proceedings, victims are supported emotionally, which is of particular relevance for the prevention of secondary victimisation in legal proceedings.<sup>160</sup> In this context, Amnesty International and the International Commission of Jurists recommend incorporating the provisions under Paragraph 6 (c) of the UN Declaration into the guidelines that assistance shall be provided to victims and their families throughout legal proceedings.<sup>161</sup>

### 5.3.1.6 The Right to Protection

From the need to be treated respectfully and fairly follows further the right to protection. Amnesty International and the International Commission of Jurists recommend incorporating the provisions under Paragraph 6 (d) of the UN Declaration that where appropriate, the State shall ensure adequate protection of victims, witnesses and their families.<sup>162</sup> Article 8 of the EU Framework Decision explicitly provides for special waiting areas for victims in appropriate cases and special possibilities for victims to testify.

Principle VIII para. 2 of the guidelines includes the obligation of the media to ensure the protection of the private and family life of victims of terrorist acts in the framework of their information activities. This is against the background that victims of terrorism are in special focus of the media due to the ‘publicity’ of the terrorist act, and risk secondary victimisation when details of the case are reported publicly.<sup>163</sup> In this respect, victims of terrorism should have the possibility beyond the provisions in Principle VIII para. 3 of the guidelines, to enforce a claim by legal action in order to prohibit the publication of those pictures that violate the dignity of

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<sup>159</sup>Council of Europe, Victims – Support and Assistance, 2006, p. 57.

<sup>160</sup>See the speech by the German minister of justice at [http://www.bmj.bund.de/enid/0,d04570706d635f6964092d0933323131093a0979656172092d0932303036093a096d6f6e7468092d093131093a095f7472636964092d0933323131/Reden/Brigitte\\_Zypries\\_zc.html](http://www.bmj.bund.de/enid/0,d04570706d635f6964092d0933323131093a0979656172092d0932303036093a096d6f6e7468092d093131093a095f7472636964092d0933323131/Reden/Brigitte_Zypries_zc.html) (30/07/07).

<sup>161</sup>Recommendation of Amnesty International and the International Commission of Jurists at [http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/\\$File/IOR6102204.pdf](http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/$File/IOR6102204.pdf) (04/07/2007).

<sup>162</sup>Recommendation of Amnesty International and the International Commission of Jurists at [http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/\\$File/IOR6102204.pdf](http://web.amnesty.org/library/pdf/IOR610222004ENGLISH/$File/IOR6102204.pdf) (04/07/2007).

<sup>163</sup>See for instance, the simultaneous media coverage of the plane crash in the World Trade Center in New York on 9/11.

the victim in order to protect him/her from secondary victimisation.<sup>164</sup> Further, in the report of the CoE High Commissioner for Human Rights it was stressed that one of the aspects of the problem, which the associations and organisations representing the victims of the terrorist attacks in Madrid on 11 March 2004 highlighted, is the use and exploitation of the consequences of terrorist violence by the media. The High Commissioner therefore recommends that ‘it seems fair and reasonable to insist that the media refrains from repeated use of certain images, which only serve to revive the pain and suffering in the minds of those concerned. A certain moderation and restraint are required on the part of both the media and society in general.’<sup>165</sup>

### 5.3.2 *The Practical Relevance of These Provisions and Their Implementation in National Law*

With regard to the *status of victims in criminal proceedings* as set out in Article 3 (1) of the EU Framework Decision, the European Commission found that most EU Member States allow victims to bring *partie civile* proceedings.<sup>166</sup> Likewise, the presentation of written reports is a common technique in some Member States enabling the victim to set forth his claim more fully.<sup>167</sup> However, as stated above, research by Erez, Davies and Smith revealed that written victim impact statements evoke the least effect on the criminal justice system and on victims’ satisfaction.<sup>168</sup> Hence, it is rather victim allocution than written impact statements that has the potential to provide more victim satisfaction. As regards the crime victim’s status of a party to criminal proceedings, empirical research shows that the institute of accessory prosecution is being made use of in Germany in a regular way.<sup>169</sup> In contrast to

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<sup>164</sup>For instance, the family of the RAF-victim Hanns Martin Schleyer is still confronted with the pictures showing him in a degrading and humiliating pose when kidnapped by RAF-terrorists in 1977. See also [http://www.welt.de/politik/article780077/Ex-Terroristen\\_wollen\\_alte\\_Fotos\\_verbieten\\_lassen.html?nr=0&bpnr=0](http://www.welt.de/politik/article780077/Ex-Terroristen_wollen_alte_Fotos_verbieten_lassen.html?nr=0&bpnr=0) (01/08/07).

<sup>165</sup>Report by Alvaro Gil-Robles, Commissioner for Human Rights, On his visit to Spain, 10–19 March 2005, Strasbourg, 9 November 2005, CommDH(2005)8, para. 157. See to the problem of media reporting also Chapter 7.

<sup>166</sup>However, due to different translations in the English and German report of the European Commission, it is not clear whether proceedings are encompassed that are ‘*partie civile* proceedings’ in the strict sense, or where the victim can have the status of ‘auxiliary prosecutor’.

<sup>167</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 4.

<sup>168</sup>Cited in Strang, 2002, p. 13; Davis and Smith, 2000, p. 283. This article reports on the results of a field test that examined the effects of impact statements on victim perceptions of involvement and satisfaction with the criminal justice system in the US.

<sup>169</sup>Michael Kaiser, Die Stellung des Verletzten im Strafverfahren, in Günther Kaiser (ed.), *Kriminologische Forschungsberichte aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Band 53*, Freiburg, edition iuscrim, 1992, pp. 88-91; Brienen and Hoegen, 2000, p. 364.

findings before the strengthening of the victim status in Germany, where only every fifth of qualified crime victims did opt for the status of ‘auxiliary prosecutor’, the situation has changed to a duplication of commencement of the accessory prosecution.<sup>170</sup>

In this context, it is important to reflect on the question whether victims of terrorism could have a status of a party to criminal proceedings or participatory rights in common law jurisdictions. Characteristic of the common law is the adversarial nature of the criminal court proceedings. From this follows that prosecution and defence contest each other in court as equal parties before an impartial judge and jury.<sup>171</sup> Furthermore, prosecution and defence may negotiate to avoid a full trial, which has resulted in the tendency towards trial avoidance in England and Wales.<sup>172</sup> This has important consequences for the position of the victim of crime: relatively few victims have to testify in court, there is no procedural incentive to inform the victim of the developments of the case, and where a case ends with a caution, the victim is denied the chance of being awarded compensation by the criminal court.<sup>173</sup> Furthermore, the victim has no *locus standi* and is considered an *alleged* victim. In contrast to the English adversarial system, the inquisitorial system regards the victim of crime as the victim until proven otherwise.<sup>174</sup> In this respect, Brien and Hoegen highlight that the presumption of truthfulness of the victim in the inquisitorial system does not compromise the presumption of innocence of the defendant. In this context, the suggestions by Jorda and De Hemptinne for the accusatorial procedure of the ICC could be taken into consideration for applying participation rights of victims in such a system. Jorda and De Hemptinne stress that the accusatorial procedure of the ICC makes it difficult to apply the participation rights of the victim under the Rome Statute of the ICC in an efficient way.<sup>175</sup> Therefore, they suggest two alternative approaches, whereby the participatory rights of victims can be safeguarded in a better way within such an accusatorial procedure. This is either by allowing the victim to participate continuously in the entire process and by giving the judge greater powers to control the proceedings.<sup>176</sup> Alternatively, the accusatorial procedure could be modified into two separate, successive parts, with

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<sup>170</sup>Staiger-Allroggen (1992) and Niedling (2005), cited in Wu, 2007, pp. 55, 56.

<sup>171</sup>Brien and Hoegen, 2000, p. 245.

<sup>172</sup>Brien and Hoegen, 2000, p. 246.

<sup>173</sup>Brien and Hoegen, 2000, p. 247.

<sup>174</sup>Brien and Hoegen, 2000, p. 286.

<sup>175</sup>Jorda and De Hemptinne, 2002, pp.1388, 1412. In the accusatorial procedure, the trial is conceived as a duel between two adversaries, i.e. the prosecution and the defence, which leaves little room for a third protagonist. Further, the judge does not have at his disposal the documents gathered by the prosecution and the defence as the Statute does not provide like the Romano-Germanic systems, for the appointment of an investigating judge with responsibility for collecting all items of evidence.

<sup>176</sup>Jorda and De Hemptinne, 2002, p.1413.

elements of accusatorial and inquisitorial procedures.<sup>177</sup> Consequently, at least participatory rights for victims of terrorism would be possible to implement in accusatorial/adversarial systems provided that the suggested changes are made.

With regard to the *right to receive information*, in particular at the beginning of criminal proceedings, EU Member States did not fully comply with the requirements under Article 4 (1) of the EU Framework Decision. Certain Member States transposed this obligation by posting the requisite information on the websites of the relevant agencies and/or by creating booklets. Such measures do, however, not fulfil completely the obligations imposed by Article 4 (1), because Member States must take the necessary measures to oblige their authorities to actively provide individual victims with this information.<sup>178</sup> It is further not sufficient to provide information on the Internet because not everyone has access to a computer. Moreover, there is no guarantee that the victim truly understood the information made available.<sup>179</sup> Another concern is the problem of languages. The EU Framework Decision states in Article 4 (1) that information should be given ‘as far as possible in languages commonly understood’. While some Member States have information available in several languages, most of the other Member States are silent in this respect. Further, all the Member States ignored to make any special arrangements available to victims in order to protect their interests if they are resident in another State as set out in Article 4 (1) (h) of the EU Framework Decision.<sup>180</sup>

With regard to the right to receive information concerning the conduct of the proceedings under Article 4 (2) of the EU Framework Decision, by and large this Article was correctly transposed by most of the EU Member States. However, concerning information on the sentence of the court, not all Member States indicated such information.<sup>181</sup> With regard to Article 4 (3) on the right to receive information concerning the release of the sentenced offender, only Finland correctly transposed this obligation.<sup>182</sup> The right not to receive information under Article 4 (4) of the EU Framework Decision was not transposed by most of the Member States.<sup>183</sup> The

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<sup>177</sup>Jorda and De Hemptinne, 2002, p.1414. The first part would be essentially adversarial and would allow no oral interaction of the victim, while the second part would be devoted to victims and much more inquisitorial, since it would be conducted under the strict control of a judge. At this stage, the victim could intervene orally with the possibility to call witnesses. Following the closure of the oral proceedings, the victim and his lawyer would be entitled as of right to put forward their own arguments and call their own witnesses to testify. Under these circumstances, the judge would be fully informed as to the various aspects of the case and could exercise proper control both over the list of witnesses and over the testimony given by them before the Court.

<sup>178</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 5.

<sup>179</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 5.

<sup>180</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 6. On 25 March 2003, only the United Kingdom (Scotland) had a telephone link making it possible to reach interpreters directly.

<sup>181</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 6.

<sup>182</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 6.

<sup>183</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 7.

European Commission concluded that Member States must be more proactive and reach out to victims in order to comply fully with the requirements as set out in Article 4 of the EU Framework Decision.

With regard to assistance *during criminal proceedings* under Article 13 of the EU Framework Decision, the European Commission found that most of the EU Member States financed victim support services which provide the public with information, guidance and support as regards their rights.<sup>184</sup> However, only Austria, France, Portugal and Sweden notified relevant national provisions on the various functions that these associations can fill.<sup>185</sup> Regarding the prevention of secondary victimisation under Article 15 of the EU Framework Decision, only two Member States had taken the necessary measures to comply with this Article.<sup>186</sup> Thus, the transposal measures of both Articles were not provided sufficiently by various Member States in March 2003.

In the context of assistance to victims before, during and after the trial, the CoE High Commissioner on Human Rights stressed the proposal of victim associations to set up a single office in charge of managing all victims' requests for assistance. Thereby, lengthy procedures with the administrative agencies dealing with the situation of victims of terrorism could be avoided. The setting up of a single administrative unit where victims could go to process their requests for different types of assistance would induce a more individual treatment of persons who have suffered terrorist violence, alleviating these persons of the burden, particularly heavy in their case, of having to claim in front of several agencies and authorities the concession of different types of assistance.<sup>187</sup>

The requirements under Article 8 (1) and (2) of the EU Framework Decision concerning the *protection of the safety and privacy of victims and their families* have not been transposed in all the Member States.<sup>188</sup> Moreover, until March 2003, only Germany transposed correctly the requirement under Article 8 (3) concerning separate waiting areas for victims. All the other Member States did not clearly provide for a victim's right to avoid contact with the offender in their national legislation.<sup>189</sup> With regard to the provision of Article 8 (4) of the EU Council Decision on rules of evidence adapted to the situation of particularly vulnerable victims, most of the Member States had transposed it, in particular by establishing the possibility for victims of testifying by audio-visual link-up or by preserving the anonymity of certain witnesses considered particularly vulnerable.<sup>190</sup> The European Commission concluded in its report that the transposal of Article 8 of the EU

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<sup>184</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 10.

<sup>185</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 10.

<sup>186</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 10.

<sup>187</sup>Report by Alvaro Gil-Robles, CommDH(2005)8, para. 159.

<sup>188</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 7.

<sup>189</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 8.

<sup>190</sup>EUR-Lex – 52004DC0054R(01) – EN, p. 8.

Framework Decision remains highly fragmentary. In this respect, the report of the CoE High Commissioner on Human Rights illustrates the lack of protection measures for victims of terrorism at the Spanish trials.<sup>191</sup> According to victim associations, victims wishing to be present during the trial of the persons accused of having committed terrorist crimes, find themselves in a difficult situation due to the absence of specific measures of attention for the benefit of victims. For instance, they had to enter and leave the premises of the competent court at the same time as the members of the families and friends of the accused terrorists. This situation evoked that victims had to face insults and threats before, during and after the trial. According to the CoE High Commissioner on Human Rights, proper safeguards of the victims' dignity would require the adoption of specific measures enabling them to participate in full serenity and confidence in the trial of those having caused their suffering.

At the level of the Council of Europe, the CEPEJ examined whether Member States of the Council of Europe have implemented specific information mechanisms, specific hearing modalities and specific procedural rights for victims of terrorism.<sup>192</sup> However, none of the proposed specific provisions met the requirements of at least half of the Member States, and the specific methods presented by the States could not compensate the proposals of the CEPEJ.<sup>193</sup> The CEPEJ asked 47 Member States of the Council of Europe whether they provide specific information mechanisms for victims of terrorism, including, for instance, a public, free of charge and personalised information mechanism, operated by the police or the justice system, which enables the victims to get information on the follow-up to the complaints they have launched. Only 15 of the 47 Member States replied with positive answers in this respect.<sup>194</sup> The provision of specific procedural rights as the obligation to inform victims in case of the release of the offender was fulfilled by only 18 Member States.<sup>195</sup> Specific hearing modalities were offered by 21 of the 47 Member States. Thus, the majority of Member States of the Council of Europe is rather reluctant to implement specific provisions for victims of terrorism.

In summary, although victims' rights of information, for assistance during legal proceedings and protection have been considered in international legal instruments, their implementation in national law is rather low. Further, participatory rights for crime/terrorist victims are only partly foreseen at international and national levels. As discussed above, the existing rights at international level do not provide victims' needs in a sufficient way. In contrast, the granting of more extensive participatory rights under some European civil law jurisdictions complies much better with

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<sup>191</sup>Report by Alvaro Gil-Robles, CommDH(2005)8, para. 158.

<sup>192</sup>European Commission for the Efficiency of Justice (EPEJ), 2006, p. 53.

<sup>193</sup>European Commission for the Efficiency of Justice (EPEJ), 2006, p. 54.

<sup>194</sup>European Commission for the Efficiency of Justice (EPEJ), 2006, p. 54 (Table 14), pp.164-165 (Table 81).

<sup>195</sup>European Commission for the Efficiency of Justice (EPEJ), 2006, p.54 (Table 14), pp.164-165 (Table 81).

crime victims' needs. The following section will therefore discuss the potential of participatory rights for victims of terrorism in more detail.

## **5.4 Participation Rights for Victims of Terrorism**

In Chapter 3, the needs of victims of terrorism were assessed. It was concluded that the needs of victims of crime and the needs of victims of terrorism are not so different in kind but may differ in degree. Further, still more research is needed when looking at victims of terrorism in particular. The previous sections showed that the question of participation is central for both victims of crime and in particular for victims of terrorism. Therefore, the relevance of participatory rights for victims of terrorism in the context of access to justice and administration of justice will be discussed.

### ***5.4.1 Participation in Partie Civile Proceedings***

As set out above, the participation of victims of terrorism in *partie civile* proceedings is foreseen under the guidelines. Moreover, most of the EU Member States with a civil law jurisdiction do provide such a position in their national laws. This is against the background that victims need material compensation as described in Chapter 3. Access to justice for victims of terrorism implies, according to the interpretation of the guidelines, first of all the possibility of active participation in their case in order to claim for compensation by way of civil proceedings or by way of *partie civile* proceedings. Accordingly, this provision reflects the victim's need for financial or symbolic reparation or compensation. In this respect, the above-mentioned research findings by Kilchling show that crime victims in general support the idea of *partie civile* proceedings. However, although possibilities exist for victims to claim reparation in the course of criminal proceedings, their practical relevance is still limited in some EU Member States. In this respect, the position of victims in common law jurisdictions needs further assessment. Moreover, in case that the terrorist is either not apprehended or dead, state compensation may play a role (see Chapter 6 on compensation).

### ***5.4.2 Participation and Legal Aid***

Basically, access to justice implies that victims of terrorism have the opportunity to be represented by a lawyer free of charge depending on the circumstances of the case. At CoE level, legal aid is granted only in the context of civil or *partie civile* proceedings. Under the ICC jurisdiction, victims have participatory rights in



criminal proceedings and are granted free legal aid under certain conditions. The EU Framework Decision foresees that if victims have the possibility to obtain the status of parties to criminal proceedings, free legal aid is provided, where appropriate, according to national laws. It was discussed above that victims of terrorism could claim legal aid without further preconditions due to their vulnerability depending on the respective provision of the EU Member State to offer them a status of a party to criminal proceedings. Therefore, it is important to consider legal aid for victims of terrorism not only in *partie civile* but also in criminal proceedings.

### 5.4.3 Participation Through Oral Victim Impact Statements

As mentioned before, a starting point for victim participation in criminal proceedings is to include the victim's point of view in the criminal justice process. In this respect, in particular the communicative element of an oral victim impact statement would have the potential to give victims a voice in the sentencing process. However, it has to be taken into consideration that such a statement is still limited to the sentencing stage and does not influence the decision-making process. On the other hand, it has the potential that a victim perspective is integrated within criminal justice provided that the victim's view and concerns are actually heard. This aspect justifies the focus on the communicative element of a victim impact statement in order to prevent that victim statements are not noticed by the competent judicial authorities or that the input is filtered.<sup>196</sup> Hence, direct victim statements may rather guarantee that legal professionals become aware of the scope of the impact of the crime on the victim.<sup>197</sup> Moreover, the opportunity to have a voice is also a possibility for victims to overcome their sense of powerlessness in a criminal justice system where they have no further participatory rights. Research suggests that this latter aspect includes a therapeutic element for victims as well.<sup>198</sup> This point of view is also supported by Rohne's findings on Israeli/Palestinian victims (see Chapter 7).

### 5.4.4 Participation as a Party to Criminal Proceedings

The German institute of the *Nebenklage* (accessory prosecution) serves as a good example for granting victims of terrorism the status of a party to criminal proceedings. In contrast to victim impact statements or victim allocution, the status

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<sup>196</sup>Edna Erez, Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements, in Adam Crawford and Jo Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice*, Aldershot, Ashgate/Dartmouth, 2000, pp. 170, 173.

<sup>197</sup>Erez, 2000, pp. 175, 176.

<sup>198</sup>Erez, 2000, p. 176.

of the ‘auxiliary prosecutor’ provides crime victims with a set of full procedural rights, which is according to victims’ needs for control over the process (see research findings above). As set out above, it is even more important for victims of terrorism to achieve such a status, because they could otherwise face the risk of being excluded from terrorist trials on grounds of Article 6 (1) 2 of the ECHR. Moreover, their vulnerability due to the impact of the terrorist act suggests granting primary victims of terrorism and their family members a status of a party to criminal proceedings in those EU Member States where this is possible.

#### **5.4.5 Information of Participatory Rights**

Victims of terrorism should be informed of their participation rights in the respective national jurisdictions. In this respect, restorative justice initiatives are of relevance as well, because they offer victims of terrorism a possibility to participate actively in their case. Restorative justice instruments, like victim impact panels, may offer victims of terrorism a platform where they can get in dialogue with terrorists who are not involved in the actual terrorist act, but who could help victims to get information about the crime and its circumstances.<sup>199</sup> This is against the background that criminal proceedings are an ineffective measure to obtain justice when perpetrators are difficult to bring to court, as it is e.g. the case with suicide terrorists.<sup>200</sup>

### **5.5 Concluding Observations**

The situation for victims of terrorism at international level is to a great extent dependent on the implementation of international standards into national legislation. The main barriers regarding victims’ rights to access to justice and a proper administration of justice are limited participation rights in some of the Member States’ jurisdictions, as well as the lack of implementation of international legal instruments into national law and/or their weak enforcement. This leads to a lack of adequate information, assistance for and protection of victims and hinders their enforcement of any other rights. While victim participation by way of *partie civile*

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<sup>199</sup>See further Chapter 7.

<sup>200</sup>Almquist, 2005, p. 17: For instance, the 9/11 victims are facing this situation. While there have been some 119 terrorist trials in the United States since 9/11, there are few visible results. US courts have indicated relatively few individuals on the charge of direct acts of terrorism and convicted only one. The recent Spanish proceeding against Al-Qaeda members involved in the 9/11 terrorist attacks, though leading to convictions, indicated the evidentiary difficulties involved. None of the 21 accused were tied to the actual commission of the act of terrorism, 16 were found guilty of belonging to a terrorist organisation or for conspiracy or collaboration in the formation of a terrorist act and five were acquitted.

proceedings is considered for victims of terrorism under the guidelines and is also foreseen in most national laws, a more difficult situation arises regarding other participatory rights in criminal proceedings. Although victim allocation is in principle considered at international level (except at CoE level), the implementation into national law still needs further follow-up. The most innovative participation right for terrorist victims lies in the possibility to have a status of a party to criminal proceedings, which is the case in some European civil law jurisdictions. The possibility of full participation rights gives victims a real choice whether to participate actively or not in criminal justice proceedings. In this respect and in the light of both discussed EU Framework Decisions, special provisions for victims of terrorism could be considered according to their vulnerability. First, victims of terrorism could obtain the status of a party to criminal proceedings in those EU Member States where this is possible. Second, legal aid free of charge could be granted to victims of terrorism in those EU Member States that provide free legal aid for vulnerable victims. In conclusion, the most innovative participation rights that could be obtained by victims of terrorism are victim allocation at a minimum, and the status of a party to criminal proceedings at the maximum. Such provisions would not only need to be put on paper but would also need to have practical relevance. Thus, Member States would need to implement the necessary requirements in their respective legislation and ensure their enforcement. In this way, the required measures could gain practical relevance for victims of terrorism.

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# Chapter 6

## Compensation and Reparation for Victims of Terrorism\*

Rianne Letschert and Karin Ammerlaan

### 6.1 Introduction

As demonstrated in Chapters 3 and 4, terrorism is capable of inflicting widespread personal injury, and unprecedented property and financial damage.<sup>1</sup> Especially the 9/11 aftermath has led to a worldwide academic and political discussion on how to compensate victims of future terrorist acts.<sup>2</sup> The debate concentrates on (a) the availability of (default) private and public compensation schemes, (b) their mutual

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R. Letschert

Tilburg University, International Victimology Institute (INTERVICT), 5000 LE Tilburg, Netherlands  
e-mail: R.M.Letschert@uvt.nl

K. Ammerlaan

Tilburg University, International Victimology Institute (INTERVICT), 5000 LE Tilburg, Netherlands  
e-mail: karinammerlaan@gmail.com

\*The authors wish to thank prof. Bernhard Koch, one of the experts of the seminar held in November 2007, for his valuable comments on an earlier version of this chapter. The usual disclaimer applies.

<sup>1</sup>Note, for instance, that the insured losses after the 9/11 attack were estimated between \$30 and \$58 billion. Most of the losses consisted of commercial property and business interruption loss. See P. Lenain, M. Bonturi & V. Koen, 'Economic Consequences of Terrorism', OECD Working Papers Department, No. 334, OECD Publishing 2002.

<http://fiordiliji.sourceoecd.org/vl=838689/cl=15/nw=1/rpsv/cgi-bin/wppdf?file=5lgsjhvj7zbr.pdf>. See also Section 3.1.6 of Chapter 3.

<sup>2</sup>R.L. Rabin, The September 11 Victim Compensation Fund: A Circumscribed Response or an Auspicious Model? *Stanford Public Law and Legal Theory Working Papers*, No. 65, L.S. Mullenix & K.B. Stewart, The September 11th Victim Compensation Fund: Fund approaches to resolving mass tort litigation, *Conn. Ins. Law Journal Association*, Fall 2002, E.S. Abraham & K.D. Logue, The Genie and the Bottle: Collateral Sources under the 9/11 Victims Compensation Fund, 54 *DePaul L. Rev.* (2003), B.A. Koch (ed.), *Terrorism, Tort Law and Insurance, A Comparative Survey*, Tort and Insurance Law, Vol. 11, Vienna: Springer 2004, M.S. Shapo, *Compensation for Victims of Terrorism*, Oxford University Press, 2005.



relationship, and (c) whether government involvement and design of state compensation funds for victims of terrorism is advisable.

With regard to the availability of private and public compensation schemes, compensation for personal injury is – in the majority of the EU Member States – in principle a matter of social security compensation schemes. This permanent, public and default system offers modest protection against the financial consequences for personal injury based on stringent rules.<sup>3</sup> Private remedies, such as property or life insurance can offer financial protection in theory. Yet not many people obtain proper insurance or insurance companies have terrorism exclusion clauses.<sup>4</sup>

Finally, it is difficult for victims of terrorism to obtain the benefit of full compensation based on claims made in tort law – even when terrorists are without doubt liable for their acts – since the tortfeasors are dead, not identified or unable to compensate.<sup>5</sup> Although the possibility exists that victims of terrorism, like victims of crime in general, may receive compensation through the criminal justice procedure, this issue is only marginally addressed in this chapter (see Section 6.8). In the first place this has a practical reason. To our knowledge there is no research evidence available concerning the experiences of victims of terrorism with gaining compensation, either through the common law compensation order, or the adhesion procedure that is prevalent in civil law criminal justice systems. This could well be related to the question whether, particularly reviewing the evidence of relatively poor practice concerning victims of crime in general,<sup>6</sup> these procedures are particularly suitable for meeting the needs of victims of terrorism.

The discussion in this chapter mainly concentrates on State compensation funds and the possibilities of civil remedies. The question arises whether victims of terrorism should be treated as victims of ‘ordinary’ crime, including them in the existing State compensation funds, or that specifically set up compensation schemes for

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<sup>3</sup> Social Security Systems cover up for medical treatment and hospitalisation, loss of earnings and maintenance support. Note that the Netherlands has a system of private health insurance for medical costs. Private insurers apply their own acceptance criteria and the people who take out the insurance pay a nominal premium, which is not income-related, typically around EUR 900 a year. See for more information: [http://www.minvws.nl/en/folders/staf/health\\_insurance\\_in\\_the\\_netherlands\\_as\\_of\\_january\\_2002.asp](http://www.minvws.nl/en/folders/staf/health_insurance_in_the_netherlands_as_of_january_2002.asp).

<sup>4</sup> As the 9/11 attacks have shown, terrorism risk was excluded of business property and business interruption insurances, since insurers considered the risk no longer insurable. See for more information Section 6.7.

<sup>5</sup> Victims can bring claims against second tortfeasors such as the federal government or the airline industry; this is a very complicated – politically and legally – matter. See for more information Section 6.7.

<sup>6</sup> See, Brienen, M.E.I. and Hoegen E.H., *Victims of Crime in 22 European Jurisdictions: The Implementation of Recommendation 85 (11) of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Tilburg: Wolf Legal Productions 2000; Chapter 26 relating to the adhesion procedure and the compensation order in the CoE Member States.

victims of terrorism should be established.<sup>7</sup> Several EU countries already have such schemes for victims of crime.<sup>8</sup>

In addition, this chapter will pay attention to the question whether reparation can be of importance for victims of terrorism. We will define the term ‘compensation’ (a specific aspect of the wider concept of reparation) as follows: providing for any economically assessable damage, listing the following items: physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage, and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>9</sup> Reparation is broader and entails the following concepts: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, often used in the framework of massive and systematic cases of grave human rights violations.<sup>10</sup>

The chapter is divided along the following lines. Section 6.2 discusses the European legal framework providing rules and guidelines on compensation for victims of crime/terrorism. Section 6.3 reports on the different permanent State compensation schemes for victims of crime in general in the Member States of the European Union. Section 6.4 will examine compensation schemes that were specifically set up for victims of terrorism. Section 6.5 provides insight on the ad hoc State compensation fund set up for the victims of the 9/11 attacks. Section 6.6 discusses the model of international trust funds, like the trust fund of the International Criminal Court that offers compensation to victims of the worst atrocities.

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<sup>7</sup> A few EU Member States have set up legislation for compensation after natural and technological disasters, such as the Netherlands, Austria, France, Belgium and Spain. See for the Netherlands the *Wet tegemoetkoming Schade bij rampen en zware ongevallen* of 1998, for Austria the *Katastrophen-fondsgesetz* of 1996, for France the *Catastrophe Naturelle Fund (CATNAT)* of 1982, for Belgium the *Fonds des calamités naturelles et des risques technologiques majeurs* of 1990 for Spain the *Consortio de Compensacion de Seguros (CCS)* of 1954. On European level, a solidarity fund exists, see for more information Section 6.6.3.

<sup>8</sup> B.A. Koch, Report on Indemnifying Victims of Terrorism, A Comparative Survey for the European Committee on Legal Co-operation (CDCJ), 27 November 2006, p. 18.

<[http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/steering\\_committees/cdcj/cj-s-vict/CDCJ-BU%20\(2006\)%2019%20e%20-%20ECTIL%20Report.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/CDCJ-BU%20(2006)%2019%20e%20-%20ECTIL%20Report.pdf). See further Section 6.3.

<sup>9</sup> Note that also with regard to compensation issues, the lack of an accepted definition of terrorism may pose difficulties. See in this regard C. Lahnstein, *Liability Insurance for Risks of Terrorism*, in B.A. Koch (ed.), *Terrorism, Tort Law and Insurance*, 2004, p. 252: ‘With specific terrorism exclusions, problems of defining inevitably arise. [...] No-one would see a well-intentioned Greenpeace attack as an act of terrorism, even if went wrong, although it does have the same symbolic nature in order to influence governments and the public. Difficulties also arise when it comes to distinguishing terrorism from war and other political risks, or from other criminal acts; or in differentiating organized terrorism from unorganized madness, as in the case of the recent attack on the metro in Korea; and finally, in distinguishing terrorism from normal accidents or normal industrial accidents.’

<sup>10</sup> See P. de Greiff, *Justice and Reparations*, in P. de Greiff (ed.), *The Handbook of Reparations*, New York, Oxford University Press 2006, pp. 452–453.

Section 6.7 analyses private remedies, such as insurance, tort law and charity. Section 6.8 discusses possibilities to claim civil damages through criminal proceedings, and Section 6.9 examines different forms of reparations that could bring justice for victims of terrorism. Finally, Section 6.10 offers thoughts for further discussion and conclusions.

## **6.2 European Instruments Relating to Compensation for Victims of Crime and Terrorism**

### **6.2.1 Council of Europe**

#### **6.2.1.1 The CoE 1983 Convention on the Compensation of Victims of Violent Crimes**

The most important reference document within the CoE is the 1983 Convention on the Compensation of Victims of Violent Crimes, which entered into force on 1 February 1988 creating minimum standards relating to compensation.<sup>11</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 territory principle, which declares the Convention applicable to nationals of the State Party to this 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. Compensation shall cover at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance (Article 4).

#### **6.2.1.2 Guidelines on the Protection of Victims of Terrorist Acts (2005)**

The Guidelines state that victims of terrorist acts are entitled to compensation, irrespective of the identification, arrest, prosecution and conviction of an individual offender. When compensation is not available from other sources (through the

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<sup>11</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 draft resolution on compensation of victims of crime was adopted by the Council. This led to the 1983 Convention. See for more information also K. Buck, 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, 2005.

confiscation of property of the perpetrators, organisers and sponsors of terrorist acts), the State should contribute to the compensation of victims for direct physical or psychological harm. Furthermore, compensation should be easily accessible to victims, irrespective of nationality. To this end, the State on the territory of which the terrorist act took place, should introduce a mechanism allowing for fair and appropriate compensation, after a simple procedure and within a reasonable time. States whose nationals were victims of a terrorist act on the territory of another State should also encourage administrative cooperation with the competent authorities of that State to facilitate access to compensation for their nationals. Apart from the payment of pecuniary compensation, States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the negative effects of the terrorist act suffered by the victims. What these other measures could entail is not further elaborated. The Guidelines are not based on the principle of reciprocity. Apart from direct victims, close family members are also entitled to compensation. Covered losses are for direct physical and psychological harm.

### **6.2.1.3 Recommendation 2006(8) on Assistance to Crime Victims**

The CoE 2006(8) Recommendation on Assistance to Crime Victims amends Recommendations R (87)21 and R (85)1. It encourages States to adopt a compensation scheme for victims of all serious, violent crimes, including sexual violence (Article 8.1), committed on their territory, irrespective of the victim's nationality (Article 8.2).<sup>12</sup> 'Victim' is defined as 'a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state.' The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim (Article 1.1). Article 8.3 notes that compensation should be awarded based on the principle of social solidarity. Furthermore, Member States should assist each other helping victims of crime get access to compensation – in the country where the offence took place – in case of cross-border crime (Article 8.5).

Covered should be treatment and rehabilitation for physical and psychological injuries. States should consider providing compensation for loss of income, funeral expenses and loss of maintenance for dependants (Article 8.6). It furthermore states that States may also consider compensation for pain and suffering and compensation for property damage, which arise from the crime (Articles 8.7 and 8.8).

The Recommendation also contains a section on insurance. Article 9.1 provides that States 'should evaluate the extent of cover available under public or private insurance schemes for the various categories of criminal victimisation.' Relating to terrorism, Article 9.3 stipulates that 'States are encouraged to promote the principle

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<sup>12</sup> Adopted by the Committee of Ministers on 14 June 2006 at the 967th meeting of the Ministers' Deputies.

that insurance policies do not exclude damages caused by acts of terrorism unless applicable provisions exist.’

Finally, the Recommendation states that compensation should be provided according to the principle of subsidiarity. This means that ‘State compensation should be awarded to the extent that the damage is not covered by other sources such as the offender, insurance or state funded health and social provisions’ (Article 8.9).

## **6.2.2 *European Union***

### **6.2.2.1 Framework Decision on the standing of victims in criminal proceedings (2001)**

The Framework Decision on the standing of victims in criminal proceedings of 15 March 2001 only marginally addresses compensation.<sup>13</sup> Article 9 provides that each Member State ‘shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of the criminal proceedings, except where, in certain cases, national law provides for compensation to be awarded in another manner.<sup>14</sup> No mention is made of compensation by the State in case the offender is unable or unwilling to pay, or has not been identified or prosecuted. However, a Council Directive has been adopted that addresses this issue, which will be discussed in the following section.

### **6.2.2.2 The Council Directive 2004/80/EC**

The Council Directive 2004/80/EC of 29 April 2004 on Compensation for Crime Victims was drafted to address a conclusion drawn in the Green Paper, namely that the current situation concerning compensation of crime victims in the EU is not satisfactory. The Directive aims at implementing State compensation funds in the Member States if non-existent 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 proposes minimum standards, not harmonisation; ‘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>15</sup> It offers general access for all EU citi-

<sup>13</sup> Official Journal L 082, 22/03/2001 P. 0001–0004.

<sup>14</sup> Note that regarding cross-border litigations, a number of initiatives have been taken that seek to facilitate the possibility to obtain compensation from the offender. See Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 12, 16.1.2001 and the Programme of measures for implementation of the principles of mutual recognition of decisions in civil and commercial matters, OJ C 12, 15.1.2001.

<sup>15</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.

zens to compensation, based on the territory principle. The Directive sets up a system of cooperation to facilitate access to compensation to victims of crime in cross-border situations, which should operate based on Member States' schemes on compensation to victims of violent intentional crimes. The Directive therefore instructs all Member States to have a compensation mechanism in place.<sup>16</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>17</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 to deciding upon applications for compensation. The Directive does not address issues relating to the nature of the expenses eligible for compensation.<sup>18</sup>

Whether the Directive has the desired result is not clear yet (the system should be operational as of 1 January 2006). The European Commission has commissioned a study to evaluate Member States' performance, the results becoming available in the end of 2008.

This section examined the various instruments adopted by the Council of Europe and the European Union.<sup>19</sup> The main conclusion is that they all encourage States to set up compensation schemes, and pay particular attention to cross-border victims that need additional assistance in obtaining compensation. The following section will present an overview of existing State compensation funds for victims of crime within the EU.

## 6.3 National State Compensation Funds for Victims of Crime in General

### 6.3.1 Rationales for State Intervention

Many victims face financial consequences of the crime they suffer from. This can be alleviated by restitution being paid by the offender. In many cases, though, the offender is not found or apprehended, or is unwilling or unable to take care of the

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<sup>16</sup> See para 7 of the Preamble.

<sup>17</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>18</sup> The original draft does contain standards on this issue, noting that 'compensation shall cover pecuniary and non-pecuniary losses [...]. Id., Article 4, p. 22.

<sup>19</sup> Note that Principle 13 of the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power also encourages "the establishment, strengthening and expansion of national funds to compensate victims. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

damages incurred by the victim. This is certainly often the case with regard to terrorist acts. It appears widely recognised that when the offender will not provide the victim with any damages with regard to the violent intentional crime, the State should step in and provide financial compensation to the victim. One can think of several reasons and arguments to justify or consider State intervention. For instance, Government intervention can be considered as a Government's task to take care of victims of crime, since the Government has not been able to prevent the crime from taking place.<sup>20</sup>

Almost all State compensation funds in the European Union are based on the notion of social solidarity with victims of crime. In the Explanatory Report to the CoE Convention on the Compensation of Victims of Violent Crimes, the Council of Europe stated solidarity as *the* foundation for victim compensation. State compensation schemes based on the principle of national solidarity often offer compensation according to social welfare principles.<sup>21</sup> Koch makes an important statement which underlines that the need for a State compensation scheme is not absolute: 'To the extent a national security scheme protects against the consequences of bodily injuries, there is no need for the direct or – to the extent applicable – indirect victim to seek cover elsewhere: Health care benefits, for example, are typically paid out irrespective of the cause and are therefore also available if a person covered by the regime is injured in the course of a terrorist act. This is correspondingly true for all other areas covered by an applicable social security system, including pension systems or the like.'<sup>22</sup> Koch also acknowledges the limits of the social security system. For instance, non-pecuniary loss is typically not covered, nor are property damage or other economic losses. In addition, the welfare state is highly overburdened in many EU Member States.

### 6.3.2 *General Comparative Remarks*

Following the CoE Convention on the Compensation of Victims of Violent Crimes, States must offer compensation to victims who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence as well as the dependants of persons who have died because of such crime.

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<sup>20</sup> M.S. Groenhuijsen, Public Damage Funds. European Developments and Some Comparative Observations, in E. Fattah and S. Parmentier, (eds.), *Victim Policies and Criminal Justice on the Road to Restorative Justice – Essays in Honour of Tony Peters* (Leuven 2001), pp. 83–97, p. 92. See also Buck, 2005, pp. 150 ff. Joutsen has developed four theories as the philosophical basis of the legislation on State compensation: the legal tort theory, the social contract theory, the insurance theory and the utilitarian theory, in Julia Mikaelsson and Anna Wergens, *Repairing the Irreparable, State Compensation to Crime Victims in the European Union*, The Crime Victim Compensation and Support Authority, Umea, Sweden, 2001, p. 176 and M. Joutsen, *The Role of the Victim of Crime in European Criminal Justice Systems: A cross-national study of the role of the victim*, Helsinki, HEUNI, 1987.

<sup>21</sup> An exception is France that considers solidarity as a basis, yet offers full compensation for personal injury for victims of terrorism and other infringements. See for an analysis of the idea of 'social solidarity' Buck, 2005, pp. 151 ff.

<sup>22</sup> Koch, 2006, p. 17.



According to Albrecht & Kilchlings' report, the majority of Member States of the CoE have set up compensation funds.<sup>23</sup> Compensation schemes exist in the following CoE countries: Armenia, Austria, Belgium (1985), Bosnia Herzegovina, Bulgaria, Czech Republic, Denmark (1976), Estonia, Finland (1973), Germany (1976), Iceland, Ireland, Lithuania, Luxembourg (1984), the Netherlands (1979), Northern Ireland (1968), Norway (1976), Poland, Portugal (1991–1993), Romania, Sweden (1971), Switzerland (1992), Cyprus (1997), Poland (1995), England/Wales, and Scotland.<sup>24</sup> In Macedonia, Moldova and Monaco, the State is ultimately liable for terrorist attacks. Italy has no general victim compensation scheme.

The following countries have *specific* compensation funds for victims of terrorism: Azerbaijan, Croatia, Greece, France (1977), Italy, Russian Federation, Spain, Turkey, and Northern Ireland (the EU Member States will be further examined in Section 6.4). A possible political motivation to create special compensation funds for victims of terrorism is present, since these countries have or had long time experience with terrorism, mostly driven by separatist or ideological motivations. France also has a general crime victim compensation system, thus the specific legislation is in addition to this.<sup>25</sup> The same is true for Spain and Northern Ireland. The fact that some countries have specific legislation for victims of terrorism does not mean that major quantitative differences can be observed.<sup>26</sup>

Section 6.3.3 will discuss the differences in various compensation schemes in general. Note that we will not report on the satisfaction level of victims with the procedure in general (covering issues such as speed, length of procedure, height of the amount awarded). Section 6.3.4 will focus on the scheme in the UK, mainly to demonstrate the approach of the scheme after the terrorist attacks in London of 7 July 2005. Section 6.3.5 will focus on Germany because of the experience with left-wing terrorist activities of the RAF and the recent attention that is again given to the victims of these acts.<sup>27</sup> Section 6.4 will examine the specific State compensation funds for victims of terrorism.

### 6.3.3 *Variety in EU Member State Compensation Funds*

#### 6.3.3.1 **Eligibility and Cross-Border Victimisation**

All schemes compensate direct (primary) victims of crime. Some countries require that the sustained injury is *serious* for it be eligible for compensation (Belgium, France, Germany, Luxembourg, the Netherlands, Portugal and Spain), and require

<sup>23</sup>H.J. Albrecht & M. Kilchling, 'Victims of Terrorism, Policies and Legislation in Europe', Council of Europe, *CDPC Paper*, March 2005, pp. 41–43.

<sup>24</sup>Albrecht & Kilchling (2005).

<sup>25</sup>Mikaelson and Wergens, 2001, pp. 63–75.

<sup>26</sup>See further Section 6.4.

<sup>27</sup>For an overview of all CoE States, see Albrecht & Kilchling, 2005.

that the crime should be intentional.<sup>28</sup> All Member States offer compensation to persons who were depending on a deceased victim for financial support. Certain schemes also cover a third group: ‘persons accidentally hurt in the turmoil (so called “bystanders”) or persons helping the victim or helping the police to prevent a crime or to apprehend the offender (so called “Samaritans”).’<sup>29</sup> Belgium, Denmark, Finland, France, Germany and Sweden offer compensation to bystanders and Samaritans. The UK offers compensation for the latter group.

The EU has paid considerable attention to difficult issues arising related to compensation for cross-border crime victims, inspired by the fundamental ‘freedom of movement’ principle.<sup>30</sup> In the 1989 Cowan Case, the Court of Justice held that, when community law guarantees to a natural person the freedom to go to another Member State, the protection of that person from harm in another Member State should be on the same basis as that of nationals and persons residing there. Measures to facilitate compensation to victims of crime form part of the realisation of that objective.<sup>31</sup> In September 2001, the European Commission presented a Green paper, which discussed the topic of crime victim compensation.<sup>32</sup> The Green paper launched a consultation with interested parties on possible measures to be taken at Community level to improve State compensation to crime victims in the EU. The paper also gives a general overview of State compensation schemes in the Member States.<sup>33</sup> It examined, amongst others, the obstacles involved with cross-border victimisation and discussed the ‘mutual assistance model’ and the ‘double responsibility model’ as ways for assisting the victim in obtaining compensation. The first model gives responsibility to the Member State in which the crime took place, yet the Member State of permanent residence must assist the victim in getting access to compensation. Based on the second model, both Member States have a duty to assist the victim, which causes confusion regarding the ultimate Member State’s responsibility. The Green paper’s preference therefore goes to the mutual assistance model.<sup>34</sup>

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<sup>28</sup> For more information relating to these two elements, see Buck, pp. 159–160.

<sup>29</sup> Green Paper, p. 11.

<sup>30</sup> For a thorough overview on the developments regarding compensation to crime victims in the EU, see Mikaelsson and Wergens, 2001, concluding observations, pp. 169 ff.

<sup>31</sup> See Preamble of the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims. Case 186/87 *Cowan v. Tresor Public* [1989] ECR 195. The case concerned a British national who was subjected to a violent assault while visiting France as a tourist. The perpetrators were never identified and the British national turned to the French state for compensation under the national compensation scheme. The French compensation scheme held that the victim should be either a French national, a national of a State with reciprocal agreements with France regarding state compensation, or a holder of a residence permit. The European Court found that these conditions infringe the non-discrimination principle in Article 7 of the EC Treaty.

<sup>32</sup> COM (2001) 536, 28.09.2001.

<sup>33</sup> The countries that joined the EU in 2004 (the EU underwent a historic enlargement to 10 countries of Central and Eastern Europe and the Mediterranean: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia and Slovenia) are not included in this study.

<sup>34</sup> Green Paper, pp. 30–38.

State compensation funds within the EU are founded on the principle of territoriality (see Article 2 of the EU Directive relating to Compensation), differentiating, however, the eligibility of compensation between EU nationals, permanent EU residents and non-EU nationals.<sup>35</sup> As indicated before, the Cowan Case stated with regard to EU nationals being victimised in another EU Member State that access to compensation mechanisms may not be restricted to nationals. The EU Directive as discussed before provides that in cross-border cases within the European Union, the applicant for foreign State compensation may now submit his application to the assisting authority in his own Member State who will deal with all formalities. Most Member States indeed have compensation schemes covering all EU citizens subjected to crime on their territory. The situation is different with regard to non-EU citizens. Some countries offer compensation to non-EU victims, yet under the restriction that they have permanent residence on their territory, or if there are reciprocity arrangements between the countries.<sup>36</sup> Note that Article 1 of the EU Directive relating to Compensation to Crime Victims lists the following scope: 'Member States shall ensure that where a violent intentional crime has been committed in a Member State other than the Member State where the applicant for compensation is *habitually resident* [...] (italics added).' This entails that the Directive applies to EU nationals and EU residents and thus excludes tourist victims from access to compensation mechanisms.<sup>37</sup>

Some Member States also offer compensation to residents or citizens when injured abroad (outside the EU), usually under certain restrictive conditions (including that the victim should first seek compensation in the State where the offence occurred). With regard to EU citizens who get victimised in a non-EU country, only Austria, France, Spain, Switzerland and Sweden offer compensation to their nationals when they are victim of a crime abroad. The UK and France offer additional and ad hoc compensation. In Germany, additional compensation for citizens who become victims abroad occurs on an ad hoc basis as well.

### 6.3.3.2 Losses Covered

The CoE Convention sets out a minimum standard for the items for which State compensation should be offered: loss of earnings, medical and hospitalisation expenses, funeral expenses and, in the case of dependants, loss of maintenance (Article 4). In the explanatory memorandum to the Convention, pain and suffering is mentioned as an item that could be brought into the scope of the Convention.

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<sup>35</sup> See Buck, 2005, p. 156.

<sup>36</sup> Note that the Statement on the Social Rights of Victims of Crime of the European Forum for Victim Services notes in Article 8(c) that 'reciprocal arrangements should be in place so that compensation may be claimed when travelling abroad.'

<sup>37</sup> See also Buck who analyses how this interpretation correlates with the notion of (European) solidarity, 2005, p. 157.

Most Member States compensate the following losses: medical and hospitalisation expenses, loss of earnings, and, in the case of dependants, funeral expenses and loss of maintenance. Compensation for pain and suffering constitutes a dilemma. Medical expenses are covered in all Member States. This is not the same for transportation costs to and from the hospital; only Austria, Germany, Northern Ireland, Sweden and the UK offer this. For that matter, Sweden offers the most extensive compensation. Loss of earnings is also often covered, although there are differences as to how income awards are compensated. Loss of earnings is not covered in Italy. Dependants of a deceased victim are entitled to receive compensation for loss of maintenance or financial support in all compensation schemes. Funeral expenses are also compensated, except for Italy. With regard to property damage, a distinction is often made between property damaged in connection to a violent crime and stolen goods. Regarding the latter, when there is no connection to a violent assault, only Denmark, Finland, France and Sweden offer compensation. Northern Ireland is the only country which offers a special statutory scheme for the compensation of property damage.

Compensation for pain and suffering varies in the Member States. Mikaelsson and Wergens rightly state that it is difficult to compare non-material damages in the Member States, partly because of the differences in living conditions, taxation provisions and the relation of the law of damages to social security benefits and partly because of the confusion regarding the terms; some call it pain and suffering, others refer to moral damages.<sup>38</sup>

### **6.3.3.3 Thresholds**

Relating to the amount of the award, almost all Member States have maximum ceilings. Most countries offer fair and just compensation, yet no full compensation. Several national compensation schemes adhere to the principle of subsidiarity; State compensation is considered the last resort, and victims need to exhaust all other possibilities to receive compensation before turning to the State.

### **6.3.3.4 Procedure**

Most Member States require that the victim has reported the crime to the police before any compensation request is taken into account. When an offender remains unknown or cannot be prosecuted, the body that assesses the eligibility of the claim for compensation has to decide whether an applicant has indeed been the victim of a crime. The burden of proof lies in most Member States with the applicant, however, the degree of proof varies. According to the Green Paper, 'it is probably safe to say that in most Member States a lower standard is applied as compared to

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<sup>38</sup>Mikaelsson and Wergens, 2001, pp. 232 ff.

what applies in criminal procedure, but it is difficult to define more precisely the standards applied in each Member State.<sup>39</sup> The provisions in the Member States do not have specific procedural rules in case of mass victimisation. However, after the 2005 London bombing, a report to the police was not necessary.<sup>40</sup>

### **6.3.4 UK and Northern Ireland**

#### **6.3.4.1 The UK and the Criminal Injuries Compensation Act**

The Criminal Injuries Compensation Act of 1995 offers compensation to victims of a violent crime and domestic violence on British territory.<sup>41</sup> Eligible are direct victims, their surviving dependants or relatives, and also Samaritans or financially dependent loved ones of a death victim.<sup>42</sup> Victims or Samaritans must have suffered personal injury, which includes physical injury, a recognised psychiatric or psychological illness, or a disease. Compensation for only mental injury is possible, but under strict conditions.<sup>43</sup> Furthermore, special expenses and loss of earnings are also compensated.<sup>44</sup> According to a tariff system, compensation is standard and based on the severity of the injury and ranges from €1,400 to €360,000.<sup>45</sup> Covered losses are pain and suffering, loss of income after 28 weeks, costs of care, and reasonable funeral expenses. In case of death of the victim, death payments are maximum €11,000.<sup>46</sup>

#### **6.3.4.2 Compensation After the London Bombings of 7 July 2005**

On 7 July 2005, four bombs were set off by terrorists on the London Transport System, on three tube trains and a bus. 52 people were killed, and 700 went to hospital that day – some just for cuts and bruises, others had to stay overnight. In a specially launched guide, the Criminal Injuries Compensation Authority (CICA) offered compensation for victims of the ‘7/7 bombings’. The special guidance

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<sup>39</sup>Green paper, p. 12.

<sup>40</sup>See point 26 of the special brochure for victims [www.cica.gov.uk](http://www.cica.gov.uk).

<sup>41</sup>This does not mean that the applicant has to be British.

<sup>42</sup>Para. 38 Criminal Injuries Compensation Scheme of 2001. The 1996 scheme was changed in 2001.

<sup>43</sup>Para. 9 Criminal Injuries Compensation Scheme.

<sup>44</sup>Para. 30–37 Criminal Injuries Compensation Scheme.

<sup>45</sup>§ 23 Criminal Injuries Compensation Scheme.

<sup>46</sup>For a thorough discussion of the scheme, see David Miers, *Rebuilding Lives: Operational and Policy Issues in the Compensation of Victims of Violent and Terrorist Crimes*, *Criminal Law Review*, August 2006, pp. 695–721.

booklet that the CICA produced soon after the bombings is a rewritten version of their usual short guide to the Scheme, explaining how those involved might be eligible for compensation. The Scheme was not changed in any way as victims of terrorist acts would always have been eligible – this was just a more appropriate explanation which explained the Scheme with respect to this particular event. The reason was simply to help the bereaved and survivors of this event to understand how their experiences ‘fitted’ within the Scheme and the definition of violent crime. It was also written in a slightly more compassionate style, addressing these particular victims.<sup>47</sup>

Compensation was based on the 2001 compensation scheme (because of which it is dealt with in this section instead of Section 6.4). CICA’s financial capacity of the Fund amounted to £15 million. Eligible are (a) the direct victims with serious injury, (b) the immediate family members of a deceased victim, or (c) persons who suffered medically or psychologically diagnosed trauma caused by reasonable fear of immediate physical injury or death in the bombings. This means that a certain category of tertiary victims can obtain compensation as well.<sup>48</sup> According to the CICA rules, bereaved families could receive a bereavement payment of £11,000 (£5,000 per person if there is more than one bereaved person), the maximum award could amount to £500,000 which included compensation for financial loss and compensation for funeral expenses. The maximum for seriously injured victims was £500,000. These tariffs follow the tariffs as applied to bereaved families of a victim who died because of an ‘ordinary’ murder.

This policy led to criticism from some victims, who pleaded that the compensation procedure was slow, inadequate and insulting compared to the compensation obtained after the 9/11 attacks. However, the CICA did what it could do, given the circumstances and the high number of victims. Private charity gifts from the London Bombings Relief Charitable Fund (LBRFCF) took care of an extra award for the victims (see further Section 7.3).<sup>49</sup>

Lastly, the British Red Cross Relief Fund for UK victims of terrorism abroad provides financial assistance to people who have been seriously injured or bereaved by such incidents.<sup>50</sup>

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<sup>47</sup> From an interview with Ms. Carol Stone, former chief executive of the London Bombings Relief Charitable Fund and now freelance consultant. See also [www.cica.gov.uk](http://www.cica.gov.uk).

<sup>48</sup> According to the scheme, this is the most difficult group to put a number on. See also Chapter 3 relating to vicarious victims. As a guide, you would come within this group: if you were on one of the underground trains that were bombed; or if you were in or near Tavistock Square and saw the Number 30 bus explode; and if your experience caused you to suffer a medically or psychiatrically diagnosed trauma. But people who were, understandably, fearful due to being in central London around the time of the bombings are unlikely to be able to receive compensation. The key element, in addition to the trauma itself, is a reasonable fear of immediate injury or death due to one of the bombs.’ See para 16 of the compensation scheme relating to the London bombing.

<sup>49</sup> See for their website <http://www.lbrfcf.org.uk/>.

<sup>50</sup> See for their website <http://www.redcross.org.uk/standard.asp?id=70133>.

### 6.3.4.3 Northern Ireland

Northern Ireland's compensation scheme shows great similarities to the British system. Unlike Great Britain which has a 'tariff' scheme (a special tariff is laid down for each kind of personal injury and for death), Northern Ireland has chosen to compensate the particular loss suffered by each individual victim which is subject to interpretation and application by the courts accustomed to assessing the damages payable to ordinary accident victims.<sup>51</sup> The Criminal Injuries Compensation Scheme, established by the Criminal Injuries Compensation Order 2002, provides compensation to victims and other persons (including family members) who have suffered as a result of deaths or injuries caused by violent crime, including terrorism. In addition, the Criminal Damage Order 1977 provides the right to claim compensation from the Secretary of State for loss suffered as a result of malicious or wanton damage to agricultural property and, in the case of other property, as a result of damage caused by an unlawful assembly of three or more persons or by terrorist acts.<sup>52</sup>

Noteworthy further is that, following the enormous pain and suffering of victims of violence in Northern Ireland, the Secretary of State established a Commissioner in 1997, Sir Kenneth Bloomfield, 'to examine the feasibility of providing greater recognition for those who have become victims in the last 30 years as a consequence of events in Northern Ireland, recognising that those events have also had appalling repercussions for many people not living in Northern Ireland.'<sup>53</sup> Table 6.1 presents a summary of the recommendations of the Commissioner:

### 6.3.5 Germany

Germany has no specific legislation or compensation schemes for victims of terrorism. This might seem odd, considering that the country has been confronted with numerous terrorist acts, mainly in the 1970s (compared to countries like Spain and France). In West Germany, the so-called Red Army Faction, also known as the Baader-Meinhof Gang, committed numerous of serious crimes and was responsible for the death of 34 people and the injury of many. By the late 1970s, most activists of the Red Army Faction were either imprisoned or dead.

The Crime Victims Compensation Act of 1976 provides compensation to victims of violent acts and dependent family members and is State funded.<sup>54</sup> With regard to foreigners who have no legal status or residence in Germany, reciprocal agreements

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<sup>51</sup> *Id.*, p. 27.

<sup>52</sup> For more information, see <http://www.compensationni.gov.uk/>.

<sup>53</sup> Sir Kenneth Bloomfield, Northern Ireland Victims Commissioner, Final Report, *We Will Remember Them*, April 1998, p. 8.

<sup>54</sup> *Opfererschädigungsgesetz (OEG)* of 15 May 1976, amended in 1985 and 1991.



**Table 6.1** Summary of recommendations Sir Kenneth Bloomfield<sup>55</sup>

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- (a) there should be a comprehensive review of the “fitness for purpose” of Criminal Injuries compensation in serving the needs of victims of violence (para 5.11);
  - (b) employers should be sensitive to the special circumstances of victims and their carers, and specific action should be taken by public sector employers to assure this (para 5.13);
  - (c) in dealing with victims within the social security and other systems officials should be sensitive and understanding in their approach (para 5.16);
  - (d) effective targeting of the special needs of victims should be a specific sub-set of the Targeting Social Need objective (para 5.17);
  - (e) a senior official should be designated to take immediate responsibility for a better co-ordinated approach to the problems of victims within Government (para 5.17);
  - (f) the recommendations of the SSI-led study on “Living with the Trauma of the Troubles” should be energetically implemented by those interests to which they are directed (para 5.23);
  - (g) victims should be given the best comprehensive advice, locally differentiated, on where to turn for support (para 5.25);
  - (h) victims must, as the barest minimum, be as well served as former prisoners in terms of their rehabilitation, future employment etc (para 5.26);
  - (i) in the interests of giving victims an effective ‘champion’, existing organisations meeting their needs require more and more secure funding, and there is a strong case for a powerful ‘umbrella’ organisation to give them a stronger voice in bidding for resources and urging changes in policy or practice (para 5.27);
  - (j) in the longer term, the interests of victims should be made the concern of a Standing Commission or a Protector or Ombudsman for Victims;
  - (k) a much higher priority should be given to treatment of and local research into chronic physical pain (para 5.30); the question of a Trauma Centre and the availability of residential psychiatric care for young people should also be addressed (para 5.30);
  - (l) the recent Code of Practice for Victims of Crime should be conscientiously observed and critically monitored (para 5.35);
  - (m) the possibility of benefiting from some form of Truth and Reconciliation Commission at some stage should not be overlooked (para 5.37);
  - (n) every effort should be made to persuade and enable those with information about the ‘disappeared’ to disclose it (para 5.38);
  - (o) Government should not overlook the special claims of communities uprooted from their homes and farms (para 5.39);
  - (p) consideration should be given to the creation of a fund to assist in particular children and young people affected by the death or injury of a parent (para 6.5);
  - (q) the Government should consider the possibility of supporting efforts towards peace and reconciliation originating in Great Britain and not just in Northern Ireland (para 6.6);
  - (r) consideration should be given, if and when the churches consider it appropriate, to the designation of a “Memorial and Reconciliation Day” (para 6.19);
  - (s) at the appropriate time, consideration should be given to a Northern Ireland Memorial in the form of a beautiful and useful building within a peaceful and harmonious garden (para 7.13);
  - (t) such a project should be called simply “the Northern Ireland Memorial” (para 7.18).
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are required. Losses covered include medical expenses, vocational rehabilitation, and loss of income or maintenance. Albrecht & Kilchling refer to a serious practical problem with regard to the German system; the allocation of evidence.<sup>56</sup> This entails that the claimant has to provide all necessary evidence supporting all facts

<sup>55</sup> *Ibid.*, pp. 51 ff.

<sup>56</sup> Albrecht & Kilchling, 2006, p. 28.

on which the claim is based, also the aspect of *mens rea* (the intent). However, with regard to terrorist attacks, this will most probably not cause any problems. State compensation is limited to the German territory. However, following the attack on the Tunisian island Djerba in April 2002 which killed and wounded 21 Germans, the German Government decided to provide support and compensation to victims and families.

### **6.3.6 Summary**

When establishing national State compensation funds, the State acts as a safety net in case losses cannot be compensated based on private compensation systems or by the offender. However, full compensation is in most cases not offered, since the leading principle is that of subsidiarity: unless private sources of compensation cannot offer financial relief, then government steps in with a grant; a contribution in costs and damage. An exception is made with regard to France, which is one of the few countries offering full compensation.

State compensation is by nature an extremely sensitive topic, since it is eventually a matter of legal politics: do we want to spend taxpayers' money on victims of crime or do we prioritise the treasury to other common goods? State compensation may involve large sums of money, while many Member States either just do not have the required resources or are unwilling to prioritise funds for this particular purpose. This problem has become even more apparent with the new Member States and the applicant States. Hence, it will be difficult to reach consensus with regard to harmonising State compensation at a European level. Other difficulties concern introducing minimum standards relating to the eligibility of non-EU citizens who become victimised in an EU Member State and EU citizens who become victimised in a non-EU Member State.

## **6.4 Specific State Compensation Funds for Victims of Terrorism**

Several UN documents refer to the need to establish trust funds at national level specifically relating to victims of terrorism. For instance, Article 8 (4) of the UN International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 reads: 'Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in Article 2, para 1, subparagraph (a) or (b), or their families.' A minority of the Member States (Croatia being an applicant Member State) has set up specific legislation and compensation provisions for victims of terrorism. The countries involved will be briefly discussed.

When available, other provisions, besides those relating to compensation, in specific victims of terrorism legislation, will also be addressed. Furthermore, Israeli legislation will be dealt with because of its elaborate compensation scheme.<sup>57</sup> We have not assessed whether victims are satisfied with the procedures as described below, or whether the compensation schemes provide fair and appropriate compensation.

### **6.4.1 Greece**

Greece has adopted specific legislation for victims of terrorism, providing State compensation and special victim support services. Some provisions are far-reaching; Law No. 1897/1990, for instance, provides in Article 10 that children whose parents died or have become 100% disabled as a result of a terrorist attack, may claim certain preferences and privileges, such as registration at a university near the place of residence, and the option to enter the public service as an employee (even when no budget or vacant position is available).<sup>58</sup>

### **6.4.2 France**

France has enacted specific legislation applying to victims of terrorism and through the 1990 amendment of the 1986 terrorist act it assigned victims of terrorism the status of victims of war. The 'Fonds de garantie pour les victimes d' actes de terrorisme et d' autres infractions' (hereafter FGTI) was established by the Law of 9 September 1986 (and improved by a law of 6 July 1991).<sup>59</sup> The fund is based on the principle of national solidarity and financed by a levy of €3.30 on the premiums paid to property insurances. The government acts as a last resort reinsurer. Eligible are all French citizens who are victim of a terrorist attack in France or abroad, as well as foreign people who become victims of terrorism on French territory. Eligible are primary and secondary victims and those who were harmed when intervening to help.<sup>60</sup> The fund offers full compensation through expert valuation for physical injury, pain and suffering, consequential losses, and the costs of all medical expenses, medical appliances, physical impairment, costs of nursing and assistance in housework.

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<sup>57</sup> Please note that this section does not claim to be exhaustive; it merely aims to provide a general overview of applicable legislation and policies. In March/April 2008, A comparative study was conducted by Rianne Letschert and Antony Pemberton based on questionnaires sent out to OSCE Participating States, requesting information on victims of terrorism legislation and policies.

<sup>58</sup> See further Albrecht & Kilching, October 2005, p. 30.

<sup>59</sup> The fund compensates victims of serious offences and victims of road accidents occurring abroad.

<sup>60</sup> See the French reaction to the OSCE/ODIHR Questionnaire sur la Pratique des Etats Membres sur la Solidarité avec les Victimes de Terrorisme, question 6 E. On file with the authors.

Surviving relatives of a deceased victim are entitled to compensation for economic loss. The fund does not cover for property damage. However, damage to clothing/glasses which is directly caused by the crime can be compensated. Property damage is covered under property insurance. Cover for terrorism risk is obligatory in France. Since 1986, France has required insurance policies relating to property damage (including motor vehicle policies) to cover terrorism risks. The terrorism risk is insured by Gareat, a reinsurance pool between insurers and reinsurers. The French government acts as reinsurer of last resort, offering unlimited financial backup.

To conclude, the French system has the following characteristics: a right to full compensation independent of judicial proceedings, a sustainable compensation scheme run by a self-governing body, the guaranty fund (FGTI), a scheme not only focusing on financial compensation but aiming at providing recognition for the victims, a scheme where victim support associations are fully involved in the process, federated through a national network (INAVEM) and members of the national council for the assistance to the victims.<sup>61</sup>

### 6.4.3 Spain

As a result of the ETA terrorism, Spain already developed legislation (Royal Decree (RD)-ct 3/1979 on the protection of citizens' security) in 1979 to express its sympathy with victims of terrorism. This legislation has been further developed by art. 93 of Act 13/1996 which takes fiscal, administrative and social measures to compensate victims of terrorism for bodily harm and damage to property. The 'Reglamento de ayudas y resarcimientos a las víctimas de delitos de terrorismo' (RAVT) of 7 March 2003 states that victims are entitled to State compensation based on social solidarity.<sup>62</sup> Eligible are direct victims and surviving relatives of deceased victims. Furthermore, legal persons affected by terrorist acts are entitled to compensation.<sup>63</sup> The victim does not have to be citizen of Spain, and reciprocity arrangements are not required.<sup>64</sup> Spanish victims of terrorist acts abroad may also claim compensation, but only when the attack was aimed at Spanish interests.

Compensation is based on fixed tariff systems. Losses covered are personal injury (physical and mental), medical expenses, private and commercial property damage, and vehicles. In case of death or permanent disability, victims or surviving relatives are entitled to receive an extraordinary pension from the social security system,

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<sup>61</sup> These features were presented by Mr. Mallassagne of the Bureau de l'Aide aux Victimes et de la Politique Associative during the OSCE High Level Meeting on Victims of Terrorism, Vienna, 13–14 September 2007.

<sup>62</sup> For an extensive overview of Spanish legislation, see the Spanish Reaction to the OSCE/ODIHR Questionnaire on the Practice of OSCE Participating States on Solidarity with Victims of Terrorism, on file with the authors.

<sup>63</sup> See the Spanish Questionnaire, question 6 F.

<sup>64</sup> Spain has compensated victims of 11 different nationalities after the Madrid bombings.

which is around €138,000. In case of total invalidity, victims are entitled to an award of approximately €96,000; in case of partial invalidity this award is €36,000. Victims and their family members are exempt from any administration fees within the educational system and compensation or further financial support is tax free.

Additional financial support is available to victims of hijacking or kidnapping. Victims are entitled to a basic award of around €12,000 and €180 per day for the duration of the offence. The award can be no higher than €36,000.

The Act 32/1999 of 8 October (LSVT) states that victims of terrorist acts can obtain additional State compensation for personal injury, based on what the tortfeasors under tort law are obliged to pay. This right applies as long as the tortfeasors have not paid under tort law and if victims transfer their tort law claims to the State. Spain also has a government backed compulsory insurance system, which will be addressed in Section 6.7.

As a result of the Madrid train bombings on 11 March 2004, 191 people died and more than 2000 got injured. The specially set compensation fund, which is named '*Fundo de Ayuda de 11-M*' offered compensation to victims and was created by the Spanish Ministry of Labour and Social Affairs.<sup>65</sup> In addition, there is a Fundacion de Victimas del Terrorismo that is financed by public and private donations which covers urgent social instruments of assistance for victims of terrorism and their families.<sup>66</sup>

In a report by Alvaro Gil-Robles, Commissioner for Human Rights for the Committee of Ministers and the Parliamentary Assembly of the CoE,<sup>67</sup> several aspects relating to the aftermath of terrorist attacks in Spain were criticised. For instance, he noted that 'the people I met also stressed the need for the authorities to establish some sort of procedure to avoid lengthy procedures with the administrative agencies dealing with the situation of victims of terrorism. In more specific terms, the associations representing the victims of 11 March 2004 referred to the problems facing injured persons and the difficulties encountered by those affected by terrorist attacks in returning to employment. Although I am aware of the exceptional efforts which the authorities [...] have already made, and are continuing to make, to ensure that the victims of terrorism receive adequate care and attention, everything possible must still be done to put into practice the duty of solidarity to which I have previously referred. I found particularly interesting the proposal launched by some victims' associations to set up a single office – possibly within the Under-Directorate for the attention to the citizens and assistance to the victims of terrorism in the Ministry of Interior – in charge of managing all victims' requests for assistance. The setting up of a single administrative unit where victims could go to process their requests for different types of assistance would, no doubt, induce a more individual treatment of persons who have suffered terrorist violence in their bodies

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<sup>65</sup> We were not able to find more information regarding this Fund.

<sup>66</sup> See the OSCE ODIHR Questionnaire, question 15.

<sup>67</sup> Report by Alvaro Gil-Robles, Commissioner for Human Rights for the CoM and PA of the CoE, On his visit to Spain, 10–19 March 2005, Strasbourg, 9 November 2005, commdh(2005)8, para. 157.

and souls, alleviating these persons of the burden, particularly heavy in their case, of having to claim in front of several agencies and authorities the concession of different types of assistance.’ Such a specific unit is currently existent in Spain, as well as the position of a High Commissioner for Victims of Terrorism whose task it is to coordinate all national, regional, and local political and administrative initiatives for victims of terrorism (the latter is, however, no longer in function).

#### **6.4.4 Italy**

For several decades, special legislation on compensation for victims of terrorism has existed. In 1990, a special compensation programme for victims of terrorism and organised crime was established by Act no. 302 (“Norme a favore della vittime del terrorismo e della criminalità organizzata” (extended with Act no. 206 of 3 August 2004)). Eligible are direct victims and surviving relatives of deceased victims. Foreign nationals are also eligible for compensation in the case that the crime occurred on Italian territory. Italian nationals may also claim compensation for terrorist or organised crime acts that occurred outside Italian territory.

In case of disability, victims are entitled to a disability pension, with a maximum of €200,000 per year if the victim is 80% or more disabled. In case of death, payments will be made to surviving relatives. They are also entitled to a monthly award of €1,033 each. Furthermore, the pension is income tax-free for the victim, and the pensions benefiting surviving relatives are ‘tax-neutral’. According to the same underlying principle, victims of terrorism and their relatives are released from all major types of further taxes. Moreover, medical care, medicine and other medical aid and instruments are free of charge. Advance payments can be granted by the Compensation Committee. Even when compensation is ultimately not awarded, the victim is not compelled to retribute the payments.

#### **6.4.5 Israel**

Israel has long time experience with terrorism and its consequences for victims. Israel’s compensation system is, following Albrecht & Kilchling, ‘in line with the principle of solidarity and the recognition that general risks such as war, collective violence and terrorism must be borne by the general public.’<sup>68</sup>

The Property Tax and Compensation Fund Law of 1961 and the Victim of Hostile Actions (Pensions Law) of 1970 offer legal provisions for victims of terrorism. The first law provides for State compensation for property damage caused by terrorism.

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<sup>68</sup> See Albrecht & Kilchling, October 2005, p. 17. For an historical overview of the Governments’ policy towards victims of terrorism from the moment the State of Israel was founded, see Uri Yanay, Assistance to Civilian Casualties of Hostile Actions, on file with the authors.

The second law offers State compensation awards for bodily injuries and awards for families of deceased victims.<sup>69</sup>

The definition of enemy-inflicted injury is as follows: (1) An injury caused through hostile action by military or semi-military or irregular forces of a state hostile to Israel, through hostile action by an organisation hostile to Israel or through hostile action carried out in aid of one of these or upon its instructions, on its behalf or to further its aims (all hereinafter referred to as “Enemy Forces”); (2) An injury inflicted by a person unintentionally in consequence of hostile action by Enemy Forces or an injury inflicted unintentionally under circumstances in which there were reasonable grounds for apprehending that hostile action as aforesaid would be carried out; (3) An injury caused through arms which were intended for hostile action by Enemy Forces, or an injury caused through arms which were intended to counter such action.<sup>70</sup> The definition has a broad scope of application; defensive measures aimed against terrorist aggression (friendly fire) are included as well.

#### **6.4.5.1 Eligibility**

Israeli citizens and residents on Israeli territory and while abroad are eligible for compensation. This applies also to all harmed foreign nationals who have entered Israel legally and who are victimised by a hostile act in Israel or in the Territories administered by Israel, thus including tourists, business travellers, and legal foreign workers. Another group of foreign nationals exposed to anti-Israeli terrorist attacks are employees of Israeli entities abroad, yet only those employed by the state of Israel (embassies, consulates, and other formal delegations representing the state) or by an employer pre-approved for that purpose by the Minister of Labour are eligible.

The benefits provided to those wounded in terrorist attacks and the families of those killed in terrorist attacks have been equated to the benefits provided to injured soldiers and to the families of soldiers killed in action.

#### **6.4.5.2 Losses Covered**

##### Compensation for Injured Victims

Victims are entitled to a stipend during the time that they are unable to work because of medical treatment for their injury. This stipend can be paid for an unlimited amount of time, and is based on the victim’s pre-injury income subject to a limit set at a rate of five times the average salary in Israel. Unemployed victims

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<sup>69</sup> See for more information H. Sommer, Providing Compensation for Harm Caused by Terrorism: Lessons Learned in the Israeli Experience, *Indiana Law Review* 335 (2003) and Uri Yanay, Assistance to Civilian Casualties of Hostile Actions, on file with the authors.

<sup>70</sup> The definition excludes an injury that is inflicted upon a person age 18 or older while committing a crime, or a felony involving wilfulness or culpable negligence.



receive a stipend based on the (relatively low) salaries of mid-level government employees. Victim's age and family situation are taken into account.

Furthermore, injured victims are entitled to a range of benefits, such as care-taking benefits, home purchasing grants and loans, financial assistance in the purchase of a medically necessary car; monthly mobility payments; appliances, special equipment and other household items to paraplegics and the blind, a yearly clothing allowance, college education grants for children of the victim, and compensation of telephone expenses.

### Compensation for Relatives of Deceased Victims

Widowers, widows, bereaved children and bereaved parents of victims killed as a result of hostile acts are entitled to a regular monthly benefit, based on a percentage of the salary of a low-level government employee. Family members of deceased victims are entitled to certain benefits as well, such as compensation for the expenses made for psychological assistance, housing assistance, financial assistance in the purchasing of a car, yearly convalescence grants, tax breaks; school grants, college grants; grants and loans to start a business, Bar-Mitzvah grants, compensation of a variety of health-related expenses; and compensation of telephone costs.

### Compensation for Property Damage

As with damage for personal injury, the compensation of victims of terror for property damage is an extension of the compensation to civilians for war damage. The scope of events covered by insurance includes terrorist actions. The law covers 'War Damage' (direct damage to property) and 'Indirect Damage'. Both terms are defined as to include terrorist acts as part of the expression 'other hostile actions against Israel'.

## **6.5 Ad Hoc Compensation Funds: The Victim Compensation Fund of 11 September 2001 (VCF)**

### ***6.5.1 Introduction to US Legislation Relating to Victims of Terrorism***

The United States has enacted several acts that deal specifically with victims of terrorism. The first law was the Hostage Relief Act (1980), followed by the Victims of Terrorism Compensation Act in 1986. Acts were also adopted in response to specific terrorist acts. The bombing of PanAM flight 103 resulted in the Act US Response to Terrorism Affecting Americans Abroad and the Oklahoma City

bombing resulted in the Justice for Victims of Terrorism Act. The 9/11 attack led to several acts, under which the Victims of Terrorism Tax Relief Act (providing tax relief to relatives of the victims), the Terrorism Risk Insurance Act (2002)<sup>71</sup> and the Air Transportation Safety and System Stabilization Act (establishing a Victim Compensation Fund covering full compensation for economic and non-economic losses but also seeks to shield airlines from civil litigation).<sup>72</sup> The Compensation Fund is unique in providing full compensation; other government programs which provide payments to survivors have fixed limited amounts (think of soldiers or public officials killed on the job).<sup>73</sup>

US legislation relating to victims of terrorist acts is often adopted after a terrorist act has occurred. As Albrecht & Kilching critically note: ‘The US has thus adopted an individualized approach which focuses on specific terrorist attacks. With this, flexibility is adopted as is the possibility to consider various and differing (political and economic) goals when deciding whether, and to what extent, victim of terrorism legislation should be enacted to respond to terrorist attacks. The basic problem then concerns control of discretion and implementation of equal treatment.’<sup>74</sup> In addition, ‘critique has also been voiced as regards its guiding principles that tend to be rather close to tort law principles, moving away from a support and social welfare approach.’ On the other hand, it must be noted that the US system differs from the European system for personal injury: in the US, a lower degree of social welfare exists compared to European countries.

Next to these specific terrorism acts, US legislation has an elaborate system of civil legislation which enables victims to sue foreign perpetrators in US federal courts, based on US Tort Law.

On the organisational level, the Office for Victims of Crime plays a pivotal role in providing leadership and funding on behalf of crime victims including victims of terrorism. The Office for Victims of Crime (OVC) was established by the 1984 Victims of Crime Act (VOCA) to oversee diverse programs that benefit victims of crime. It is a federal agency within the Office of Justice Programs, US Department of Justice.<sup>75</sup> Within the Office, a special Terrorism and International Victim Assistance

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<sup>71</sup> See for more information Peter Chalk, Bruce Hoffman, Robert Reville, Anna-Britt, Kasupski, Trends in Terrorism, Threats to the United States and the Future of the Terrorism Risk Insurance Act, RAND Publication, [http://www.rand.org/pubs/monographs/2005/RAND\\_MG393.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG393.pdf).

<sup>72</sup> See Albrecht & Kilchling, October 2005, p. 15. See also M. Diller, Tort and Social Welfare Principles in the Victim Compensation Fund, *DePaul Law Review*, nr. 53, 2003–2004, pp. 719–768. Especially the aspect of equal treatment has been widely criticised. Note for example the reaction of the mother of a fourteen year old daughter who died in the bombings of Oklahoma City: ‘Why is it right for a New York stockbroker’s widow to be given millions of dollars and not a poor farmer’s family in Oklahoma? [...] They told me that my daughter was not worth as much as a New York victim, and that’s an ugly thing to say. In Issacharoff, S. and Morawiec Mansfield, A., Compensation for the Victims of September 11, in De Greiff, P (ed.), *The Handbook of Reparations*, Oxford University Press, 2006, p. 311.

<sup>73</sup> Diller, 2003–2004, p. 720.

<sup>74</sup> See Albrecht & Kilchling, October 2005, p. 16.

<sup>75</sup> [http://www.ojp.usdoj.gov/ovc/publications/factshts/what\\_is\\_ovc/fs\\_000307.html#1](http://www.ojp.usdoj.gov/ovc/publications/factshts/what_is_ovc/fs_000307.html#1).

Services Division (TIVAS) was created which addresses emerging issues related to serving victims of violent crime, mass victimisation, and terrorism both in the United States and abroad.

## 6.5.2 9/11 Victim Compensation Fund

### 6.5.2.1 Legal Basis

The establishment of the VCF is a unique solution to an unprecedented disaster. Shortly after the attacks, Congress enacted the Air Transportation Safety and System Stabilization Act (ATSSSA) of 24 September 2001. This act not only constituted the legal basis for the Victim Compensation Fund,<sup>76</sup> but also offered financial assistance and legal protection for the airline transportation industry.<sup>77</sup> The Federal government wanted to prevent a financial breakdown of the air transportation industry by a potential wave of claims from 9/11 victims.<sup>78</sup>

The fund's goal was 'to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001' (§403).<sup>79</sup> Against this background, the VCF had to present itself as a worthy alternative to tort law litigation. The VCF involves the largest no fault compensation experiment ever to compensate mass damage disaster victims.<sup>80</sup> The fund's financial resources were unlimited. In total, the fund distributed \$7.049 billion to 2,880 survivors and to 2,680 injured victims.

Surviving families received an average award of over \$2 million and injured victims received an average award of \$400,000. The fund was supervised and in charge of a 'special master' Kenneth Feinberg, who was appointed by the Attorney General.<sup>81</sup> The establishment, implementation and settlement period of the VCF took 33 months. Apart from the VCF, congress enacted the Victims of Terrorism

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<sup>76</sup>Title IV of Pub. L. 107–142, 115 Stat. 230, 49 U.S.C. § 40101. The ATSSSA was completed with more concrete provisions by the Interim Final Rules of 21 December 2001 and the Final Rules of 13 March 2002.

<sup>77</sup>See [http://www.usdoj.gov/victimcompensation/civil\\_01.html](http://www.usdoj.gov/victimcompensation/civil_01.html).

<sup>78</sup>C.C. Lebow, Understanding the September 11th Victim Compensation Fund: The proper response or a dangerous precedent?, Ann. 2002 ATLA-CLE 243 (2002) vol. 1. The Association of Trial Lawyers of America played an important role in the realisation of the VCF.

<sup>79</sup>See for more information also Samuel Issacharoff and Anna Morawiec Mansfield, Compensation for the Victims of September 11, in De Greiff, 2006, pp. 284–320.

<sup>80</sup>L.S. Mullenix & K.B. Stewart, The September 11th Victim Compensation Fund: Fund approaches to resolving mass tort litigation, *Conn. Ins. Law Journal Association*, Fall 2002, p. 123.

<sup>81</sup>For a discussion of the fund's functioning, see also Lew Goldfarb, The 9/11 Victim Compensation Fund – A Model for the Future or a one-off phenomenon? Munich Re Group, 11th International Liability Forum, *Acts of Terrorism, Tort Law and Liability Insurance*, 2007.

Relief Act of 2001, which offered tax income relief for all 9/11 victims and relatives, yet also for victims of the anthrax attacks of 2001 and for the victims of the Oklahoma City Bombings.

### 6.5.2.2 Victims' Eligibility Criteria

Victims and surviving family members were eligible for an award when: '(§ 405) The individual was located during or in the immediate aftermath of the attacks at the site of the WTC, Pentagon or on Shanksville air crash territory, or if the individual suffered physical harm<sup>82</sup> or died<sup>83</sup> during or in the immediate aftermath of the attacks.' Individuals who were passengers or employee aboard of one of the four hijacked planes were eligible as well, and so were surviving relatives of the dead victim, or other 'personal representatives of the deceased victim'.<sup>84</sup>

### 6.5.2.3 VCF Procedure

Victims and relatives of deceased victims were to make a decision between a VCF award or a claim in tort law within a 2 year period (§ 405(c)(3)(B)(i)).<sup>85</sup> The ATSSSA stated that all 9/11 tort claims had to be submitted before judge A.K. Hellerstein of the Southern District Court in New York (§ 408;115 Stat 239). Claimants had the right to be represented by an attorney and to submit evidence material, amongst which the presentation of witnesses and documents.<sup>86</sup> The decision made by the Special Master was definitive, and thus was excluded from any form of 'judicial review'. Claimants had at best the option to file a complaint to the Special Master himself (§ 405(b)(3)).

### 6.5.2.4 Thresholds

The Special Master was attributed the exclusive power of decision with regard to the amount of compensation. This involved compensation for economic and non-economic losses (§ 402–407). Economic losses were defined as: 'lost earnings

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<sup>82</sup> Medical treatment for harm had to be provided within 24 h after the injury or after the rescue. Victims who only sustained psychological harm were not eligible for compensation. When it was not possible to find the nature of the injury within 24 h, or when no medical treatment was available on September 11, the time limit could be expanded by the Special Master.

<sup>83</sup> The injury or death had to commence within 12 h after the attacks. The time limit for rescue workers was put at 96 h after the attacks.

<sup>84</sup> Disputes concerning the definition of a 'personal representative' were submitted to the District Courts.

<sup>85</sup> §403;115 Stat. 239.

<sup>86</sup> The American Trial Lawyers Association set up the Trial Lawyers Care (TLC) and granted on voluntary basis legal advice and counselling to eligible claimants, [www.911lawhelp.org](http://www.911lawhelp.org).

or other benefits relating to employment, medical expenses, replacement services, loss due to health, burial costs, and loss of business or employment opportunities.’ Non-economic losses were defined as ‘losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and all other non pecuniary losses of any kind.’ The Special Master paid out a fixed amount of \$250,000 for non-economic damages to each eligible claimant. On top of this award, marital spouses and direct surviving relatives were entitled to a supplementary award of \$100,000.<sup>87</sup> Furthermore, the Interim Rules (§104.41) decided that no award could be – before collateral sources are deducted – lower than \$500,000 when requests were being made by direct surviving relatives of deceased victims. When the request was made on behalf of a surviving relative who is not a dependent next of kin the award could not be lower than \$300,000. The individual compensation system led to strikingly different outcomes. Death benefit awards averaged \$2.1 million, but ranged from 250,000 to \$7.1 million.

#### 6.5.2.5 Calculation of the Awards

The Special Master implemented a calculation model to assess the damage as accurately as possible.<sup>88</sup> The model took into account (1) the victim’s injury, (2) the claim’s facts and (3) the claimant’s individual circumstances. The calculation was based on the claimant’s age, the income years 1998–2000, the future income years,<sup>89</sup> marital status, the number of surviving relatives and their age. The awards varied: death awards amounting from 250,000 up to \$7 million and the award for personal injury amounted to 500 up to \$7.9 million. Claimants were given the option to have the award paid out periodically.

#### 6.5.2.6 Collateral Sources

The total award was to be deducted from the ‘collateral sources’ (§402–404).<sup>90</sup> ‘Collateral sources’ included life insurance payments, pension money, death payments and awards made by federal states or local authorities, who were allied to 9/11.<sup>91</sup> Remarkably enough, charity payments were not seen as ‘collateral sources’

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<sup>87</sup> 28 CFR 104.49(b)(2), p.11237.

<sup>88</sup> When calculating the economic losses, special calculation models were set up for military and FDNY/NYPD police personnel, fire fighters, and airport employees.

<sup>89</sup> The calculation of loss of future income years is based on the model drafted by J. Ciecka, T. Donley, J. Goldman, A Markov Process Model of Works-Life Expectancies for the Victim’s Age contained in 1997–1998, *Journal of Legal Economics*, Winter 2000.

<sup>90</sup> E.S. Abraham and K.D. Logue, *The Genie and the Bottle: Collateral Sources under the 9/11 Victims Compensation Fund*, 54 *DePaul L. Rev.* (2003).

<sup>91</sup> § 405(b)(6).

and thus not deducted from the award.<sup>92</sup> This was considered controversial, since the total sum of charity was \$1.4 billion.<sup>93</sup> The Twin Tower Fund was created especially for fire-fighters and police staff. Furthermore, the Red Cross ascribed awards of \$64,000 to victims. The New York Police and Fire Widow's and Children Fund provided widower's compensation awards of an average \$40,000. Victims' point of view was, however, that it would not be fair when government and/or insurers would benefit from the charity gifts, in the case these awards would be deducted. Also, the Interim Rules stated that State compensation for social security would not be seen as 'collateral sources'.<sup>94</sup>

## 6.6 International Trust Funds

### 6.6.1 Introduction

Next to the establishment of national compensation funds, discussion takes place on the desirability of establishing international trust funds for victims of terrorism. For instance, UN Security Council Resolution 1566 (2004) of 8 October 2004 noted that the Council 'decides to establish a working group consisting of all members of the Security Council [...] 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.' The Working Group should consider recommendations on measures to be imposed against individuals, groups or entities involved in or associated with terrorist activities, not already identified by its Al-Qaida and Taliban sanctions committee.<sup>95</sup> Some approaches to be studied include more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition, freezing financial assets, travel restrictions and arms embargoes. In addition, the possibility of establishing an international fund is explicitly mentioned in UN General Assembly Resolution 59/195 of 22 March 2005 on 'Human rights and terrorism', para 15, and in UN Commission

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<sup>92</sup> Fed. Reg. Vol. 66 nr. 246, p. 66274 and see 28 CFR 104.47(b)(2).

<sup>93</sup> See for more information Section 7.3.

<sup>94</sup> 28 CFR 104.47(b)(3).

<sup>95</sup> The Security Council Committee established pursuant to resolution 1267 (1999) on 15 October 1999 the Al-Qaida and Taliban Sanctions Committee. The sanctions cover individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban wherever located. See for more information <http://www.un.org/sc/committees/1267/index.shtml>.

on Human Rights, Resolution 2002/35 on Human Rights and Terrorism, para 11.<sup>96</sup> It should be noted, however, that until now, no progress has been made regarding a further implementation of these suggestions.

The idea of an international compensation fund merits further examination, especially when taking into account the number of, mainly tourist, victims often not eligible for receiving compensation from national schemes, and the fact that terrorist acts can be directed at any State or government institution that, in the eyes of the terrorists, needs to be overthrown.

The International Criminal Court has elaborated an extensive system of reparation (see also Chapter 2), partly carried out by an International Trust Fund for Victims. Because of its unique character and example function, it will be examined more in depth in the next section.

### 6.6.2 *Trust Fund for Victims of the ICC*

As mentioned in Chapter 2, Article 79 of the Rome Statute of the International Criminal Court provides for the establishment of a Trust Fund for Victims (TFV) and for the families of victims who fall within jurisdiction of the International Criminal Court (ICC), based on the idea that reparation is part of achieving justice for victims.<sup>97</sup> Eligible for an award from the Trust Fund are direct and indirect victims, and also organisations and institutions – within the jurisdiction of the ICC – of genocides, crimes against humanity and war crimes.<sup>98</sup> The Trust Fund focuses on the most vulnerable victims.<sup>99</sup> As of September 2007, the Trust Fund contains an amount of €2,689,345.32.

Article 75 of the Rome Statute mentions a range of measures of reparations: ‘including restitution,<sup>100</sup> compensation and rehabilitation.’<sup>101</sup> The inclusive element of this article also allows the Court to order other forms of reparation, including

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<sup>96</sup>Note that within the UN, a UN Compensation Commission (UNCC) was set up to establish Iraq’s liability for the invasion and occupation of Kuwait, and to provide appropriate compensation to injured parties. For more information, see Hans van Houtte, Hans Das and Bert Delmartino, United Nations Compensation Commission, in De Greiff, 2006, pp. 321–389.

<sup>97</sup>The Victim Trust Fund is part of the ICC. See the website of the ICC Trust Fund < <http://www.icc-cpi.int/vtf.html> >. As of 17 September 2007, the Trust Fund contains a total amount of €2,689,345.32.

<sup>98</sup>TFV Regulations, art. 42; Rules of Procedure & Evidence, rule 85.

<sup>99</sup>To date, the Court is investigating the following situations: The Democratic Republic of Congo, Uganda, and Sudan, see for up-to-date information <http://www.icc-cpi.int/cases.html>.

<sup>100</sup>Henzelin et al. note that restitution is rarely available in practice. See Henzelin et al, 2006, p. 331.

<sup>101</sup>See further Brouwer, de, A.L.M., Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families, *Leiden Journal of International Law*, Vol. 20, pp. 207–237, at 218 ff, 2007.



satisfaction and non-repetition.<sup>102</sup> The Victim Trust Fund foresees in financial aid, helping to meet needs such as compensation of medical costs, school fees for orphans, restitution of seized property, reconciliation projects for communities, and psychotherapy for traumatised victims and witnesses. It is still unclear whether the Court will elaborate set scales for compensation.

The Trust Fund must be seen as a non-political, cross-cutting organisation, which operates independently from the UN. It is funded by voluntary contributions and by money and other property collected through fines and forfeitures imposed by the Court on perpetrators. After the determination of the damages, the Court may decide to make a reparation to individual victims (transferring the reparation directly to the beneficiaries) or a group of victims through the ICC Trust Fund. The Trust Fund is also responsible for forwarding the awards to individuals. Following Article 75 of the Rome Statute, the ICC can request the Trust Fund to implement awards for reparations made against a convicted person.<sup>103</sup> When awards are granted to a certain group of victims or a collective, the Trust Fund needs to identify the beneficiary group, using demographic data, targeted outreach, and consultations with those with relevant knowledge.<sup>104</sup> It needs to set out draft plans for the implementation of the group or collective awards.<sup>105</sup>

De Greiff and Wierda state that it is important to temper expectations about what the TFV can actually mean in terms of compensation to (individual) victims.<sup>106</sup> Indeed, 'efficiency and effectiveness suggest that the Trust Fund should assist victims collectively rather than individually.'<sup>107</sup> Think of collective projects at the national level that set up treatment centers where victims can get psychical, psychological, and medical assistance. By enabling such collective projects, the Trust Fund can reach many more victims than the Court will be able to.<sup>108</sup> As Van Boven

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<sup>102</sup> Henzelin et al, 2006, p. 331.

<sup>103</sup> See also Rules of Procedure and Evidence, rule 98; TFV Regulations, arts. 59–75.

<sup>104</sup> Rules of Procedure & Evidence, rule 98(3); TFV Regulations, arts. 60, 69–72.

<sup>105</sup> See also De Brouwer, 2007, p. 227.

<sup>106</sup> P. de Greiff and M. Wierda, The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints, in K. de Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systemic Human Rights Violations*, Antwerpen: Intersentia 2006, pp. 225–243. See also Van Boven who noted that 'the types of situations referred to the International Criminal Court [...] all involve systematic and widespread attacks against civilian populations, affecting many thousands, if not hundreds of thousands of women, men and children. The reparative capacities of the Court and its Trust Fund for Victims will be complex as regards the demarcation of beneficiaries and the entitlements to and modalities of reparation.' Van Boven, 2007, p. 20.

<sup>107</sup> De Brouwer, 2007, p. 233.

<sup>108</sup> *Id.*, p. 236. It should furthermore be noted that the Trust Fund may also provide interim relief through psychical or psychological rehabilitation or material support during the investigation phase (on condition that the Court does not block this decision).

rightly notes, in situations of a large number of victimised people, reparative duties are very complex: ‘nevertheless, also in these circumstances and in order to meet the requirements of justice, reparation policies and programmes must aim to be complete and inclusive by providing material and moral benefits to all victims.’<sup>109</sup>

With regard to the ICC and the processing of mass claims, Henzelin, Heiskanen and Mettraux argue that a number of legal and practical challenges arise.<sup>110</sup> First, they mention the scale of reparations proceedings and the number of claimants, since the jurisdiction of the Court sees at crimes which can involve hundreds of thousands of potential claimants. Second, due to the large number of potential claimants, funding problems and lack of resources arise. Third, the Court seems to lack expertise, since it is the first permanent international criminal court, yet not a mass claim commission. Fourth, the Statute lacks rules on how to collect and process reparation claims and implement awards. With respect to procedural problems, the Court will face highly complicated and unique evidentiary and investigative issues, due to the large number of claimants and to a lack of sufficient resources. The Court should also consider investing in administrative and managerial best practices, in order to become an efficient reparations body. As mentioned also in Chapter 2, it will be interesting to see how the Court and the Trust Fund will address the difficult reparation issues lying ahead.

It seems doubtful whether victims of terrorism can obtain (collective or individual) compensation from the ICC Victim Trust Fund, since it is determined to serve as the facilitator for reparation programmes for victims of crimes against humanity, war crimes and genocide.<sup>111</sup> However, in 2009, a review conference will take place to discuss, among other things, whether the ICC Statute should be amended with provisions concerning crimes of terrorism.<sup>112</sup>

### 6.6.3 *A European Trust Fund for Victims of Terrorism*

With regard to natural, technological and environmental disasters, the European Commission proposed to create a new Disaster Relief Fund to assist regions in Member States and countries involved in accession negotiations, to take care of victims of a major natural, technological or environmental disaster.<sup>113</sup> The EU

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<sup>109</sup> Van Boven, 2007, p. 24.

<sup>110</sup> Henzelin et al, 2006, pp. 339–343.

<sup>111</sup> However, one can discuss whether terrorism can be defined as ‘crimes against humanity’.

<sup>112</sup> P.J. Wertheim, Should Grave Crimes of International Terrorism be Included in the Jurisdiction of the International Criminal Court?, *Policy and Society*, 22 (2), pp. 1–21, 2003.

<sup>113</sup> See <http://europa.eu/scadplus/leg/en/lvb/g24216.htm>.

Solidarity Fund (EUSF) was established in 2002 and provides relief assistance to areas affected by a major natural disaster, independent of their status under the Structural Funds. Health threats and acts of terrorism are excluded. The amount of support is related to the scale of the disaster and could also take account of the prosperity of the region concerned. The total capacity of the fund is € 500 million, eventually financed by all EU taxpayers. This fund is meant to be benefiting the entire community, since it offers financial aid to reconstruct destroyed infrastructure and preventive infrastructure such as dams and dikes.

However, on 6 April 2005, the Commission proposed to extend the scope of application to man-made disasters as well.<sup>114</sup> It specifically stated to include acts of terrorism. The fund aims at offering financial help to Member States to provide for medical, psychological and social assistance to victims of terrorism and their families. The fund does not directly compensate victims, yet offers financial help to Member States in need. In Table 6.2, the main features of the fund are presented (compared to the previous fund).

**Table 6.2** Proposal for a new Solidarity Fund – synopsis of main features

	Current Solidarity Fund	New proposal
Entry into force	November 2002	January 2007
Geographical scope	Member States and candidate countries after formal opening of accession negotiations	No change
Application deadline	10 weeks after first damage	No change
Applicant	National government only	No change
Thematic scope	‘Mainly’ major natural disasters (health threats and terrorism excluded)	Major disasters resulting from <ul style="list-style-type: none"> <li>– Natural disasters</li> <li>– Industrial and technological disasters</li> <li>– Public health emergencies- acts of terrorism</li> </ul>
Eligibility criteria	<ol style="list-style-type: none"> <li>1. Total direct damage above threshold</li> <li>2. Neighbouring country</li> <li>3. Exceptional mobilisation for extraordinary regional disasters</li> </ol>	<ol style="list-style-type: none"> <li>1. Total direct damage above threshold</li> <li>2. Neighbouring country</li> <li>3. Political criterion (no regional disasters)</li> </ol>

(continued)

<sup>114</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/111&format=HTML&aged=1&language=EN&guiLanguage=fr>.

**Table 6.2** (continued)

	Current Solidarity Fund	New proposal
Threshold (to be met per applicant State)	In relation to above: 1. Total direct damage above €3 bn or 0.6% of GNI, whichever is the lower 2. No threshold if major disaster in neighbouring country recognised 3. Major part of population affected, lasting repercussions on living conditions and economic stability of affected region	In relation to above: 1. Total direct damage above €1 bn or 0.5% of GNI, whichever is the lower 2. No threshold if major disaster in neighbouring country recognised 3. Political decision of the Commission: for cases where damage is inappropriate criterion (health threats, terrorism)
Eligible operations	Emergency operations – To restore to working order basic infrastructures – To secure protective infra- structure – Pay for emergency services and provisional housing, – For protection of cultural heritage – Cleaning up No compensation of private damage	As now, plus – Medical, psychological and social assistance to the direct victims of acts of terrorism and their families – Protection of the population against imminent health threats, including the replacement of vaccine, drugs, medical products and medical equipment used up during an emergency
Implementation period	1 year following payment of grant	18 months from first damage
Budgetary procedure	Full budgetary procedure in- volving EP and Council following a Commission proposal for an amending budget in each case	No change
Advance payments	Not possible	Upon request of applicant State: 5% of the estimated cost of eligible operations, maximum €5 million To be made available rapidly through internal budget transfer
Payment of grant	100% up front upon conclu- sion of the implementa- tion agreement with beneficiary State, no co-financing obliga- tion	No change
Implementation	Under full responsibility of beneficiary State Minimum requirements on monitoring and reporting Final report 6 months after end of grant	No change
Technical assistance	Not available	Up to €2 million/year for external expertise
Annual amount	€1 billion (not 'budgetised')	No change

## 6.7 Private Remedies

### 6.7.1 Insurance After 9/11

#### 6.7.1.1 Implications of 9/11 for the Terrorism Risk

The events of 9/11 have caused the biggest insured loss in recorded history and caused damage in all lines of insurance, from insurances of the person (life, disability, workers' compensation) to property insurance (material damage and business interruption) and also liability insurance (in this case in particular airlines).<sup>115</sup> Though the industry was able to manage the losses, it faced great difficulties in redefining the risk of terrorism.<sup>116</sup> Terrorism was regarded as a rather insignificant risk, but the events of September 11th made it painfully clear that this hazard is capable of causing unprecedented personal injury, death and property damage.<sup>117</sup> The insurance industry regards the risk as uninsurable, since its decisive factors – assessment, randomness, mutuality and economic feasibility – cannot be determined.

According to Liedtke and Courbage, the problem of insurability must not be mistaken with the market for insurance.<sup>118</sup> The authors define a risk insurable when: '[...] the organization of risk transfer in the private market place can be organized so that a prospective policyholder could acquire the coverage he needs to combat the adverse financial consequences of damages resulting from an uncertain occurrence.'<sup>119</sup> Insurers need to identify and quantify the risk and set fixed premiums. Within their drawn insurability framework, Liedtke and Courbage distinguish extremely low frequency events that are scarcely insurable, due to a lack of adequate data information. But all the same, a risk with huge financial consequences

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<sup>115</sup> The losses were estimated at USD 40.2 billion (of which business interruption insurance 27%) and are at least double the next largest loss in history. Damages were at least ten times greater than the next largest man made disaster, since all previous big losses resulted from natural disasters. The catastrophe caused losses in several insurance lines of business, which hitherto had never been hit: life insurance, workers compensation and disability insurance. European insurers are financially responsible for 50% of the total insured loss, North American insurers carry 40% and the remaining 10% will be borne by Bermudan companies. See Koch, 2006, p. 8.

<sup>116</sup> According to a general report by reinsurer Swiss Re, no bankruptcies or panic sell-off on insurers' assets took place, [www.swissre.com](http://www.swissre.com).

<sup>117</sup> Three Madrid railroad stations were target of a severe terrorist bomb attack on 11 March 2004, causing more than 200 deaths and over 1400 casualties. Spain's state-sponsored pool CCR will cover for all losses, other than life insurance. The aggregated insured loss is estimated at more than €25 million, [www.elmundodiner.com](http://www.elmundodiner.com).

<sup>118</sup> C. Courbage and P.M. Liedtke, On insurability and Its Limits, in: P.M. Liedtke and C. Courbage (eds.), *Insurance and September 11, One Year After, impact, Lessons and Unresolved Issues*, Geneva: The Geneva Association 2002, pp. 227–235.

<sup>119</sup> Courbage and Liedtke (2002), p. 228.

(like the crash of an asteroid), of which data collection is available, might also be uninsurable, since the industry would not have enough financial capacity to cover for the loss.

Further obstacles to insurability are *ex ante* and *post moral hazard* (the changing behaviour of the insured person), *adverse selection* (a lack of proper information) and *ambiguity* (the impossibility of setting a fixed price). Insurability is finally constrained through regulatory and legal limitations. Nevertheless, under different scenarios those limits of insurability can be pushed back by raising premiums, reducing transfer costs, providing triggered coverage under certain terms and conditions and pooling high frequency event risks. Notwithstanding these arguments, Koch notes that ‘the insurance industry would still not be (and probably will never be) able to endure a so-called “mega-terrorism” event such as a CBRN attack, not even with the combined efforts of both the market and the governments, which is why CBRN attacks are excluded in most (but not all) policies and compensation schemes.’<sup>120</sup>

### 6.7.1.2 Insurance Schemes in Europe and the US

State intervention is seen as a solution to the problem of insurability. After the 9/11 attacks, some countries set up State-backed insurance pools to continue offering coverage on commercial property and business interruption insurances. In Germany, a government-backed system was set up to cover commercial business insurances with the insurance pool *Extremus A.G.* In the Netherlands, private and commercial property and business risks are covered under the ‘*Nederlandse Herverzekeringsmaatschappij voor Terreurschade*’ (NHT), Luxembourg’s new special risk insurer offers worldwide terrorism coverage for commercial and industrial companies.<sup>121</sup> In Belgium, as of 1 May 2008, an agreement was concluded between the government and insurance companies (including car and fire insurance, hospital et al) to include damage caused by terrorist acts, without an extra fee for the insurance taker. The only exception is nuclear terrorism.<sup>122</sup>

When it comes to compensation for private property damage, France offers coverage for private and commercial property risks through *GAREAT*. Spain has a compulsory insurance system that covers for terrorism risks on private insurances (*CCS*). Northern Ireland (government), the Netherlands (NHT),<sup>123</sup> Austria (Austrian

<sup>120</sup> Koch, 2006, p. 11. See also Koch, B.A., *Indemnifying Victims of Terrorism, Preliminary Considerations with a Particular Focus on the Role of Insurance*, *CJ-S-VICT* (2007) 10, 29 August 2007.

<sup>121</sup> Austria has created an insurance pool which is not backed up by the state.

<sup>122</sup> See for more information: [www.tripvzw.be](http://www.tripvzw.be) (info in Dutch and French only).

<sup>123</sup> The NHT offers coverage for non-life businesses, health and life insurance and commercial insurance. Aviation is excluded.

Terror Pool without state intervention) and Belgium<sup>124</sup> offer compensation for both commercial and private property damage. The UK and Switzerland only offer terrorism risk coverage for commercial property and business interruption insurances. The US adopted the Terrorism Risk Insurance Act following the attacks on 9/11. The act was 'intended to provide temporary federal support to the US insurance industry until it could develop its own solutions and products in response to the new risk assessment.'<sup>125</sup> In 2005, the program was extended until the end of 2007.

### 6.7.1.3 Government Intervention

Cluff and Jonkman have presented policy recommendations to create an alternative private-public partnership, if legitimate reasons for government intervention can be found.<sup>126</sup> Based on the specific threat of terrorism in each State, policy makers should firstly define the specific problems that insurers face. Governments need to reflect upon the question to what extent it wishes to complete its role in supporting the private market. Government involvement must be accompanied by continuing vigilance in order to avoid excessive costs, bureaucracy and inefficiency. Furthermore, policy makers are recommended to implement a provision into future legislation that creates a possibility to re-evaluate the government's role. The authors argue that because of the different threats terrorism can pose on the financial and insurance market in each country, it is difficult to design a general program.<sup>127</sup>

Other authors are more critical with regard to State intervention in the private insurance market. For instance, Gron and Sykes discuss, following a law and economics perspective, the legitimacy for (ex ante) government involvement in the private insurance market. They argue tentatively that insurers were already adapting to the post 9/11 situation. Government involvement came too late to address short-term market disruptions, noting also that this would create a source of seriously long-term distortions on the private market.<sup>128</sup>

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<sup>124</sup> Claims are borne directly by insurers.

<sup>125</sup> Koch, 2006, p. 15.

<sup>126</sup> L.D. Cluff and S. Jonkman, *Terrorism Insurance Post 9/11: Principles for Designing Private/Public Programs*, in: P.M. Liedtke and C. Courbage (eds.), *Insurance and September 11, One Year After, impact, Lessons and Unresolved Issues*, Geneva: The Geneva Association 2002, pp. 215–227.

<sup>127</sup> See Cluff and Jonkman, pp. 222–223. In Israel for instance, the government administers two structural and direct insurance programs for property/casualty and life and health losses resulting from terrorist attacks. Tax revenues fund both programs. See in this context also the concluding remarks of H. Koziol in: *Terrorism, Tort Law and Insurance*, pp. 306–307.

<sup>128</sup> A. Gron and A.O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer?*, 36 *Indiana Law Review* 447–463 (2003). See also critical S. Levmore & K. D. Logue, *Insuring Against Terrorism and Crime*, 102 *Michigan Law Review* 268–327, (2003).



### 6.7.2 *Tort Law*

Seen from a tort law perspective, the loss lies where it falls and except if there are sufficient reasons to pass the loss to another person/party, victims have to suffer their loss. In a comparative survey, Koch distinguishes between four possible ‘routes’ for victims of terrorism under tort law.<sup>129</sup> First, victims can bring claims against the perpetrators. However, problems arise in bringing offenders to court and with regard to the solvency of the offenders. In addition, bringing claims against State sponsors of terrorist acts will often pose a problem because of State immunity. Even if State sponsors or organisations will appear in court, collecting money from them will be almost impossible for victims. Victims can – if they win their civil case against State sponsors or organisations supporting terrorist acts – try to force access to the frozen assets from terrorist states and terrorist organisations. Member States can freeze assets from sponsor States or organisations as a means of combating the financing of terrorism.<sup>130</sup> Since 9/11 2001, throughout the EU, assets have been frozen up to more than €100 million. In theory, this sounds like an effective solution to solve the problem of the insolvent terrorists themselves. However, the fact that assets have been frozen does not mean that it is easy for victims to collect compensation from these assets. Unfortunately, there is almost no information on this topic with regard to the EU situation.<sup>131</sup> With regard to the US situation, the Victims of Trafficking and Violence Protection Act of 2000 allows victims to collect money from Iranian assets, after they have a successful claim against a State in tort law. Yet, 9/11 victims who tried to collect money from the frozen Iraqi assets, were not successful, since the federal government evoked para 1610(f)(3) of the Act, which states that the President may ‘waive any provision of para (1) in the interest of national security.’

Second, victims could bring claims against the so called ‘second tortfeasors’, parties not directly involved in the terrorist attacks, yet making the terrorist act possible because of a lack of security. For instance, the government could be blamed for not having prevented the terrorist act. On this route, problems arise as well, because of a successful State appeal to discretionary policy.

Third, victims can follow the route of strict liability, bringing claims against parties responsible for risks that are inherent in the targeted object. This applies to airlines, where planes were used as bombs. Koch notes that jurisdictions such as

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<sup>129</sup> Koch (2006), p. 6 ff.

<sup>130</sup> See the UN Security Council Resolutions 1373 and 1262. United Nations International Convention for the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109, 9 December 1999.

<sup>131</sup> See for some information:

[http://ec.europa.eu/justice\\_home/fsj/terrorism/prevention/fsj\\_terrorism\\_prevention\\_disrupt\\_en.htm](http://ec.europa.eu/justice_home/fsj/terrorism/prevention/fsj_terrorism_prevention_disrupt_en.htm).

France, South Africa, Switzerland and the United Kingdom would hold the airlines strictly liable for a 9/11 scenario.<sup>132</sup> This is different when terrorists would bomb a nuclear plant: all jurisdictions would hold the operators liable, since exploiting a plant forms a high-risk activity. Fourth, victims could bring claims because of bad disaster management after the attacks, stating that further damage could have been prevented if the response to attacks would have been better managed/executed.

Despite theoretical options in tort law, it can be questioned whether tort law as a default system really serves as an adequate remedy for victims. Seen from a victim perspective, tort law litigation often stands for a complicated, challenging, long-lasting, stressful experience, which can – though hard scientific evidence is not yet available – result in secondary victimisation.<sup>133</sup> Due to the fact that some of the compensation issues are related to immediate needs, a long process for meeting those needs seems ill-suited. Victims can also obtain compensation through criminal proceedings based on the adhesion principle or through a compensation order. However, in the case of terrorism, it remains unsure whether victims can *effectively* claim damages, especially in cases where the terrorists are dead or cannot be traced. Besides solvency issues, it remains unclear in what way – e.g. with regard to the logistics of victim participation – a large number of claimants, in case of a disastrous attack, can pursue compensation through criminal proceedings (see further Section 6.8).

### 6.7.3 *Charity*

Apart from default private compensation systems, the amounts given through private charity gifts after terrorist attacks must not be underestimated, since the consequences of these acts evoke world/nationwide sympathy from politicians and private citizens. For example, the events of 9/11 led to a total of \$1.4 billion of charity gifts. The private September 11th Fund (which must not be confused with the VCF) was founded on the day of the attacks by the New York Community Trust and the United Way of New York City organisation.<sup>134</sup>

Primary goal of this fund was to fulfil the needs of victims, surviving relatives of decedents and communities in the short and long term (Get your life back). The capacity of the fund was estimated at \$526 million. It offered financial and other forms of support to eligible victims. Other forms of support included advice and support, mental health care and psycho-social support, job support, legal aid, allowances

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<sup>132</sup> Koch (2006), p. 7.

<sup>133</sup> Shuman, D.W. (2004), When Time Does not Heal: Understanding the importance of avoiding unnecessary delay in the resolution of tort cases, *Psychology, Public Policy, and Law*, 6, 880–897. Shuman, D.W. (1994), The Psychology of Compensation in Tort Law, *Kansas Law Review*, 43, 39–77.

<sup>134</sup> <http://www.september11fund.org/index.php>.

for medical insurance premiums, children and school support, scholarships, support for small companies and non-profit organisations.

Also after the London bombings, a charity fund with a total capacity of £10 million was established. This Charity Fund was set up one day after the bombing, by the Mayor of London and the British Red Cross. In the Appendix to this chapter we have enclosed a list of lessons learned by the Charity Fund.

Although charity organisations cannot be forced to cooperate with governments in compensating victims – since they are free in deciding who is in need – it might be advisable to consider cooperation between charities and government in order to meet the victims' (financial) needs. For example in the Netherlands, charity funds have cooperated voluntarily with the Dutch government – who contributed to the charitable response – in order to compensate private property damage and personal injury after the May 2000 Enschede firework explosion<sup>135</sup> and the 2001 Volendam Cafe fire.<sup>136</sup>

## 6.8 Compensation Through Criminal Proceedings

As follows from the previous section, it is difficult for victims of terrorism to obtain the benefit of full compensation based on claims made in tort law – even when terrorists are without doubt liable for their acts – since the tortfeasors are dead, not identified or unable to compensate. A similar difficulty arises regarding the possibility to claim compensation through the criminal justice procedure.

Several international instruments contain a provision relating to compensation possibilities through the criminal procedure. Para 10 of CoE Recommendation (85)11 notes for instance that 'it should be possible for a criminal court to order compensation by the offender to the victim. To that end, existing limitations, restrictions or technical impediments which prevent such a possibility from being generally realised should be abolished.' In most jurisdictions, compensation by the offender is awarded either through the adhesion procedure or in the form of a compensation order.<sup>137</sup>

The first is the most well-known model, found in the Germanic, Romanistic and Nordic jurisdictions.<sup>138</sup> Through this procedure, the injured person may present his civil claim for damages against the offender in conjunction with the criminal proceedings. The victim is party to the proceedings in as far as his civil claim is concerned.

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<sup>135</sup> As a result of the firework explosion, 18 people died and 900 people sustained injury.

<sup>136</sup> 14 young people died and over 200 adolescents got severely injured.

<sup>137</sup> Note that the Netherlands have introduced the so-called hybrid model, where the adhesion procedure and the compensation order exist side by side. See further Brienens and Hoegen, 2000, p. 1075 ff.

<sup>138</sup> See Brienens and Hoegen, 2000, Chapter 26.

Brienen and Hoegen mention several problems with regard to the full realisation of compensation for the victim through the adhesion model. The first concerns the strict adherence to the principle of civil liability, imposing the strict civil law rules of evidence. If these cannot be met, the claim will immediately be referred to the civil court for further consideration.<sup>139</sup> A second problem relates to the fact that the civil claim is subordinate to the criminal proceedings; deciding on the criminal liability of the offender is the main objective of the proceedings and a collapse of the criminal case entails automatic collapse of the civil claim. Lastly, Brienen and Hoegen refer to the ‘pervasive negative attitude of the courts’ towards considering civil claims in the criminal proceeding.

Another measure, with similar features like the adhesion procedure, is the compensation order, which can be found in common law jurisdictions. The main difference to the adhesion procedure is that the relation between the civil liability of the offender and the eventual awarding of compensation has been loosened.<sup>140</sup> Also here, some restrictions can be mentioned. The main one being that the compensation order is restricted to certain types of crime and only covers material damages. However, the biggest advantage is, following Brienen and Hoegen’s study, the high enforcement rate of the compensation order compared to the enforcement rate in the adhesion procedure.

As a general conclusion, Brienen and Hoegen note that ‘in absolute sense, the frequency and amount of compensation awarded in the form of a compensation order is still modest. Characteristic for all three models is a pervasive negative attitude of the prosecution and judiciary towards awarding compensation for the benefit of the victim in the course of criminal proceedings.’<sup>141</sup>

The application of these procedures for victims of terrorism should therefore not be overestimated. As underlined before, bringing offenders of terrorist acts to court, and the solvency of the offenders will pose difficulties for victims in adequately making use of the civil claim option in criminal proceedings.

## 6.9 Reparation for Victims of Terrorism

### 6.9.1 *Reparation as a Means of Doing Justice to Victims of Terrorism*

The preceding sections in this chapter focused on monetary compensation. This section will address the broader meaning of the term reparation (a term often used in the human rights framework), which goes far beyond the strict meaning of monetary

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<sup>139</sup> Brienen and Hoegen, 2000, p. 1069.

<sup>140</sup> Brienen and Hoegen, 2000, p. 1072.

<sup>141</sup> Brienen and Hoegen, 2000, p. 1099.

compensation (see also Chapter 2). We decided to include a section on reparation in order to assess whether and which reparation measures could be beneficial for victims of terrorism as well.

According to the Handbook of Reparations by De Greiff, reparation is used to refer to two different contexts.<sup>142</sup> The first meaning of reparation refers to the usage according to 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 (van Boven Principles, see Chapter 2). The second meaning of reparation refers to the design of reparation programmes for countries in transitional justice (see Chile, Argentina). De Greiff states that reparation within this context is used in a narrower sense. The Handbook of Reparations gives a detailed overview of various reparation programmes throughout the world, from Argentina, South-Africa, the USA, to Germany.<sup>143</sup> The Handbook acknowledges that ‘a great deal of attention has been paid to what post conflict or transitional countries have attempted to do by way of prosecuting human rights violators, but much less attention has been paid to these countries’ efforts by way of reparations for the victims.’<sup>144</sup> The following sections will provide a brief overview of reparations programmes installed after massive human rights violations and will further examine the Van Boven/Bassiouni principles.

### 6.9.2 *Reparations Based on the Van Boven/Bassiouni Principles*

Based on the Van Boven/Bassiouni Principles, as referred to earlier in Chapter 2, the international community is encouraged to establish reparation principles for victims of *gross* and *serious* human rights violations. This restriction was subject to much debate, mostly because ‘it was argued that all violations entail a duty to afford remedies and reparations.’<sup>145</sup> To avoid any confusion, Article 26 notes that ‘[...] it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law’ (italics added).

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<sup>142</sup> De Greiff, pp. 452–453.

<sup>143</sup> Pablo de Greiff, *The Handbook of Reparations*, The International Center for Transitional Justice, Oxford University Press, 2006.

<sup>144</sup> *Ibid.*, p. 1

<sup>145</sup> Boven, T. van, *The Right to a Remedy as contained in International Instruments: Access to Justice and Reparation in Treaties and the New United Nations Principles*, forthcoming, Bruylant Publishers, 2007/2007, pp. 16 and 18. See also Van Boven, *Reparative Justice – Focus on Victims*, SIM Lecture 2007, on file with the authors.

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>146</sup> The subsequent articles, 19–23, further elaborate the meaning of these forms. Reparation consists of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

*Restitution* refers to restoring the victim to the original situation before the violation took place, including, among other things, restoration of employment and return of property.

*Compensation* is defined as providing for any economically assessable damage, listing the following items: physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage, and costs required for legal or expert assistance, medicine and medical services, and psychological and social services. International mechanisms like the Inter-American Court and the European Court of Human Rights appear to agree on the following interpretation of fair and adequate compensation: ‘The ideal behind reparations is ‘full restitution’ (*restitutio in integrum*), that is the restoration of the *status quo ante*.’<sup>147</sup>

However, as adequately put by De Greiff, ‘the capacity of the State to redress victims on a case-by-case basis is overtaken when the violations cease to be the exception and become frequent.’<sup>148</sup> With regard to terrorist attacks this is in many cases unrealistic; for example, the impossibility to bringing someone back to life, or a scarcity of resources that makes it unfeasible to satisfy the claims of all victims.<sup>149</sup>

*Rehabilitation* includes medical and psychological care as well as legal and social services (Section IX, Article 21).<sup>150</sup>

Article 22 elaborates the different forms of *satisfaction*, including, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the

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<sup>146</sup> Van Boven, 2007, p. 22. See also Pablo De Greiff, Justice and Reparations, in Pablo de Greiff, *The Handbook of Reparations*, The International Center for Transitional Justice, Oxford University Press, 2006, pp. 452–503.

<sup>147</sup> De Greiff, 2006, p. 455

<sup>148</sup> De Greiff, 2006, p. 454.

<sup>149</sup> See De Greiff in similar words regarding large-scale human rights violations, *id.*, p. 456.

<sup>150</sup> Special legislation for victims of terrorism often stipulates that social rehabilitation is one of the goals to achieve.

recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgment of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims;<sup>151</sup> (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels (Section IX, Article 22 a–h).

Finally, States should take measures for the *guarantees of non-repetition*, which will also contribute to prevention (Section IX, Article 23).

When reading the Basic Principles and Guidelines carefully, it can be noted that the approach is rather judicial. As Van Boven rightly notes, ‘in reality non-judicial schemes and programmes offering redress and reparation do also contribute to reparative justice for the benefit of large number of victims. Such schemes and programmes should operate in coordination with other justice measures.’<sup>152</sup>

Indeed, according to De Greiff, ‘in the case of massive abuse [...] an interest in justice calls for more than the attempt to redress the particular harms suffered by particular individuals. Whatever criterion of justice is defended must be one that has an eye also on the preconditions of reconstructing the rule of law, an aim that has a public, collective dimension.’<sup>153</sup> In his article, he describes the characteristics of reparation programmes that have been established following massive human rights abuses. Some of the lessons learned might also be useful in the case of terrorist attacks. In his article he gives an overview of different design choices in reparation programmes (see Table 6.3).<sup>154</sup>

All these elements are interrelated and can be introduced simultaneously. De Greiff notes, however, that ‘in those places where the violence was predominantly collective, it makes sense to design a program that also places special emphasis on these kinds of methods.’<sup>155</sup>

In Chapter 3 we concluded that the fact that victims of a terrorist acts are victimised as a representative of a larger group, in an often political context, does have implications, in particular when it concerns mass victimisation. It implies that acknowledging victims’ suffering in these cases will entail recognition of the fact

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<sup>151</sup> The setting up of commemorations is not always easy. Note for instance the discussions between the victims’ families of 9/11 and the business developers regarding the reconstruction of the site of the World Trade Center, see for more information, Issacharoff, S. and Morawiec Mansfield, A., Compensation for the Victims of September 11, in De Greiff, P. (ed.), *The Handbook of Reparations*, Oxford University Press, 2006, pp. 307 ff.

<sup>152</sup> Van Boven, 2007, p. 24.

<sup>153</sup> Id., p. 457.

<sup>154</sup> De Greiff, 2006, p. 468.

<sup>155</sup> Id., p. 470.



**Table 6.3** Pros and cons of symbolic measures, service packages and individual grants

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<b>1. Symbolic measures</b>	<ul style="list-style-type: none"> <li>• Individual (personal letters of apology, copies of truth commission reports, proper burial for the victims etc.)           <ul style="list-style-type: none"> <li>✓ Advantages               <ul style="list-style-type: none"> <li>○ Constitute a way to show respect for individuals</li> <li>○ Express recognition for the harm suffered</li> <li>○ Low cost</li> </ul> </li> <li>✓ Disadvantages               <ul style="list-style-type: none"> <li>○ May create the impression that by themselves they constitute sufficient reparations for victims</li> </ul> </li> </ul> </li> <li>• Collective (public acts of atonement, commemorative days, establishment of museums, changing of street names and other public places etc.)           <ul style="list-style-type: none"> <li>✓ Advantages               <ul style="list-style-type: none"> <li>○ Promote the development of collective memory, social solidarity and a critical stance toward, and oversight of State institutions</li> </ul> </li> <li>✓ Disadvantages               <ul style="list-style-type: none"> <li>○ May be socially divisive</li> <li>○ In societies or social sectors with a proclivity toward feeling victimized, this feeling may be heightened</li> <li>○ May create the impression that they alone constitute sufficient reparations for victims</li> </ul> </li> </ul> </li> </ul>
<b>2. Service Packages</b> (may include medical, educational, and housing assistance)	<ul style="list-style-type: none"> <li>✓ Advantages           <ul style="list-style-type: none"> <li>○ Satisfy real needs</li> <li>○ May have a positive effect in terms of equal treatment</li> <li>○ May be cost-effective if already existing institutions are used</li> <li>○ May stimulate the development of social institutions</li> </ul> </li> <li>✓ Disadvantages           <ul style="list-style-type: none"> <li>○ Do not maximize personal autonomy</li> <li>○ May reflect paternalistic attitudes</li> <li>○ Quality of the benefits will depend on the services provided by the current institutions</li> <li>○ The more the programme concentrates on a basic service package, the less force the reparations will have, as citizens will naturally think that the benefits being distributed are ones they have a right to as citizens, not as victims</li> </ul> </li> </ul>
<b>3. Individual grants</b>	<ul style="list-style-type: none"> <li>✓ Advantages           <ul style="list-style-type: none"> <li>○ Respect personal autonomy</li> <li>○ Satisfy perceived needs and preferences</li> <li>○ Promote the recognition of individuals</li> <li>○ May be easier to administer than alternative distribution models</li> </ul> </li> <li>✓ Disadvantages           <ul style="list-style-type: none"> <li>○ If they are perceived solely as a way of quantifying the harm, they will always be viewed as unsatisfactory and inadequate</li> <li>○ If the payments fall under a certain level, they will not significantly affect the quality of life of victims</li> <li>○ This method of distributing benefits presupposes a certain institutional structure</li> <li>○ If they are not made within a comprehensive framework of reparations, these measures may be viewed as a way to 'buy' the silence and acquiescence of victims</li> <li>○ Politically difficult to bring about, as the payments would compete with other urgently needed programmes, may be costly, and may be controversial as they would probably include ex-combatants from both sides as beneficiaries</li> </ul> </li> </ul>

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that they were victimised as a member of the larger target audience, rather than as individuals. Such recognition could well be organised through (a combination of) the reparation measures as indicated in the table above. Reparation measures could also lead to diminished feelings of vicarious retribution, in which members of the public strike back at people they perceive to be responsible by association with the terrorist acts, which may lead to more innocent people being victimised in the aftermath of the attack.

## 6.10 Concluding Observations

### 6.10.1 *Compensation and Reparations from a Needs Perspective; Differences in Kind, Degree and Implementation*

With regard to the comparison between victims of crime and victims of terrorism, arguments to differentiate between these two categories will be presented following the analysis put forward in Chapter 1. Chapter 1 noted that a difference could be made with regard to the question whether victims of terrorism have needs of a *different kind*, i.e. additional or other needs than other victims of crime, whether they *differ in degree*, i.e. whether the consequences of terrorism are more or less severe, making meeting the need in question more or less important and finally, whether there are indications that meeting a need of victims of terrorism may require *additional effort in implementation*.<sup>156</sup>

Applying this to the issue of compensation results in the following observations. As mentioned in several international instruments, victims should receive *fair, appropriate and timely* compensation that is *easily accessible*. This need applies as much to victims of ordinary crime as to victims of terrorism (needs in kind), or perhaps personal injury victims in general. The need for reparation in the broader meaning could be more apparent for victims of large-scale terrorist acts than for victims of ordinary crime. Especially the various forms of satisfaction may be important, for instance, in the form of a public acknowledgment of the facts and acceptance of responsibility and commemorations and tributes to the victims (see also Chapter 3). In addition, reparation could focus on preventing indirect victimisation of minority communities that may be confronted with a backlash after a terrorist attack, caused by vicarious anger (see Chapter 3). Tertiary victims would also benefit from such reparation programmes, considering that allowing this category access to the regular compensation schemes would be practically impossible.

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<sup>156</sup> A report was drafted in November 2007 by the CoE Group of Specialists on remedies for crime victims (CJ-S-Vict). This group concluded that victims of terrorism are not essentially different from victims of crime, yet that there are some specialties in case of large-scale attacks.

Chapter 3 assessed that, considering that the physical damage and large-scale property damage in case of large-scale terrorist acts are more likely (even in the case of non-fatal terrorist acts), victims' financial needs are acute. It is open to question whether normal procedures for compensation will be sufficiently swift in reaction to large-scale terrorist victimisation, resulting in a large group of both primary and secondary victims. In addition, Chapter 3 further estimated that the costs of murder and manslaughter are by far the highest and that for victims of terrorism the costs of fatal incidents are unlikely to be much different from other victims of crime. Nevertheless, Chapter 3 also acknowledged that the injuries sustained through terrorist acts are on average more severe, and the chances of developing a psychological disorder are higher, which implies that costs of suffering non-fatal terrorist victimisation will be higher. The higher costs are further compounded by the increased likelihood of incurring material damage, due to the methods used by terrorists. The frequent use of explosive devices in terrorist attacks will be likely to cause material damage more often than is usual in personal victimisation for crime. This is further compounded by the fact that 9/11 has had a dramatic impact on insurers' policies vis-à-vis terrorism coverage, which temporarily led to terrorism being excluded from coverage. These elements cause the needs of victims of large-scale terrorism to differ in degree from those of 'ordinary' crime victims.

Another issue relating to differentiation in degree relates to the possibility that terrorist attacks will make cross-border victims. As terrorist attacks not infrequently target tourist places, many victims come from abroad. Apart from the other difficulties this may pose for victims and their families (getting access to compensation schemes), it also adds to the cost of victimisation making meeting the financial need even more important.

Problems seem to come to the fore also at the implementation level (how should a State deal with, for instance, mass claims?), more than at the normative level (are victims of terrorism entitled to a different form of compensation?).<sup>157</sup>

For instance, one can have doubts about the adequacy of State compensation schemes in case of *large-scale* terrorist acts, with regard to procedural matters and with regard to the possibility to receive compensation for property damage. We have seen that in countries confronted with terrorist attacks, specific funds, based on public/private charity gifts, will evolve. However, it is an open question whether this will reduce the need to create specific measures that will enable to provide adequate and prompt compensation schemes.<sup>158</sup> Based on the above, standards for victims of (large-scale) terrorism should include provisions on different reparation

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<sup>157</sup>See also Albrecht & Kilchling who note that differences between compensation relating to crime victims or victims of large-scale terrorism 'are located in the areas of planning, organization and co-ordination of the response to victimization [...].' 2005, p. 58.

<sup>158</sup>Note that the UK provided compensation to the victims of the London Bombings under the Criminal Injuries Compensation Authority (covering also victims of ordinary crime), but decided to launch a special booklet in order to be able to address the claims put forward by the victims.

possibilities and the processing of mass claims, in order to strive for a settlement within a reasonable time and to strive for fair and appropriate compensation.

### ***6.10.2 Enhancing Crime Victim Compensation and Default Compensation Systems in EU Member States***

The EU Member States show a great diversity in different legal systems and default compensation schemes for victims of terrorism. The compensation schemes can be divided in three main groups. The first are States that have enacted specific legislation and compensation programmes for victims of terrorism (France and Spain). The second category consists of States that have enacted general crime victim compensation schemes, covering also victims of terrorism, and the last group includes States that have limited compensation schemes. Differences within these schemes (whether general or for victims of terrorism) include, for instance, providing full compensation versus adhering to the social welfare approach, and offering compensation for pain and suffering or not.

Other differences within the EU Member States relate to rules with regard to the eligibility requirements concerning cross-border victimisation, especially with regard to EU nationals victimised outside the EU and non-EU residents victimised in a EU Member State. Whether the situation for EU nationals becoming victimised in another EU Member State has changed because of the implementation of the EU Directive on Compensation, requesting States to establish assisting and deciding authorities, which should reduce possible problems relating to cross-border victimisation within the EU area, is not clear yet. Also, it should be discussed whether a clear rule should be established on additional compensation from a victim's home country. For example, if a Dutch citizen becomes a victim of terrorism in Hungary, should this entail that he has a statutory right to claim additional compensation in his home country? In addition, most States offer compensation to primary and secondary victims, however, some exclude the first responders (see Chapter 1).

Furthermore, the effectiveness of default compensation systems could be enhanced on a European level, with regard to private insurance, tort law and even social security. With strong and well-functioning default systems, victims have better financial protection and security of financial protection. With regard to compensation for property damage, we have seen that self-insurance is not an absolute given and that property damage through terrorism attacks is not covered under all private property damage insurances (sometimes explicitly excluded). At a European level, more pressure can be put on insurers to offer coverage. It is remarkable that in one European country insurance for property damage resulting from terrorist attacks is possible, yet in another country the risk of terrorism is excluded. When necessary, governments could consider providing financial back up as a State reinsurer, as is the case in France and Spain by embarking upon private/public schemes. It will be interesting to further discuss whether a 'social security regime' for property damage could be a desirable and feasible development.

It will be difficult to harmonise the different forms of compensation schemes in the EU Member States, whether they are benefiting victims of crime in general or victims of terrorism in particular. Political considerations and socio-economic and cultural differences among the Member States play an important role and should be taken into account when discussing uniform compensation schemes.

### 6.10.3 *Specific Compensation Fund at the European Level*

The fundamental question is how the European Union perceives terrorism and the risk of terrorism. So far, the EU considers terrorism a collectively shared risk. The second question is how the Union wants to express this solidarity to victims of terrorism. Europe's 'Counter Terrorism Strategy' states that it wants a strategic commitment to respond to attacks, 'by managing and minimizing the consequences of a terrorist attack, by improving capabilities to deal with: the aftermath; the co-ordination of the response; and the needs of victims.'<sup>159</sup> The EU wants *Member States* to ensure that appropriate compensation is available to victims. However, no mention has been made of a European financed compensation scheme which offers *direct compensation* to victims of terrorism, as a sort of supranational compensation fund, based on European solidarity.<sup>160</sup> A reason that would support such a 'European Solidarity Compensation Fund', is that if terrorism is seen as an important topic in *European* public policy, a unified approach towards victims of terrorism could be justified.

This fund could be made effective, in case of large-scale terrorist acts which can be seen as a disaster and which devastate social infrastructure, as a last resort solution (subsidiarity principle). It could provide compensation to victims (regardless of their nationality), victimised on European territory and offer minimum compensation to meet the basic needs, based on social welfare principles.

To conclude, this leads to the following policy recommendations:

- Considering that recouping the damages from perpetrators or insurance providers is more difficult, adequate compensation schemes need to be in place, that are in particular able to process mass claims and include primary and secondary victims.

<sup>159</sup> See Counter Terrorism Strategy of 30 November and see for other documents Chapter 1, <http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf>.

<sup>160</sup> Remember that the European Solidarity Fund discussed in Section 6.5 does not offer direct payments to victims.

- Take into account the needs of cross-border victims, who often do not fall under the eligibility criteria of existing compensation schemes.
- In order to prevent vicarious retribution, provisions relating to reparation in the broader meaning should be incorporated in standards for victims of (especially large-scale) terrorism; thereby addressing also the needs of tertiary victims.
- Encourage insurers not to exclude damages caused by acts of terrorism and enhance cooperation in insuring terrorism risks collectively through pooling arrangements.
- Start a discussion on the desirability and feasibility of the establishment of a ‘European Solidarity Compensation Fund’.

## 6.11 Appendix I

Lessons Learned by the London Bombings Relief Charitable Fund<sup>161</sup>

- i. Setting up
  - Do it quickly.
  - Get a partner (or more than one).
  - Get experienced staff.
  - Look (and be) professional.
  - Don’t reinvent wheels.
  - Focus on single task.
  - Devise feedback/evaluation mechanisms from Day 1.
- ii. Know your beneficiaries
  - Identify who they are.
  - Realise they may not know how to ask.
  - They are stressed/emotional/traumatised.
  - Know why you are giving.
  - People have urgent, practical needs.
- iii. Find your ethos
  - Define and redefine what you are saying.
  - Learn from precedent.
  - Understand your relationships with other organisations.
  - Be liberated by what you don’t need to do.
  - Don’t over commit.
  - Set criteria but leave room for exceptions.
- iv. Processing applications
  - Work out a system to capture information.
  - Keep it simple.

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<sup>161</sup> Presentation by Ms. Carol Stone during the OSCE High Level Meeting on Victims of Terrorism, Vienna, 13–14 September 2007. See also [www.lbrcf.org.uk/publications.jsp](http://www.lbrcf.org.uk/publications.jsp).

- Use third parties to verify information.
  - Give sooner not later.
  - Expect late applications.
- v. Communications
- Keep all partners and applicants informed (e.g. newsletters, website).
  - Recognise you are under press scrutiny.
  - Say it first before they ask.
  - Prepare a ‘line to take’ (on everything).
  - Target journalists.
- vi. Have an endgame
- Prepare for wind-down from day one.
  - Don’t extend your remit.
  - Announce closure well in advance.
  - Set deadlines for the last applications and donations.
  - Identify your legacy: pass on the knowledge.

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OSCE/ODIHR Final Report on Solidarity with Victims of Terrorism, 9-10 March 2006

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Peter Chalk, Bruce Hoffman, Robert Reville, Anna-Britt, Kasupski, *Trends in Terrorism, Threats to the United States and the Future of the Terrorism Risk Insurance Act*, RAND Publication, [http://www.rand.org/pubs/monographs/2005/RAND\\_MG393.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG393.pdf)

**Lectures**

Van Boven, T., *Reparative Justice – Focus on Victims*, SIM Lecture 2007

# Chapter 7

## Restorative Justice and Victims of Terrorism

Ines Staiger

### 7.1 Introduction

Restorative justice for victims of terrorism is a rarely researched topic despite various legal instruments dealing with the response to terrorism. A common way to respond to terrorism is either by prosecuting terrorists or by using strategies to prevent terrorism. However, there is also the need to address the pain of those who have been victimised through terrorist acts, and to promote reconciliation between conflicting communities. This latter response is about approaching terrorism and its victims from a restorative justice perspective.<sup>1</sup> Restorative justice is not restricted to minor offences but is also applied to the most serious forms of violent crime as will be discussed in this chapter. This prospect is also reflected in Article 10 of the EU *Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings*, which does not restrict mediation to minor offences from the outset.<sup>2</sup> From this follows the possibility to apply restorative justice in the context of terrorism. This is why the European Commission asked to undertake research in this respect in order to explore such a restorative justice response to terrorism and its potential for victims of terrorism. Due to limited literature in this respect, the application of restorative justice in cases of terrorism had to be compared with that of other forms of serious violent crime and large-scale conflict situations. Restorative justice practices in these fields are examined in order to highlight their potential for victims of terrorism. The present chapter aims at exploring possibilities of restorative justice practices for victims of terrorism in how to deal with the aftermath of

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I. Staiger (✉)

Katholieke Universiteit Leuven, Leuven Instituut voor Criminologie (LINC),  
and European Forum for Restorative Justice, Herbert Hooverplein 9, 3000 Leuven, Belgium  
e-mail: Ines.Staiger@googlemail.com

<sup>1</sup>Christopher D. Marshall, Terrorism, religious violence and restorative justice, in Gerry Johnstone and Daniel W. Van Ness (eds.), *Handbook of Restorative Justice*, Cullompton, Willan Publishing, 2007, p. 377.

<sup>2</sup>OJL 82, 22.3.2001, p. 3.

terrorist acts that have affected them either directly or indirectly. Restorative justice is not a completely new idea in this context as examples of victims of terrorism will show. However, what is new with regard to the field of terrorism is that only recently the focus has been shifted from terrorism and the terrorists to the *victims* of terrorist acts. This late focus on victims of terrorism reflects the subordinate position of the victim in the criminal justice system and the repeated complaints that this system ignores the victim and victims' needs. In this respect, restorative justice offers an active involvement of victims. Instead of focusing only on the criminal or terrorist act with the response to punish the offender, the aim of restorative justice is first of all to pay attention to the person who has been harmed. Further, its aim is to find a response by trying to repair that harm as far as possible through involvement of both victim and offender, or the community.<sup>3</sup> This approach is not completely new as restorative justice has been rediscovered in Europe and North America in the last 3 decades. It is a worldwide movement and its idea can be traced back through history in many cultures.<sup>4</sup>

In the following, restorative justice principles and values are presented first. This is followed by a framework of restorative justice, where the relation of restorative justice to the criminal justice system is discussed and a model of restorative justice with reflections of its application at the micro-, meso- and macro-level is portrayed. Then, restorative justice practices in the context of serious violent crime are discussed and compared with other restorative justice oriented practices. In this context it is examined in how far the model of truth commissions is consistent with restorative justice principles and values in the context of terrorism. Findings related to ongoing intergroup conflict, past terrorism and mass terrorist victimisation are presented in order to identify adequate restorative justice responses. It is further explored what can be learned from the applicability of restorative justice for cases of terrorism by reflecting on other forms of serious violent crime, including hate crime, and special types of terrorism like religious and suicide terrorism. Moreover, the potential of restorative justice in the context of the vicarious dimension of terrorism is assessed, which includes the involvement of vicarious victims and whether restorative justice is a means for dealing with vicarious retribution in intergroup conflicts. On the basis of some recent findings on victims of terrorism, it is explored whether their needs can be addressed by restorative justice and what relevance restorative justice principles and practices have in the case of terrorism. Further, the conceptual framework of restorative justice processes in the context of terrorism is discussed, whereby the restorative justice approach at the micro-, meso- and macro-level is addressed. Finally, the question is raised whether a global restorative justice strategy that encompasses a restorative justice approach at all the levels, could add to the response to terrorism and its victims.

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<sup>3</sup>Ivo Aertsen, Robert Mackay, Christa Pelikan, Jolien Willemsens, and Martin Wright, *Rebuilding community connections – mediation and restorative justice in Europe*, Strasbourg, Council of Europe Publishing, 2004, pp. 12, 14.

<sup>4</sup>Aertsen et al. 2004, pp. 12, 16.

## 7.2 Restorative Justice Principles and Values

### 7.2.1 Restorative Justice Principles

According to Zehr, restorative justice is based upon the understanding that crime is a violation of people and relationships and that these violations create obligations. The central obligation is to put right the wrong.<sup>5</sup> Thus, the harm caused by the crime, i.e. the wrongdoing and its restoration are central concerns of restorative justice. Neither harm nor restoration is clearly defined in restorative justice literature.<sup>6</sup> However, Chapter 3 illustrates the different kinds of harm for victims of terrorism. As regards the restoration of harm, this can be done, for instance, through financial restitution, or with regard to the community through community service.<sup>7</sup> Moreover, a communication process itself can offer restoration. Zehr further explains that this understanding of wrongdoing follows from the assumption that there is one society in which all human beings are interconnected.<sup>8</sup> Thus, crime in this worldview represents a wound in the community as relationships are damaged. This perception reflects that crime is also a community problem and may affect other victims beyond the direct victim. This corresponds, for instance, with the perspective of Palestinian victims (see findings by Rohne in Section 7.5). These interrelationships imply mutual obligations and responsibilities as well as a concern for healing of those affected by crime.<sup>9</sup> These stakeholders need to be given information about each other and to be involved in deciding what justice requires in their case. Accordingly, restorative justice principles focus on harms and related needs, obligations and engagement.<sup>10</sup> Based on this understanding, Weitekamp et al. suggest four key principles of restorative justice, namely personalism, reparation, reintegration and participation.<sup>11</sup> The *principle of personalism* reflects that crime is a violation of people and their relationships rather than a violation of law.<sup>12</sup> This perception of restorative justice to understand crime first of all as harm done to people and communities, implies an inherent concern for

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<sup>5</sup>Howard Zehr, *The Little Book of Restorative Justice*, Intercourse, Good Books, 2002, p. 19.

<sup>6</sup>Inge Vanfraechem, Community, society and state in restorative justice: an exploration, in Robert Mackay, Marko Bošnjak, Johan Deklerck, Christa Pelikan, Bas van Stokkom and Martin Wright (eds.), *Images of Restorative Justice Theory*, Frankfurt am Main, Verlag für Polizeiwissenschaft, 2007, pp. 73–91 at p. 76.

<sup>7</sup>Vanfraechem 2007, p. 76.

<sup>8</sup>Zehr 2002, p. 19.

<sup>9</sup>Zehr 2002, p. 20.

<sup>10</sup>Zehr 2002, p. 24.

<sup>11</sup>Elmar G.M. Weitekamp, Stephan Parmentier, Kris Vanspauwen, Marta Valiñas and Roel Gerits, How to Deal with Mass Victimization and Gross Human Rights Violations. A Restorative Justice Approach, in Uwe Ewald and Ksenija Turković (eds.), *Large-scale victimization as a Potential Source of Terrorist Activities*, Amsterdam, IOS Press, 2006, pp. 217–249, at p. 226.

<sup>12</sup>Zehr 2002, p. 19.

victims' needs and their role in the criminal justice system.<sup>13</sup> This victim-oriented approach requires that justice is concerned about victims' needs even when no offender has been identified or apprehended.<sup>14</sup> According to Strang,<sup>15</sup> victims are in need of a less formal process where their view is taken into account. She further found that victims want more participation in their case, more information about both the processing and outcome of their case, respectful and fair treatment, material restoration, and most importantly, emotional restoration, including an apology. Zehr identified that victims need information about the offence in order to understand why it happened and what happened since the crime.<sup>16</sup> This corresponds with findings by Weitekamp et al., who suggest that the finding of truth is a decisive element for victims in order to engage in a restorative justice process.<sup>17</sup> The need for answers, for information was also found to be a part of the victim's recovery process.<sup>18</sup> Further, victims need to have the opportunity to tell the story of what happened for therapeutic reasons and to regain a feeling of control of their lives. Finally, victims need to gain vindication, and one way is to provide restitution by the offender, which may also be of symbolic nature.<sup>19</sup>

The obligations resulting from the violation of people and their relationships include offender accountability and responsibility.<sup>20</sup> This is reflected in the *principle of reintegration* that demands that a society aims to hold perpetrators accountable for their wrongdoings in a supportive way in order to re-accept the offender.<sup>21</sup> The traditional criminal justice system defines accountability as making sure offenders are punished.<sup>22</sup> From a restorative justice perspective, however, accountability means the obligation to explain behaviour or decisions.<sup>23</sup> Moreover, offenders must be encouraged to understand that harm and to comprehend the consequences of their behaviour. The responsibility 'to make things as right as possible', both concretely and symbolically follows from this. This means that the offender should aim at repairing the harm done to the victim. The *principle of reparation* indicates that the primary goal is to repair the harm of the victim rather than to punish the perpetrator.<sup>24</sup> According to Zehr, this implies besides reparation also restoration or recovery, although the reparation of harm to the victim is not always possible, for instance with a view to serious violence, and particularly murder. However, symbolic steps,

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<sup>13</sup>Zehr 2002, p. 22.

<sup>14</sup>Zehr, p. 23.

<sup>15</sup>Heather Strang, Is Restorative Justice Imposing Its Agenda On Victims? in Howard Zehr and Barb Toews (eds.), *Critical Issues in Restorative Justice*, Cullompton, Willan Publishing, 2004, pp. 95–105, p. 96.

<sup>16</sup>Zehr 2002, p. 14.

<sup>17</sup>Weitekamp et al. 2006, p. 230.

<sup>18</sup>Howard Zehr, *Changing Lenses*, Waterloo, Herald Press, 1990, p. 26.

<sup>19</sup>Zehr 2002, p. 15.

<sup>20</sup>Zehr 2002, p. 23.

<sup>21</sup>Weitekamp et al. 2006, p. 229.

<sup>22</sup>Zehr 2002, p. 21.

<sup>23</sup>Declan Roche, *Accountability in Restorative Justice*, Oxford University Press, 2003, p. 25.

<sup>24</sup>Weitekamp et al. 2006, p. 226.

including acknowledgment of responsibility or restitution, can be helpful to victims and are a responsibility of offenders.<sup>25</sup> It is possible that a victim can be helped towards ‘healing’ when an offender works towards ‘making things right’. This raises the question what reparation comprises.

A concept of *reparation* can be found in transitional justice<sup>26</sup> and includes according to Article 18 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*, forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>27</sup> According to these principles, reparation implies components of dignity, safety and socio-psychological well-being. Sharpe suggests that reparation is a kind of recompense, a mechanism for redress, whereby a situation is corrected or remedied.<sup>28</sup> According to Sharpe, there are three ways of redressing a wrong; that is vengeance, retribution and repair. In contrast to vengeance and retribution, repair aims at ‘reducing the inequity created by injustice with the strategy to decrease suffering for the victim rather than to increase suffering for the offender.’<sup>29</sup> The types of reparation can take many forms, but the most common types are material reparation and symbolic (or emotional) reparation. The general function of material reparation is to address specific harms that result from wrongdoing (e.g. in the form of restitution or compensation), while symbolic reparation refers to the wrongness of the act itself.<sup>30</sup> While material reparation can be coerced and can play a significant role in helping victims to integrate the trauma and heal its effects, symbolic reparation can be even more significant. Sharpe argues that the meaning of symbolic reparation is lost when it is coerced.<sup>31</sup> In her view, symbolic reparation is highly significant because it can help redress harms that cannot be otherwise repaired as well as the injury of injustice itself.<sup>32</sup> In this respect, reparation should be tailored according to victims’ needs, whereby it is important that the offender learns from the victim the full range of harms, so that he can at least contribute to the repair of those harms.<sup>33</sup> Thus, the role of reparation can be pivotal to the victim’s recovery and healing because it

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<sup>25</sup>Zehr 2002, p. 28.

<sup>26</sup>Transitional justice means ‘the study of the choices made and the quality of justice rendered when states are replacing authoritarian regimes by democratic state institutions’; thus, transitional justice tries to find forms for how to deal with the past, see Weitekamp et al. 2006, p. 218.

<sup>27</sup>Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, <http://www.ohchr.org/english/law/remedy.htm> (13/07/07).

<sup>28</sup>Susan Sharpe, The Idea of Reparation, in Gerry Johnstone and Daniel W. Van Ness (eds.), *Handbook of Restorative Justice*, Cullompton, Willan Publishing, 2007, pp. 24–40, at p. 24.

<sup>29</sup>Sharpe 2007, p. 26.

<sup>30</sup>Sharpe 2007, p. 27.

<sup>31</sup>Sharpe 2007, pp. 29, 32.

<sup>32</sup>Sharpe 2007, p. 29.

<sup>33</sup>Sharpe 2007, p. 30.



achieves reparation of damage, vindication of the victim, location of responsibility and restoration of equilibrium.<sup>34</sup>

Finally, the *principle of participation* aims to encourage the involvement of all stakeholders to deal with the crime collectively.<sup>35</sup> It suggests that the primary parties affected by crime are given significant roles in the criminal justice process.<sup>36</sup> Thus, the principle of participation refers to the dimension of empowerment and stresses that those affected by the crime need to regain their sense of autonomy.<sup>37</sup> In some cases, this may mean actual dialogue between these parties, as happens, for instance in victim–offender mediation. Such a restorative process is characterised by a collaborative and inclusive process and the restorative outcome should be mutually agreed upon rather than imposed.<sup>38</sup> This approach is also reflected in the definition of the *UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.<sup>39</sup>

### 7.2.2 Restorative Justice Values

Zehr points out that the principles of restorative justice are useful only if their underlying values are respected. In his view, the value of respect is the fundament, on the basis of which the principles have to be applied in context.<sup>40</sup> This perspective also corresponds with Tschudi's point of view, for whom dignity is one of the most important values of restorative justice.<sup>41</sup> The contrast of dignity with its antonym humiliation, to which anger and depression are typical reactions, explains the focus on dignity in a restorative justice context.<sup>42</sup> Further, Marshall points out that restorative values such as respect, honesty, humility, mutual care, accountability and trust form the basis for any restorative justice process.<sup>43</sup> Moreover, as Tschudi shows, restorative justice principles and values can also be applied at the macro-level by

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<sup>34</sup> Sharpe 2007, p. 28.

<sup>35</sup> Weitekamp et al. 2006, p. 226.

<sup>36</sup> Zehr 2002, p. 24.

<sup>37</sup> Weitekamp et al. 2006, p. 230.

<sup>38</sup> Zehr 2002, p. 25. However, there is discussion in restorative justice literature, whether a restorative outcome should be of voluntary or consensual character. See Section 7.4.2.2.

<sup>39</sup> ECOSOC Resolution 2002/12 of 24 July 2002 at <http://www.un.org/docs/ecosoc/documents/2002/resolutions/eres2002-12.pdf>. Hereinafter 'the UN Basic Principles'.

<sup>40</sup> Zehr 2002, p. 36.

<sup>41</sup> Finn Tschudi, Dealing with violent conflicts and mass victimisation: a human dignity approach, in Ivo Aertsen, Jana Arsovska, Holger-C. Rohne, Marta Valiñas, Kris Vanspauwen (eds.), *Restoring Justice After Large-Scale Violent Conflicts*, London, Willan Publishing 2008, pp. 46–69, at p. 51.

<sup>42</sup> Tschudi 2008, p. 48.

<sup>43</sup> Marshall 2007, p. 381.

way of a dialogue or shuttle diplomacy between adversaries.<sup>44</sup> Restorative justice values can further be considered when reporting on cases of terrorism by taking the dignity of victims and also terrorists into account.

### 7.3 A Framework for Restorative Justice

#### 7.3.1 *The Relation of Restorative Justice to the Criminal Justice System*

In the context of the aftermath of the crime, Zernova's suggestions for different possibilities for the relation of restorative justice with the criminal justice system can serve as a starting point. Zernova suggests either complementing the criminal justice system, or setting restorative justice independently of the system, in parallel with, or even challenging the traditional system.<sup>45</sup> The first approach involves keeping the existing criminal justice system, and diverting certain cases from the system into community-based restorative justice programmes at different stages of the criminal justice process.<sup>46</sup> This is a development that is also foreseen under international legislation at EU, CoE and UN level. Aertsen et al. highlight the different stages where a restorative justice programme within the criminal justice system can occur:<sup>47</sup> besides placing it independently from the criminal justice system or through referral, they present the possibilities of having it parallel to prosecution, after conviction and before the sentence (in common law jurisdictions), as part of/ in addition to a non-custodial sentence, or in prison context.

In Zernova's view, the approach of restorative justice as a diversion programme would not shift entirely from retributive to restorative justice, because the formal criminal justice system defines beforehand what constitutes crime, and who is a victim and an offender in a particular situation.<sup>48</sup> Therefore, Zernova favours a two-track system, with one track being the existing criminal justice system, and another informal system not connected to the formal one.<sup>49</sup> However, according to Johnstone, the problem might be that in the informal track enforcement power might be missing, and therefore it would be necessary to interlink the two tracks.<sup>50</sup>

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<sup>44</sup>Tschudi 2008, p. 57.

<sup>45</sup>Margarita Zernova, Restorative Justice outside the Criminal Justice System. How far can we go? In *Restorative Justice and Its Relation to the Criminal Justice System*. Papers from the second conference of the European Forum for Victim–Offender Mediation and Restorative Justice, Oostende, Belgium, 10–12 October 2002, p. 97.

<sup>46</sup>Zernova 2002, p. 98.

<sup>47</sup>Aertsen et al. 2004, pp. 22–25.

<sup>48</sup>Zernova 2002, p. 98.

<sup>49</sup>Zernova 2002, p. 99.

<sup>50</sup>Cited in Zernova 2002, p. 99.

Another approach is that cases could be tried to be solved in a restorative justice framework before they would enter the criminal justice system. This idea is reflected in Braithwaite's regulatory pyramid, which represents a model describing when to punish and when to persuade.<sup>51</sup> The model starts with a restorative dialogue-based approach, followed by more and more demanding and punitive interventions. According to Braithwaite, the idea of responsive regulation is that people's presumption should always start at the base of this pyramid, and only when dialogue fails, more punitive approaches should be approached.<sup>52</sup> Braithwaite underlines that this approach would also apply for all types of matters, including the most serious cases. As a basic principle, the presumption is that however serious the crime, the response should try dialogue first.<sup>53</sup> Dignan points out that Braithwaite's model has been criticised because of a possible absence of proportionality constraints as regards punitive responses within such a restorative justice approach.<sup>54</sup> Dignan suggests incorporating some form of judicial oversight in order to ensure that the agreement of the parties does not exceed a reasonable level of reparation.<sup>55</sup> On the other hand, it is necessary to ensure that every kind of penalty applies restorative justice principles in the pursuit of restorative outcomes.<sup>56</sup>

Further, Zernova suggests another approach of how restorative justice could function outside the criminal justice system, namely by conceptualising restorative justice as a set of values applicable in everyday situations, irrespective of whether or not a crime has been committed.<sup>57</sup> In her view, the application of restorative justice should not be limited to the framework of criminal law as this would disregard social harms and injustices that are not defined as criminal offences.<sup>58</sup> This viewpoint is of particular relevance when looking at conflicts at the macro-level. At a macro-level, social harms, injustices and violations of some people by others are not always defined as 'crime', but stem from the inequalities of wealth and power in the society.<sup>59</sup> A comparison of such a situation can be drawn to the root causes of terrorism.<sup>60</sup>

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<sup>51</sup>John Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, 2002, p. 31.

<sup>52</sup>Braithwaite 2002, p. 30.

<sup>53</sup>Braithwaite 2002, p. 30.

<sup>54</sup>Jim Dignan, Towards a Systematic Model of Restorative Justice: Reflections on the Concept, its Context and the Need for Clear Constraints, in Andrew van Hirsch, Julian Roberts, Anthony E. Bottoms, Kent Roach and Maria Schiff (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* Oxford, Hart Publishing, 2003, pp. 135–156, at p. 146.

<sup>55</sup>Dignan 2003, p. 147.

<sup>56</sup>Dignan 2003, p. 148.

<sup>57</sup>Zernova 2002, p. 101.

<sup>58</sup>Zernova 2002, p. 101.

<sup>59</sup>Zernova 2002, p. 101.

<sup>60</sup>Anthony J. Marsella, Reflections on International Terrorism: Issues, Concepts, and Directions, in Fathali M. Moghaddam and Anthony J. Marsella (eds.), *Understanding Terrorism*, Washington, American Psychological Association, 2004, pp. 11, 32, 34, 37.

Zernova suggests that restorative justice should not only be understood as a way to deal with crime, but should be applied in a broader context. She argues that if restorative justice conceptualises crime as harm to or violation of people and relationships while in legal terms crime is a breach of criminal law, restorative justice can be applied to every instance of violation of some people by others, irrespective of whether or not the violation is considered illegal.<sup>61</sup> This point of view is also of relevance when reflecting on the role of the media in cases of terrorism. Thus, restorative justice principles and values are relevant mechanisms for dealing with both criminal and non-criminal cases.

### ***7.3.2 Restorative Justice at the Micro-, Meso-, and Macro-level***

#### **7.3.2.1 The Micro-level**

Restorative justice in its conventional understanding is concerned with responding to a particular interpersonal incident at the micro-level.<sup>62</sup> Thereby, the individual relationships between the persons directly affected by crime are the focus of restorative justice at the micro-level. Restorative justice seeks to respond to crime at the micro-level by addressing the harm that results from the offence by involving all the direct stakeholders of the respective offence with a view to repair the harm to the victim.<sup>63</sup> This response usually encompasses restorative justice practices like victim–offender mediation, conferencing and circles (see Section 7.4). The practices of conferencing and circles can also be used at the meso-level.

#### **7.3.2.2 The Meso-level**

Restorative justice at the meso-level involves a wider circle of stakeholders in the response to crime, including the community. Crime victims, other citizens, and offenders are caught up in a cycle in which crime is both a cause of breakdowns in individual and community relationships, and a result of these breakdowns. Therefore, restorative justice aims at strengthening or rebuilding social and community relationships, whereby the community needs to be identified.<sup>64</sup> Although the concept of

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<sup>61</sup>Zernova 2002, p. 101.

<sup>62</sup>Holger-C. Rohne, Jana Arsovska and Ivo Aertsen, Challenging Restorative Justice – State-based Conflict, Mass Victimisation and the Changing Nature of Warfare, in Ivo Aertsen, Jana Arsovska, Holger-C. Rohne, Marta Valiñas and Kris Vanspauwen (eds.), *Restoring Justice After Large-Scale Violent Conflicts: Kosovo, DR Congo and the Israeli–Palestinian Case*, Cullompton, Willan Publishing, 2008b, p. 17.

<sup>63</sup>Sandra O’Brian and Gordon Bazemore, A New Era in Governmental Reform: Realizing Community, *Public Organization Review: A Global Journal*, (2004) 4, 205–219, p. 208.

<sup>64</sup>O’Brian and Bazemore 2004, p. 212.

community is a central concept in restorative justice, restorative justice literature provides no commonly agreed definition of community.<sup>65</sup> McCold and Wachtel point out that ‘with the advent of family group conferencing and sentencing circles, the restorative justice movement has recognised the importance of including the personal communities of care of both offenders and victims in the resolution of criminal conflict.’<sup>66</sup> ‘Communities of care’ are defined as the network of victim and offender, whereas the local community includes vicarious victims, namely those who become aware of the crime. The local community can further include a social group of any size whose members reside in a specific locality, share government, and have a common cultural and historical heritage.<sup>67</sup>

Communities of care as well as the local community, including vicarious victims can be involved in the restorative justice process through circles or sentencing. Vicarious victims have to be reassured that what happened was wrong, that something constructive is done about it and that steps are being taken to discourage its recurrence.<sup>68</sup> The local community as a social group could be involved in expressing the sense of threat that people have felt living in the same neighbourhood, e.g. through conferencing or circles.<sup>69</sup>

In this respect, McCold and Wachtel argue that since community is not only a place but rather a perception of connectedness, restorative practices can enhance this connectedness and provide informal social control.<sup>70</sup> This perception of connectedness is also relevant for cases of intergroup conflicts like in Israel/Palestine or formerly in Northern Ireland resulting in the use of terrorist acts. In this context, the community that should be involved is not only the local community but also communities that are connected through their culture or personalised experiences. For instance, such an approach can be seen in the Parents Circle – Families Forum in Israel/Palestine and the LIVE-programme in Ireland (see Section 7.7.3). Rohne points out that violence in intergroup conflicts affects and may victimise a whole society. This collective dimension is not only crucial for the coping process of the individual victim, but also for communally based societies.<sup>71</sup> In this respect, the community can be involved in restorative justice through conferencing or circles. Thus, a restorative response to crime at the community level seeks first to build and strengthen relationships by increasing the nature and quality of participation in

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<sup>65</sup> Vanfraechem 2007, p. 77.

<sup>66</sup> P. McCold and B. Wachtel, *Community Is Not A Place: A New Look At Community Justice Initiatives* at <http://www.iirp.org/library/albany.html> (17/07/07)

<sup>67</sup> McCold, cited in Vanfraechem 2007, p. 77.

<sup>68</sup> McCold and Wachtel, cited in Vanfraechem 2007, p. 78.

<sup>69</sup> Vanfraechem 2007, p. 80.

<sup>70</sup> McCold and Wachtel, cited in Vanfraechem 2007, p. 78.

<sup>71</sup> Holger-C. Rohne, Opportunities and limits for applying restorative justice in the context of the Israeli–Palestinian conflict, in Ivo Aertsen, Jana Arsovska, Holger-C. Rohne, Marta Valiñas and Kris Vanspauwen (eds.), *Restoring Justice After Large-Scale Violent Conflicts: Kosovo, DR Congo and the Israeli–Palestinian Case*, Cullompton, Willan Publishing, 2008a, pp. 279–319, at p. 296.

problem solving in the response to crime and conflict. This is due to the fact that community conflict and disharmony are often a root cause of crime.<sup>72</sup>

### 7.3.2.3 The Macro-level

Restorative justice at the macro-level seeks to involve the state or governments in the response to crime. According to Bazemore and Umbreit, restorative justice seeks to respond to crime at the micro- and macro-level.<sup>73</sup> O'Brian and Bazemore point out that restorative justice also addresses the need to build safer communities at the macro-level.<sup>74</sup> Government and community play complementary and collaborative roles in this response to crime, with the government responsible for establishing order and the community responsible for restoring and maintaining peace.<sup>75</sup> In this respect, truth commissions have been set up for resolving large-scale conflicts in order to achieve national reconciliation.<sup>76</sup> When looking at large-scale conflicts that can be compared to some extent to terrorism,<sup>77</sup> there is a tendency that the violent incident is primarily attached to the overall conflict, including its historical, political and religious dimensions.<sup>78</sup> Rohne therefore stresses that the experience of victimisation must be dealt with effectively in order to prevent revitalisation of hostilities. Moreover, McEvoy and Eriksson argue that top-down approaches to conflict resolution (like truth commissions) are often not enough, but must be complemented by bottom-up initiatives where the needs of the local communities are central.<sup>79</sup> This perspective is consistent with Tschudi's point of view who highlights the Bougainville model as an appropriate bottom-up approach for promoting restorative values in the context of peace and reconciliation processes.<sup>80</sup> Thus, restorative justice at the macro-level also seeks to involve the interpersonal aspect at the micro-level.

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<sup>72</sup> O'Brian and Bazemore 2004, p. 213.

<sup>73</sup> J. Nesor, *Restorative Justice as Reaction to crime; Development and Conceptualisation* at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=1413> (01/02/08). However, there is not always a clear distinction in restorative justice literature whether the macro-level or the meso-level is addressed when the term 'macro-level' is used.

<sup>74</sup> O'Brian and Bazemore 2004, p. 208.

<sup>75</sup> O'Brian and Bazemore 2004, p. 208.

<sup>76</sup> Charles Villa-Vicencio, *Restorative Justice in Social Context: The South African Truth and Reconciliation Commission*, in Nigel Biggar (ed.) *Burying The Past: Making Peace and Doing Justice After Civil Conflict*, Washington, Georgetown University Press 2003, pp. 235–250, at p. 235.

<sup>77</sup> See Section 7.6.3.

<sup>78</sup> Rohne 2008a, p. 299.

<sup>79</sup> Kieran McEvoy and Anna Eriksson, *Restorative justice in transition: Ownership, leadership and 'bottom-up' human rights*, in Dennis Sullivan and Larry Tiff, *Handbook of Restorative Justice*, London, Routledge, 2007, pp. 321–335 at p. 331.

<sup>80</sup> Tschudi 2008, p. 60. This model will be explained at a later stage.

Another restorative justice approach at the macro-level, detached from a restorative justice process is for the government/state or entities to create conditions for the application of restorative justice at the micro- and meso-level, for instance by financing restorative justice oriented local programmes.<sup>81</sup> Such an approach does also strengthen a bottom-up approach of restorative justice and can contribute to address individual victim's pain and suffering and to promote reconciliation between estranged communities.

### 7.3.3 A Three-Level Model of Restorative Justice

Rohne developed a three-level model of restorative justice that is based on the UN Basic Principles and characterises restorative justice responses on the levels of procedure, outcome and purpose.<sup>82</sup> First, the *procedural level* aims at identifying the type of procedure for a possible restorative justice response. The UN Basic Principles are not limited to a particular procedure but address processes and programmes that entail a voluntary, communicative and inclusive approach.<sup>83</sup> Accordingly, it has to be questioned what type of procedure or practices could be an appropriate response to terrorism. In the following section various types of restorative justice practices are illustrated. However, it has to be taken into consideration that the types of procedures or practices must be accepted by the respective society and conforming to their culture.<sup>84</sup> This does not exclude that societies accept restorative justice mechanisms that are foreign to their own culture, as can be seen on the example of family group conferencing.<sup>85</sup> Further, in order to be accepted and legitimised by a society, restorative justice practices need to be known of and supported.<sup>86</sup> Then, the selection and role of the facilitator is of particular importance in cases of intergroup conflicts at the macro-level. Finally, the active interaction of the parties constitutes a restorative process according to the UN Basic Principles. In this respect, Rohne et al. suggest including also indirect or other forms of interaction of the parties in a restorative justice process. This may be of particular relevance in cases of mass terrorist victimisation due to the high number of victims.

The second level of the model looks at possible *outcomes of a restorative justice procedure*. Under the UN Basic Principles agreements are considered as the result

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<sup>81</sup> The EU is funding such programmes; e.g. the LIVE-programme of the Glencree Center (<http://www.glencree.ie/site/live.htm>) and partly the Parents Circle – Families Forum in Israel/Palestine (<http://www.theparentscircle.com/about.asp>).

<sup>82</sup> Rohne et al. 2008b, p. 22.

<sup>83</sup> Rohne et al. 2008b, p. 22.

<sup>84</sup> Rohne et al. 2008b, p. 22.

<sup>85</sup> The idea of family group conferencing stems from aboriginal cultures and is now used in Western cultures.

<sup>86</sup> Rohne et al. 2008b, p. 23.



of a restorative process as well as reparation, restitution and community service. In this respect, Rohne et al. question whether restorative sanctions are perceived as possible restorative outcomes of a restorative process and in how far (material and immaterial) reparations can be achieved at the interpersonal or collective level.<sup>87</sup> This is against the background that in collective conflicts where victims perceive their victimisation as part of a collective struggle, reparation might be understood as a debt to the collective or community rather than an interpersonal affair.<sup>88</sup>

Further, responsibilities need to be identified that go beyond the particular perpetrator.<sup>89</sup> Thus, it is important to see whether it is the individual, representatives or the collective as such that can be made responsible for the respective incident. This perspective is particularly important for cases of suicide terrorism and may lead to the identification of multiple responsibilities of parties that have to get involved in the restorative justice process.

The third level of the model examines the *aims of the particular restorative justice response*, namely the spectrum of restorative objectives and the envisaged beneficiaries of the restorative justice process.<sup>90</sup> Rohne et al. characterise the objectives according to their degree of relational restoration, starting from (material) redress over working through the past (e.g. through mutual listening) and coexistence (e.g. through mutual empathy) to reconciliation.<sup>91</sup> The following sections will illustrate attempts of restorative justice practices in cases of terrorism. Finally, the UN Basic Principles state that ‘restorative justice programmes are for the benefit of all parties affected by wrongdoing, namely the victim, the offender and the community.’ In this respect, Rohne et al. point out that it has to be taken into consideration that from a Western perspective a conflict is typically understood as interpersonal, while other cultures perceive a conflict generally as immediately concerning the respective community.<sup>92</sup> This aspect will be illustrated in Section 7.5.

## 7.4 Restorative Justice Practices

### 7.4.1 Restorative Justice Processes

Three distinct models dominate the practice of restorative justice, namely victim–offender mediation, family group conferencing and circles. These models are the prototypes of a restorative justice process. Each of these models uses direct or indirect encounters between the parties involved. While this is also true for victim

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<sup>87</sup>Rohne et al. 2008b, p. 26.

<sup>88</sup>Rohne et al. 2008b, p. 26. See also Section 7.5.

<sup>89</sup>Rohne et al. 2008b, p. 27.

<sup>90</sup>Rohne et al. 2008b, p. 28.

<sup>91</sup>Rohne et al. 2008b, p. 28.

<sup>92</sup>Rohne et al. 2008b, p. 30.

sensitive offender dialogue programmes (a category of victim–offender mediation), surrogate encounters are used in the context of victim impact panels.

#### 7.4.1.1 Victim–Offender Mediation and Victim Sensitive Offender Dialogue (VSOD)

Victim–offender mediation is the longest established of the main restorative justice approaches and is still the most dominant form of restorative justice practices in Europe.<sup>93</sup> Victim–offender mediation deals with adult as well as juvenile offenders and all types of offences. Mediation offers both victims and offenders support to reach a personal settlement centred on reparation or conflict solution through a process of mutual communication mediated by a neutral third party, either through direct or indirect contacts.<sup>94</sup> The participation of both parties must be voluntary and the mediation process has to respect the principle of confidentiality.<sup>95</sup> Starting point is that the offender has admitted the crime. However, this does not include that the offender has to admit full guilt or to assume full responsibility for everything that happened. It rather means that the offender does not deny, from the outset, having played a part in the offence.<sup>96</sup>

*Direct victim–offender mediation programmes* are appropriate means for those victims and offenders who voluntarily want to meet each other together with the assistance of a neutral third party, who is normally a trained mediator, to talk about the crime and to agree on steps towards justice. Unlike a court process, these programmes seek to empower the participants to resolve their conflict on their own in a secure environment. Unlike arbitration, in which a third party hears both sides and makes a judgment, the mediation process relies on the victim and the offender to resolve the dispute together.<sup>97</sup> The mediator imposes no specific outcome, the goal is to empower participants, promote dialogue and encourage problem-solving.<sup>98</sup> Most victim–offender mediation programmes emphasise the importance of initial preparation which often involves one or more meetings with each of the parties prior to the face-to-face encounter.<sup>99</sup>

*Indirect victim–offender mediation* is appropriate for those victims and offenders who are not able to meet directly or do not want to do so. In these cases, the mediation

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<sup>93</sup>James Dignan, *Understanding Victims and Restorative Justice*, Maidenhead, Open University Press, 2005, p. 111.

<sup>94</sup>Ivo Aertsen and Tony Peters, Mediation for Reparation: The Victim’s Perspective, in Ezzat Fattah and Tony Peters (eds.), *Support for Crime Victims in a Comparative Perspective*, Leuven University Press, 1998, pp. 229–251, p. 233.

<sup>95</sup>Aertsen and Peters 1998, pp. 240, 241.

<sup>96</sup>Aertsen and Peters 1998, p. 234.

<sup>97</sup>Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice. An Introduction to Restorative Justice*, 3rd edn, Cincinnati, Anderson Publishing, 2006, p. 64.

<sup>98</sup>Van Ness and Strong 2006, p. 64.

<sup>99</sup>Dignan 2005, p. 111.

process takes the form of a more restricted kind of dialogue.<sup>100</sup> The role of the mediator is limited to acting as a go-between and to communicating information, views and feelings between the parties. The interaction can be done through letters, videos or verbal comments made to the facilitator who passes them along to the other party.<sup>101</sup> Other possibilities include that victims and offenders are videotaped in conversation about the offence with facilitators, and these videos are then shared with their counterparts.<sup>102</sup>

*Victim sensitive offender dialogue* is a form of the humanistic model of mediation developed by Umbreit, which is a specific practice application of the broader theory of transformative mediation.<sup>103</sup> This means that humanistic mediation is grounded more in a paradigm of healing and peacemaking than problem-solving and resolution. Humanistic mediation represents a ‘dialogue driven’ rather than ‘settlement driven’ approach to confronting conflict. According to Umbreit et al., ‘the telling and hearing of each other’s stories about the conflict, the opportunity for maximum direct communication with each other, and the importance of honouring silence and the innate wisdom and strength of the participants, are all central to humanistic mediation practice’.<sup>104</sup> Umbreit et al. point out that a humanistic style of mediation is particularly important in cases of severe violent crime. The approach of focusing on communication and dialogue between victims and offenders in cases of severe violent crime has been applied in different programmes in the US and in Canada.<sup>105</sup>

### General Research Findings on Victim–Offender Mediation

Umbreit et al. found that mediation participation rates for crime victims in the US typically range from 40% to 60%, though rates as high as 90% have been reported.<sup>106</sup> Gehm found that 47% of the victims from six US victim–offender reparation

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<sup>100</sup>Dignan, p. 113.

<sup>101</sup>Gerry Johnstone and Daniel W. Van Ness, Restorative Processes, Outcomes, Stakeholders, in Gerry Johnstone and Daniel W. Van Ness (eds.), *Handbook of Restorative Justice*, Cullompton, Willan Publishing, 2007, pp. 209–227, at p. 219.

<sup>102</sup>Umbreit, M.S., Coates, R. B. and Vos, B., Victim–Offender Mediation: Three Decades of Practice and Research, (2004) 22, *Conflict Resolution Quarterly*, 279–303, p. 285.

<sup>103</sup>Mark S. Umbreit, William Bradshaw and Robert B. Coates, Victims of Severe Violence in Dialogue with the Offender: Key Principles, Practices, Outcomes and Implications in Elmar G.M. Weitekamp and Hans-Jürgen Kerner (eds.), *Restorative Justice in Context: International Practice and Directions*, Cullompton, Willan Publishing, 2003b, pp. 123–144, at p. 136.

<sup>104</sup>Umbreit et al. 2003b, p. 136.

<sup>105</sup>For an overview, see for instance: Umbreit et al., 2003b, pp. 123–144; Tim Roberts, Evaluation of the Victim Offender Mediation Project, Langley, B.C. Final Report for Solicitor General Canada, March 2005, p. 66.

<sup>106</sup>M.S. Umbreit, B. Vos, R.B. Coates and E. Lightfood, Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls, (2005) 89 *Marquette Law Review*, 251–304, p. 271.

programmes agreed to meet their offender after strenuous efforts to reach agreement.<sup>107</sup> Several studies noted that victim willingness to participate was driven by a desire to receive restitution, to hold the offender accountable, to learn more about the reasons behind the crime, to share their pain with the offender, to avoid court proceedings, to help the offender change behaviour, or to see the offender adequately punished.<sup>108</sup> Further, though victims frequently report that while restitution was the primary motivator to participate in victim–offender mediation, the opportunity to talk with the offender was appreciated most.<sup>109</sup> Sherman and Strang found that victim participation in restorative justice programmes depends on factors like who asks the victims, in what fashion, and with what kind of priority given to the victim’s convenience and emotional state.<sup>110</sup> Among victims who chose not to participate in victim–offender mediation, reasons included feeling the crime was too trivial to be worth the time, feeling fearful of meeting the offender, and wanting the offender to have a harsher punishment.<sup>111</sup> Further, Sherman and Strang found that it is a common experience of victims in the UK that the restorative justice event cannot be held at a time and place convenient to the victims, so they decline to attend.<sup>112</sup> A study by Wyrick and Costanzo showed the interaction between type of crime and the passage of time: although they found that property cases were more likely to reach mediation than personal offences, they found that the longer the time lapse between the offence and the mediation opportunity, the less likely property crimes would come to mediation, but the more likely personal offences would reach mediation.<sup>113</sup> Regarding victim satisfaction, research found that the expression of satisfaction with victim–offender mediation is consistently high for both victims and offenders across sites, cultures, and seriousness of offences.<sup>114</sup> There are, however, different levels of satisfaction depending on the programme. Umbreit et al. found that participants involved in a face-to-face mediation were more satisfied than those who worked with a go-between.<sup>115</sup> In Belgium in contrast, there is a high degree of satisfaction with the mediation for reparation programme, even in cases where no direct contact was established or where no written agreement was reached.<sup>116</sup> Further, a Canadian meta-analysis showed that those victims and offenders going through mediation indicated being significantly more satisfied with victim–offender

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<sup>107</sup> Cited in Lawrence W. Sherman and Heather Strang, *Restorative Justice: The Evidence*, London, The Smith Institute, 2007, p. 37.

<sup>108</sup> Umbreit et al. 2005, p. 271.

<sup>109</sup> Umbreit et al. 2005, p. 271.

<sup>110</sup> Sherman and Strang 2007, p. 37.

<sup>111</sup> Umbreit et al. 2005, p. 272.

<sup>112</sup> Sherman and Strang 2007, p. 38.

<sup>113</sup> Umbreit et al. 2005, p. 272.

<sup>114</sup> Umbreit et al. 2004, p. 287.

<sup>115</sup> Umbreit et al. 2004, p. 288.

<sup>116</sup> Aertsen and Peters 1998, p. 241.

mediation programmes than those going through traditional court prosecutions.<sup>117</sup> McCold and Wachtel (2002) found in a meta-analysis of 25 evaluation studies, encompassing 41 restorative justice programmes in the Anglo-Saxon countries, victim satisfaction rates of 82% and fairness rates of 85% as regards victim–offender mediation.<sup>118</sup> Umbreit et al. found that in many studies of victim–offender mediation, in which participants were asked about the fairness of the mediation process and of the resulting agreement, the vast majority of participants (about 80%) reported believing that the process was fair to both sides and the resulting agreement was fair.<sup>119</sup> With regard to reparation, research found that typically 90% generated agreements, and 80–90% of the contracts were reported as completed.<sup>120</sup> Thus, the restorative outcome of victim–offender mediation was perceived as successful by victims in the majority of the cases.

#### 7.4.1.2 Family Group Conferencing

Family group conferencing was initially developed in New Zealand and is now also used in Australia, Canada, USA and Europe mainly for serious youth offending, but also in the context of adult criminal law.<sup>121</sup> It differs from victim–offender mediation programmes in so far as the conference participants include not only the victim and offender but also their families or supporters, and where applicable, the (arresting) police officers and other criminal justice representatives.<sup>122</sup> There are different stages in the meeting, which can vary according to the model by which the conferencing is set up. Usually they involve an introduction, both parties and their supporters giving their comments, thoughts about a solution and aiming at achieving an agreement.<sup>123</sup>

#### General Research Findings on Family Group Conferencing

Research on family group conferencing in New Zealand revealed that these conferences were initially not well-attended by victims, with a participation rate

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<sup>117</sup>This 2001 Canadian study by Latimer, Dowden and Musie brought together 22 studies that examined the effectiveness of 35 individual restorative justice programmes, comprising victim–offender mediation as well as conferencing models. See in Aertsen et al. 2004, p. 34.

<sup>118</sup>Cited in Aertsen et al. 2004, p. 35.

<sup>119</sup>Umbreit et al. 2005, p. 278.

<sup>120</sup>Umbreit et al. 2005, p. 280.

<sup>121</sup>Dignan 2005, p. 142. See also M.S. Umbreit, T. Lewis, H. Burns, A Community Response to a 9/11 Hate Crime: Restorative Justice through Dialogue, (2003) 6 *Contemporary Justice Review*, pp. 383–391.

<sup>122</sup>Van Ness and Heetderks Strong 2006, p. 66.

<sup>123</sup>Inge Vanfraechem, Victim's Role in Restorative Justice: Is it Worth While for Them? An Analysis of Some Restorative Oriented Instruments and What They Can Do for Victims of Crime. A Critical Perspective, 2000, p. 22 at <http://www.law.kuleuven.ac.be/cals/eurocrim/papers/Vanfraechem.pdf> (25/06/07).

of 53% and even lower.<sup>124</sup> Dignan points out that due to the fact that only 6% of the victims, when asked, said that they did not wish to meet the offender, the low participation rate was attributed to poor implementation practice rather than resistance on the part of victims. Most of the attending victims (60%) found it a positive, helpful and rewarding experience.<sup>125</sup> However, about 25% of the victims reported that they felt worse as a result of attending the conference, or were dissatisfied with the outcome.<sup>126</sup> This dissatisfaction with family group conferencing might result from insufficient preparation of the participants and might change overtime with the increasing experience of facilitators.<sup>127</sup> In this respect, little information is given on preparing the parties for the conference itself, especially concerning the victim.<sup>128</sup> It has to be considered that the victim will need some time to deal with the aftermath of the crime, especially in cases of serious crime. In this respect, family group conferencing might overburden the victim when looking at the practice of holding a conference within a couple of weeks.<sup>129</sup> Thus, the preparation time should be adapted according to the victim's recovery process. In a Minnesota, USA study of family group conferencing, victims listed the most helpful component of their experience as the opportunity to talk to the offender and explain the effect of the crime on them and to hear the offender's explanation.<sup>130</sup> However, the least helpful aspect of family group conferencing was the negative attitude of some parents toward the victim.<sup>131</sup> McCold and Wachtel (2002) found in their meta-analysis particularly positive results for conferencing programmes, in comparison with victim-offender mediation.<sup>132</sup> They found that 91% of the victims participating in a conference expressed satisfaction with the way their case was handled, and 96% expressed a sense of fairness. In an Australian study, 80–95% of victims and offenders reported that they were treated fairly and had a say in the agreement.<sup>133</sup> With regard to restitution or reparation, high agreement rates (90%) were reported, whereby apologies played a central role in family group conferencing. Other frequently reported agreement components included monetary restitution and work for the victim or the community.<sup>134</sup> In sum, the restorative outcome of conferencing varies between the programmes.

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<sup>124</sup> Sherman and Strang 2007, p. 37; Dignan 2005, p. 140.

<sup>125</sup> Dignan 2005, p. 140.

<sup>126</sup> Dignan 2005, p. 141.

<sup>127</sup> Later research in New Zealand showed that bad practice was the cause of the dissatisfaction and that the number of dissatisfied victims diminished to 5%, see Gabrielle Maxwell, Venezia Kingi, Jeremy Robertson, Allison Morris, and Chris Cunningham, *Achieving Effective Outcomes in Youth Justice. Final Report*, New Zealand, Ministry of Social Development, 2004, p. 158.

<sup>128</sup> Vanfraechem 2000, p. 32.

<sup>129</sup> Vanfraechem 2000, p. 32.

<sup>130</sup> Umbreit et al. 2005, p. 275.

<sup>131</sup> Umbreit et al. 2005, p. 275.

<sup>132</sup> Cited in Aertsen et al. 2004, at p. 35. But even for mediation, victims on average rated these programmes as more satisfying and fair than traditional justice systems.

<sup>133</sup> Umbreit et al. 2005, p. 279.

<sup>134</sup> Umbreit et al. 2005, p. 281.

### 7.4.1.3 Circles

The circle is central to traditional aboriginal cultures and social processes, and is based either on a healing or a co-judging paradigm.<sup>135</sup> According to Griffiths and Belleau, the circle 'is designed to break down the formality of a court room and to provide a forum for the disposition of cases which is premised on healing, consensus building, and returning to communities the responsibility for resolving conflicts.'<sup>136</sup> Healing circles are used to dispose of situations with the focus on healing relationships and human dignity as well as addressing the social circumstances that were the cause of violent behaviour.<sup>137</sup> It has to be noted that (healing) circles are still limited in their use in reservations, but in Minnesota there is the attempt to make more common use of circles.<sup>138</sup>

A sentencing circle is a community-directed process where the victim and offender, their supporters, the judge, the prosecutor, the defence lawyer and the community residents discuss in a circular arrangement all the aspects of the crime, including cases of serious crime in order to find consensus on a sentencing plan.<sup>139</sup> The focus is on finding a constructive outcome, in which the needs of the victim and community are understood and addressed along with the needs and obligations of the offender.<sup>140</sup> Non-compliance with the circle plan results in the case being returned to the circle or to the formal court process.<sup>141</sup>

#### General Research Findings on Sentencing Circles

So far, only little research is undertaken on victim satisfaction with sentencing circles. However, these findings suggest that circles have been attested as fair and victims expressed high satisfaction rates.<sup>142</sup> Preliminary research on sentencing circles suggests that they had a positive impact on the lives of the participants. Having a voice and a stake in justice outcomes, mutual respect, renewed community and cultural pride were cited as benefits of participation. However, other participants

<sup>135</sup>Paul McCold, The recent history of restorative justice: Mediation, circles, and conferencing, in Dennis Sullivan and Larry Tiftt, *Handbook of Restorative Justice*, London, Routledge, 2007, pp. 23–51 at p. 28.

<sup>136</sup>Curt Griffiths and Charlene Belleau, Restoration, Reconciliation, and Healing: The Revitalization of Culture and Tradition in Addressing Crime and Victimization in Canadian Aboriginal Communities, in Ezzat Fattah and Tony Peters (eds.), *Support for Crime Victims in a Comparative Perspective*, Leuven University Press, 1998, pp. 169–187, at p. 179.

<sup>137</sup>McCold 2007, p. 29.

<sup>138</sup>McCold 2007, p. 30.

<sup>139</sup>Vanfraechem 2000, p. 23; Dignan 2005, p. 153.

<sup>140</sup>Van Ness and Heetderks Strong 2006, p. 67.

<sup>141</sup>Van Ness and Heetderks Strong 2006, p. 67.

<sup>142</sup>Coates et al. cited in Dignan 2005, at p. 154; I. Potas, J. Smart and G. Brignell. *Circle Sentencing in New South Wales: A Review and Evaluation* at <http://www.austlii.edu.au/au/journals/AILR/2004/16.html#Heading185> (26/06/07).



criticised the lack of privacy, difficulty of working with family and close friends, embarrassment, un-professionalism, and religious conflict as negative aspects of the circle process.<sup>143</sup> In other programmes, victim satisfaction was high, and victims liked being able to tell their story, listening to others, and connecting with people in the circle.<sup>144</sup> With regard to restorative outcomes, research findings do not reveal how agreements have been perceived by victims, or how reparation has been accomplished.<sup>145</sup>

#### 7.4.1.4 Victim Impact Panels

In cases where the victim and offender do not want or are not able to meet the other at all, for instance in cases where the offender is either not apprehended or dead, victim impact panels offer an opportunity of surrogate encounter. Victim impact panels consist of a group of victims and a group of offenders who are linked by a common kind of crime, although they are not ‘each other’s’ victims or offenders.<sup>146</sup> The purpose of these meetings is to help victims find resolution and to expose offenders to the damage caused to others by their crime, thereby aiming at producing a change in the offender’s attitudes and behaviours.<sup>147</sup> Victim impact panels can also offer victims a forum where they can be heard, to tell their story with the effect of healing. In this respect, the narrative element of encounter is significant, for the act of telling a personal story to a listener rescues the narrator from a realm of silence, isolation and despair about human connection.<sup>148</sup> It is important for the victims’ healing process that they are heard but also that they have a platform where they can release painful emotions because such a re-evaluation often replaces trauma and allows the person to move from ‘passive victim’ to ‘active survivor’.<sup>149</sup>

#### General Research Findings on Victim Impact Panels

Research on victim impact panels is relatively limited with a main focus on offender recidivism.<sup>150</sup> A study by Mercer et al. presented research findings on

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<sup>143</sup> Umbreit et al. 2005, p. 276.

<sup>144</sup> Umbreit et al. 2005, p. 276.

<sup>145</sup> See Umbreit et al. 2005, p. 279.

<sup>146</sup> Van Ness and Heetderks Strong 2006, p. 69.

<sup>147</sup> Van Ness and Heetderks Strong 2006, p. 69.

<sup>148</sup> Judith W. Kay, Murder Victims’ Families for Reconciliation – Story-telling for Healing, as Witness, and in Public Policy, in Dennis Sullivan and Larry Tifft (eds.), *Handbook of Restorative Justice: A Global Perspective*, London, Routledge, 2006, pp. 230–245, at p. 231.

<sup>149</sup> Kay 2006, p. 234.

<sup>150</sup> See Iowa Department of Corrections, Victim Advisory Council, *Victim Impact Classes and Evidence-Based Practices*, 2007 at <http://www.doc.state.ia.us/Documents/VICandEvidenceBasedPractices.pdf> (26/02/2008); Dean G. Rojek, James E. Coverdill and Stuart W. Fors, The Effect of Victim Impact Panels on Dui Rearrest Rates: A Five-Year Follow-Up, *Criminology*, (2003) 41(4), 1319–1340.

victim satisfaction in the context of victim impact panels for victims of drunk driving.<sup>151</sup> The study consisted of 482 drunk driving crash victims who participated in a victim impact panel compared to 903 victims who did not participate. The study revealed that 82% of the victims who spoke in the panels felt that telling their stories to offender audiences was very helpful, while 10% felt no difference, and 8% said that telling their story was more hurtful than helpful. Consistent with self-report and statistical analysis, victims participating in the panels showed more positive psychological adjustment than victims who did not participate. Despite the negative outcome for some victims participating in the panels, the majority of victims experienced positive outcomes like decreased anger, increased self-confidence, and an increased sense of control over their lives. A most common positive reaction was that participation in victim impact panels made the trauma more bearable and increased the victims' self-confidence.

## 7.4.2 Other Restorative Justice Oriented Practices

### 7.4.2.1 Symbolic Reparation Measures

Under Article 18 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*, reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>152</sup> According to Cunneen, the reparation principles of international law are consistent with restorative justice principles, which can be seen, for instance in the importance placed on acknowledgment and wrongdoing.<sup>153</sup> In this respect, the South African Truth and Reconciliation Commission recommended symbolic reparation measures, including for instance, national remembrance days, memorials, monuments, museums and commemorative plaques.<sup>154</sup> The healing value of symbolic measures lies in the way they can help concretise a traumatic incident, and serve as a focal point in the grieving process.<sup>155</sup> Accordingly, such symbolic reparation measures may also be of relevance in cases of terrorism, especially in cases of large-scale victimisation or where the offender is either not apprehended or dead.

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<sup>151</sup>Dorothy Mercer, Rosanne Lorden and Janice Harris, *Victim Impact Panels: A Healing Opportunity*, 1999 at <http://maddtx.org/victims/2025> (26/02/2008).

<sup>152</sup>Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

<sup>153</sup>Chris Cunneen, Exploring the Relationship between Reparations, the Gross Violation of Human Rights, and Restorative Justice, in Dennis Sullivan and Larry Tift (eds.), *Handbook of Restorative Justice*, London, Routledge, 2006, p. 363.

<sup>154</sup>Cunneen 2006, p. 364.

<sup>155</sup>David Bloomfield, Teresa Barnes, Luc Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook*, Stockholm, International IDEA, 2003, p. 85.

### 7.4.2.2 Restorative Sanctions

The discussion in restorative justice literature on whether a restorative outcome should always be of consensual character or if there is place for imposing ‘force’, reflects the differences in the perspectives of maximalist and purist approaches to restorative justice.<sup>156</sup> According to Walgrave, who represents the maximalist perspective of restorative justice, restorative actions should be possible in cases where a restorative process is not feasible. This means when the victim and/or the community are not able to conclude a reasonable restorative settlement, although the offender is willing to do so, or where the victim is confronted with a non-cooperative offender.<sup>157</sup> In such cases Walgrave suggests ‘coercive restorative sanctions’ under strict legal control, because such sanctions would nevertheless include a restorative element.<sup>158</sup> According to the purist perspective, restorative justice is concerned only with communication processes with an outcome that was agreed upon.

Thus, it is controversial in restorative justice literature whether the approach of restorative justice should follow a maximalist or a purist perspective. McCold argues that the maximalist model defines restorative justice in such a way that it blurs the differences between the current criminal justice system and one that would be truly restorative. Adherents of the purist perspective object the maximalist perspective because it violates the principle of voluntariness that distinguishes restorative processes from those operating in the traditional system.<sup>159</sup> A second central disagreement between the purist and maximalist approach involves the definition of restorative justice in view of the process or the outcome: is restorative justice to be defined as an outcome, or is it defined by a process in which all the parties are able to have a voice in determining the resolution of harm? McCold argues that the failure to include the relational dimension as an inviolable principle of restorative justice neglects the requirement that restorative justice repairs relationships.<sup>160</sup> Boyes-Watson points out that the issue of coercion or voluntariness may not be as critical as long as the elements of the process are preserved. However, a process-based understanding of restorative justice does not rule out the possibility of a punitive outcome. According to Walgrave, the disadvantage of the purist perspective is that it would keep restorative justice at the margin of responding to crime, leaving the mainstream to the traditional justice system.<sup>161</sup>

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<sup>156</sup> See Section 1.6 of Chapter 1.

<sup>157</sup> Lode Walgrave, Extending the Victim Perspective Towards a Systematic Restorative Justice Alternative, in Adam Crawford and Jo Goodey (eds.), *Integrating a Victim Perspective within Criminal Justice*, Ashgate, Aldershot Publishing Company, 2000, pp. 253–284, at p. 274.

<sup>158</sup> Walgrave 2000, p. 274. This means, for instance, that the offender is forced to make restitution, to work for the benefit of a victims’ fund or to do community service.

<sup>159</sup> C. Boyes-Watson, Reflections On The Purist And Maximalist Models Of Restorative Justice (2000) 3(4) *Contemporary Justice Review*, 441–450, p. 442.

<sup>160</sup> Boyes-Watson 2000, p. 442.

<sup>161</sup> Cited in Weitekamp et al. 2006, p. 231.

When looking at the UN Basic Principles, the restorative outcome may consist in an agreement resulting from a restorative process. Moreover, a restorative outcome may also include community service, which may be seen as a ‘restorative sanction’. However, such an outcome would require a preceding restorative process under the UN Basic Principles.

#### **7.4.2.3 Truth Commissions: The Example of the South African Truth and Reconciliation Commission (TRC)**

The TRC is a transitional justice mechanism with the goal to achieve peaceful coexistence between former hostile parties, by highlighting the need to understand the motives and perspectives of all involved in the conflict of the past, in order to achieve national reconciliation.<sup>162</sup> Transitional justice mechanisms include the provision of prosecution, truth telling, reconciliation, institutional reform and reparations in order to build effective and just states in post-conflict areas as a response to mass violence.<sup>163</sup> Although the TRC involved victims of gross human rights violations in the process with the goal of their healing<sup>164</sup>, this model was primarily addressed to manage the conflict at the macro-level. Rohne et al. point out that the TRC was used as a top-down instrument implemented as an alternative to a criminal justice response.<sup>165</sup> This approach is in contrast to a restorative justice process, which is generally understood as a voluntary process at the interpersonal level with the main focus on a particular incident.<sup>166</sup> Thus, the traditional restorative justice approach concentrates rather on the micro-level, while transitional justice mechanisms are oriented towards the macro-level. The latter offer a more global framework wherein a particular incident and the response to it must be placed.<sup>167</sup>

In the following, it will be examined in how far the TRC can be considered a model of a restorative justice oriented process. While the TRC sought to promote truth and reconciliation through the means of amnesty, victim testimony, reparation and rehabilitation, Villa-Vicencio and Llewellyn highlight the pitfalls of its accomplishment. Although the TRC did require applicants to make full disclosure in a public hearing, i.e. amnesty in exchange for truth, the amnesty process did not require them to show remorse, to apologise or to take any responsibility for their acts.<sup>168</sup> This does not fully comply with restorative justice principles. The principle of reintegration demands that a society aims at holding perpetrators accountable

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<sup>162</sup> Villa-Vicencio 2003, p. 235.

<sup>163</sup> Rohne et al. 2008b, p. 18.

<sup>164</sup> Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York, Routledge 2002, p. 15.

<sup>165</sup> Rohne et al. 2008b, p. 19.

<sup>166</sup> Rohne et al. 2008b, p. 19.

<sup>167</sup> Rohne et al. 2008b, p. 19.

<sup>168</sup> Villa-Vicencio 2003, p. 238.

and responsible for their wrongdoings. This includes the obligation to explain behaviour or decisions but also includes the responsibility to make ‘things as right as possible’, thus repairing the harm done to the victim (see Section 7.2). Hence, restorative justice requires that a perpetrator takes an active role in repairing harm caused by wrongdoing because it is crucial for the reintegration of offenders and the restoration of relationships.<sup>169</sup> This is why Llewellyn suggests that an institutional model of restorative justice should ensure all parties are actively engaged in the process of reparation.

While the TRC provided for individual reparation through the perpetrator, it had no authorisation power to make the perpetrator do so.<sup>170</sup> This is in contrast to the process of sentencing circles where non-compliance with the sentencing plan leads to referring the case to the court. According to Llewellyn restorative justice truth commissions should be backed by mechanisms aimed at ensuring accountability for those who do not participate in the process, e.g. through prosecution.<sup>171</sup> This is also in line with Braithwaite’s pyramid model of responsive regulation (see above).

The TRC did provide a forum for victims to give public testimony of their suffering in order to restore their human dignity.<sup>172</sup> However, the TRC did not provide a common forum for dialogue between the victims and the perpetrators.<sup>173</sup> This raises the question in how far the restorative justice principles of personalism and participation are respected. According to Weitekamp et al., the principle of personalism indicates that mass violence is a violation of people rather than a violation of law.<sup>174</sup> In order to fully address victims’ needs, it is therefore important that the element of encounter is included in truth commissions. This is also in line with the principle of participation, since a form of communication is required in order to address the harms and obligations in an effective way. This approach is also taken in the UN Basic Principles that focus on a voluntary, communicative and inclusive approach in the context of restorative justice. However, as mentioned above, such an approach was not realised in the TRC. Thus, the question remains whether truth commissions serve as institutions of restorative justice, respectively, whether the potential of restorative justice in such contexts can be realised.

According to Llewellyn, justice understood restoratively is fundamentally concerned with restoring the harm caused to relationships by wrongdoing, i.e. not only the relationship between the wrongdoer and the direct victim, but all the relationships involved.<sup>175</sup> Following from this, these will also include the relationship between the wrongdoer and their communities, and between the different communities involved.

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<sup>169</sup>Jennifer Llewellyn, Truth commissions and restorative justice, in Gerry Johnstone and Daniel W. Van Ness, *Handbook of Restorative Justice*, Portland, Willan Publishing 2007, pp. 351–371, at p. 365.

<sup>170</sup>Villa-Vicencio 2003, p. 245.

<sup>171</sup>Llewellyn 2007, p. 365.

<sup>172</sup>Villa-Vicencio 2003, p. 240.

<sup>173</sup>Llewellyn 2007, p. 364.

<sup>174</sup>Weitekamp et al. 2006, p. 231.

<sup>175</sup>Llewellyn 2007, p. 355.

Accordingly, restorative justice is applicable at the micro-, meso- and macro-level. Further, the TRC did involve the public in the process, whereby it was ensured that the community could play a role in understanding and developing a response to the experienced harm, which could restore a sense of community and reinforce the values of a healthy community.<sup>176</sup> In this context, the example by Villa-Vicencio of an older Afrikaans lady who was deeply ashamed of the human rights violations of her community when hearing the victims' testimonies shows the importance of public involvement.<sup>177</sup> This point of view also corresponds with Lickel's et al. findings on the importance of emotions in the context of vicarious retribution.<sup>178</sup>

Llewellyn further highlights that the goal of restorative justice is not only the restoration of personal or intimate relationships but also to ensure equality in social relationships by satisfying each party's rights to equal concern, respect and dignity.<sup>179</sup> Llewellyn suggests approaching restorative justice as a theory of justice. In this respect, in so far as truth commissions can be considered as restorative justice institutions, they should be the first choice for transitional contexts.<sup>180</sup> Moreover, if full justice of restoration is not possible, prosecutions might be seen as an alternative.<sup>181</sup> This perspective reflects the above-mentioned approach by Braithwaite.

Thus, it has to be questioned in how far the model of the TRC complemented with restorative justice principles would be an appropriate response for victims of terrorism.

In the context of (post-) conflict situations, Weitekamp et al. applied restorative justice principles to the building blocks of transitional justice (truth, accountability, reparation, and reconciliation).<sup>182</sup> This approach can also be applied to cases of terrorism. First, a truth-seeking process in order to gain information of the offender and the circumstances of the crime/terrorist act are essential needs of victims of terrorism as described in Chapter 3 and in the following section. Second, experience has shown that the restriction of the TRC to victims of gross human rights violations was too limited. It is rather important to include a broader category of victims.<sup>183</sup> The restorative justice approach for victims of terrorism at the macro-level could envisage those victims of mass violence where intergroup conflicts or cultural differences are the pre-eminent factors for terrorist acts. Examples like the Parents Circle – Families Forum in Israel/Palestine or the Bougainville model (see Section 7.7) reveal that such an approach is actually feasible in ongoing conflict situations. The Parents Circle serves as an example that a restorative justice

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<sup>176</sup>Llewellyn 2007, p. 363.

<sup>177</sup>See Villa-Vicencio 2003, p. 243.

<sup>178</sup>See Section 7.6.

<sup>179</sup>Llewellyn 2007, p. 355.

<sup>180</sup>Llewellyn 2007, p. 357.

<sup>181</sup>Llewellyn 2007, p. 357.

<sup>182</sup>Weitekamp et al. 2006, p. 221.

<sup>183</sup>See also the argument that many victims of the South African conflict could not be taken into account in the process of the TRC because they could not be defined as victims of gross human rights violations, which lead to a feeling of injustice among many victims; Weitekamp et al. 2006, p. 230.

approach is possible at the micro-and meso-level.<sup>184</sup> The engagement in dialogue between the leaders of the parties in conflict as happened in the Bougainville case serves as an example for the macro-level approach.

Further, Weitekamp's et al. approach to include restorative justice principles in the TRC model could serve as an example for a restorative justice response for cases of terrorism at the micro- as well as the macro-level. The principle of participation refers to the dimension of empowerment, and stresses that those affected by the crime need to regain their sense of autonomy, which may be achieved by truth-seeking.<sup>185</sup> For instance, the Beslan case offers a good example in how far victims of terrorism are excluded from the truth-finding process within the criminal justice system.<sup>186</sup> Within a restorative justice approach, accountability means to cooperate with the perpetrator, by seeking to reintegrate rather than to alienate or isolate the perpetrator from society.<sup>187</sup> This approach can be contrasted with the purely retributive approach of detaining suspected terrorists in Guantánamo.<sup>188</sup> Thus, the accountability of perpetrators could be achieved by using a collaborative approach seeking to reintegrate the perpetrator and by providing for reparation for the victims. Reparation is a common element of restorative justice and transitional justice, which includes both material and immaterial reparation.<sup>189</sup> Finally, as regards the principle of personalism, Weitekamp et al. suggest in the context of mass violence that 'truth commissions bear the promise of being a fully restorative justice process if they stress the importance of the encounter', namely a victim-offender dialogue within such a process.<sup>190</sup>

In sum, the model of the TRC can serve as an example for a restorative justice practice if particular restorative justice principles are integrated. However, further research is needed in order to see in how far a redefined TRC model could be applied in cases of terrorism.

### 7.4.3 *Limits to the Use of Restorative Justice Practices*

When looking at common restorative justice practices and especially at victim-offender mediation as the most researched restorative justice practice, it becomes evident that restorative justice is not a remedy that is beneficial for every victim.<sup>191</sup> For instance, a Leuven project in Belgium on victim-offender mediation after

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<sup>184</sup> See at <http://www.theparentscircle.org/> (13/02/08).

<sup>185</sup> Weitekamp et al. 2006, p. 230.

<sup>186</sup> See Chapter 5.

<sup>187</sup> Weitekamp et al. 2006, p. 229.

<sup>188</sup> See Chapter 5.

<sup>189</sup> Weitekamp et al. 2006, p. 230.

<sup>190</sup> Weitekamp et al. 2006, p. 231.

<sup>191</sup> For instance, a Canadian victim, who attended the final conference of this project, and lost her husband in the 9/11 attack, was quite opposed to the idea of restorative justice. In her view, the terrorists are evil persons and she does not wish to have any contact with a member of a terrorist group. However, she would like to have the terrorists taking some financial responsibility for her suffering.



sentencing experienced a high degree of refusals from victims. This was due to the fact that some of them were simply not interested in mediation, but other victims had the perception that victim–offender mediation was an offender-focused practice and/or were not completely informed of the proceedings.<sup>192</sup> Thus, the offer of mediation to victims is important in order to prevent misunderstandings. Research by Sherman and Strang revealed that for a small minority of victims within well-conducted studies, restorative justice was a negative experience that did not improve the victim’s situation and may have made it worse.<sup>193</sup> Sherman and Strang remark that at present it is difficult to determine for which type of victims restorative justice is likely to be beneficial and for which cases it would be counterproductive. The strong and positive research findings about victims’ benefits in the vast majority of cases militate, however, for the general benefit from participation in a restorative justice process.<sup>194</sup>

Zehr identified the following questions that help to analyse both the effectiveness and the extent of restorative justice practices for particular situations:<sup>195</sup>

- Does such practice address harms, needs and causes?
- Is it adequately victim-oriented?
- Are offenders encouraged to take responsibility?
- Are all relevant stakeholders involved?
- Is there an opportunity for dialogue and participatory decision making?
- Is the practice respectful to all parties?

These criteria can also be transposed to those restorative justice practices that do not require direct face-to-face participation of the stakeholders. In this respect, indirect victim–offender mediation or victim impact panels are possible restorative processes for victims who do not want to meet the offender, or where the offender is unwilling or unable to participate.

## **7.5 The Potential of Restorative Justice Practices for Victims of Terrorism**

### **7.5.1 *Victims of Ongoing Intergroup Conflict: the Example of Israel/Palestine***

Rohne presented findings of a survey on Palestinian and Israeli intifada victims on how to respond to their victimisation (i.e. 298 clients of local, non-governmental victims’ assistance organisations; most respondents were physically injured).

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<sup>192</sup> Suggnomè-Forum voor Herstelrecht en Bemiddeling, *Jaarverslag 2006*, Leuven, vzw Suggnomè, 2007, p. 52: from 82 contacted victims only 30 victims were interested in mediation.

<sup>193</sup> Sherman and Strang 2007, p. 62.

<sup>194</sup> Sherman and Strang 2007, p. 62.

<sup>195</sup> Zehr 2002, p. 55.

As regards questions of the procedure, in both victim groups an overwhelming majority expressed their desire to prosecute the victimisers.<sup>196</sup> The respondents were also asked about the implementation of truth commissions as an alternative or supplement to criminal prosecution. However, for most respondents the notion was unknown, so only a few persons expressed their view on the usefulness of a truth commission in their own case.<sup>197</sup> With regard to participation of victims in the criminal justice process, both Palestinian and Israeli victims expressed their desire to be involved and commonly supported the importance of the victims' testimony. While for Palestinian victims it was more important to have the opportunity to tell their story of their victimisation, the Israeli victims preferred to be a part of the prosecution, thus, to actively influence the prosecution of the offender.<sup>198</sup> At the outcome level, the option to put the offender on trial was most supported. There was no support for the offenders' impunity, which reflects the observation in large-scale conflicts that amnesty or impunity for offenders is largely rejected among victims.<sup>199</sup> The majority of all the victims supported the imprisonment of the offender and material reparation to the victim.<sup>200</sup> While most of Palestinian and Israeli victims expressed their desire for payment of money, the majority of the Israeli victims wished a memorial.<sup>201</sup> Rohne explains these differences on the basis of cultural peculiarities: while commemoration ceremonies as an expression of the collective memory play an outstanding role in Israeli society, monetary payment after wrongdoing is a manifest sign of remorse from a Palestinian perspective.<sup>202</sup> Therefore, an apology was perceived as a further important element by Palestinian victims.<sup>203</sup> As regards the victim's perspective on the justification of punishment, Rohne found that the majority of both victim groups stated that the main purpose was to reveal the truth about what happened to them, followed by the wish for revenge.<sup>204</sup> Moreover, almost a third of the Palestinian victims and nearly half of the Israeli victims expressed that punishing the offender would serve the purpose of enabling people to live together again.<sup>205</sup> When asked who should benefit from the offender's prosecution, Palestinian and Israeli victims revealed remarkable differences in their attitudes. The majority of the Palestinian victims viewed the offender's prosecution to benefit solely communitarian purposes, while the majority of Israeli victims saw the prosecution as benefiting individual purposes.<sup>206</sup> Rohne points out that this

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<sup>196</sup>Rohne 2008a, p. 281.

<sup>197</sup>Rohne 2008a, p. 281.

<sup>198</sup>Rohne 2008a, p. 286.

<sup>199</sup>Rohne 2008a, pp. 288, 305.

<sup>200</sup>Rohne 2008a, pp. 288, 289.

<sup>201</sup>Rohne 2008a, p. 289.

<sup>202</sup>Rohne 2008a, pp. 290, 291.

<sup>203</sup>Rohne 2008a, p. 289.

<sup>204</sup>Rohne 2008a, pp. 293, 294.

<sup>205</sup>Rohne 2008a, p. 294.

<sup>206</sup>Rohne 2008a, p. 297.

difference can be attached to the perception of conflicts as collective disputes prevalent in Arab-Islamic societies.<sup>207</sup> Rohne concludes that the victims' expectations can be met by restorative justice due to its flexibility. In this respect, the UN Basic Principles can serve as a starting point for understanding the role of restorative justice in large-scale conflicts. However, they need to be adapted and modified due to some specific elements of large-scale conflicts like cultural perceptions and needs.<sup>208</sup> The latter aspect mainly concerns the punitive need of Israeli/Palestinian victims – although it aims at reconciliation with both sides of Israeli/Palestinian society – and their rejection of amnesty or impunity for the offender. While these issues encountered difficulties in the TRC proceedings, these aspects can be addressed by restorative justice by focusing on offender accountability and responsibility. Further, it has to be taken into account that violence in intergroup conflicts also affects a whole society so that the collective dimension is also crucial for the coping process of the individual victim.<sup>209</sup>

In conclusion, Rohne's findings reveal that there is potential for a restorative justice approach in cases of ongoing conflict situations. However, his findings suggest that a punitive element has to be integrated in the restorative justice response as victims wanted to see the offender punished in order to enable people to live together again. This means that they wish for a safe community. This perspective does not exclude a restorative justice approach because restorative justice can provide the basis for a safe community (see the Parents Circle or the LIVE-programme as discussed later). Secondly, restorative justice is possible at different stages within the criminal justice system, or can be seen as the first response to crime as Braithwaite suggests (see above).

### ***7.5.2 Victims of Past Terrorism: the Example of the German Red Army Faction (RAF)***

In Germany only recently, more than 30 years after the foundation of the RAF and 9 years after its termination has the focus shifted from the terrorists to the victims. The impulse was mainly given by Siemens' findings on RAF victims and Michael Buback's public approach for information about his father's death (see further Section 7.7). Siemens conducted research on nine RAF victims (two primary victims and seven family members of primary victims). Her findings revealed that all of the seven interviewed secondary victims of RAF terrorism had the need to individualise the direct victim.<sup>210</sup> This means that the family members of the victims killed by

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<sup>207</sup> Rohne 2008a, p. 298.

<sup>208</sup> Rohne 2008a, p. 310.

<sup>209</sup> Rohne 2008a, p. 296.

<sup>210</sup> Anne Siemens, *Für die RAF war er das System, für mich der Vater. Die andere Geschichte des deutschen Terrorismus*, München, Piper Verlag, 2007, pp. 65, 111, 131, 258.

the RAF wanted to give the primary victim a voice, by describing what kind of human being the primary victim had been, that he was a person with feelings and attitudes contrary to those described by the RAF. In this context, one victim expressed that it was very important for her that at least after 25 years the terrorist act was acknowledged by the government as murder against her father and not simply as an act of political dispute.<sup>211</sup> Some of the victims did want to hear a sign of remorse, while others did not want to receive any apology because they doubted the sincerity of it.<sup>212</sup> None of the interviewed RAF victims was revengeful, though there were different opinions about the early release of terrorists from prison.<sup>213</sup> Siemens found that the need to get in dialogue with sentenced RAF terrorists was expressed in three cases by the family of the direct victims.<sup>214</sup> Siemens found that these victims wanted to meet the terrorists in order to talk about the terrorists' guilt, to give them an opportunity to live with this guilt, and to get answers to open questions.<sup>215</sup> However, only in one of these cases did the family members of the primary victim actually meet a RAF terrorist in order to seek information. Moreover, they published a letter in a newspaper with the aim of convincing the terrorists of the insanity of their acts as well as to awaken the public.<sup>216</sup> The need for information also caused another victim of RAF terrorism to actually meet the terrorist, respectively, a (former) member of the same terrorist organisation as this was felt as a necessary prerequisite for gaining closure.<sup>217</sup> Further, a police officer, who was injured by two RAF terrorists in the course of their arrest, pled for their early release after he read why they had distanced themselves from the RAF. He started to meet them on a regular basis and developed empathy for the former terrorists through these contacts.<sup>218</sup> However, according to Siemens' research, other victims did forebear from meeting the offender. One of the RAF victims was afraid of the reactions of the public and did not have the strength to deal with justifying her reasons to family members or the public.<sup>219</sup> Another RAF victim was afraid of a possible negative impact of such a meeting on herself and on her mother, including fear of security. The other six victims interviewed by Siemens were opposed to meeting the offender. The reasons given were that the terrorists did not show any

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<sup>211</sup> Siemens 2007, p. 115.

<sup>212</sup> Siemens 2007, pp. 67, 102, 265.

<sup>213</sup> Siemens 2007, pp. 66, 101, 102, 120, 182, 243, 245.

<sup>214</sup> Siemens 2007, pp. 70, 100, 256, 267.

<sup>215</sup> Siemens 2007, pp. 70, 100, 267. Although the interviews were not conducted in connection with restorative justice, the needs and feelings expressed by the victims of RAF-terrorism could be used in the context of restorative justice.

<sup>216</sup> Siemens 2007, pp. 70, 100, 267; Hamburger Abendblatt: 'Klar muss die Mörder nennen'.

<sup>217</sup> Michael Buback in Tagesschau: *Da ist noch so eine wunde Stelle* at [http://www.tagesschau.de/aktuell/meldungen/0,1185,OID6325210\\_REF2,00.html](http://www.tagesschau.de/aktuell/meldungen/0,1185,OID6325210_REF2,00.html) (16/05/07).

<sup>218</sup> Frans Denkers, Herman van Hoogen, Christof Wackernagel et al., *Begrepen Onbehegen. Politie en Rote Armee Fraktion verzoend*, Lelystad, 1999, pp. 148–154, 156–157.

<sup>219</sup> Siemens 2007, pp. 70, 100.

remorse for their acts and would still see themselves as victims of the state, that there was no strength for such a meeting or a great aversion against the terrorist act, and that nothing could justify what the terrorists had done.<sup>220</sup> It has to be noted that one of the RAF victims who did not want to meet with the terrorists, started a dialogue with the left-wing intellectuals in the 1970s because they were quite supportive of the RAF. It was for him a reconciliatory and significant experience that he could activate critical debates around the RAF through this dialogue.<sup>221</sup>

In conclusion, Siemens' findings reveal that there are some victims of terrorism with the need of engaging in a dialogue with the terrorist and the need that their suffering is acknowledged. Thus, the restorative justice principles of personalism and participation can be stressed. The notion of 'healing' was more important than reparation in the strict sense. As regards reintegration of the offender, different aspects have to be taken into consideration: although there were some victims who did not mind an early release of the imprisoned terrorists, there is no evidence that these victims would not vote for the terrorists' imprisonment *per se*. This may indicate a restorative justice approach in parallel with the traditional criminal justice system. Furthermore, it could also be a first step before approaching punitive interventions.

### 7.5.3 *Mass Terrorist Victimisation and Their Impact upon Tertiary/Vicarious Victims*

The terrorist attacks on 11 September 2001 were the sad peak of large-scale indiscriminate violence of contemporary terrorism, followed by terrorist attacks in Madrid, Beslan (Russian Federation) and London.<sup>222</sup> (Mass) terrorist victimisation has physical, financial, psychological and emotional effects for the victims. Albrecht and Kilchling suggest that victims of terrorism are not different as regards the impact of violence and the needs following the victimising event.<sup>223</sup> The impact of crime on victims can be described as a product of the perceived seriousness or intensity

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<sup>220</sup>Siemens 2007, pp. 68, 120, 182, 183; see also Spiegel Online: *RAF-Opfer: Wie kann man einen Menschen zum Schwein machen?* at <http://www.spiegel.de/politik/deutschland/0,1518,481776,00.html> (16/05/07); SWR: *Für uns ist die Welt stillgestanden* at <http://www.swr.de/nachrichten/deutscher-herbst/-/id=2070672/nid=2070672/did=2071244/mpdid=2071412/bsfw43/index.html> (31/05/07).

<sup>221</sup>Siemens 2007, p. 166.

<sup>222</sup>Zvonimir Paul Šeparović, International Terrorism: Large-Scale Victimization in Uwe Ewald and Ksenija Turković (eds.), *Large-Scale Victimisation as a Potential Source of Terrorist Activities*, Amsterdam, IOS Press, 2006, p. 23.

<sup>223</sup>H.J. Albrecht and M. Kilchling, Victims of Terrorism Policies: Should Victims of Terrorism be Treated differently? (2007) 13 *European Journal of Criminal Policy and Research*, 13–31, p. 26.

of the effects of crime plus their duration from the victim's own standpoint.<sup>224</sup> The impact of terrorist acts creates a sense of vulnerability, trauma, disruption of everyday life, destruction of the future and financial problems. According to Albrecht and Kilchling, this kind of impact is comparable to that of other serious crime.<sup>225</sup> However, in the Oklahoma report and in the report on victims of 9/11, it is suggested that victims of terrorism appear to experience higher levels of distress than other violent crime victims or disaster victims due to the unique issues related to the traumatic elements and magnitude of these events.<sup>226</sup> When looking at mass victimisation through natural disasters, a Canadian report on victims of terrorism shows that victims of mass criminal victimisation react differently from victims of natural disasters largely because of the human factor – that someone did this on purpose to hurt innocent people.<sup>227</sup> These findings reveal that the impact from human made disasters, including terrorism, may be more prolonged, and recovery may take longer when compared to natural disasters. Accordingly, the impact of terrorism on victims, namely higher levels of distress and a more prolonged recovery from the terrorist act would differ from the impact on victims of other serious violence and of natural disasters regarding the timeframe for the victim's recovery. However, the intensity of any impact that violent crime may have is both highly subjective and also much more difficult to measure.<sup>228</sup> Albrecht and Kilchling argue that the differences between victims of terrorism and victims of other severe violence are rather located in the areas of planning, organisation and coordination of the response to terrorist victimisation.<sup>229</sup> Moreover, differences concern the particular attention terrorist acts draw upon themselves in the media and in the political system.<sup>230</sup> This increases media attention and publications about victims of terrorism, which has effects particularly on secondary victims, who are confronted with the publication about their family members or friends in the media. Such publication may also generate vicarious (tertiary) victims, who may feel vulnerable when being confronted with pictures or broadcast material of victims of terrorist acts. This is according to Pfefferbaum due to the fact that indirect (vicarious) victims identify with the

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<sup>224</sup> Dignan 2005, p. 24.

<sup>225</sup> Albrecht and Kilchling 2007, p. 26.

<sup>226</sup> Office for Victims of Crime, *Responding to Terrorism Victims – Oklahoma and Beyond*, Washington, 2000, p. 29; Office for Victims of Crime, *Responding to September 11 Victims: Lessons Learned From the States*, New York, US Department of Justice, 2005, p. ix.

<sup>227</sup> Canadian Resource Centre for Victims of Crime, *A Report Responding to The Needs of Canadian Victims of Terrorism*, Ottawa, Canadian Resource Centre for Victims of Crime, 2007, p. 7.

<sup>228</sup> Dignan 2005, p. 25.

<sup>229</sup> See Albrecht and Kilchling 2007, p. 27.

<sup>230</sup> Hans-Jörg Albrecht and Michael Kilchling, *Victims of Terrorism – Policies and Legislation in Europe: an Overview on Victim-Related Assistance and Support*, Expert report prepared by, Max-Planck-Institute for Foreign and International Criminal Law, Freiburg (Germany) for the Group of Specialists on Assistance to Victims and Prevention of Victimisation (PC-S-AV) reporting to the Committee of Experts on Terrorism (CODEXTER) and to the European Committee on Crime Problems (CDPC), in *Victims-Support and assistance*, Strasbourg, Council of Europe Publishing, 2006, p. 247.

direct victim.<sup>231</sup> Moreover, Pfefferbaum argues that these indirect victims are the principal targets of terrorism as they are the audience for terrorism and recognise little distinction between themselves and the direct victims.<sup>232</sup>

Wilkinson highlights that the randomness of a terrorist act is a factor for the vulnerability of indirect victims.<sup>233</sup> This ‘vicarious dimension’ of terrorism may be even more aggravated in cases of mass terrorist victimisation due to the higher number of direct victims. The vicarious dimension of mass terrorist victimisation may therefore result in a larger class of vicarious victims. These aspects are important for addressing vicarious victims in the restorative justice response to terrorism. This may be done either through their involvement in a restorative justice process, or through approaching the media to include restorative justice principles and values in the media coverage.

In view of their involvement in restorative justice processes, community-based mechanisms of restorative justice like family group conferencing, circles or an adapted form of the TRC model may be of relevance. According to McCold and Wachtel, the most constructive response to vicarious victims is to provide reassurance that what happened was wrong, that something constructive is done about it, and that steps are being taken to discourage its occurrence.<sup>234</sup> In this respect, vicarious victims could be involved in the restorative justice process.<sup>235</sup> With regard to terrorism, however, such an involvement may take some time because of the recovery process of direct or secondary victims.

Another approach may be that the media and other information sources rethink their role of reporting. Instead of sensation-seeking media coverage, the victim’s dignity could be emphasised by applying a balanced approach of reporting on victims of terrorism.<sup>236</sup> Further, possibilities of a restorative approach towards victims of terrorism and terrorists could be structured into the media coverage. This has recently been done for instance through broadcasting encounters between victims and terrorists in the United Kingdom and in Germany.<sup>237</sup>

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<sup>231</sup> Betty Pfefferbaum, *Victims of terrorism and the Media*, in Andrew Silke (ed.), *Terrorists, Victims and Society. Psychological Perspectives on Terrorism and its Consequences*, West Sussex, Wiley, 2003, p. 176.

<sup>232</sup> Pfefferbaum 2003, p. 179. See also Chapter 3.

<sup>233</sup> Wilkinson cited in Pfefferbaum 2003, p. 176.

<sup>234</sup> P. McCold and B. Wachtel, *Community Is Not A Place: A New Look At Community Justice Initiatives* at <http://www.iirp.org/library/albany.html> (17/07/07).

<sup>235</sup> This approach is in line with Umbreit’s and Zehr’s suggestion to include the micro-community in family group conferencing or sentencing circles; see P. McCold and B. Wachtel, *Community Is Not A Place: A New Look At Community Justice Initiatives* at <http://www.iirp.org/library/albany.html> (17/07/07).

<sup>236</sup> In Germany, for instance, hostages taken by terrorists are recently telecast only as fixed-image. This can minimise the humiliation of the victim and the effects this can cause to secondary and vicarious victims. In this context, the seminar participants of the project highlighted the DART CENTER for Journalism and Trauma, see at <http://www.dartcenter.org/> (28/01/08).

<sup>237</sup> ‘Facing the Enemy’, BBC 2, 2001; ‘Facing the Truth’, BBC 2, 2006; ‘Das Opfer und der Terrorist. Michael Buback im Gespräch mit Peter-Jürgen Boock’, NDR, 2007.



## 7.6 Restorative Justice Responses to Terrorism

A common way to respond to terrorism at the macro-level is the so-called ‘war on terrorism’ by the US Bush Administration and other states outside the EU, while the EU approach is either the use of deterrent measures or negotiations between the government and the terrorists. As the world’s political situation shows, the strategy of ‘war on terrorism’ is rather contra-productive. According to Tschudi, neither deterrence nor negotiation is an appropriate approach for responding to terrorism either. This is based on findings by Lum et al. who concluded that most deterrent measures fail to achieve their goal of compliance.<sup>238</sup> Negotiation as an alternative approach to the deterrence approach also entails weaknesses, where at the best only unsatisfactory compromises are reached.<sup>239</sup> Tschudi found that a typical reason for the failure of negotiations may be that restorative values such as humility and respect are not present in the process.<sup>240</sup> Therefore, Tschudi suggests fostering restorative values in the negotiation process with the emphasis on dialogue, aiming at mutual understanding instead of defeating the opponent.<sup>241</sup> However, with deep-seated conflicts there is a risk that attempts at dialogue may backfire. An alternative is to emphasise the building of personal relations by having the participants work together on concrete tasks.<sup>242</sup> In this context, the micro- and meso-level approach is of great importance in order to build upon for the macro-level approach of restorative justice. However, up to now, there are rarely indications that restorative justice is applied in the context of terrorism.<sup>243</sup> This is why in the following sections a comparison is drawn to other forms of violent crime. Before doing so, the peculiarities of terrorist victimisation are briefly highlighted.

Terrorism is distinguished from other forms of criminal acts of violence by two characteristics. First, the direct targets of terrorist violence are often not the main targets. The immediate human victims of violence are generally chosen randomly or selectively from a target population, and serve as message generators.<sup>244</sup> Second, violence is used for dramatic purposes to instil fear in a larger class of indirect victims. As mentioned in Chapter 1, terrorist acts are classified in two main categories, namely

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<sup>238</sup>Tschudi 2008, pp. 53.

<sup>239</sup>Tschudi 2008, pp. 53, 54. This aspect is also highlighted by Neumann, who, however, rather favours deterrent measures than negotiations. In case of negotiations, Neumann stresses that the negotiation process should begin after the terrorist group has declared a permanent cessation of violence, see P.R. Neumann, *Negotiating With Terrorists*, (2007) 86 (1) *Foreign Affairs*, 128–138.

<sup>240</sup>Tschudi 2008, p. 55.

<sup>241</sup>Tschudi 2008, p. 56. Neumann also highlights the potential of dialogue in the case of the IRA, see Neumann, pp. 128–138.

<sup>242</sup>Tschudi 2008, p. 57.

<sup>243</sup>See however examples of the Parents Circle and the LIVE-programme.

<sup>244</sup>Alex Schmid, *Magnitudes and Focus of Terrorist Victimization*, in Uwe Ewald and Ksenija Turković (eds.), *Large-Scale Victimisation as a Potential Source of Terrorist Activities*, Amsterdam, IOS Press, 2006, p. 4.

focused and indiscriminate terrorism.<sup>245</sup> First, *focused terrorism* discriminately chooses victims, who are usually part of the target group that is the principal addressee of the terrorist's message, coercion or intimidation. In *indiscriminate terrorism*, the random victim happens to be in the wrong place at the wrong time and is not specifically selected for his or her individual characteristics. The apparent randomness of an act creates a sense of vulnerability in a larger class of indirect victims who identify with direct victims. This 'vicarious' dimension generates and spreads apprehension and alarm and creates so-called vicarious victims.<sup>246</sup> This dimension is even aggravated by the use of suicide terrorism as modern suicide terrorism is aimed at causing devastating physical damage, which inflicts profound fear and anxiety.<sup>247</sup> Further, suicide terrorism is a common means to effect mass victimisation.<sup>248</sup> Mass victimisation is also caused by large-scale conflicts that are often followed by terrorist acts. Moreover, a common goal of both political and religiously motivated terrorism is mass terrorist victimisation, though suicide terrorist acts are a more common *modus operandi* of religiously motivated terrorists.<sup>249</sup> Religious terrorism designates public acts of violence for which religion has provided the motivation, the justification, the organisation, and the world view. It shares many common features with political terrorism, such as its use of 'performative' violence, i.e., violence that serves a theatrical as well as a practical purpose.<sup>250</sup>

In the following, terrorism is compared to other forms of serious violent crime, including hate crime, and to large-scale conflicts. Then, the specific dimension of terrorism as well as suicide and religious terrorism are discussed. Thereby, possibilities for a restorative justice approach for the terrorism context are presented.

### 7.6.1 *Terrorism and Other Forms of Serious Violent Crime*

Besides the particular dimension of terrorism, victims of terrorism are affected by the terrorist act in a similar way as are victims of other forms of serious violent crime by the criminal act.<sup>251</sup> As set out in Chapter 1, terrorism is defined in international legal instruments as a form of serious violent crime. Therefore, research findings on victim-offender mediation and victim sensitive offender dialogue in cases of

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<sup>245</sup> Schmid 2006, p. 9.

<sup>246</sup> Pfefferbaum 2003, p. 176.

<sup>247</sup> Šeparović 2006, p. 23.

<sup>248</sup> Šeparović 2006, p. 23.

<sup>249</sup> Marshall 2007, p. 382; Andrew Silke, The Psychology of Suicidal Terrorism, in Andrew Silke (ed.), *Terrorists, Victims and Society. Psychological Perspectives on Terrorism and Its Consequences*, West Sussex, Wiley, 2003, p. 95.

<sup>250</sup> Marshall 2007, p. 374.

<sup>251</sup> See the findings above and those in Chapter 3.

severe violence will be presented in order to highlight the possibility of applying these restorative justice practices also for victims of terrorism.<sup>252</sup>

### 7.6.1.1 Restorative Justice Practices in Cases of Serious Violent Crime

Most of the existing restorative justice practices, particularly victim–offender mediation programmes, focus primarily on non-violent property crimes and minor assaults. This is against the background that there is a general feeling of reluctance towards the idea of mediation in cases of serious crime as mediation is often considered as ‘a favour’ by the judiciary.<sup>253</sup> However, mediators witness that participation in a mediation process is not at all a soft option, not even for minor crimes.<sup>254</sup> Moreover, empirical evidence suggests that restorative justice principles can be applied in crimes of severe violence, including homicide, murder, manslaughter, armed robbery and sexual assault.<sup>255</sup> However, there are some important differences between victim–offender mediation in cases of minor crime and cases of severe violence. Findings by Umbreit et al. on the use of mediation and dialogue in cases of severe violence as well as findings by Aertsen on mediation programmes in Belgium revealed that the emphasis of victim–offender mediation in cases of severe violence is placed more upon communication than on reaching an agreement.<sup>256</sup> In this respect, Umbreit et al. suggest that the distinctive element of a restorative justice process in cases of severe violence is rather healing and peacemaking than problem solving and resolution.<sup>257</sup> This is why mediation in this context often takes the form of a therapy process between the parties.<sup>258</sup>

There is a difference in the use of direct and indirect mediation between cases of serious crime in Europe and the USA. While Umbreit mainly uses dialogue models in direct, face-to-face meetings between victims and offenders, Aertsen found that in Belgium indirect mediation is more prevalent than direct mediation in cases involving serious offences.<sup>259</sup> In the Langley victim–offender mediation

<sup>252</sup>The restriction on these restorative justice practices is due to limited research for other practices.

<sup>253</sup>Ivo Aertsen, *Victim–offender Mediation with Serious Offences*, in Council of Europe Publishing (ed.), *Crime Policy in Europe*, Strasbourg, Council of Europe, 2004, pp. 75–86, at p. 75.

<sup>254</sup>Aertsen 2004, p. 75.

<sup>255</sup>For an overview see: Umbreit et al. 2003b, p. 125; M. S. Umbreit, R.B. Coates, B. Vos and K.B. Brown, Executive Summary: *Victim Offender Dialogue in Crimes of Severe Violence. A Multi-Site Study of Programs in Texas and Ohio*, (2002), *Center for Restorative Justice & Peacemaking*, pp. 1–20, p. 7; Aertsen 2004, p. 82; L. Walker, *Restorative Justice without Offender Participation: A Pilot Program for Victims* (2004) *International Institute for Restorative Practices*, 1–6, p. 2.

<sup>256</sup>Aertsen 2004, p. 82; Umbreit et al. 2003b, p. 125.

<sup>257</sup>Umbreit et al. 2003b, p. 131.

<sup>258</sup>Aertsen 2004, p. 83.

<sup>259</sup>Umbreit et al. 2003b, p. 127; Aertsen 2004, p. 83. See also in Suggnomè-Forum voor Herstelrecht en Bemiddeling, 2007, p. 85: indirect mediation was used in 80.3% of the cases in Leuven, Belgium, and only in 19.7% of the cases was direct mediation used.

project in Canada, face-to-face-meetings of victims and offenders were not regarded as necessary for healing.<sup>260</sup> Another distinction is the stage of application of victim–offender mediation in cases of serious crime. It appears that victim–offender mediation is applied only at a post-sentence stage in the USA, while in Belgium, for instance, victim–offender mediation can basically be applied both parallel to prosecution and in a prison context.<sup>261</sup>

The following research findings refer to the application of victim–offender mediation and victim sensitive offender dialogue in cases of severe violence, as little empirical data is available on most other restorative justice practices in this respect.<sup>262</sup>

Roberts (1995) examined the Langley project in Canada that used victim–offender mediation at post-sentence stage in cases of serious crime and provided therapeutic preparation for victims and offenders before a face-to-face meeting was arranged.<sup>263</sup> Prior to the Langley project a small study by Gustafson and Smidstra (1989) was conducted to assess whether victims and offenders involved in severely violent crime would be interested in meeting with each other.<sup>264</sup> Umbreit et al. (2001) undertook a multi-site, multi-year study of programmes in Texas and Ohio (USA) to examine the impact of victim–offender mediation and dialogue in crimes of severe violence. The Texas programme included 20 mediated cases, of which 70% involved homicide. In the Ohio programme, 21 cases were mediated, of which 57% involved homicide.<sup>265</sup> Both programmes used victim sensitive offender dialogue, but the communication and dialogue between victim and offenders occurred in different forms. The model used in the Texas programme was of therapeutic nature, with the primary focus on healing. In the Ohio programme, the emphasis was upon empowerment, i.e. it is of primary importance that victims and offenders define their own needs and take responsibility for meeting those needs.<sup>266</sup> Another approach is used in humanistic mediation victim sensitive offender dialogue programmes, where the narrative element is of main importance, i.e. that each participant is enabled to speak of the impact of the crime.<sup>267</sup>

In Leuven, Belgium, a local victim–offender mediation programme within a prison context was set up by the Flemish NGO Suggnomè that involved mainly cases of homicide and sexual offences. In case of direct mediation, the meeting was

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<sup>260</sup>Umbreit et al. 2003b, p. 131.

<sup>261</sup>Aertsen 2004, pp. 78, 81. See the new Belgian law of 22 June 2005 on mediation at <http://www.suggnome.be/pdf/wetbemiddeling220605.pdf> (28/01/08).

<sup>262</sup>See in M.S. Umbreit, T. Lewis, H. Burns, A Community Response to A 9/11 Hate Crime: Restorative Justice Through Dialogue (2003c) *Contemporary Justice Review* 6, pp. 383–391, p. 385.

<sup>263</sup>Tim Roberts, Evaluation of the victim offender mediation project, Langley, B.C. for Solicitor General Canada, March 1995.

<sup>264</sup>See in Umbreit et al. 2003b, p. 139.

<sup>265</sup>See Umbreit et al. 2003b, p. 138.

<sup>266</sup>Umbreit et al. 2003b, p. 128.

<sup>267</sup>Umbreit et al. 2003b, p. 128.

organised in prison and parties could propose support persons.<sup>268</sup> Initially, the project faced difficulties as the mediation processes in the framework of the project could not be concluded as most of the applicants withdrew or postponed their decision.<sup>269</sup> However, within 6 years, the project has dealt with 200 mediations of 400 applications, including 50 face-to-face meetings in cases of serious crime.<sup>270</sup> In ten of these cases (mainly murder cases), victim–offender mediation took place before the trial.<sup>271</sup>

### Victim Motivation

Gustafson and Smidstra (Langley, Canada, 1989) found that victims of severe violence wanted to meet the offender in order to personally express their hurt and anger to the offender or to ask questions that continued to plague them for a number of years after the crime.<sup>272</sup> These victims considered that a meeting with the offender would be helpful, if not crucial, to their recovery and ability to bring an additional measure of ‘closure’ to the offence.<sup>273</sup> The study by Roberts (Langley, Canada, 1995) revealed that the most common reasons of victims to participate in the victim–offender mediation programme were the need to know more about the offence, to share its impact with the offender, and to finally gain closure.<sup>274</sup> These findings correspond with research by Umbreit et al. who found that victims of sexual assault, attempted homicide, and survivors of murder victims wanted to meet the offender in order to get answers to many questions, to express the full impact of crime upon their life, to have some form of human contact with the person responsible for the crime, to hear the offender take responsibility, and to gain a greater sense of closure so that they

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<sup>268</sup> Aertsen 2004, p. 82.

<sup>269</sup> Aertsen 2004, p. 82.

<sup>270</sup> Kristel Buntinx, *Victim–Offender Mediation In Severe Crimes, 2007, Paper presented at a meeting jointly convened by the Probation Service and Facing Forward*, 1–7, at 3. For instance, for the year 2006, 49 cases of serious violence (murder, homicide, robbery with murder) were dealt with victim–offender mediation by the organisation Suggnomè. See in Suggnomè-Forum voor Herstelrecht en Bemiddeling, 2007, p. 79.

<sup>271</sup> Buntinx 2007, p. 3.

<sup>272</sup> David L. Gustafson and Henk Smidstra, *Victim Offender Reconciliation in Serious Crime. A Report on the Feasibility Study Undertaken for the Ministry of the Solicitor General (Canada)*, Langley, 1989, pp. 47–70. Cited in: David L. Gustafson, *Exploring Treatment and Trauma Recovery Implications of Facilitating Victim Offender Encounters in Crimes of Severe Violence: Lessons from the Canadian Experience*, in Elisabeth Elliott and R. Gordon (eds.), *New Directions in Restorative Justice: Issues, Practice, Evaluation*, Cullompton, Willan Publishing, 2005, pp. 1–44, p. 3.

<sup>273</sup> Gustafson 2005, pp. 6–7; Gustafson and Smidstra 1989, p. 71.

<sup>274</sup> Roberts 1995, pp. vi, 90, 104. Cited in Jo-Anne Wemmers and Marisa Canuto, *Victims’ Experiences with, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature*, Montreal, Department of Justice Canada, 2002, p. 28.

can move on with their lives.<sup>275</sup> Buntinx also found that the need for information about the crime, the possibility to ask open questions concerning the crime and the offender as well as the need to express themselves, were the most common motivations of victims of serious crime in Belgium to actually meet the offender.<sup>276</sup>

### Restorative Outcomes

Research by Umbreit et al. revealed that the telling and hearing of each other's stories about the conflict, and the opportunity for direct communication were beneficial to the involved parties.<sup>277</sup> Umbreit et al. found a very high rate of satisfied victims of the mediated cases in Texas and Ohio.<sup>278</sup> The Texas study revealed that victims' main short-term achievements included receiving admissions of responsibility, having a human, face-to-face encounter, receiving answers to questions, asking questions that mattered, holding the offender accountable, and having an impact on the offender.<sup>279</sup> In the longer term, the majority of victims experienced major positive life changes, changes in their view of the offender to the better, personal growth and healing.<sup>280</sup> Further, Umbreit and Vos (2000) examined two case studies of capital murder involving a victim-offender mediation/dialogue session between surviving family members and two death row inmates facing execution shortly after the mediation session. All participants described that they felt that the experience was powerful and healing, and that they were relieved and renewed.<sup>281</sup> Umbreit (2001) further examined three case studies of parents of murdered children who initiated a face-to-face meeting with the offender. The victim-offender mediation/dialogue took place several years after the murder (only in one case it took place less than a year after the murder) and was experienced by the victims as positive and pivotal for the healing process.<sup>282</sup> These findings correspond with the Belgian experience that communication between victims and offenders in cases of serious crime is an essential element in coping with the crime.<sup>283</sup> Research findings by Roberts (Langley, Canada, 1995) also showed a positive effect of mediation on victims involved in severe violent crime: victims expressed that they had finally been heard,

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<sup>275</sup> Umbreit et al., 2003b, p. 125; M. Umbreit and B. Vos, Homicide Survivors Meet the Offender Prior to Execution (2000) *Homicide Studies*, 63–87, p. 72.

<sup>276</sup> Buntinx 2007, p. 4.

<sup>277</sup> Umbreit et al. 2003b, p. 136.

<sup>278</sup> Umbreit et al. 2003b, p. 138; M. S. Umbreit et al. 2002, pp. 9, 14–16.

<sup>279</sup> Mark S. Umbreit, Betty Vos, Robert B. Coates and Katherine Brown, *Facing Violence – The Path of Restorative Justice and Dialogue*, Monsey, Criminal Justice Press, 2003a, p. 117.

<sup>280</sup> Umbreit, Vos, Coates and Brown 2003a, p. 119.

<sup>281</sup> Umbreit and Vos 2000, p. 78.

<sup>282</sup> Mark S. Umbreit, *The Handbook of Victim Offender Mediation. An Essential Guide to Practice and Research*, San Francisco, Jossey-Bas, 2001, p. 270.

<sup>283</sup> Buntinx 2007, pp. 5, 6.

that the offender no longer exercised control over them, that they could see the offender as a person rather than a monster, that they felt more trust in their relationships with others, that they felt less fear, that they were no longer preoccupied with the offender, that they felt peace, that they would not feel suicidal again, and that they had no more anger.<sup>284</sup> The research findings further revealed that victims who participated in a face-to-face meeting with the offender identified the following factors as important and helpful: the acknowledgment of responsibility from the offender or an apology, being able to express anger about the crime and its impact, getting answers, and seeing the offender being affected or honest.<sup>285</sup>

### 7.6.1.2 Alternatives to Direct Victim Involvement

Not every victim wants to get in contact with the offender. In the first Langley project, 11 of 28 victims indicated that they would choose not to meet the offender, because they did not feel it necessary for themselves, the crime had not been serious enough, the offender was not remorseful, and because they needed more time to recover.<sup>286</sup> However, only in five of the 28 cases victims indicated that they would derive no benefit from a face-to-face- reconciliation meeting with the offender in a crime as serious as the ones in which they were recently victims.<sup>287</sup> Other objections against a meeting with the offender found by Aertsen and Peters are mostly related to the victim's feelings of fear and anger and to the scepticism about the possibility of a meaningful interaction with the offender.<sup>288</sup> A possibility to overcome these objections may be to familiarise victims with mediation proceedings. In this respect, Umbreit et al. found that some victims, who initially did not want to participate in a mediation programme, changed their minds after watching videos of other mediations.<sup>289</sup>

There are, however, also a number of victims who do not want or cannot meet the offender, but who need nevertheless a possibility to 'heal' from the harm done to them.<sup>290</sup> A possibility is to offer indirect victim-offender mediation or surrogate encounters in victim impact panels to these victims, by respecting the preparation time victims need to be 'ready' for an encounter. Although restorative justice practices are not adequate for every victim, research findings show that there is a high interest for restorative justice programmes among victims of severe violence.<sup>291</sup>

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<sup>284</sup> Roberts 1995, p. 104. Cited in: Umbreit et al. 2003b, p. 139.

<sup>285</sup> Cited in Wemmers and Canuto 2002, p. 28.

<sup>286</sup> Gustafson and Smidstra 1989, p. 12.

<sup>287</sup> Gustafson and Smidstra 1989, pp. 12, 71.

<sup>288</sup> Aertsen and Peters 1998, p. 235; Aertsen 2004, p. 82.

<sup>289</sup> Umbreit, Vos, Coates and Brown 2003a, p. 99.

<sup>290</sup> Walker 2004, p. 2.

<sup>291</sup> Umbreit et al. 2003b, p. 125; Aertsen 2004, p. 82.



The question is therefore not whether restorative justice practices should be offered to victims but, rather, how they should be offered.<sup>292</sup> Moreover, restorative justice principles and values are an orientation for possible restorative responses to all types of crime. In this respect, the practices described above, namely victim–offender mediation with the focus on communication (Belgium) or on healing/therapy (Canada), as well as victim sensitive offender dialogue programmes (USA), can serve as a basis for a restorative justice approach in the context of severe violent crime. Section 7.7 explains on the basis of exemplary cases of victims of terrorism in how far restorative justice practices can be applied to victims of terrorism.

### 7.6.2 *Terrorism and Hate Crime*

The common characteristic between terrorism and hate crimes is that both perpetrators of hate crimes and terrorists choose their victims in accordance with what they or their characteristics represent, whereby the victim's individual characteristics are irrelevant.<sup>293</sup> The only issue of interest to the perpetrator is the obvious symbolic meaning of the chosen target and its effectiveness in delivering the message to the group to which the victim and the perpetrator are associated.<sup>294</sup> In this respect, victims of (focused) terrorism may be compared with so-called 'generic' or 'representative' victims. These persons are victimised not because they are known to the offender, or selected randomly and for opportunistic reasons, but because they belong to or represent groups towards whom the offender harbours feelings of resentment and hatred.<sup>295</sup> Dignan points out that though it is unusual for hate crimes to be specifically referred to in restorative justice writing, hate crimes are potentially likely to prove no less problematic for restorative justice approaches than for conventional criminal justice approaches.<sup>296</sup> Hudson suggests that conferencing or similar procedures can force the offender of a hate crime to see the victim as a 'real' person, with qualities, commitments and emotions other than those attributed to him by the offender through stereotype or fantasy.<sup>297</sup> This is underlined by Umbreit et al. who presented a case study of hate crime that has been resolved by conferencing.<sup>298</sup>

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<sup>292</sup> Wemmers and Canuto 2002, p. 37.

<sup>293</sup> D. Shichor, Thinking about Terrorism and Its Victims, (2007) 2(3) *Victims and Offenders*, 269–287, p. 273.

<sup>294</sup> Anna-Maria Getoš, Hate Crimes and their Practical Use in Risk Assessment and Terrorism Prevention, in Uwe Ewald and Ksenija Turković (eds.), *Large-Scale Victimisation as a Potential Source of Terrorist Activities*, Amsterdam, IOS Press, 2006, p. 127.

<sup>295</sup> Dignan 2005, p. 171.

<sup>296</sup> Dignan 2005, p. 171.

<sup>297</sup> Cited in Dignan 2005, p. 171.

<sup>298</sup> M.S. Umbreit, T. Lewis, H. Burns, A Community Response to a 9/11 Hate Crime: Restorative Justice through Dialogue, (2003c) 6 *Contemporary Justice Review*, pp. 383–391.

### 7.6.3 *Terrorism and Large-Scale Conflicts*

In view of mass terrorist victimisation, a comparison can be drawn to large-scale conflicts in (post-) conflict situations. The basic conflicts that have triggered violence in a certain territory often continue to exist in terms of interest and value conflicts and have to be addressed by identifying the root causes of such conflicts.<sup>299</sup> Terrorism may be linked to conflict regions and in this respect, terrorist violence may be perceived as the continuation of war in the form of private and asymmetric war or violence.<sup>300</sup> It has to be noted that the continuation of violence might be an obstacle for the work of restoration in cases of ongoing terrorism. Llewellyn suggests in circumstances of continuing hostilities or violence that prosecution ‘might pave the way for restorative justice by incapacitating those who continue to cause harm to relationships’.<sup>301</sup> Initiatives in Israel/Palestine or in the Northern Ireland conflict show that reconciliation between communities is possible, even when the conflict is still ongoing or just resolved.<sup>302</sup> Moreover, according to Braithwaite and Lederach, a response to collective conflicts requires the healing of societies affected by such conflicts through a multilayered process.<sup>303</sup> In this respect, the concept of transitional justice is of relevance.<sup>304</sup> Transitional justice mechanisms aim at building effective and just states in a post-conflict era and form a response to mass violence; an example of which is the TRC.<sup>305</sup> Although this concept may share a restorative goal it has to be distinguished from a strict restorative justice approach. While restorative justice processes are generally understood as being focused on direct communication and making amends at the interpersonal level, transitional justice mechanisms are used as a top-down instrument implemented as an alternative to or supplement to criminal justice response.<sup>306</sup> This is why Weitekamp et al. suggest integrating restorative justice principles in transitional justice mechanisms in order to include a bottom-up approach at the macro-level. In this way, the TRC can serve as a model for a restorative justice practice as discussed in Section 7.4.2.3.

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<sup>299</sup> Hans-Jörg Albrecht, *Regaining Trust and Confidence in Post-Conflict Societies*, in Uwe Ewald and Ksenija Turković (eds.), *Large-Scale Victimisation as a Potential Source of Terrorist Activities*, Amsterdam, IOS Press, 2006, p. 37.

<sup>300</sup> Albrecht 2006, p. 41.

<sup>301</sup> Llewellyn 2007, p. 357.

<sup>302</sup> For Israel/Palestine see for instance the initiative of the Parents Circle – Families Forum, see at <http://www.theparentscircle.com/>. For the Northern Ireland conflict see the LIVE-programme described in Section 7.7.

<sup>303</sup> Cited in Rohne et al. 2008b, p. 9.

<sup>304</sup> Rohne et al. 2008b, p. 9.

<sup>305</sup> Rohne et al. 2008b, p. 11.

<sup>306</sup> Rohne et al. 2008b, p. 19.

## 7.6.4 *Restorative Justice and the Vicarious Dimension of Terrorism*

### 7.6.4.1 Restorative Justice and Vicarious Retribution

In Chapter 3 the vicarious dimension of terrorism and findings on vicarious retribution were described. While Chapter 3 explained these findings on the basis of the processes that guide such retributive behaviour in intergroup conflicts, this section will examine the role of restorative justice in such cases. According to Lickel et al. vicarious retribution occurs ‘when a member of a group commits an act of aggression towards the members of an out-group for an assault or provocation that had no personal consequences for him or her but which did harm a fellow in-group member.’<sup>307</sup> The Northern Ireland conflict serves as one example of vicarious retribution, where bombings and shootings by Catholic and Protestant partisans occurred in cycles of retributive killings often aimed at non-partisans who were considered appropriate targets for retaliation because of their religious identity. In these cases, people’s behaviour was motivated in part by a desire for revenge for a perceived harm from an outgroup.<sup>308</sup> A similar situation applies in the Israel/Palestine conflict. Lickel et al. illustrate the motivations for vicarious retribution, namely group pride, empathy for harmed ingroup members and influence of social norms that cause vicarious retribution.<sup>309</sup> Regarding the latter, they observed that in order to avoid exclusion from the respective group, members of such a group may retaliate on behalf of their group even when they do not want to.<sup>310</sup> This aspect is reflected in the causes of suicide terrorism. Silke describes cases where PKK (Kurdistan Workers’ Party) members were coerced into carrying out suicide attacks, or where Palestinian suicide bombers felt obliged to die as a ‘martyr’ through suicide bomb attacks.<sup>311</sup> Further, intergroup conflicts are often characterised by a tendency to depersonalise the outgroup, with the effect that individual group members are seen as interchangeable and therefore equally deserving of retaliation.<sup>312</sup> In this respect, a comparison to hate crime as mentioned above can be made. Against this background, Lickel et al. present conflict reduction mechanisms for vicarious retribution. Thus, it will be explored whether restorative justice principles can be built upon these mechanisms.

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<sup>307</sup>Brian Lickel, Norman Miller, Douglas M. Stenstrom, Thomas F. Denson and Toni Schmader, Vicarious Retribution: The Role of Collective Blame in Intergroup Aggression, in *Personality and Social Psychology Review* (2006) 10 (4), 372–390, p. 372.

<sup>308</sup>Lickel et al. 2006, p. 373.

<sup>309</sup>Lickel et al. 2006, p. 377.

<sup>310</sup>Lickel et al. 2006, p. 378.

<sup>311</sup>Silke 2006, pp. 95; 98–99.

<sup>312</sup>Lickel et al. 2006, p. 378.

Lickel et al. present the contact hypothesis that proposes that bringing conflicting groups into face-to-face interactions can decrease intergroup hostility, but simple contact alone may not be sufficient to reduce discrimination. This aspect must be taken into consideration so that those interactions are not new catalysts for escalating conflicts.<sup>313</sup> Tschudi also highlights this aspect when looking at negotiations and comes to the conclusion that the restorative justice values of dignity and respect play an important role in such encounters.<sup>314</sup> Moreover, restorative justice principles can help to further elaborate such an encounter between conflicting groups. In the context of a restorative justice process, the principle of participation is of utmost importance. It implies involvement of an enlarged circle of parties having a stake in the offence and its resolution, which may mean actual dialogue between these parties, indirect exchanges or other forms of involvement.<sup>315</sup>

Lickel et al. further suggest aiming at the personalisation of the groups by highlighting the idea of shared humanity as reflected in the TRC.<sup>316</sup> In cases of long-lasting ongoing conflicts, a further approach in changing the societal context has to be made, thus including the meso- and macro-approach in such a conflict.<sup>317</sup> A further approach is to stimulate the identification with members on the other side of the conflict.<sup>318</sup> Such an approach has been made in the Israel/Palestine conflict by the Parents Circle – Families Forum, where bereaved families of each group meet together in informal settings.<sup>319</sup> Lickel et al. further describe the importance of emotions like ingroup-directed anger, shame, guilt and sympathy with the outgroup.<sup>320</sup> The emotional aspect is also highlighted in restorative justice when looking, for instance, at Rohne's et al. suggestion to characterise restorative justice objectives according to their degree of relational restoration.<sup>321</sup>

Possible restorative justice responses in the context of intergroup conflict can be seen in those restorative justice practices that involve the community in the restorative justice process like conferencing or circles. However, also so-called grassroots approaches like the Glencree Centre in Ireland or the Parents Circle – Families Forum in Israel/Palestine can provide a forum for restorative justice practices. In this respect, Lickel's et al. findings on the importance of emotions like ingroup directed anger or sympathy with the outgroup are of relevance. They point out that ingroup directed anger is an important impetus for confronting ingroup members who

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<sup>313</sup>Lickel et al. 2006, p. 383.

<sup>314</sup>Tschudi 2008, pp. 56 ff.

<sup>315</sup>Zehr 2002, p. 24.

<sup>316</sup>Lickel et al. 2006, p. 384.

<sup>317</sup>In this respect, Cohen suggests reconstruction in the sense of consolidation of political authority, but also for the social and economic situation in Israel/Palestine; S. Cohen, *Justice in Transition? Prospects for a Palestinian-Israeli Truth Commission*, *Middle East Report*, (1995) 194/195, 2–5, p. 5.

<sup>318</sup>Lickel et al. 2006, p. 385.

<sup>319</sup>See at <http://www.theparentscircle.org/> (28/01/08).

<sup>320</sup>Lickel et al. 2006, p. 386.

<sup>321</sup>See Section 7.3.

are perceived to have unjustly harmed an outgroup.<sup>322</sup> Moreover, they argue that sympathy for the other side may be even more relevant for ameliorating conflict.<sup>323</sup> The question remains how these emotions can be achieved. A first approach is to begin with restorative justice at the micro-level. An example of this is the Jo Berry and Patrick Magee case, in which a former ex-combatant of the IRA changed through the dialogue with his victim.<sup>324</sup> Further, McEvoy and Eriksson suggest that such a change is also possible to achieve at the meso-level. This is described with the example of the Northern Ireland conflict where ex-prisoners and former combatants are leading their communities together with other community activists involved in restorative justice away from violence.<sup>325</sup> Other examples are the LIVE-Programme of the Glencree Centre and the Parents Circle in Israel/Palestine.

#### **7.6.4.2 The Involvement of the Community in the Restorative Justice Process**

As set out in Section 7.3.1 the involvement of the community in restorative justice is important in order to address the collective dimension of a terrorist act, which is not only crucial for the coping process of the individual victim, but also for communally based societies. As the ‘community’ also consists of vicarious victims, possible restorative justice strategies and their involvement in a restorative justice process have been outlined in Section 7.5.3. However, it is open to question in how far vicarious victims may be involved in the restorative justice process. According to Young, in principle, there is no reason why other victims who do not stand in ‘caring’ relationships with the primary victim (or the offender) should not be involved in restorative justice processes. Such a ‘multi-victim perspective’ may even have a greater potential to be restorative and re-integrative, including those cases in which there may not be a primary victim, or cases in which such a victim does not wish to participate.<sup>326</sup> This perspective corresponds with the above-mentioned suggestion by Umbreit and Zehr to include the ‘community of care’ in family group conferencing or circles. The consequences of this ‘multi-victim perspective’ are, however, that the extent of the offender’s responsibility to provide reparation, and the prioritisation of victims’ claims for reparation where different categories of victims are involved, have to be addressed.<sup>327</sup> Young argues that the claims of any primary victim should take precedence over all other claims.<sup>328</sup> Young found in his

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<sup>322</sup>Lickel et al. 2006, p. 385.

<sup>323</sup>Lickel et al. 2006, p. 386.

<sup>324</sup>This case will be presented in Section 7.7.

<sup>325</sup>See Section 7.3.

<sup>326</sup>Cited in Dignan 2005, p. 172.

<sup>327</sup>Dignan 2005, p. 172.

<sup>328</sup>Dignan 2005, p. 184.

evaluation project that the adoption of a ‘multi-victim perspective’ did not diminish the primary victims’ special status or that of their ‘communities of care’. He found that there was, however, a tendency for the more indirect forms of victimisation, i.e. those extending beyond the victim’s and offender’s ‘community of care’ to be overlooked in offences that involved a primary victim.<sup>329</sup> Moreover, as mentioned above, other restorative justice strategies like the cooperation of the media for balanced media coverage need to be developed in order to address the needs of vicarious victims.

### ***7.6.5 Suicide Terrorism***

In many cases today, mass terrorist victimisation is achieved through suicide terrorist acts. Modern suicide terrorism is aimed at causing devastating physical damage, which inflicts profound fear and anxiety on an entire population rather than on just the victims of the actual attack.<sup>330</sup> This vicarious dimension of terrorism is also reflected on in Chapter 3. As the actual perpetrator of the terrorist act is dead, restorative justice responses need to open ways for victims of terrorism, where their needs can still be met. It is important to see whether it is the individual, representatives or the collective as such that can be made responsible for the respective incident.<sup>331</sup> This perspective is particularly important for cases of suicide terrorism and may lead to the identification of multiple responsibilities of parties that have to get involved in the restorative justice process. Restorative justice practices like victim impact panels do not require the participation of the actual offender but work with surrogate encounters (see above). This means that the victim of a suicide terrorist attack may meet with a representative of the same terrorist group. Other possibilities are circles or conferencing, where representatives of the terrorist organisation could meet with the other stakeholders.

### ***7.6.6 Religious Terrorism***

Marshall suggests that religious terrorism is characterised by the absolutism of its categories, its contagiousness, and its use of symbolism that is of more importance than the advancement of its goals.<sup>332</sup> According to Stern, the prominent feature that ‘distinguishes religious terrorists from other terrorists is that they know with absolute certainty that they are doing good.’<sup>333</sup> This reflects the dualistic worldview of reli-

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<sup>329</sup>Cited in Dignan 2005, p. 184.

<sup>330</sup>Šeparović 2006, p. 23.

<sup>331</sup>Rohne et al. 2008b, p. 27.

<sup>332</sup>Marshall 2007, pp. 374, 376.

<sup>333</sup>Cited in Marshall 2007, p. 374.

gious terrorists who see their cause morally justified because they regard other perspectives of the Western world as morally wrong.<sup>334</sup> Further, Marshall suggests that faith-inspired terrorism is contagious insofar as religious fanatics are enthusiastic in joining such a terrorist group and that additional ‘missions’ are not limited to one place or one incident only.<sup>335</sup> In this respect, Stern found that all of the interviewed terrorists were ‘spiritually intoxicated’ by their cause, with the aim to purify the world of corruption by force.<sup>336</sup> In contrast to other terrorist acts, religious violence is almost exclusively symbolic, i.e. the primary goal is to achieve a symbolic statement about the conditions of the world.<sup>337</sup> In this respect, Marshall cites the videotaped executions of three Western hostages in Iraq on command of Abu Musab al-Zarqawi as examples for hidden symbolic messages of Islamic propaganda, which should justify the killings in the eyes of the Islamic world. Accordingly, religious terrorists communicate to the public their goals and justifications of their terrorist acts.<sup>338</sup> The question arises how to respond to this type of terrorism. Marshall suggests an additional response to terrorism besides the response of prosecution and prevention, namely a therapeutic response. Thereby, the pain of victims and terrorists is addressed, which promotes reconciliation between estranged communities.<sup>339</sup> He explains the dilemma of this situation as follows: ‘every bomb that explodes leaves victims battered and bereaved in its wake, and every perpetrator of violence who callously extinguishes human life is left morally and spiritually diminished by his actions, and more able to do it again. The wall of hostility between embittered communities also grows higher as mutual recriminations go unanswered and stereotypes get more pronounced. These human realities need attention if strategies of prevention and containment are to be successful.’<sup>340</sup>

This is where restorative justice could play an important role, although or because religious terrorism is a particular challenge for applying restorative justice values and practices.<sup>341</sup> Marshall points out that restorative justice values like respect, honesty, mutual care, accountability, and trust are not respected by religious terrorists as regards their victims; on the contrary, they explicitly deprive their opponents of an equal dignity.<sup>342</sup> Further, a restorative justice process is characterised by a dialogical process where people come together to share their thoughts and feelings, and where genuine dialogue can only happen when there is a willingness to shift ground and to compromise.<sup>343</sup> According to Marshall, religious violence represents a radical rejection of dialogue and compromise, which is explicitly expressed through the use of suicide terrorism.<sup>344</sup>

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<sup>334</sup> Marshall 2007, p. 374.

<sup>335</sup> Marshall 2007, p. 375.

<sup>336</sup> Cited in Marshall 2007, p. 374.

<sup>337</sup> Marshall 2007, p. 375.

<sup>338</sup> Marshall 2007, p. 376.

<sup>339</sup> See Marshall 2007, p. 377.

<sup>340</sup> Marshall 2007, p. 380.

<sup>341</sup> Marshall 2007, pp. 381 ff.

<sup>342</sup> Marshall 2007, p. 381.

<sup>343</sup> Marshall 2007, p. 382.

<sup>344</sup> Marshall 2007, p. 382.



As regards the application of restorative justice practices in cases of terrorism, this may be hindered by the unclear distinction of roles of the parties in victims and offenders. The main goal of a restorative justice process is to identify the needs of the victim and to hold the offender accountable. However, a distinctive attribute of terrorists is the refusal to see themselves as culpable offenders; it is rather that they perceive themselves as victims.<sup>345</sup> In cases where an offender denies responsibility for the harm inflicted, restorative justice processes can hardly proceed. Moreover, it is difficult for victims to engage in a restorative justice process when they see the terrorists as ‘unnatural monsters, incapable of remorse and deserving only extermination’.<sup>346</sup>

However, although there are cultural or civilisational obstacles especially between fundamentalist Islam and the Western world, a restorative justice response to terrorism may offer the chance to dialogue and rejects the view that annihilation is the sole response to religious terrorism.<sup>347</sup> Subsequent case examples will show that there are examples of terrorists changing and that dialogue is an important means in effectively responding to terrorism and its victims. Further, Marshall points out that the flexibility of a restorative justice practice is of particular importance.<sup>348</sup> The most relevant contribution that restorative justice can offer in this context is the re-humanisation of the parties, on which confidence building and understanding among parties of different cultures and faiths may be promoted and the risk of religiously motivated violence may be minimised.<sup>349</sup>

### ***7.6.7 Critical Comments on the Scope of Restorative Justice Responses***

Restorative justice itself is met with criticism and the same may be true for its application in the context of terrorism. Llewellyn argues that scepticism on restorative justice is due to the assumption that restorative justice is only concerned with the restoration of personal or intimate relationships.<sup>350</sup> Llewellyn points out that restorative justice is mainly focused on ensuring equality in social relationships that result from the networks of relationships human beings exist in, e.g. through the sharing of the same physical or political space. According to Llewellyn, ‘the basic requirement for equality in these relationships is the satisfaction of each party’s rights to equal concern, respect and dignity’.<sup>351</sup> Thus, the aim of restorative justice is to seek to restore relationships to this ideal of relationship, and not to return to

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<sup>345</sup> Juergensmeyer cited in Marshall 2007, p. 382.

<sup>346</sup> See Marshall 2007, p. 382.

<sup>347</sup> Marshall 2007, p. 384.

<sup>348</sup> Marshall 2007, p. 385.

<sup>349</sup> See Marshall 2007, p. 388.

<sup>350</sup> Llewellyn 2007, p. 355.

<sup>351</sup> Llewellyn 2007, p. 355.

the status quo ante.<sup>352</sup> This goal can be transposed to the context of terrorism in responding to terrorism by addressing the pain of victims and terrorists in order to promote reconciliation between these persons or their communities.<sup>353</sup>

Further, according to Llewellyn, restorative justice mechanisms are criticised as unjust because they do not ensure the punishment of the guilty.<sup>354</sup> Thereby, these critics adhere to the fundamental commitment that justice requires punishment. In contrast, the restoration of relationships requires identifying how to achieve this aim rather than seeing punishment as the only option of justice.<sup>355</sup> Although restorative justice literature is not unanimous in the question whether restorative justice processes constitute or involve punishment, it is clear that it is not its primary focus. When looking at terrorism, the question arises whether punishment of terrorists is the only solution in responding to terrorism and its victims. According to Marsella, the deeper roots of terrorism are located within complex historical and cultural contexts that are often centuries old, and therefore the understanding of its origin and sustaining influences cannot be achieved by demonising specific individuals or cultures.<sup>356</sup> Further, the belief that the use of strong military is an adequate response to terrorism, as happened for instance after the 9/11 attacks, has proved not to be successful.<sup>357</sup> This ‘vicious’ circle of violence can also be seen in the Israel-Palestine conflict.<sup>358</sup> Furthermore, punishment of (alleged) terrorists in its extreme form of detention in Guantánamo also proves that such an approach cannot solve the underlying conflicts of terrorism.<sup>359</sup> It has rather the potential to create even more hatred and terrorist acts. Therefore, it is worthwhile to reflect on the possible role restorative justice can play in the context of terrorism. The following section will give some evidence of the potential of restorative justice for victims of terrorism.

## 7.7 Restorative Justice Practices in Context

### 7.7.1 *Restorative Justice Practices for Victims of Terrorism at the Micro-level*

As mentioned in the introduction, research findings on a restorative justice approach for victims of terrorism are rather limited. Therefore, exemplary information about victims of terrorism is presented describing cases of victims who engaged in an

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<sup>352</sup>Llewellyn 2007, p. 359.

<sup>353</sup>See Marshall 2007, p. 377.

<sup>354</sup>Llewellyn 2007, p. 358.

<sup>355</sup>Llewellyn 2007, p. 358.

<sup>356</sup>Marsella 2004, p. 11.

<sup>357</sup>Marsella 2004, pp. 11, 34.

<sup>358</sup>Marsella 2004, pp. 11, 37.

<sup>359</sup>See further Chapter 5, and the Murat Kurnaz case at <http://www.zeit.de/online/2006/42/Kurnaz> (31/01/08).

encounter with the terrorist or a member of the same terrorist group. The examples illustrate the potential of restorative justice in this context, and serve as a basis for developing a restorative justice approach for victims of terrorism at the micro-level.

### 7.7.1.1 Jo Berry and Patrick Magee

Jo Berry's father, Sir Anthony Berry, British Member of Parliament, was killed in the Irish Republican Army (IRA) Brighton Bombing in 1984 by Patrick Magee. In November 2000 Jo Berry wanted to meet Patrick Magee, who was given multiple life sentences for the Brighton Bombing, but released under the Good Friday Agreement in 1999. The meetings between the two were spread over several years and not facilitated, but partly broadcast, and entailed long and searching conversations dissecting their roles as victim and perpetrator. Jo Berry described these meetings as a journey of healing. She needed to understand Patrick Magee's motivations and to see him as a real human being.<sup>360</sup> She experienced the meetings with Patrick Magee as a way to deal with the pain of having lost her father.<sup>361</sup> The dialogue with Patrick Magee enabled Jo Berry to gain some sense of closure in order to move on with her life. The meetings caused a positive transformation for both parties. Through hearing his side of the story in an ongoing dialogue, Jo Berry found a process of healing in meeting the terrorist, and the possibility to recover her humanity.<sup>362</sup> For Patrick Magee, the meetings helped to reclaim some of his humanity and to go the way of peace and reconciliation.<sup>363</sup>

This case shows that, while terrorists may initially lack the values and attitudes essential for involvement in restorative processes, the very act of meeting with their victims has the potential, over time, to change their attitude and to help the victim to gain healing and closure.<sup>364</sup> This case is further particular in the sense that Jo Berry and Patrick Magee are (together) engaged in a peace and reconciliation process and attend conferences in order to tell their story.<sup>365</sup>

### 7.7.1.2 Laura Blumenfeld and Omar al Khatib

Laura Blumenfeld's father, David Blumenfeld, was the target of a random political shooting by a Palestinian terror group during his visit in Israel as a tourist in 1986.

<sup>360</sup> Jo Berry at <http://www.stethelburgas.org/documents/joberry.pdf> (14/06/2007).

<sup>361</sup> Jo Berry at <http://www.stethelburgas.org/documents/joberry.pdf> (14/06/2007).

<sup>362</sup> Jo Berry at <http://www.theforgivenessproject.com/stories/jo-berry-pat-magee> (23/05/07).

<sup>363</sup> See in 'Facing the Enemy', BBC 2, 2001. Jo Berry also attended the final conference of this project and highlighted the humanising effect of having met and talked to Patrick Magee. In her view, it is necessary to break through the circle of violence.

<sup>364</sup> Marshall 2007, p. 386.

<sup>365</sup> See at <http://www.buildingbridgesforpeace.org/> (22/10/2007).

He survived the attack and had no particular desire for retribution. His daughter Laura Blumenfeld, however, was consumed with feelings of revenge. She wanted to master her revenge and developed the plan to meet the offender. In 1997, she began corresponding with the family of the terrorist and the imprisoned terrorist without, however, revealing her true identity. She posed as a journalist and they exchanged letters about the conflict.<sup>366</sup> Through the course of their correspondence, both parties changed. The victim recognised how important it was for her that the terrorist acknowledged his sorrow for injuring her father, and to see his victim as a human being.<sup>367</sup> Omar al Khatib wrote later to David Blumenfeld that through Laura's letters and actions she had been the mirror that made him see David Blumenfeld as a human person to be admired and respected.<sup>368</sup> He acknowledged that 'people are so different when you get to know them from near.' Marshall suggests that this perspective is what restorative justice tries to achieve, namely the recognition that we share a common humanity, on the basis of which dialogue is possible. Laura Blumenfeld came to understand that the revenge she craved was not for retaliation but for transformation. The mutual understanding between the parties through extensive dialogue was also an essential element for Laura Blumenfeld and facilitated her healing.<sup>369</sup> Laura Blumenfeld revealed her identity in a court hearing where the terrorist was appealing for early release and she stood up for his release, however, unsuccessfully.

### **7.7.1.3 Michael Buback and Peter-Jürgen Boock/Patrick von Braunmühl and Birgit Hogefeld**

Michael Buback is the son of the late attorney general Siegfried Buback who was killed by RAF-terrorists in 1977. The actual murderer of his father remained unknown. Boock, who is a former RAF-terrorist, distanced himself from the RAF in 1980 and contacted Buback in 2007. Michael Buback agreed to talk to Boock, because he was not satisfied with the results of the court proceedings and saw the conversation with Boock as a chance to find answers to his open questions, namely about the person who was responsible for his father's death. He wanted to find an inner peace and to gain some sense of closure. The encounter was broadcast because the victim also wanted to use this forum as a pleading to the law enforcement agencies to take Boock's statement as well as another testimony into account which was not included in the judgment. The meeting with Boock gave him hope to come closer to the information about the murderer of his father.<sup>370</sup> However, although Boock

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<sup>366</sup> Marshall 2007, p. 387.

<sup>367</sup> Marshall 2007, p. 387.

<sup>368</sup> Marshall 2007, p. 387.

<sup>369</sup> Marshall 2007, p. 387.

<sup>370</sup> Der Standard: 'RAF: Täter und Opfer im TV' at <http://derstandard.at/?url=/?id=2859384> (16/05/07)

gave Buback the name of the potential murderer of Michael Buback's father, the question is still open due to other contradictory witness statements.<sup>371</sup>

Patrick von Braunmühl's father, Gerold von Braunmühl, was killed by RAF terrorists in 1986. The actual murderer of his father remained unknown. Together with his uncles he contacted the imprisoned RAF terrorist Birgit Hogefeld in 1996. He wanted to know how the RAF had chosen their victims and if the terrorists had given attention to the persons they had chosen as victims.<sup>372</sup> Birgit Hogefeld did not want to answer these questions because she was afraid that such information could reveal the internal structures of the RAF. Prior to this meeting, Patrick von Braunmühl's uncles had written a letter to the RAF that was published in a newspaper in 1986 in order to demonstrate the insanity of the murder and to involve the terrorists in a dialogue. As they did not get any reaction then, Patrick von Braunmühl wanted to know from Birgit Hogefeld whether the RAF members had discussed this letter. She said that they had read it but did not discuss it. Patrick von Braunmühl was disappointed by this meeting as he did not receive answers to his questions and felt that the atmosphere was oppressive, because he realised that Birgit Hogefeld was, at the time of the murder of his father, an active member of the RAF. Moreover, the formal conditions of this meeting were quite difficult as it was time limited and they could not talk freely but only through a barrier between them. He did not want to meet Birgit Hogefeld again, because he did not expect her to give him answers to his questions.<sup>373</sup>

#### 7.7.1.4 The facilitated encounter by Archbishop Desmond Tutu

The broadcast encounter between a former member of the IRA and a British police officer was facilitated by Archbishop Desmond Tutu and two further facilitators in 2006. The former IRA member (Ronnie) had served 21 years in prison for shooting Malcolm in 1974. Nearly 33 years later, the two had agreed to meet in this setting. The encounter resulted in an extraordinary reconciliation where they honoured each other's dignity and thereby strengthened their own.<sup>374</sup> The facilitation team and particularly Archbishop Tutu's dignity, consistency, and uncommon compassion significantly contributed to their reconciliation. Malcolm started to talk about the incident. It was the first time for him since the shooting that he had talked about what had happened and this experience moved him deeply. Ronnie said that he had

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<sup>371</sup> Michael Buback also attended the final conference of this project, where he pointed out that it is important for him to know the truth about his father's murderer and the failure of the prosecution to use the different information available for a reopening of the case so far.

<sup>372</sup> Siemens 2007, p. 266.

<sup>373</sup> Siemens 2007, p. 267.

<sup>374</sup> Donna Hicks, *As Good As Forgiveness – Reconciling with Dignity*, unpublished document, 2007, p. 9.

joined the IRA because a close friend of his had been killed by the British army. He concluded that he had no regrets about his involvement in the IRA. He was determined not to admit regret or remorse for what he had done. In reaction to a question by one of the facilitators, he acknowledged that he had feelings for everyone who suffered in this conflict. However, after Malcolm heard Ronnie's side of the story, he acknowledged and identified with Ronnie's experience, and this was the decisive moment that created an opening between the two men. The encounter had caused a rehumanisation of the parties and had shifted ground for a mutual understanding. The encounter also reflects that both parties honoured each other's dignity, namely by first agreeing to sit together, and second, by listening to one another in order to seek understanding. As they both acknowledged and recognised what the other had been through, and by identifying with each other's experience, they could no longer dehumanise one another. They rather expanded their understanding by experiencing each other's humanity. At the end of the encounter, they could shake hands and continued to meet privately.

## ***7.7.2 Encounters Between Victims of Terrorism and Terrorists in the Light of Restorative Justice Principles***

### **7.7.2.1 Principle of Personalism**

The examples illustrate that crime – terrorist acts included – is foremost a violation of people and their relationships. They further show the importance of perceiving terrorism as harm done to its victims, so that their needs can be addressed. This also explains the relevance of a restorative justice approach at the micro-level in cases of terrorism. The examples suggest that a common need of victims of terrorism is information about the offender and clarification of the case, including the historical clarification of terrorist groups, and to gain some sense of closure.<sup>375</sup> The need for information about the terrorist and the terrorist act determined both Patrick von Braunmühl and Michael Buback to get into contact with a former member of the RAF. In the Laura Blumenfeld case, the victim wanted to master her revenge insofar as she wanted the offender to realise that he was wrong to injure her father.<sup>376</sup> Jo Berry wanted to understand Patrick Magee's motivations in order to cope with the aftermath of her father's murder.

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<sup>375</sup> WDR: Siemens-Interview: Den RAF-Opfern ein Gesicht geben at [http://www.wdr.de/themen/politik/deutschland/deutscher\\_herbst/personen/interview\\_siemens.jhtml](http://www.wdr.de/themen/politik/deutschland/deutscher_herbst/personen/interview_siemens.jhtml) (31/05/07); Hamburger Abendblatt: 'Klar muss die Mörder nennen' at <http://www.abendblatt.de/daten/2007/04/28/732383.html> (16/05/07); see also the Jo Berry case at <http://www.stethelburgas.org/documents/joberry.pdf> (14/06/2007).

<sup>376</sup> Marshall 2007, p. 387.

### 7.7.2.2 Principle of Reintegration: Offender Accountability and Responsibility

As set out above, the principle of reintegration demands that a society aims to hold perpetrators accountable for their wrongdoings in a supportive way. Accountability from a restorative justice perspective means the obligation to explain behaviour or decisions. Such an approach was taken by Peter-Jürgen Boock when he contacted Michael Buback in order to give him information of the possible murderer of his father. Moreover, offenders must be encouraged to understand that harm and to comprehend the consequences of their behaviour. This explains why the encounter between Gerold von Braunmühl and Birgit Hogefeld was not successful from a restorative justice perspective. In their case, genuine dialogue did not happen because Birgit Hogefeld was not willing to shift ground and to compromise, since she rejected to fully explain her motivations for the sake of protecting the former RAF. On the other side, Omar al Khatib took responsibility for his acts, and although this was acknowledged by the victim, the court did not do so.

Marshall argues that if an offender denies responsibility for the harm inflicted, or refuses to see it as morally wrong, restorative justice practices cannot proceed.<sup>377</sup> However, the Jo Berry and Patrick Magee case shows that a restorative justice approach is possible if the terrorist takes responsibility but does not necessarily see his terrorist act as morally wrong.<sup>378</sup> Furthermore, as regards a facilitated encounter between victims and offenders, Marshall points out that many terrorists are convinced that they are victims as well.<sup>379</sup> Hence, preparation meetings should also concentrate on the terrorist's prior experience and background so that he is prepared for taking accountability and responsibility for the harm he has caused the victim. This is necessary as it is only when the offender's pain is acknowledged that his or her last refuge from responsibility is removed.<sup>380</sup> This is reflected in the facilitated encounter between Malcolm and Ronnie, when Ronnie started to open for a full dialogue when the victim acknowledged his experiences. However, also victims of terrorism must be open to dialogue and compromise with the terrorist. For instance, some of the victims of the 'Oklahoma bomber' welcomed the death of the terrorist through the execution of the death penalty.<sup>381</sup> Such a retributive approach does, however, eliminate the possibility of regaining lost humanity, as seen for instance in the Jo Berry and Patrick Magee case.

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<sup>377</sup> Marshall 2007, p. 382.

<sup>378</sup> Patrick Magee explained that he will always carry the burden that he harmed other human beings. However, he still stands by his actions. See at [http:// www.theforgivenessproject.com/stories/jo-berry-pat-magee](http://www.theforgivenessproject.com/stories/jo-berry-pat-magee) (23/05/07).

<sup>379</sup> Marshall 2007, p. 382.

<sup>380</sup> Marshall 2007, p. 386.

<sup>381</sup> See in 'Facing the Enemy', where Jo Berry watches victims' statements on the executed death penalty.



### 7.7.2.3 Principle of Reparation

From offender accountability follows the responsibility ‘to make things as right as possible’, i.e. both concretely and symbolically. As explained above, this implies besides reparation also restoration or recovery, especially in cases of murder, where the reparation of harm to the victim is not possible. In both the Jo Berry and Laura Blumenfeld case, the dialogue with the offender had caused a positive transformation in both the victims and the offenders. Jo Berry had experienced a form of healing through the meetings with Patrick Magee, and could recover her humanity through the ongoing dialogue.<sup>382</sup> The mutual understanding between the parties through extensive dialogue was also an essential element for Laura Blumenfeld and facilitated her healing.<sup>383</sup> The facilitated encounter by Archbishop Desmond Tutu between a former IRA terrorist and his victim resulted in mutual understanding and empathy on both sides.<sup>384</sup> However, restoration was not possible for Patrick von Braunmühl because of the terrorist’s unwillingness ‘to make things as right as possible’.<sup>385</sup> Although Boock gave Michael Buback hope to come closer to the information about the murderer of his father, Buback is still not able to fully gain some sense of closure because there are still open questions in his case. However, for many taking the initiative and reaching out to the other party is in itself extremely meaningful and beneficial in a psychological way.<sup>386</sup>

### 7.7.2.4 Principle of Participation

As set out above, the principle of participation refers to the dimension of empowerment and stresses that those affected by the crime need to regain their sense of autonomy. In some cases, this may mean actual dialogue between these parties, either through direct, indirect or surrogate encounters. According to Marshall, a restorative justice response to terrorism rests on a fundamental faith in common humanity.<sup>387</sup> It makes the assumption that people are capable of living together peacefully, that there is no difference that cannot be resolved with dialogue. In fact, the above-mentioned examples of restorative dialogue between victims of terrorism and terrorists show that the encounter has the potential, over time, to help the victim’s recovery process and to change attitudes of the terrorist. It further shows that restorative justice can contribute to the rehumanisation of the parties.<sup>388</sup>

<sup>382</sup>Jo Berry at [http:// www.theforgivenessproject.com/stories/jo-berry-pat-magee](http://www.theforgivenessproject.com/stories/jo-berry-pat-magee) (23/05/07).

<sup>383</sup>Marshall 2007, p. 387.

<sup>384</sup>Hicks 2007, p. 9.

<sup>385</sup>Siemens 2007, p. 267.

<sup>386</sup>Aertsen 2004, p. 82.

<sup>387</sup>Marshall 2007, p. 384. See also the letter of a victim whose brother was killed by RAF-terrorists at <http://www.frugalfun.com/letter.html> (07/08/07).

<sup>388</sup>Marshall 2007, p. 386.

Face-to-face encounters are often the ideal way to achieve the goals of restorative justice. However, given the extraordinary security concerns surrounding detained terrorists, such meetings may be difficult or impossible to arrange. The encounter between Patrick von Braunmühl and Birgit Hogefeld gives an example for the difficulty of such a face-to-face meeting. Further, indirect encounters may have the same effect as direct encounters in order to achieve a common ground for mutual understanding as seen in the Laura Blumenfeld case. The same is true for surrogate encounters, as seen in the Michael Buback case, where the need for information was (partly) fulfilled by one of the (former) members of the RAF. Thus, indirect victim–offender mediation or victim impact panels may offer an opportunity for victims who do not want to get in direct dialogue with the terrorists or where the terrorist is unwilling or unable to meet the victim.

In sum, the examples illustrate that restorative justice processes can provide a platform for mutual understanding that may change the attitudes of terrorists and help the victims in their journey of healing, respectively in getting the information victims need in order to get some sense of closure. Moreover, the restorative justice programmes in other cases of serious violent crime (see Section 7.6) show that restorative justice processes can have a positive effect on victims. These examples reveal that restorative justice is a possibility for victims of crime, including terrorism. Moreover, it is not so much a specific practice or process that makes a particular response to terrorism ‘restorative’, but rather the flexibility of practice, as described by Marshall (see above). Therefore, particular emphasis should be placed upon restorative justice principles and values in a restorative justice setting. In this respect, process values have to be taken into consideration in order to create a non-adversarial, non-threatening environment in which the interests and needs of the parties involved in the process can be addressed.<sup>389</sup> In the UNODC *Handbook on Restorative Justice Programmes* it is highlighted that the participation by the victim and the offender must be voluntary, with an offender who accepts responsibility for his/her criminal behaviour.<sup>390</sup> For instance, the example of the facilitated encounter by Archbishop Tutu revealed that the process for the offender to accept responsibility is not always easily achieved. Therefore, it is important to identify the underlying causes of the crime in order to move on with the restorative process and to achieve a restorative outcome. As happened in this example and as it is described in the UNODC Handbook, ‘at its best, the process may lead the offender not only to assume responsibility but also to experience a cognitive and emotional transformation and improve his or her relationship with the community and, depending upon the particular circumstance, with the victim and the victim’s family’.<sup>391</sup> The UNODC Handbook further highlights the flexibility of the process by acknowledging that ‘the manner in which this responsibility will lead to action, in particular apologies and restoration, is left to be determined by the process itself and not through the automatic application of

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<sup>389</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programmes*, New York, United Nations, 2006, p. 8.

<sup>390</sup> UNODC, p. 8.

<sup>391</sup> UNODC, p. 11.

some general legal rules'.<sup>392</sup> These examples show that the basic principles for a restorative justice process can be applied for cases of terrorism as well.

However, the application of restorative justice in terrorist cases is still not yet fully developed. On the basis of the examples of victims of terrorism, the potential of restorative justice for victims of terrorism becomes apparent yet. As said before, possible criteria for the application of restorative justice for victims of terrorism at the micro-level can be drawn from experiences of restorative justice in cases of serious violent crime. Basically, any restorative intervention needs to be skilfully managed and thoroughly prepared by operating restorative values and principles, and both victims and perpetrators must be at an appropriate stage of their recovery process.<sup>393</sup> It has to be taken into account that restorative justice practices at the micro-level cannot address all the effects of terrorism. In this respect, Marshall suggests ongoing work at reconciliation and structural transformation, so that lasting peace may be achieved.<sup>394</sup> This is in line with the UNODC Handbook where it is stressed that 'the restorative process is an open one that encourages frank discussion of the background of the offence in a spirit of explanation rather than making excuses. If, for example, this reveals that the offenders come from areas with particular deficits, action can be taken to remedy the problem.'<sup>395</sup> For the case of terrorism this would include a restorative justice approach at the meso- and macro-level as well.

### ***7.7.3 Restorative Justice Practices at the Meso-level: Involvement of the Community, Including Vicarious Victims***

The Victim–Combatant Dialogue of the LIVE-Programme<sup>396</sup> serves as an example for a restorative justice model at the meso-level. The programme was established by the Glenree Centre in the Republic of Ireland and focused primarily on relationship-building between victims of the three communities involved in the Northern Ireland conflict (60 victims from Northern Ireland, and 20 victims each from both Britain and the Republic of Ireland).<sup>397</sup> The programme was set up in order to overcome the negative perception of each other through the common feeling

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<sup>392</sup> UNODC, p. 11.

<sup>393</sup> Marshall 2007, p. 385.

<sup>394</sup> See Marshall 2007, p. 388.

<sup>395</sup> UNODC, p. 11.

<sup>396</sup> The 'Let's Involve the Victims' Experience' (LIVE) programme was devised in the post-Agreement context of 1998, see Ian White, Victim–Combatant Dialogue in Northern Ireland, in David Bloomfield, Teresa Barnes, Luc Huyse (eds.), *Reconciliation After Violent Conflict. A Handbook*, Stockholm, International IDEA, 2003, p. 90.

<sup>397</sup> White, 2003, p. 91. The term 'victim' was defined in such a way as to include all who have suffered as a result of the conflict. The great majority were victims of Loyalist or Republican paramilitaries, but also victims of the Royal Ulster Constabulary or the British Army, who suffered from injuries or bereavement.

of suffering and/or bereavement. Secondary objective was to facilitate dialogue between former combatants in the conflict and the victims. The experimental programme was held in three steps: the first step was a discussion between victims from one region only, the second step involved dialogue between victims from the different regions, and the last step included a number of facilitated dialogue sessions between former paramilitary combatants and victims. In the framework of the victim-combatant dialogue, a number of dialogue sessions took place. One such dialogue involved a former IRA member and 28 victims, most of them had suffered as a result of IRA violence.<sup>398</sup> This dialogue session offered the victims the opportunity to get answers to open questions and an understanding of the causes of the conflict. Though the re-telling of the stories brought much grief with it, the former combatant offered a sincere apology for the casualties of his actions. However, he could not apologise for the 'war' itself which was, he believed, a just 'war'.<sup>399</sup> The outcome offered both parties a clear sense of growth of understanding of each other's sacrifice. This (surrogate) encounter between the victims and the perpetrator did provide the opportunity for the perpetrator to take responsibility and give explanations that enabled the parties to live together again. The programme suggests that intergroup dialogue has more potential than the dialogue between the victim and the offender only, because it is less threatening for all parties involved and allows a diversity of shared experience.<sup>400</sup> However, two of the victims left the session at different stages as they did not feel comfortable with the dialogue. In the reflection session, the group processed their experience overwhelmingly positive. Some of the participants continued this interaction further on a private basis.<sup>401</sup>

This example shows that victims of different communities can be brought together in order to provide a forum for dialogue between different groups of people. A similar approach is taken in the Parents Circle – Families Forum in Israel/Palestine, where bereaved families with a different cultural background engage in dialogue with each other (see above). There are further approaches at the meso-level in Israel/Palestine to engage with 'the other side' in order to achieve mutual understanding and a non-violent solution to the conflict; e.g. the Arik Institute, the Palestinian-Israeli Peace NGO Forum, and the Sulha Peace Project.<sup>402</sup>

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<sup>398</sup> White 2003, p. 93.

<sup>399</sup> White 2003, p. 93.

<sup>400</sup> White 2003, p. 95.

<sup>401</sup> White 2003, p. 94.

<sup>402</sup> See at <http://www.arikpeace.org/eng/>, <http://www.peacengo.org/mission.asp> and <http://www.sulha.com/> (07/07/2008). See also the documentary 'Encounter Point', Just Vision, 2006, which portrays the work of the Parents Circle-Families Forum.

### ***7.7.4 Restorative Justice Practices at the Macro-level***

A restorative justice approach at the macro- (national or political) level would try to seek implementing restorative justice principles between two conflicting parties in order to address the broader societal/political/cultural context. The importance of involving leaders of two conflicting parties in the restorative justice process has been highlighted by Tschudi and Lickel et al. in the context of intergroup conflicts in order to get vicarious retribution under control.<sup>403</sup> A restorative justice approach would further require the availability of a neutral third party as facilitator. At this level, restorative justice values would also be needed to be taken into account (see Tschudi's arguments on dialogue above). As discussed above, the TRC is one of the possible examples for a restorative justice oriented practice that serves mainly as an example for approaching reconciliation at the national level. However, Tschudi points out that while the peace process was successful at the national level, the same does not apply to reconciliation between individuals.<sup>404</sup> This is why Rohne argues that restoration for individuals needs responses at the micro- and meso-level.<sup>405</sup> Therefore, a restorative justice practice oriented at the TRC model with focus on restorative justice principles as explained by Weitekamp et al. (see above) could be considered as possible restorative justice response for terrorism at the macro-level. Moreover, the Bougainville model described by Tschudi could serve as an additional example in how far a restorative justice model designed for the macro-level could include victims' needs. Such an approach would integrate restorative justice responses at both levels. Tschudi highlights that peace talks in ongoing conflicts must involve the major fighting parties who have to accept to engage in such a process.<sup>406</sup> Thereby, the local culture has to be accepted by the facilitators. This aspect would also have to be taken into consideration for religiously motivated terrorism, respectively terrorism between two different cultures. Moreover, Tschudi favours a bottom-up approach rather than the top-down approach of the TRC in order to better promote restorative justice values.<sup>407</sup> In the Bougainville case, reconciliation meetings at both community and individual level have taken place, allowing for the victims' need for their recovery time.<sup>408</sup> Thus, an integrated restorative justice approach, including the micro- and macro-level would best serve victims' needs.

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<sup>403</sup> Lickel et al. 2006, p. 382; Tschudi 2008, p. 59.

<sup>404</sup> Tschudi 2008, p. 63.

<sup>405</sup> Rohne 2008a, p. 301.

<sup>406</sup> Tschudi 2008, p. 59.

<sup>407</sup> Tschudi 2008, p. 60.

<sup>408</sup> Tschudi 2008, p. 62.

## 7.8 Towards a Conceptual Framework for Restorative Justice Processes for Victims of Terrorism at the Micro-, Meso- and Macro-level

### 7.8.1 *A Conceptual Framework for Involving Victims of Terrorism and the Community in Restorative Justice Processes*

Due to the vicarious dimension of terrorism, the involvement of the community is a central element for a restorative justice process. However, the findings suggest that starting point for any interaction in this context should be the restorative justice response at the micro-level, irrespective of the fact that the conflict/terrorist activity is still ongoing or has already ended. Rohne argues that such an approach is most consistent with the individual's needs, and prepares the ground among the population for sustainable peace and stability.<sup>409</sup> This can be transferred to conflict regions that are burdened with terrorist acts. This is why some recommendations are made for adapting existing concepts of restorative justice for victims of terrorism on the basis of the CoE legal instruments in the following section.

When looking again at Rohne's three-level model after having discussed the possibilities of a restorative justice approach for victims of terrorism, the following remarks can be made: for the *procedural level*, restorative justice procedures like victim–offender mediation, conferencing, circles and victim impact panels can serve as a proficient basis to deal with terrorist acts at the micro- and meso-level. Victim impact panels or circles and conferencing are particularly of use in cases of suicide terrorism. Victim impact panels, because they offer a surrogate encounter between the victim and a member of the terrorist group; circles and conferencing, because they can involve multiple responsibilities of parties in the restorative justice process. Further, Umbreit's et al. suggestion to develop an increasing number of hybrids that integrate the strengths and limitations of each individual restorative justice intervention is of relevance.<sup>410</sup> In this way, different procedures could be applied for the same case but at different levels of intervention, or elements of restorative justice mechanisms could be combined with regard to the same case. Such an approach could include victim–offender mediation between the primary or secondary victim (those with a close bond to the primary victim) and the terrorist, and at a later stage this approach could include other secondary as well as tertiary (vicarious) victims. Another approach derives from the LIVE-programme that suggests first involving victims of different (cultural/religious/political) backgrounds in a circle or conferencing, before the encounter with the terrorist/member

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<sup>409</sup> Rohne 2008a, pp. 301, 309.

<sup>410</sup> Umbreit et al. 2005, p. 300.

of a terrorist group takes place. Both approaches could be of relevance in particular for the vicarious dimension of terrorism, whereby a ‘multi-victim perspective’ could be integrated. When looking at the macro-level, practices need to be developed that entail restorative justice principles. Examples of such an approach could be based upon the TRC model if restorative justice principles as set out by Weitekamp et al. are integrated. In particular, the Bougainville model as described by Tschudi offers a possibility to integrate a bottom-up approach. Moreover, cases of mass terrorist victimisation can be dealt with more easily as a broader forum for victims can be reached through such practice.

Second, the *outcome* of a restorative process under para. 3 of the UN Basic Principles ‘means an agreement reached as a result of a restorative process’ and can include ‘responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.’ The findings suggest that victims are interested in material reparation but even more in telling their story and gaining some sense of closure by receiving information about what happened. Therefore, the restorative justice process itself may offer victims restoration.

These findings correspond with the description of Rohne’s et al. *purpose level* of the particular restorative justice response. Accordingly, restorative purposes are characterised by their degree of relational restoration, namely redress, working through the past, co-existence and reconciliation. The lowest degree of relational restoration is redress as the result of a consensual agreement between the parties.<sup>411</sup> For instance, offering material reparation or symbolic reparation measures for those victims who cannot or do not want to meet with the offender could also fall within this level. A higher degree is constituted by a process that is based on the parties’ mutual listening to each other’s perceptions. This degree of relational restoration could be seen in all the examples of victims of terrorism, and reflects a first step in honouring each other’s dignity. The third level of restoration is that of ‘co-existence’, when parties are moving towards each other by sharing perceptions and emotions, which can evolve in empathy for the other. Such mutual empathy allows the healing or recovery process for the victim in a later step. This level has been reached in the cases of Jo Berry, Laura Blumenfeld and the facilitated encounter by Archbishop Tutu; it has not been reached in the Von Braunmühl case and only partly in the Buback case. Finally, the level of ‘reconciliation’ can be reached, when there is ‘willingness for future relationships of the parties on an equal level despite the experiences of the past.’<sup>412</sup> Such a level has been reached by Jo Berry and Patrick Magee who are now both involved in peace and reconciliation that enables both to further ongoing dialogue. However, the findings by Rohne and Siemens suggest integrating the punitive demand of victims in a restorative justice approach.<sup>413</sup>

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<sup>411</sup> Rohne et al. 2008b, p. 17.

<sup>412</sup> Rohne et al. 2008b, p. 18.

<sup>413</sup> Rohne 2008a p. 306; Siemens 2007, pp. 66, 101, 102, 120, 182, 243, 245.



This means, for instance, for the Israeli/Palestine victims that the purpose of prosecuting the offender shall enable people to live together. This is why Rohne argues that the punitive demand indicates that restorative justice needs to find a way to cooperate or coexist with a criminal justice response.<sup>414</sup> This does not mean, however, that starting point should always be the formal criminal justice system as Braithwaite's pyramid model reveals.

### ***7.8.2 Towards a Victim–Offender Mediation Model for Victims of Terrorism***

Due to the importance for victims of terrorism of including the micro-level in a restorative justice response, the existing international legal instruments of the Council of Europe will be examined. Two recommendations of the Council of Europe, namely *Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims* and *Recommendation R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters*<sup>415</sup> serve as the basis for the following discussion.

#### **7.8.2.1 Indirect Mediation**

The Committee of Ministers of the Council of Europe has adopted Recommendation Rec(2006)8 on assistance to crime victims, which also applies to victims of terrorism. It refers in para. 13 to the application of mediation between the victim and the offender according to the Committee of Ministers' Recommendation R (99) 19. In the Explanatory Memorandum to Recommendation R (99) 19, mediation shall include, among others, direct and indirect mediation, as well as family and community group conferencing.<sup>416</sup> According to victims' of terrorism choice to accept or decline face-to-face settings, victims who would prefer not to meet the offender should be given a clear and free choice to mediate indirectly through the mediator.<sup>417</sup>

#### **7.8.2.2 The Decision to Initiate Mediation**

Under para. 9 of Recommendation R (99) 19, the 'decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.' This position is also reflected

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<sup>414</sup>Rohne 2008a, p. 308.

<sup>415</sup>Hereinafter 'Recommendation No. R (99) 19'.

<sup>416</sup>See in Aertsen et al. 2004, p.99.

<sup>417</sup>European Forum for Victim Services, *Statement on the Position of the Victim Within the Process of Mediation*, p.8. at <http://admin.net6.fr/datas/inavem/fichier/StatementonVOM200311.pdf> (19/07/07).

in other international legal instruments.<sup>418</sup> However, the principle of personalism would rather require including the victim's standpoint regarding the decision to initiate mediation. The case examples of victims of terrorism showed that when the initiative was taken for a dialogue with the terrorist, it was mostly done by the victim. Starting point should therefore be the victim perspective when considering the possibility of applying restorative justice practices in cases of terrorism. This corresponds also with mediators' experiences with victims who refer to the needs of the victim as a starting point for mediation, whatever the legal qualification or judicial stage of the case might be.<sup>419</sup> Therefore, the decision to initiate mediation should involve the victim's point of view from the outset. Furthermore, it has to be considered that victims of serious violent crime, including terrorism, need a recovery period that can take many years (see above) with the consequence that the need to engage with the offender may be only expressed when the terrorist is already sentenced or released from prison. In these cases, deciding if mediation takes place or not, is not solely a matter for the criminal justice authorities anymore, except that security reasons require a request from the victim or the offender.

### 7.8.2.3 Surrogate Encounters

Closely connected to the question who should decide to initiate mediation is the context of surrogate encounters. In these cases, the 'link' to refer a case to mediation, namely the apprehended or convicted offender that builds the criminal case as set out in para. 9 of Recommendation R (99) 19, is missing. Therefore, a victim-centred approach is of utmost importance. Encounters with surrogates can be a partial response to the large volume of crime victims whose offenders are never caught.<sup>420</sup> With regard to victims of terrorism, surrogate encounters are of particular relevance where the actual perpetrator cannot be apprehended or convicted, for instance in cases of suicide terrorist acts. Such victims are equally in need of gaining a greater understanding of why people commit such crimes. Such cases should be referred to restorative justice projects so that the victims could have the choice to initiate a surrogate encounter.

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<sup>418</sup> See Article 10 of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; Article 13 of the Committee of Ministers' Recommendation Rec(2006) 8 on assistance to crime victims. Article 12 of the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters leaves the conditions for the referral of cases to restorative justice programmes open to Member State's consideration.

<sup>419</sup> Aertsen 2004, p. 75. This would involve better information for victims on restorative justice methods.

<sup>420</sup> Umbreit et al. 2005, p. 301.

### 7.8.2.4 Preparation for Direct Mediation

The research findings have shown that victims need time before they are able to participate in a restorative process. With regard to para. 16 of Recommendation R (99) 19, it should be considered that once a victim has been informed about the possibility to engage in an encounter with the offender, adequate time must be allowed for the preparation before the meeting. There should be provision for full information to be given about the procedure which is planned, for all questions to be answered and for all concerns to be addressed. More than one meeting should be offered to allow the victims time to reflect on the information which they have been given.<sup>421</sup> Both preparation prior to the encounter and the mediation have to be facilitated by practitioners experienced in dealing with victims of serious violence, including advanced training experience.<sup>422</sup>

### 7.8.2.5 The Appropriate Stage for Mediation

Basically, restorative justice practices are an option that can be used at any stage of the criminal justice system.<sup>423</sup> In Belgium, for instance, according to the Belgian law of 22 June 2005 on mediation, a mediation process can be started on the request of persons who have a direct interest in a criminal procedure, which is possible at any stage of the criminal justice process.<sup>424</sup> The Belgian experience shows that mediation in cases of serious crime can be organised parallel to prosecution, the final result being taken into consideration by the sentencing judge.<sup>425</sup> In the Collaborative Justice Project in Ottawa, Canada, a collaborative resolution proposal resulting from a meeting or interchange between victim and offender can be presented before the court at the time of the sentencing.<sup>426</sup>

However, there are concerns expressed by some victims' advocates and academics that the pre-sentence application of restorative justice, with its emphasis on repairing

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<sup>421</sup> European Forum for Victim Services, p. 8.

<sup>422</sup> Umbreit et al. 2003b, p. 126; Aertsen 2004, p. 83.

<sup>423</sup> Para. 6 of the UN Basic Principles on the use of restorative justice programmes in criminal matters; para. 3 of the Appendix to the Council of Europe Recommendation No. R (99) 19 and para. II.4 of its explanatory memorandum. However, the application of restorative justice depends on the respective national law.

<sup>424</sup> See the text of the law: <http://www.suggnome.be/pdf/wetbemiddeling220605.pdf>; D. Eyckmans, New Belgian law on mediation (2005) 6 *Newsletter of the European Forum for Restorative Justice*, p. 9. This reflects the general principle of the Council of Europe Recommendation No. R (99) 19 that mediation can be used at different stages of the criminal process.

<sup>425</sup> Aertsen 2004, p. 76.

<sup>426</sup> Tanya A. Ruge and Robert B. Cormier, *Restorative Justice in Cases of Serious Crime: An Evaluation*, Paper presented at the 6th International Conference on Restorative Justice 'Best Practices in Restorative Justice', Vancouver, Canada, 2003, p. 4.

harm, may fail to adequately punish offenders who have committed serious crimes.<sup>427</sup> Others see a danger of burdening the victim with being actively involved in the pre-sentence phase. They argue that it would be too heavy a burden to give the responsibility of decision making to the victim, which they consider a responsibility of the State.<sup>428</sup> This raises the question to which extent restorative justice practices are able to interact with and influence the basic principles of the current retributive criminal justice system. As an alternative measure, mediation can also be instigated at the sentencing level or after the sentence has been pronounced.<sup>429</sup> An example of a mediation programme within prison context is the Belgian victim–offender mediation programme, where either victim or offender must take the initiative to contact the mediator.<sup>430</sup> Research by Umbreit et al. revealed that victims of serious crime need several years of recovery before they express the need to meet the offender. The same might be true for victims of terrorism, when looking at the findings of the above-mentioned examples. In this respect, mediation in the prison context could be an additional option. This option could include the possibility to influence the conditional release of an offender if the victim supports this approach.<sup>431</sup> Consequently, restorative justice practices could be used at any stage of the criminal justice system,<sup>432</sup> by taking the recovery process of the victim (and the terrorist) into account.

#### 7.8.2.6 Outcome of Mediation

According to para. 31 of Recommendation R (99) 19 on mediation in penal matters, ‘agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations.’ However, research findings in the context of serious violence suggest that the narrative element of encounter plays a significant role for the ‘healing’ process of the victim, and that the emphasis is rather on communication than on a written agreement between the parties, at least in case of direct mediation.<sup>433</sup> Therefore, reaching an agreement cannot be seen as

<sup>427</sup> Ruge and Cormier 2003, p. 2.

<sup>428</sup> See in M.S. Groenhuijsen, *Het slachtoffer in het brandpunt van dynamiek en stabiliteit van het systeem van strafprocesrecht*, p. 185 at <http://rechten.eldoc.ub.rug.nl/FILES/departments/liberAmicorumKnigge/hfdst10/hfdst10-groenhuijsen.pdf>

<sup>429</sup> Aertsen 2004, p. 76.

<sup>430</sup> Aertsen 2004, p. 82. In this programme, cases of homicide and sexual assault are involved. See also Buntinx 2007, p. 2.

<sup>431</sup> Tinneke Van Camp and Anne Lemonne, *Critical Reflection on the Development of Restorative Justice and Victim Policy in Belgium*, 2005, p. 12 at [http://www.icclr.law.ubc.ca/Publications/Reports/11\\_un/Tinneke%20final%20paper.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/11_un/Tinneke%20final%20paper.pdf) (28/01/08). However, such an option could place too much pressure on the victim and might also stimulate opportunistic motivations for terrorists to engage in a victim–offender mediation programme. Thereby, it could cause secondary victimisation on the side of the victim.

<sup>432</sup> Aertsen 2004, p. 84.

<sup>433</sup> Umbreit et al. 2003b, p. 123; Aertsen 2004, p. 81.

the decisive criterion in calling the mediation process a success. Umbreit suggests therefore the model of victim sensitive offender dialogue, where the focus is on the victim's 'healing'. This element was perceived as important for the victims of terrorism in the above-mentioned case examples.

## 7.9 Towards a Global Restorative Justice Strategy in the Terrorism Context

When looking at a restorative justice approach that is detached from a restorative justice process, it has to be asked how conditions can be created in order to develop strategies for a global restorative justice approach in responding to terrorism.

Such an approach would include, for instance, the cooperation of the media in respecting the dignity of victims in their media coverage.<sup>434</sup> By integrating restorative justice principles and values in the media coverage vicarious victims of terrorism could be reached as well (see Section 7.5.3). This would facilitate a more balanced approach in media reporting. Such cooperation could be achieved through building partnerships with the media at the policy level.<sup>435</sup> The development of a common policy on restorative justice principles and values in the context of terrorism at the macro-level would further include the willingness of states and governments to use such an approach. As mentioned before, financial support for restorative justice programmes at the meso-level is a first step in this direction. Moreover, states and governments could also implement a global restorative justice strategy in dealing with terrorists or parties in large-scale conflict regions by focusing on restorative justice principles and values. Such an approach could help to prevent further terrorist attacks and terrorist victimisation at its best. However, as regards such a global restorative justice strategy, further research is needed in order to develop such standards.

## 7.10 Concluding Observations

The research findings suggest that restorative justice has the potential to play an important role in dealing with victims of terrorism. Traditional restorative justice practices as well as transitional justice mechanisms integrated with restorative justice principles offer the possibility for a restorative justice response to terrorism

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<sup>434</sup>For instance, in the final conference of this project, John Tulloch explained his case to the conference participants. He is a victim of the London Bombing in 2005 and his injured face was shown in magazines without his knowledge and permission. The media used this picture for asking for harsher strategies on terrorism, which was not in line with John Tulloch's opinion.

<sup>435</sup>In this respect, seminar participants of the project mentioned the DART CENTER for Journalism and Trauma, see at <http://www.dartcenter.org/> (28/01/08).

at the micro-, meso-, and macro-level. In this way, the vicarious dimension of terrorism could be addressed by involving not only the community of care but also vicarious victims in the restorative justice process. However, the application of restorative justice programmes in terrorist cases is still only rarely applied and developed. The main challenge is to consider terrorism as a possible case for a restorative justice approach. Restorative justice principles and values are indicators for the reaction to all types of crime that could also be applied for terrorism. In this respect, it could be envisaged to adopt and elaborate appropriate restorative justice practices and to implement them in cases of terrorism in relation to the criminal justice system. Moreover, the findings suggest setting up a restorative justice strategy for victims of terrorism at the micro-, meso- and macro-level that addresses their needs and concerns at all levels. Further, a global vision on responding to terrorism guided by restorative justice principles and values would have the potential to result in concrete programmes for a more balanced approach in ‘the fight against terrorism’. Such a vision or strategy can already be observed in large-scale conflict situations and this approach could be transposed in cases of terrorism with a clear focus on the victims of terrorism.

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Facing the Truth, BBC 2, 2006

# Annex I

## List of Experts November 2007 Seminar

### BM1.1 Academics

Name	Contact Details
Prof. Ivo Aertsen	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Ivo.Aertsen@law.kuleuven.be
Dr. Francisco Bariffi	Área de Derecho Internacional Público Universidad Carlos III de Madrid c/Madrid 126, 28903 Getafe (Madrid) Despacho 4.35, Spain Email: fbariffi@der-pu.uc3m.es
Dr. Véronique Bruggeman	Faculty of Law, University of Maastricht Bouillonstraat 1-3 6200 MD Maastricht, The Netherlands Email: v.bruggeman@pr.unimaas.nl
Prof. Jan van Dijk	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands E-mail: Jan.vanDijk@uvt.nl
Dr. Jean-Marc Flükiger	Department of Philosophy/Ethics and Political Philosophy C/o University of Fribourg Avenue de l'Europe 20 1700 Fribourg, Switzerland Email: jean-marc.fluekiger@unifr.ch
Dr. Joanna Goodey	European Union Agency for Fundamental Rights Rahlgasse 3 1060 Vienna, Austria Email: Joanna.GOODHEY@fra.europa.eu
Prof. Jon T. Johnsen	University of Oslo Karl Johans gt. 47/Postboks 6706 St. Olavs plass 0130 OSLO, Norway Email: j.t.johnsen@jus.uio.no

(continued)

**BM1.1** (continued)

Name	Contact Details
Dr. Michael Kilchling	Max Planck Institute for Foreign and International Criminal Law Günterstalstraße 73 79100 Freiburg, Germany Email: m.kilchling@mpicc.de
Dr. Rianne Letschert	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands Email: R.M.Letschert@uvt.nl
Prof. Letizia Paoli	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Letizia.Paoli@law.kuleuven.be
Prof. Stephan Parmentier	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Stephan.Parmentier@law.kuleuven.be
Mr. Antony Pemberton	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands Email: A.Pemberton@uvt.nl
Prof. Alex Schmid	CSTPV/University of St Andrews Library Park, The Scores St Andrews KY19 9AX, UK Email: aps10@st-andrews.ac.uk
Ms. Ines Staiger	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology European Forum for Restorative Justice Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Ines.Staiger@googlemail.com
Prof. Mark Umbreit	Center for Restorative Justice and Peacemaking; School of Social Work/University of Minnesota, 1404 Gortner Ave, 105 Peters Hall St. Paul MN 55108-6160, USA (Visiting Professor, Marquette University Law School, Milwaukee, WI) Email: mumbreit@umn.edu
Dr. Inge Vanfraechem	Department of Criminology, National Institute of Criminalistics and Criminology (NICC) Simon Bolivarlaan 30 1000 Brussels, Belgium Email: inge.vanfraechem@just.fgov.be
Prof. Uri Yanay	School of Social Work & Social Welfare Hebrew University of Jerusalem Mt Scopus, Jerusalem 91905, Israel Email: uri.yanay@huji.ac.il

**BM1.2 Practitioners**

Name	Contact Details
Prof. Ivo Aertsen	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Ivo.Aertsen@law.kuleuven.be
Ms. Karin Ammerlaan	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands E-mail: v.c.ammerlaan@uvt.nl
Mr. Humbert de Biolley	Council of Europe Liaison Office in Brussels Résidence Palace Rue de la Loi 155 box 3, 1040 Brussels, Belgium Email: Humbert.deBIOLLEY@coe.int
Prof. Jan van Dijk	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands E-mail: Jan.vanDijk@uvt.nl
Ms. Pamela Dix	Disaster Action UK No 4, 71 Upper Berkeley Street London, WIH, UK Email: pameladix@disasteraction.org.uk
Ms. Paula Ellen	Victim Support England and Wales Cramner House 39 Brixton Road, London SW9 6DZ, UK Email: paula.ellen1@btinternet.com
Ms. Helga Ezendam	Ministerie van Justitie Directoraat Generaal Preventie PO Box 20301, 2500 The Hague, The Netherlands Email: h.ezendam@minjus.nl
Mr. Miguel Garcia-Herraiz	Dirección General de AA.II. de Terrorismo No proliferación y Desarme, Ministerio de Asuntos Exteriores y Cooperación, Plaza de la Provincia 1 28071 Madrid, Spain Email: miguel.gherraiz@mae.es
Mr. Juan Gutierrez	Asociación 11-M Afectados del Terrorismo C/ Puentelarra, 7, locales 3 y 4 28031 Madrid, Spain Email: juanenruta@adslitelcom.com
Prof. Bernhard A. Koch	European Centre of Tort and Insurance Law Reichsratsstr. 17/2 1010 Vienna, Austria Email: koch@ectil.org
Ms. Lina Kolesnikova	Associate of CS&A (International Risk and Crisis Management) consultancy OSCE/ODIHR Democratisation Expert av.de Tervueren 229/8, 1150 Brussels, Belgium Email: lina_kolesnikova@yahoo.com

(continued)

**BM1.2** (continued)

Name	Contact Details
Dr. Rianne Letschert	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands Email: R.M.Letschert@uvt.nl
Mr. Dominique Mallassagne	Bureau de l'Aide aux Victimes et de la Politique Associative Ministère de la Justice 13 place Vendôme, 75042 PARIS CEDEX 01, France Email: Dominique.Mallassagne@justice.gouv.fr
Ms. Albina Ovcearenco	Counter – Terrorism Task Force/Task Force contre le Terrorisme Council of Europe/Conseil de l'Europe 67075 Strasbourg cedex, France Email: albina.ovcearenco@coe.int
Prof. Letizia Paoli	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Letizia.Paoli@law.kuleuven.be
Ms. Jacinta de Paor	Glencree Centre for Peace and Reconciliation Glencree, Co. Wicklow Republic of Ireland Email: live@glencree.ie
Ms. Sandra Peake	WAVE Trauma Centre 5 Chichester Park South, Antrim Road Belfast, BT15 5DW, UK Email: ceo@wavebelfast.co.uk
Mr. Antony Pemberton	Faculty of Law, International Victimology Institute Tilburg (INTERVICT) Building M, P.O. Box 90153 5000 LE Tilburg, The Netherlands Email: A.Pemberton@uvt.nl
Ms. Delphine Pennewaert	Croix Rouge de Belgique Rue de Stalle 96 1180 Bruxelles, Belgium Email: delphine.pennewaert@redcross-fr.be
Ms. Susan Reid	Victim Support Northern Ireland Central Office Annsgate House 70–74 Ann Street, Belfast BT1 4EH, UK Email: susan.reid@victimsupportorni.org.uk
Ms. Magda W. Rooze	Impact Meibergdreef 5 1105 AZ Amsterdam, The Netherlands Email: m.w.rooze@amc.uva.nl

(continued)



**BM1.2** (continued)

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Name	Contact Details
Mr. Rob Sardemann	Victim Support the Netherlands Pallas Athenedreef 27 3508 SH Utrecht - The Netherlands Email: R.Sardemann@slachtofferhulp.nl
Prof. Alex Schmid	CSTPV/University of St Andrews Library Park, The Scores St Andrews KY19 9AX, UK Email: aps10@st-andrews.ac.uk
Ms. Ines Staiger	K.U. Leuven, Faculty of Law/Leuven Institute of Criminology European Forum for Restorative Justice Herbert Hooverplein 10, bus 3418 3000 Leuven, Belgium Email: Ines.Staiger@law.kuleuven.be
Dr. Inge Vanfraechem	National Institute of Criminalistics and Criminology (NICC) Simon Bolivarlaan 30 1000 Brussels - Belgium Email: inge.vanfraechem@just.fgov.be

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