

International Law of Victims

Carlos Fernández de Casadevante Romani

*A. von Bogdandy and R. Wolfrum, (eds.),
Max Planck Yearbook of United Nations Law, Volume 14, 2010, p. 219-272.
© 2010 Koninklijke Brill N.V. Printed in The Netherlands.*

- I. Some Previous Questions
 1. The Approach of International Law to Victims
 2. International Norms related to Victims
 - a. International Norms of a General or Universal Character: United Nations
 - b. International Norms of a Regional Character
 - aa. Europe: The Council of Europe and the European Union
 - bb. America: The Organization of American States (OAS)
- II. The International Categories of Victims
 1. The International Concept of Victims: As many Concepts of Victims as Categories of Victims
 2. The Different International Categories of Victims
 - a. Victims of Crime
 - b. Victims of Abuse of Power
 - c. Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
 - d. Victims of Enforced Disappearance
 - e. Victims of Violations of International Criminal Law
 - f. Victims of Terrorism
 - aa. The Concept of Victim of Terrorism and the Concept of Terrorism as Such
 - bb. There are Sufficient Elements to Build a Concept of Terrorism
 - cc. The Lack of a Concept of "Victim of Terrorism": Proposals
- III. Conclusions

I. Some Previous Questions

1. The Approach of International Law to Victims

Traditionally, international law has paid insufficient attention to victims. An explanation for this can be found in the particular nature of international law. As is well known, and owing to the predominantly interstate structure of the international community, international norms are created to respond to states' interests and goals. In this context attention to persons or individuals by states has only taken place in some particular fields of international law.

This is the case, for example, with human rights, international criminal law (with regard to international criminal responsibility of individuals)¹ or international humanitarian law. But in each of these branches of international law the way in which victims are considered differs. So, in human rights law, victims are acknowledged when the state is the author of the breach of an international obligation, but this branch of international law does not consider the breach of international obligations by non-state actors.² In international criminal law and in international humanitarian law on the other hand individuals may be regarded as victims as a consequence of acts perpetrated by individuals (even by individuals exercising public functions), as well as by non-state actors. In both cases, international responsibility rests only with the individuals and victims are recognised. Nevertheless, the way in which they are recognised is inadequate.³

It can thus be concluded that, despite the relevance of this subject, victims have been either ignored or insufficiently considered by international norms. But this panorama began to change since different international norms related to victims have progressively been introduced. These are norms of an institutional or conventional nature, of a general or regional frame, all related to concrete categories of victims: victims of crime, victims of abuse of power, victims of gross violations

¹ See C. Fernández de Casadevante Romani (ed.), *Derecho Internacional de los Derechos Humanos*, 3rd edition, 2007.

² Like terrorists, for example.

³ See in this respect the statutes of the ICC and of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

of international human rights law and of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law, and finally victims of terrorism. All these norms are generally characterised by a certain concept of the respective category of victim, as well as by the enumeration of a list of rights to which the category of victim in question is entitled to. At the same time, these rights constitute obligations on the part of states.

Most of these norms are of an institutional nature. This fact raises questions about their binding effects. Independently of this discussion and the doctrinal approaches traditionally related to it, it must be remembered that the absence of formalism in international law can also lead to international obligations stemming from institutional norms. From another perspective it should also be remembered that international treaties are frequently preceded by institutional norms adopted on the same subject as that of the future treaty.⁴ This is why actual institutional norms relating to the different categories of victims could lead, in the future, to international treaties.⁵ In the meantime, they show the existence of a consensus, on the part of states, on the necessity of taking certain victims into account. They also demonstrate the recognition of the existence of victims by states and by international organisations.

These groups of institutional norms have legal effects on states. Above all, these institutional norms have been adopted without a vote, i.e., by consensus. Due to the numerous international norms related to

⁴ Such a procedure is frequent in the field of international human rights law. For example, the Convention Against Torture of 1984 was preceded by the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by A/RES/3452 (XXX) of 9 December 1975. Also the International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature by A/RES/2106 (XX) of 20 December 1965, which was preceded by the Declaration on the Elimination of All Forms of Racial Discrimination adopted by A/RES/1904 (XVIII) of 20 November 1963. More recently, the International Convention for the Protection of All Persons from Enforced Disappearance adopted on 20 December 2006 by A/RES/61/177, which was preceded by the Declaration on the Protection of All Persons from Enforced Disappearance adopted by A/RES/47/133 of 18 December 1992.

⁵ Actually, only two treaties exist and both concern victims of enforced disappearance, the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, 2006 (not yet in force), see note 4, and the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994 (in force since 1996).

victims actually in existence another question arises: are we assisting the birth of a new branch inside traditional international law? That is, a new branch built upon different categories of individuals, all being victims of one kind or another and entitled to their own particular statute of rights which is inherent to such condition?

It seems that the different categories of victims entitled to certain rights and the resulting obligations of states shape a new international statute: the international statute of victims. But are there as many international statutes as categories of victims or, on the contrary, is there only one general international statute of victim?

2. International Norms related to Victims

Like the birth of the international human rights law, the relatively recent interest in victims finds its origin in the social situation created after World War II. As a consequence of this dramatic experience a legislative policy began to coordinate measures in order to revitalise the intervention of the victim, in particular, within the criminal proceedings. This initiative became more intense in the 1980s. States and international organisations began to codify law on the matter. An ensemble of international norms solely concerned with victims and their rights began to emerge. These are international norms of a different nature (most of them institutional norms). They are also norms of a different territorial range (general, universal or regional). Still most of the rights building the international statute of the victim are still rights enshrined in international treaties. Mainly human rights treaties ratified by the large majority of states.

a. International Norms of a General or Universal Character: United Nations

In the frame of the United Nations there are, at the moment, three instruments relating to five categories of victims. First General Assembly Resolution 40/34 adopted on 29 November 1985, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁶

⁶ Adopted by A/RES/40/34 of 29 November 1985 it is based on article 18 of the Universal Declaration of Human Rights, adopted and proclaimed by A/RES/217 A (III) of 10 December 1948. Article 8 contains the right of everyone to an effective remedy by the competent national tribunals for

This Declaration contains several concepts of “victim” as well as a catalogue of rights to which victims are entitled to, mainly the right to access of justice and fair treatment, which is linked to reparation as well as to the establishment and strengthening of judicial and administrative mechanisms to enable victims to obtain redress. A few years later this Declaration was followed by the *Declaration on the Protection of All Persons from Enforced Disappearance* adopted by the General Assembly in its resolution A/RES/47/133 of 18 December 1992. On the same subject, on 20 December 2006 by resolution A/RES/61/177, the General Assembly adopted the *International Convention for the Protection of All Persons from Enforced Disappearance*.⁷

Contrary to the Declaration of 1992, the International Convention gives a definition of “enforced disappearance”. So, according to article 2, “enforced disappearance” is considered to be “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”⁸

Both, the Declaration of 1992 and the Convention of 2006, contain a catalogue of rights to which victims of enforced disappearance are enti-

acts violating the fundamental rights granted by the constitution or by law. See Ch. Bassiouni, “Reconnaissance internationale des droits des victimes”, in: SOS Attentats (ed.), *Terrorisme, victimes et responsabilité pénale internationale*, 2003, 134 et seq.

⁷ See <[http://: www2.ohchr.org](http://www2.ohchr.org)>.

⁸ Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, see note 4. At the same time, article 1 of the Declaration states: “1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of International Law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.”

tled to. Basically, the mentioned right to justice (which includes the right to a prompt and effective judicial remedy), the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person,⁹ the right of access to all information concerning the person deprived of his liberty,¹⁰ the right to form and participate freely in organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons,¹¹ the right to assist victims of enforced disappearance,¹² and last but not least, the right to obtain reparation and prompt, fair and adequate compensation.¹³ The question of reparation is conceived by the Convention of 2006 with a double effect. On the one hand, the right to obtain reparation covers material and moral damages. But on the other hand, this right “where appropriate” also covers other forms of repara-

⁹ Which includes exact information about the person(s) deprived of liberty; the authority that ordered the deprivation of liberty; the date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty; the authority responsible for supervising the deprivation of liberty; the whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer; the date, time and place of release; elements relating to the state of health of the person deprived of liberty; and in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains (see article 18 of the Convention).

¹⁰ According to article 18 of the Convention State Parties shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the information quoted in the precedent footnote.

¹¹ According to article 24 para. 7 of the Convention: “Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.”

¹² See article 24 para. 7.

¹³ Article 24 paras 4 and 5 state: “4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. 5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.”

tion such as restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, and guarantees of non-repetition.¹⁴

The last norm adopted to date with regard to victims is Resolution 2005/35 of 19 April 2005 by the UN Commission on Human Rights, the *Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.¹⁵ ¹⁶ It has to be remembered that the Basic Principles do not entail new international legal obligations. On the contrary, they only compile international legal obligations already in force of a general and regional character, as well as in international treaties.

This is already clearly described in the preamble of the 2005 *Basic Principles and Guidelines* according to which 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.”¹⁷

Even though these institutional norms constitute a step forward in international law it is also true that no general international treaty on victims yet exists. In fact, there is only one treaty on victims in the framework of the United Nations related to the victims of enforced disappearance,¹⁸ which is not yet in force.

An international treaty related to the international legal status of the victim (in general) could serve not only to improve this field of international law but, more importantly, to accord to all victims a common denominator of rights on behalf of the states. Inspired by the international norms related to the different categories of victims and preceded by a general and broader definition of the term “victim” (including both di-

¹⁴ See article 24 para. 5 of the International Convention for the Protection of All Persons from Enforced Disappearance of 2006, see note 4.

¹⁵ Doc. E/CN.4/2005/L.10/Add.11.

¹⁶ The resolution was adopted within the Commission on Human Rights by a recorded vote of 40 votes to none, with 13 abstentions.

¹⁷ Later this Resolution was endorsed by A/RES/60/147 of 16 December 2005, Annex, here in particular, para. 7 of the preamble.

¹⁸ International Convention for the Protection of All Persons from Enforced Disappearance, see note 4.

rect and indirect victims) the purpose of this treaty would be the listing of a catalogue of rights inherent to the condition of victims; a catalogue actually existing in the international norms relating to victims.

The advantage would be that much of the work has been done already because both the concept of victim and the catalogue of rights have already been envisaged by the international norms relating to victims. On the other hand, this does not stop states and international organisations from adopting and applying particular norms relating to particular categories of victims. Finally, neither institutional norms nor international treaties exist relating to victims of terrorism. This category of victims is still forgotten by states as well as international organisations. Only certain references can be found in some resolutions of the Security Council,¹⁹ the General Assembly²⁰ and the Commission on Human Rights.²¹ In any case, they are insufficient and efforts should be made to build an international statute for this category of victims in line with the already existing categories of victims.²² It is a gap that should be filled urgently.

Independently of the fact that the international law of victims is mostly built upon institutional norms it should be underlined that most of the rights formulated in these norms are rights firmly enshrined in international law through international human rights treaties. These

¹⁹ See, e.g., S/RES/1566 (2004) of 8 October 2004 that considers the possibility of establishing an international fund to compensate victims of terrorist acts and their families. Also S/RES/1624 (2005) of 14 September 2005 in which the Security Council reaffirms “its profound solidarity with the victims of terrorism and their families”; or S/RES/1611 (2005) of 7 July 2005 and S/RES/1618 (2005) of 4 August 2005, in which it expresses “its deepest sympathy and condolences to the victims ... and their families” of the terrorist attacks that took place in London and Iraq respectively.

²⁰ This is the case, for example, with all resolutions adopted by the General Assembly since resolution A/RES/49/185 of 23 December 1994, under the title “Human Rights and Terrorism”; all resolutions are limited to showing the General Assembly’s solidarity with victims of terrorism and to request that the Secretary-General seek the view of Member States on the possible establishment of a United Nations voluntary fund for victims of terrorism.

²¹ See resolution 2003/37 of the Commission on Human Rights adopted on 23 April 2003 and related to the establishing of an international fund to compensate victims of terrorist acts.

²² The following: victims of crime; victims of abuse of power; victims of gross violations of international human rights law and of serious violations of international humanitarian law; victims of enforced disappearance; victims of violations of international criminal law.

treaties can be considered to have a customary nature.²³ The rights and freedoms codified by international human rights law are rights and freedoms to which any person is entitled to and states are under an obligation to ensure that individuals can effectively enjoy these rights and freedoms.

b. International Norms of a Regional Character

In the regional frame the situation differs. On the one hand the existing norms relating to victims in this regard are limited to Europe and to the Americas. At the same time, with regard to Europe, these norms come from two different organs: the Council of Europe and the European Union with the consequence that only the institutional norms adopted inside the European Union have a clear binding legal effect.²⁴

Concerning the American continent, there actually only exists one international norm on victims that was adopted by the OAS. It is a treaty that is related to a single category of victims the *Inter-American Convention on Forced Disappearance of Persons*.²⁵ Further, the situation in the regional context is also different because of the categories of victims envisaged by the existing regional norms: victims of crime, victims of terrorism and victims of enforced disappearance.

aa. Europe: The Council of Europe and the European Union

In the European regional frame, as in its work in the field of human rights, the Council of Europe has also been pioneering with the *European Convention on the Compensation of Victims of Violent Crimes* adopted on 24 November 1983.²⁶ It is the sole international treaty on

²³ This is the case at least with the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights, both adopted in 1966.

²⁴ Cf. article 288 of the Treaty on the Functioning of the European Union (Official Journal of the European Union (OJEU) C 115 of 9 May 2008).

²⁵ This Convention entered into force on 28 March 1996. That is, in accordance with its article XX, on the thirtieth day from the date of deposit of the second instrument of ratification

²⁶ European Convention on the Compensation of Victims of Violent Crimes, Convention No. 116, adopted on 24 November 1983, entered into force on 1 February 1998. This Convention is actually ratified by 27 of the 47 Member States of the Council of Europe. Italy, Greece and Poland are some of the states of the European Union that have not ratified the Convention.

victims existing in Europe although only related to one category: the victims of violent crimes. This Convention has been preceded by previous work of the Council of Europe which focused upon different international institutional norms related to victims. These are basically resolutions and recommendations. This is the case with *Resolution (77) 27 on the Compensation of Victims of Crime* adopted by the Committee of Ministers on 28 September 1977, which is based upon reasons of equity and social solidarity with the aim of laying down guiding principles with a view to harmonising national provisions in this field. Concerning compensation of victims of crime *Resolution (77) 27* takes into account the fact that the possibilities of compensation that are available to victims of crime are often insufficient, in particular, when the offender has not been identified or is without resources. This is why it lays down a group of guiding principles (like those regarding the prompt compensation of victims of crime; the subsidiary compensation by the state when it cannot be ensured by other means, etc.) that will be developed by Member States. Later, in its *Recommendation No. R (83) 7*, adopted on 23 June 1983 *On Participation of the Public in Crime Policy* the Committee of Ministers underlined the need for a crime policy which takes account of victims' interests and formulates some measures.²⁷ After 1983 the Council of Europe moved forward by taking into account *The Position of the Victim in the Framework of Criminal Law and Procedure* through *Recommendation No. R (85) 11*, adopted on 28 June 1985.²⁸ This Recommendation changes the perspective of the compensation of victims of violent crimes that is found in the 1983 *European Convention on the Compensation of Victims of Violent Crimes* and focuses on victims' rights in the framework of criminal law and procedure. From this point of view, *Recommendation No. R (85) 11* takes into account the traditional perspective of the legal justice system, focused on the relationship between the state and the offender, but it also

²⁷ For the text see under <www.coe.int>. After the European Convention on the Compensation of Victims of Violent Crimes of 1983 the Committee of Ministers of the Council of Europe took other recommendations on victims. Cf., for example, the following: No. R (85) 11 E on the position of the victim in the framework of criminal law and procedure, adopted on 28 June 1985; No. R (87) 21 E on assistance to victims and the prevention of victimisation, adopted on 17 September 1987; No. R (93) 1 E on effective access to the law and to justice for the very poor, adopted on 8 January 1993; and No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, adopted on 10 September 1997.

²⁸ See under <www.coe.int>.

focuses its attention on the needs and interests of victims through a catalogue of guidelines.

It recommends that Member States review their legislation and practice in accordance with a series of guidelines, all of which consider the position of the victim in the following fields: in respect of the police, in respect of the prosecution, in questioning of the victim, the information that should be given to victims in the framework of court proceedings, compensation of victims, the protection of victim's privacy, as well as the special protection that should be given to victims against intimidation and the risk of retaliation by the offender whenever this appears to be necessary. On 17 September 1987 the Committee of Ministers adopted *Recommendation No. R (87) 21 on the Assistance to Victims and the Prevention of Victimisation*. By that it recommends a broad battery of measures to Member States. This institutional norm was followed in 2006 by *Recommendation (2006) 8 of the Committee of Ministers On Assistance to Crime Victims* which was adopted on 14 June. These Recommendations form the corner stones for the Council of Europe's *European Convention on the Compensation of Victims of Violent Crimes* which expounds in its preamble on reasons of equity and social solidarity in order to deal with two situations. On the one hand, that of victims of intentional crimes who have suffered bodily injury or impairment of health and of dependants of persons who have died as a result of such crimes. On the other hand, and as a consequence of the precedent, the need to introduce or develop schemes for compensation for these victims by the state in whose territory such crimes were committed, in particular when the offender has not been identified or is without resources.

In order to achieve its objectives, the 1983 Convention contains "minimum provisions" to compensate victims of crimes. They consist of a general principle and some rules concerning the scope of victim's compensation. According to that general principle compensation shall be paid by the state on whose territory the crime has been committed²⁹ when compensation is not "fully available" from other sources.³⁰ Concerning the scope of the victim's compensation it shall cover "at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of mainte-

²⁹ Article 3 European Convention on the Compensation of Victims of Violent Crimes, see note 26.

³⁰ Article 2, *ibid.*

nance.”³¹ The 1983 Convention allows States Parties, if necessary, to set for any or all elements of compensation “an upper limit above which and a minimum threshold below which such compensation shall not be granted.”³² It also allows States Parties to reduce or refuse victim’s compensation on account of the applicant’s situation.³³

The victim’s compensation may also be reduced or refused in the following three situations: on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death; on account of the victim’s or the applicant’s involvement in organised crime or his membership in an organisation which engages in crimes of violence; or if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*).³⁴ Nevertheless the 1983 Convention does not cover all victims of crime. According to article 3 compensation shall be paid by the state on whose territory the crime was committed only to two groups of persons: a.) to nationals of the States Parties to the Convention; b.) to nationals of all Member States of the Council of Europe who are permanent residents in the state on whose territory the crime was committed.

As a result of this approach three groups of persons are excluded from a possible compensation even if they are victims of a crime committed on the territory of a State Party to the Convention: a.) the nationals of all Member States of the Council of Europe that are not parties to the Convention; b.) the nationals of all Member States of the Council of Europe that are not permanent residents in the state on whose territory the crime was committed; and c.) the nationals of third states. It should not be forgotten that the Council of Europe is an international organisation of cooperation. This means that the efficacy of its action is conditioned by the political will of Member States. With regard to the 1983 Convention this means that the efficacy of its objectives depends not only on the ratification of the treaty by the Member States of the Council of Europe but also on the adoption of all national measures necessary to implement the treaty by the relevant States Parties.³⁵

It is obvious that the step forward represented by the 1983 Convention is a weak one, as it excludes three groups of persons. Further, the

³¹ Article 4, *ibid.*

³² Article 5, *ibid.*

³³ Article 7, *ibid.*

³⁴ Article 8, *ibid.*

³⁵ Because the 1983 Convention is not a self-executing one, see note 26.

reluctance of Member States in accepting and executing the resolutions and recommendations adopted by the Committee of Ministers should be remembered. In any case it should be recognised that the Council of Europe has been a pioneer in respect of the attention given to victims.³⁶

The Council of Europe has also been a pioneer with regard to victims of terrorism. The only international norm actually entirely dedicated to victims of terrorism the *Guidelines on the Protection of Victims of Terrorist Acts* was adopted by the Committee of Ministers on 2 March 2005³⁷ with the aim of 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.”³⁸

But is it a binding norm? What kind of international norm is it? The answer is neither easy nor unequivocal. The Guidelines themselves underline the aim of inciting states to cooperate. The last paragraph of the preamble “invites member states to implement” the Guidelines 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.” But despite this incited character that could lead someone to conclude that these guidelines are not binding, it is necessary to take into account other elements allowing the support of an affirmative conclusion on its binding effect upon Member States of the Council of Europe. One of these elements is the fact that the Guidelines just reiterate with regard to victims of terrorism a catalogue of rights most of which are actually in force. So, for most parts it is not dealing with rights *ex novo* (that in fact these guidelines do not create) but with international obligations strongly consolidated in many international treaties.³⁹ Furthermore,

³⁶ This is the case of the European Union. As a result of it, the Council Framework Decision (2001/220/JHA) of 15 March 2001 on the standing of victims in criminal proceedings (OJEC L 82 of 22 March 2001) and the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJEC L 261 of 6 August 2004) have been adopted. Unfortunately the United Nations have not yet formulated such action.

³⁷ Council of Europe, Committee of Ministries-CM/Del/Dec (2005) 917.

³⁸ Para. h) of the preamble, *ibid.*

³⁹ As said, this is the case in the general or universal frame for both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Also, in the regional frame of the European Convention on Human Rights, the American Con-

most of the rights proclaimed have a customary nature. As a result of this, and independently of the binding or not binding effect of this institutional norm it is possible to conclude that most of its content binds Member States.

With regard to victims, the precedents of the legislative measures adopted by the European Union are focused in the Treaty of Amsterdam. They are basically two: the *Council Framework Decision (2001/220/JHA) of 15 March 2001 on the Standing of Victims in Criminal Proceedings*⁴⁰ and the *Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims*.⁴¹

The *Council Framework Decision of 15 March 2001* is adopted under Title VI of the Treaty of the European Union (TEU): "Provisions on Cooperation in the Fields of Justice and Home Affairs". With regard to its binding effects, its dispositions refer to article 34.2.b) TEU according to which the Council can adopt,

"framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect."

As a result, all Member States are obliged to adopt all national measures that are needed to give effect to the standing of victims in criminal proceedings envisaged by this Council Framework Decision. It underlines its harmonising nature, "to the extent necessary to attain the objective of affording victims of crime a high level of protection, irrespective of the Member State in which they are present."⁴² It really re-

vention on Human Rights of 22 November 1969 and of the African Charter on Human and Peoples' Rights of 27 June 1981. The Guidelines of the Council of Europe contain a catalogue of rights to which victims of terrorism are entitled: right to emergency assistance, right to continuing assistance, right to investigation and prosecution, right to an effective access to the law and to justice, right to administration of justice, right to compensation, right to protection of the private and family life of victims of terrorist acts, right to protection of the dignity and security of victims of terrorist acts, right to information for victims of terrorist acts, and the right to a specific training for persons responsible for assisting victims of terrorist acts.

⁴⁰ Council Framework Decision 2001/220/JHA, see note 36.

⁴¹ Council Directive 2004/80/EC, see note 36.

⁴² Cf. para. 4 of the preamble of the Council Framework Decision 2001/220/JHA, see note 36.

sponds to the needs underlined in the conclusions of the European Council meeting in Tampere on 15 and 16 October 1999, in particular point 32 thereof, that stipulated that “minimum standards should be drawn up on the protection of the victims of crimes, in particular on crime victims’ access to justice and on their right to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and nongovernmental, for assistance to and protection of victims.”⁴³

The approaches taken by this Council Framework Decision are the following. First, it considers that the victim’s needs should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions that may give rise to secondary victimisation.⁴⁴ Second, it states that its provisions are not confined to attending to the victim’s interests under criminal proceedings but they also cover certain measures to assist victims before or after criminal proceedings, which might mitigate the effects of the crime.⁴⁵ Third, the Council Framework Decision also considers that 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, 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.⁴⁶ Finally, the Council Framework Decision envisages the involvement of specialised services and victim support groups before, during and after criminal proceedings, as well as the fact that suitable and adequate training should be given to persons coming into contact with victims; a training that “is essential both for victims and for achieving the purposes of proceedings.”⁴⁷

*Council Directive 2004/80/EC of 29 April 2004*⁴⁸ constitutes the culmination on the European Union level of the initiative taken by the Council of Europe with its *Convention on the Compensation of Victims of Violent Crimes*, the object of both being the complete compensation of victims of crime. This is why both norms build up a system of coop-

⁴³ Cf. para. 3, *ibid.*

⁴⁴ Cf. para. 5, *ibid.*

⁴⁵ Cf. para. 6, *ibid.*

⁴⁶ Cf. para. 8, *ibid.*

⁴⁷ Cf. para. 11, *ibid.*

⁴⁸ See note 36.

eration between states to facilitate access to compensation to victims of crimes in cross-border situations. The victims of crime shall not be damaged by the fact of having suffered the crime in a state⁴⁹ other than the state where the victim is habitually resident. It is obvious that this objective is easier to achieve with *Council Directive 2004/80/EC* than with the Convention of 1983 because the Council Directive is binding upon all Member States while the Convention of 1983 is only binding for States Parties and the Directive entered into force on the twentieth day following its publication in the Official Journal of the European Union. To achieve its objectives, *Directive 2004/80/EC* builds its action upon two fundamental principles. On the one hand, the principle according to which victims of crimes in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, and this regardless of where in the European Union the crime was committed.⁵⁰ Nevertheless, as in the European Convention of 1983 a gap remains because the Directive does not cover all victims not habitually resident in a Member State of the European Union.⁵¹

The other principle is that of territoriality. According to it compensation shall be paid by the competent authority of the Member State on whose territory the crime has been committed.⁵² The idea behind this is the freedom of movement existing in the European Union linked to the objective of suppression between Member States of all obstacles to it. When European Union law guarantees to a person the freedom of movement, the protection of that person from any harm in the Member

⁴⁹ A State Party to the Convention of 24 November 1983, see note 26, or a Member State of the European Union.

⁵⁰ A principle which is mentioned in para. 6 of the preamble, Council Directive 2004/80/EC, see note 36: "Crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered regardless of where in the European Union the crime was committed". It is also formulated in article 1: "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, the applicant shall have the right to submit the application to an authority or any other body in the latter Member State."

⁵¹ As said, the European Convention of 1983, see note 26, does not cover three groups of victims: nationals of all Member States of the Council of Europe not parties to the Convention; nationals of all Member States of the Council of Europe not habitually resident in the state in which the crime has been committed; and nationals of third states.

⁵² A principle ruled in article 2 Council Directive 2004/80/EC, see note 36.

State in question, has to be guaranteed. This is the corollary of the freedom of movement.

This is why the Directive envisages several measures with the aim of realising the objective of an effective compensation.⁵³ It constitutes “minimum standards on the protection of the victims of crime, in particular on crime victims’ access to justice and their rights to compensation for damages, including legal costs.”⁵⁴ At the same time the Directive establishes a system of cooperation to facilitate the access of victims of crime to compensation in cross-border situations. This system of cooperation is structured upon the regime actually existing in most of the Member States being built upon the European Convention of 1983. The Directive adds to it a new mechanism of compensation in all Member States. Such a system of cooperation is based on two principles. On the one hand, it should be ensured that victims of crime could always turn to an authority in the Member State where they reside. Any practical and linguistic difficulties that occur in a cross-border situation should be eradicated; on the other hand, it should include the provisions necessary for the victim to find the information needed to make the application and to allow for efficient cooperation between the authorities involved.⁵⁵

bb. America: The Organization of American States (OAS)

In the American regional sphere the only existing international norm related to victims – in this case to one category of victims – is the *Inter-American Convention on Forced Disappearance of Persons* of 9 July 1994.⁵⁶ It contains a definition of “forced disappearance”⁵⁷ but not of “victim”. Thus the definitions existing in the other international norms may be useful. The Convention contains obligations of States Parties

⁵³ Cf. CJEU, *Cowan Case*, Case 186/87, European Court Reports 1989, 195.

⁵⁴ Para. 3 of the preamble, Council Directive 2004/80/EC, see note 36.

⁵⁵ Cf. paras 12 and 13, *ibid.*

⁵⁶ For the text see <<http://www.oas.org/juridico/english/treaties/a-60.html>>.

⁵⁷ According to article II: “For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

many of which are also present in other international treaties such as, for example, the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 10 December 1984, namely the obligation to adopt the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity; the obligation not to consider the forced disappearance of persons a political offence for purposes of extradition; the obligation to include the forced disappearance of persons among the extraditable offences in every extradition treaty entered into between States Parties; the obligation of States Parties to take the necessary measures to establish its jurisdiction over the crime of forced disappearance when the alleged criminal is within its territory and it does not proceed to extradite it; the non admission of the defence of due obedience to superior orders or instructions that stipulate, authorise, or encourage forced disappearance as a cause of exclusion of individual criminal responsibility; the consideration of this Convention as the necessary legal basis for extradition with respect to the offence of forced disappearance when State Parties make extradition conditional on the existence of a treaty and receive a request for extradition from another State Party with which it has no extradition treaty; etc. As a novelty this Convention states that criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

II. The International Categories of Victims

1. The International Concept of Victims: As many Concepts of Victims as Categories of Victims

The first thing that must be underlined is the non-existence of an international concept of victims. On the contrary, there are almost as many definitions as categories of victims envisaged by international norms. In any case, from the different elements present in such definitions it is possible to conclude the existence of a series of common denominators. As stated before the international norms actually related to victims concern several categories: victims of crime, victims of abuse of power, victims of gross violations of international human rights law and serious violations of international humanitarian law, victims of enforced disap-

pearance, victims of violations of international criminal law, victims of terrorism.

The different definitions of the concept of victims existing in these international norms will be examined in order to be able, to conclude the possibility of building or not building a general concept of victim that could be shared by all categories of victims independently of the definitions just quoted. Or, at least, the elements present in all of these definitions.

2. The Different International Categories of Victims

a. Victims of Crime

General Assembly A/RES/40/34 adopted on 29 November 1985 containing the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,⁵⁸ focused on victims of crime and on victims of abuse of power. More recently other international norms belonging to the European regional frame pay attention to it.⁵⁹

General Assembly Resolution 40/34 contains a concept of “victim” that includes three categories of persons: first, persons who, individually or collectively, have suffered harm. Second, it includes the immediate family or dependants of the direct victim and third, persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.⁶⁰ According to the Declaration,

“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. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship

⁵⁸ See note 6.

⁵⁹ This is the case of norms adopted by the Council of Europe and the European Union.

⁶⁰ There is a similar definition in the ICC Rules of Procedure and Evidence as well as in the statute of the Court. They also envisage a special protection for victims in the procedures before the ICC.

between the perpetrator and the victim. 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 victimization.”⁶¹

They are, in all cases, victims acquiring this condition as a consequence of acts or omissions that are in violation of criminal laws operative within Member States. As can be appreciated, criminal laws operative within Member States constitute the standard, the violation of which gives cause for the acquisition of the condition of victim.⁶² From this point of view the criminalisation in the domestic law of states of conducts like terrorism, genocide, crimes of war and crimes against humanity – as well as others – would make possible a much more expanded concept of victims, as states’ domestic criminal law would lead to the categorisation of victims as persons having suffered harm through acts or omissions that are in violation of criminal laws operative within the concerned state. Consequently, it would be very helpful for victims if states take all necessary steps and measures to ensure that such acts (as well as others envisaged by the international norms relating to victims and not yet included as offences under national law) become offences under national law.

Inside the European Union *Council Framework Decision (2001/220/JHA)* of 15 March 2001,⁶³ gives, for the first time, a concept of “victim”. According to article 1. a) victim is,

“a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused

⁶¹ The third paragraph of this definition adds: “3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.”

⁶² In the same way article 1 para. 1 of Recommendation (2006) 8 of the Committee of Ministers adopted on 14 June 2006. For the purpose of this recommendation article 1 para. 1 states that: “Victim means 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.”

⁶³ See note 36.

by acts or omissions that are in violation of the criminal law of a Member State.”⁶⁴

Article 2 of the *European Convention on the Compensation of Victims of Violent Crimes* of 24 November 1983 states that when compensation is not fully awarded from other sources States Parties shall compensate,

- a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
- b. the dependants of persons who have died as a result of such crime.”⁶⁵

From the point of view of the legal obligations it can be underlined that all Member States of the European Union are also Member States of the Council of Europe; so two different situations occur: that of states bound by the Directive and by the European Convention and that of Member States bound only by the Directive.

b. Victims of Abuse of Power

This category of victims again falls under General Assembly Resolution 40/34. According to it, victims of abuse of power, are considered,

“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic

⁶⁴ It also contains a definition of “victim support organisation”. That is “a non-governmental organisation, legally established in a Member State, whose support to victims of crime is provided free of charge and, conducted under appropriate conditions, complements the action of the State in this area” (article 1 lit. b). Some time later, on 29 April 2004, the Council Directive 2004/80/EC relating to compensation of victims was adopted, see note 36. This Directive is founded upon the principles of subsidiarity and proportionality of article 5 para. 1 of the European Union Treaty. Para. 15 of the Directive’s preamble states: “Since the objective of facilitating access to compensation to victims of crimes of cross-border situations cannot be sufficiently achieved by the Member States because of the cross-border elements and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.”

⁶⁵ This obligation to compensate victims of violent crimes persists even if the offender cannot be prosecuted or punished, see article 2 para. 2.

loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.”⁶⁶

From this definition it can be appreciated that in contrast to the concept of victims of crime just quoted, in the case of victims of abuse of power the standard of victimisation is constituted by the violation of norms relating to human rights.

c. Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The UN Commission on Human Rights Resolution 2005/35 contains the *Basic Principles and Guidelines of the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.⁶⁷ Two categories of victims are envisaged,

“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.”⁶⁸

Further,

“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.”⁶⁹

Here the conditions of victims exist regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the family relationship between the perpetrator and the victim.⁷⁰

⁶⁶ A/RES/40/34, Annex, B. para. 18, see note 6.

⁶⁷ See note 15.

⁶⁸ Ibid, Annex, V. 8.

⁶⁹ Ibid.

⁷⁰ Ibid., V. 9.

d. Victims of Enforced Disappearance

In the frame of the United Nations two international norms related to victims of enforced disappearance have been built. On the one hand, the *Declaration on the Protection of All Persons from Enforced Disappearance*, on the other hand, the *International Convention for the Protection of All Persons from Enforced Disappearance* adopted on 20 December 2006 by resolution A/RES/61/177 of the General Assembly.⁷¹

The *Declaration on the Protection of All Persons from Enforced Disappearance* was preceded by resolution A/RES/33/173 of 20 December 1978, in which the General Assembly "... expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrows caused by those disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons."⁷²

As a consequence, the General Assembly considered it necessary to adopt a specific legal instrument with the above mentioned result. But the legal answer to the seriousness of enforced disappearance is not only limited to the adoption of the International Convention. Both, the Declaration and the International Convention qualify the practice of

⁷¹ It is, until today, the only international treaty at the general or universal level relating to a category of victims even if it is not yet in force. The 1992 Declaration and the 2006 Convention, see note 4, contain the following catalogue of rights: right to justice (which includes the right to a prompt and effective judicial remedy); the right to know the truth regarding the circumstances of the enforced disappearance; the progress and results of the investigation and the fate of the disappeared person; the right of access to all information concerning the person deprived of liberty; the right to form and participate freely in organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons; and, the right to obtain reparation and prompt, fair and adequate compensation.

⁷² Para. 5 of the preamble. It is also the case with other international norms quoted by this Declaration like A/RES/43/173 of 9 December 1988 and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set forth in the Annex to the Economic and Social Council resolution 1989/65 of 24 May 1989, endorsed by the General Assembly in its resolution A/RES/44/162 of 15 December 1989 (cf. *ibid.*, op. para. 10).

enforced disappearance as a crime against humanity. The Declaration, in paragraph four of its preamble states,

“Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.”

The *International Convention for the Protection of All Persons from Enforced Disappearance*, in paragraph five of its preamble states that enforced disappearance always constitutes a crime and “in certain circumstances defined in International Law” enforced disappearance also constitutes “a crime against humanity.”⁷³ Article 5 of the Convention categorically states,

“The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable International Law and shall attract the consequences provided for under such applicable International Law.”

In the American Regional frame the only international norm relating to victims of enforced disappearance is the *Inter-American Convention on Forced Disappearance of Persons* of 6 September 1994, in force since 28 March 1996. It states in paragraph six of its preamble,

“that the systematic practice of the forced disappearance of persons constitutes a crime against humanity.”

The conception and qualification of enforced disappearance as a crime against humanity is also considered in the General Comment of the Working Group on Enforced or Involuntary Disappearances. In its General Comment the Working Group underlines that a crime against humanity is always committed in a certain context, such as: the existence of an attack against any civilian population, the widespread and systematic character of this attack and the knowledge the perpetrator has of the attack. These are elements which can be found in article 7 of the statute of the ICC.⁷⁴ Due to the fact that the ICC statute is actually

⁷³ Para. 5 of the preamble of the International Convention for the Protection of All Persons from Enforced Disappearance, see note 4.

⁷⁴ Article 7 para. 1 ICC statute states: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fun-

ratified by more than a hundred states and has been incorporated into the statutes of other international criminal courts as well as international hybrid courts the Working Group concludes that the definition of the crime against humanity given in article 7 of the statute of the ICC “now reflects customary International Law and can thus be used for interpretation.”⁷⁵

With regard to the concept of victim, the *International Convention for the Protection of All Persons from Enforced Disappearance* qualifies as victim,

“the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”⁷⁶

Consequently this Convention only envisages direct victims and, within this, two types of victims. On the one hand the disappeared person; on the other hand any individual who has suffered harm as the direct result of an enforced disappearance. Despite this limit and, in line with what was stated earlier, it is possible to enlarge this restricted concept of victim by resorting to other international norms relating to victims. However, in order to make this possible it is necessary to include the crime of enforced disappearance in the criminal code of the concerned state. Otherwise the restricted definition will persist.⁷⁷

damental rules of International Law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under International Law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

⁷⁵ See under <www2.ohchr.org/english/issues/disappear/index.htm>.

⁷⁶ Article 24 para. 1, see note 4.

⁷⁷ In the opinion of N. Fernández Sola this lack could also be covered through the way of the third category of victims envisaged by the UN Declaration of 1985, that is, “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” In his opinion this category could be helpful to protect persons, associations and groups engaged with human rights which become victims of attacks of forces or groups responsible for enforced disappearance, see N. Fernández Sola, “El derecho a la reparación de las víctimas de desaparición forzada: hacia la jus-

The *Inter-American Convention on Forced Disappearance of Persons* does not have a concept of “victim of forced disappearance”. As in other cases just quoted and as stated before this gap can be filled by resort to other existing international norms relating to victims of crime, in general, or to some crimes in particular.

e. Victims of Violations of International Criminal Law

International criminal law envisages victims of the following crimes: crimes of war, crimes against humanity and genocide. In contrast to other fields of international law already quoted here the crime is committed by a natural person and never a state because in international law the state is not criminally responsible. In consequence crimes are always committed by a natural person even if the person has committed the crime while exercising state functions. Immunity cannot be invoked to exclude international criminal responsibility. The aim of the immunity recognised by international law to persons exercising state functions is only to guarantee the exercise of state functions, i.e., to protect state sovereignty.⁷⁸

Nevertheless despite the developments that have taken place in the recent years with regard to the immunity of heads of state, heads of government and ministers, this field of international law does not yet pay enough attention to the legal status of victims. Neither the statute of the ICC nor the statutes of the international criminal tribunals for the former Yugoslavia and Rwanda recognise any active *locus standi* of victims of crimes in order to initiate criminal proceedings before these tribunals or to become parties in the proceeding. Despite these shortcomings, the statute of the ICC constitutes an advance with regard to the current situation of victims. It recognises victims’ rights more actively than the statutes of the criminal tribunals for the former Yugoslavia and Rwanda which merely envisaged victims as witnesses. Article

ticia a través del Derecho internacional”, *Revista Española de Derecho Internacional* 60 (2008), 403 et seq.

⁷⁸ See C. Fernández de Casadevante Romani, *Derecho Internacional Público*, 2003; C. Esposito, *Inmunidad del Estado y Derechos Humanos*, 2007; R. Carnerero, *La inmunidad de jurisdicción penal de los Jefes de Estado extranjeros*, 2007.

19.3 of the ICC statute e.g. authorises victims to submit observations to the Court.⁷⁹

In relation to the concept of victim, the very wide concept contained in Rule 85 of the Rules of Procedure and Evidence of the ICC should be underlined. This definition is wider compared to other categories of victims made in other international norms previously quoted. According to the Rule 85,

“For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may 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.”

The difference here is that the wide-ranging concept present in Rule 85 does not demand that the victim becomes the direct object of the criminal offence. This is why some authors considered that the concept just quoted in Rule 85 covers all natural and legal persons who have directly or indirectly suffered harm as a result of the commission of any crime within the jurisdiction of the ICC.⁸⁰

As stated, in contrast to the international criminal tribunals for the former Yugoslavia and Rwanda, the statute of the ICC, and the Rules of Procedure and Evidence of the ICC, expressly envisage victims.⁸¹ The ICC statute refers to victims in arts 68, 75 and 79.⁸² The Rules of Pro-

⁷⁹ Article 19 para. 3 states: “The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court”.

⁸⁰ So, for example, M.H. Gozzi/ J.P. Laborde, “Les Nations Unies et le droit des victimes du terrorisme”, *Revue Internationale de Droit Pénal* 76 (2005), 297 et seq.

⁸¹ The Rules of Procedure and Evidence of the ICC are an instrument for the application of the ICC statute.

⁸² Related to the protection of victims and witnesses and their participation in the proceedings (article 68), the reparations to victims (article 75) and to the Trust Fund that should be established for the benefit of victims of crimes

cedure and Evidence envisage victims and witnesses in Section III of Chapter 4. According to article 15, the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. If certain conditions are fulfilled, and the Prosecutor concludes that there is a reasonable basis to proceed with an investigation he or she shall submit to the Pre-Trial Chamber a request for authorisation of an investigation, together with any supporting material collected. This is the moment when an intervention of victims in form of representations to this Chamber takes place in accordance with the Rules of Procedure and Evidence. Afterwards, if upon examination of the request and the supporting material given to it by the Prosecutor as well as the observations made by victims, this Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and the case appears to fall within the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.⁸³

Article 19 para. 3 also authorises victims to submit observations to the Court when a question regarding the jurisdiction of the Court or the admissibility of the case is challenged. In the same way article 68 para. 3 of the statute states that 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 deemed 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. As a consequence, the legal representatives of the victims may present such views and concerns where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

and of families of such victims within the jurisdiction of the ICC (article 79). In respect of these articles see, for example, the commentaries of D. Donat-Cattin, "Article 68. Protection of victims and witnesses and their participation in the proceedings", 1275 et seq.; "Article 75. Reparation to victims", 1399 et seq.; M. Jennings, "Article 79. Trust Fund", 1439 et seq., in: O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2008.

⁸³ In accordance with article 15 para. 3, which states: "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. *Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.*" (emphasis added)

According to article 43 para. 6 of the statute, the Registrar of the ICC shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, “protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.” As a general principle Rule 86 establishes that the needs of all victims⁸⁴ (and witnesses) shall be taken into account during the procedure before the ICC.

Article 68 of the statute as well as Rules 87 and 88 are dedicated to the protection of victims and witnesses.⁸⁵ According to article 68.1 the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.⁸⁶ So, in line with article 68 para. 2, Rules 87 and 88 allow *in camera* proceedings, as well as other measures such as those relating to prevent the release of the identity or the location of a victim.⁸⁷

⁸⁴ The reference to victims is precise: “in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.” According to Rule 86: “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”

⁸⁵ According to Rule 87 para. 1: “Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the protective measure is sought prior to ordering the protective measure.”

⁸⁶ It is an exception with regard to the principle of public hearings of article 67 of the statute.

⁸⁷ Rule 87 para. 3 states: “A Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted *in camera*, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering, *inter alia*: (a) that the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records

On the other hand, in line with article 68 para. 2, Rule 88 states that upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, it is possible for the Court, to take into account the views of the victim or witnesses, to order special measures. Similarly, the Court can order that a counsel, a legal representative, a psychologist or a family member shall be permitted to attend during the testimony of the victim or the witness. Finally, apart from the special measures envisaged in Rule 88, also included is the duty that the Court, takes into consideration that violations of the privacy of a witness or victim may create risk to his or her security. The Court will be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.

Victims can also participate actively in the proceedings. According to article 68 para. 3 “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 deemed 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. Rule 89 adds that the victim or a person acting with the consent of the victim, or a person acting on behalf of a victim can present the views and concerns through written application to the Registrar, who shall transmit the application to the relevant Chamber.

Victims can freely choose a legal representative but where there are a number of victims, for the purposes of ensuring the effectiveness of the proceedings, the Court may request the victims or particular groups of victims, to choose a common legal representative or representatives. It

of the Chamber; (b) that the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party; (c) that testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media; (d) that a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or (e) that a Chamber conducts part of its proceedings in camera.”

is also envisaged that, when a victim or group of victims lack the necessary means to pay for a common legal representative chosen by the Court, it may receive assistance from the Registrar, including financial assistance when this is required.⁸⁸

According to Rule 91 para. 2 the victim and his legal representative attend and participate in the proceedings. The victim can also request the questioning of a witness, an expert or the accused; questioning which must be requested by the Court.⁸⁹ Moreover, victims as well as the legal representative shall be notified of all the proceedings before the Court. Therefore, in order to allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court shall notify victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53.⁹⁰ Consequently, the Court shall notify victims regarding its decision to hold a hearing in order to confirm charges. With regard to the competences of the Secretary of the ICC, the latter shall notify victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicated with the Court in respect of the case in question, about all proceedings before the Court. Rule 93 authorises the Chamber to seek the views of victims or their legal representatives on any issue. It also can seek the views of other victims, as appropriate.

One of the most innovative aspects of the statute of the ICC concerns victims compensation envisaged in article 75 of the statute. Victims can request reparation for any damage, loss or injury⁹¹ and reparation can adopt the following forms: restitution, compensation or rehabilitation. Before the ICC statute came into force the only international treaty relating to the compensation of victims was the *European Convention on the Compensation of Victims of Violent Crimes* of 24 No-

⁸⁸ See Rule 90.

⁸⁹ See Rule 91 para. 3.

⁹⁰ See Rule 92 para. 2.

⁹¹ According to article 75 of the statute of the ICC the request for reparation can be made by the victim as well as by the Court. Rule 96.1 states that, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested states.

vember 1983, i.e., a regional treaty limited to one category of victims, victims of violent crimes. The ICC statute being an international treaty also envisages a unique category of victims, victims of international crimes or, which is the same, victims of serious violations of international criminal law. According to article 75 para. 1 of its statute the ICC shall establish principles relating to reparations to, or in respect of, victims or the families of such victims. Here, reparation includes restitution, compensation and rehabilitation. On the basis of such principles the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. The Court may also make an order directly against a convicted person specifying appropriate reparations.⁹² But before taking a decision concerning reparation, article 75 para. 3 of the statute states that the Court may,

“either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting”.

The Rules of Procedure and Evidence of the ICC correspond with these findings. The determination of the value of the reparation rests with the ICC. Thus, Rule 97 establishes that the ICC,

“taking into account the scope and extent of any damage, loss or injury, ... may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.”

In order to do so, at the request of victims or their legal representative, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope and extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. If required, the Court shall invite victims or their legal representatives, the convicted person as well as interested persons and interested states to comment on the reports of the experts. In order to make it possible to provide reparation for victims, article 79 of the statute of the ICC creates a Trust Fund for the benefit of victims which is obtained from money and other property collected through fines or forfeiture to be transferred. The individual awards for repara-

⁹² Article 75 para. 2 states that, where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

tion shall be made directly against a convicted person, whose goods may have been confiscated. The amount of reparation can be paid through the Trust Fund and, in order to make this possible, the ICC may order that an award for reparations of a convicted person be deposited with the Trust Fund when, at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim.⁹³ But the Court may also order that an award for reparations against a convicted person be made through the Trust Fund when the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate. In addition, following consultations with interested states and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an inter-governmental, international or national organisation approved by the Trust Fund.⁹⁴ Finally, according to article 79 of the statute of the ICC, Rule 98 para. 5 envisages that resort to other resources of the Trust Fund may be used for the benefit of victims.

As can be seen the way in which the statute of the ICC and, moreover, the Rules of Procedure and Evidence envisage victims of international criminal law constitutes a significant advance in international law. Its recognition of the victim as an actor in the criminal proceedings is innovative. As mentioned, in contrast to the statute of the ICC, the statutes of the two criminal tribunals give victims a more reduced prominence, conceiving them only as witnesses. More concretely, as witnesses of the Prosecutor, they cannot receive any compensation from these tribunals. Both tribunals do not envisage a particular status to the victims. Still it must be added that a major role of victims in these tribunals becomes difficult due to the nature of, both, crimes of war and crimes against humanity that were committed; crimes that concern a great number of victims. But it also is difficult because of the accusatory legal nature of the proceedings, so that an active role for the victims in the proceedings could have a negative effect on the role given to the Prosecutor in both statutes.⁹⁵

⁹³ Concerning this question Rule 98 para. 2 states that the award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.

⁹⁴ See Rule 98 para. 4.

⁹⁵ In this respect see C. Jorda, "L'accès des victimes à la justice pénale internationale" and C. Tournaye, "L'apport des Tribunaux *ad hoc* pour la répression du terrorisme", in: SOS Attentats, see note 6, 416 et seq.

f. Victims of Terrorism

The answer of international law to terrorism has been, for a long time, very weak. Consequently, until recently, neither interest nor attention has been paid by the international community to victims of terrorism. Proof of this is the fact that until the 1993 Vienna World Conference on Human Rights the relationship between terrorism and human rights did not attract the attention of the United Nations.⁹⁶ Since 1994 the UN General Assembly's resolutions concerning terrorism appear under the title "human rights and terrorism."⁹⁷ At the same time the resolutions adopted on the matter are characterised by the affirmation "that the most essential and basic human right is the right to life", as well as the General Assembly's concern about the "gross violations of human rights perpetrated by terrorist groups."⁹⁸ They also declare the General Assembly's solidarity with victims of terrorism and request the Secretary-General of the UN to seek the views of Member States on the possible establishment of a United Nations voluntary fund for victims of terrorism as well as the ways and means to rehabilitate the victims of terrorism and to reintegrate them into society.

From 1994 onwards the UN Human Rights Commission also began to adopt resolutions under the title "human rights and terrorism"; resolutions containing references to victims of terrorism.⁹⁹ It also requested

⁹⁶ From 1972 to 1991 the General Assembly examined this matter under the title: "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes."

⁹⁷ The starting point was A/RES/49/185 of 23 December 1994.

⁹⁸ There are a lot of General Assembly resolutions qualifying terrorism as a violation of human rights, see A/RES/48/122 of 20 December 1993; A/RES/49/185 of 23 December 1994; A/RES/50/186 of 22 December 1995; A/RES/52/133 of 12 December 1997; A/RES/54/164 of 17 December 1999 and A/RES/56/160 of 19 February 2001. See C. Fernández de Casadevante Romani/ F. Jiménez García, *Terrorismo y Derechos Humanos. Una aproximación desde el Derecho Internacional*, 2005, 116 et seq.

⁹⁹ The UN Commission on Human Rights has also qualified terrorism as a violation of human rights (see resolutions 1994/46, 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35 and 2003/37). Also the Sub-Commission on the Promotion and Protection of Human Rights (see resolutions 1994/18, 1996/20 and 1997/39). In 1993 the Sub-

the Sub-Commission on the Promotion and Protection of Human Rights to undertake a study on the issue of terrorism and human rights in the context of its procedures. The Special Rapporteur stated in this respect,

“102. Terrorist acts, whether committed by States or non-State actors, may affect the right to life, the right to freedom from torture and arbitrary detention, women’s rights, children’s rights, health, subsistence (food), democratic order, peace and security, the right to non-discrimination, and any number of other protected human rights norms. Actually, there is probably not a single human right exempt from the impact of terrorism.”¹⁰⁰

The same connection between terrorism and human rights is made by the High Commissioner for Human Rights in his report to the General Assembly according to Resolution 48/142 entitled “Human rights: a unity framework report.”¹⁰¹ It states that terrorism “is a threat to the most fundamental human right, the right to life” and that “the essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter what the ends.”¹⁰²

By now it is clearly established that terrorism is a violation of human rights. In this context it must be added that terrorism is not an ordinary violation of human rights. On the contrary, it is an international crime.¹⁰³ This is why victims of terrorism request the inclusion of this crime among the crimes coming under the jurisdiction of the ICC or, as

Commission had even condemned “the violations of human rights by the terrorist groups Sendero Luminoso and Movimiento Revolucionario Tupac Amaru” in Peru (resolution 1993/23).

¹⁰⁰ Doc. E/CN.4/Sub.2/2001/31 of 27 June 2001, 46. The Special Rapporteur drafted a preliminary report (Doc. E/CN.4/Sub.2/1999/27 of 7 June 1999), a progress report (Doc. E/CN.4/Sub.2/2001/31 of 27 June 2001), a second progress report (Doc. E/CN.4/Sub.2/2002/35 of 17 July 2002), an additional progress report with two addenda (Doc. E/CN.4/Sub.2/2003/WP.1 and Add.1 and 2 of 8 August 2003), and a final report (Doc. E/CN.4/Sub.2/2004/40 of 25 June 2004). In fact, a lot of rights are infringed by terrorism: the right to liberty and security, the right to family life, the right to movement, the right to information, the right to a fair trial, etc.

¹⁰¹ Doc. E/CN.4/2002/18 of 27 February 2002, paras 3 and 4.

¹⁰² *Ibid.*, paras 2 and 5.

¹⁰³ The High Commissioner for Human Rights states that terrorism is a crime against humanity in para. 4 of the report, see note 101.

another alternative, to judge its most serious aspects (murder, torture, enforced disappearance of persons, persecution and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health) as crimes against humanity. This course of action is possible, because as underlined by the President of the ICC,

“although the Statute of the ICC does not include terrorism among the crimes within the jurisdiction of the Court, this crime could be considered a crime against humanity of the type of those envisaged in Article 7 of the Statute of the ICC ... ”¹⁰⁴

The fact of not dealing with terrorism either as an independent crime or as type of a crime against humanity leads to impunity and denies victims of terrorism their effective right to justice when the state will not or cannot guarantee it.¹⁰⁵ In consequence, it is the responsibility of the United Nations itself to urge and promote international norms recognising and guaranteeing victims of terrorism the effective enjoyment of their human rights. This is especially true for their effective right to justice and to redress. This is why victims of terrorism call for such actions.¹⁰⁶

Have victims of terrorism therefore been forgotten by the United Nations? The answer seems to be positive. Although the Commission on Human Rights has reiterated “its unequivocal condemnation of all acts, methods and practices of terrorism, regardless of their motivation, in all their forms and manifestations, wherever, whenever and by whomever committed, as acts aimed at the destruction of human rights, fundamental freedoms and democracy.”¹⁰⁷ And although bearing in

¹⁰⁴ P. Kirsch, “Terrorisme, crimes contre l’humanité et Cour pénale internationale”, in: SOS Attentats, see note 6, 111. See also note 74.

¹⁰⁵ For example, when the crime of terrorism has been amnestied or has been prescribed according to domestic law and the prescription has taken place as a consequence of the unwillingness of the state to investigate the crime or in the instruction of the indictment. Impunity takes also place e.g. in case of failed states. The causes are many and all lead to impunity.

¹⁰⁶ See V. Bou Franch/ C. Fernández de Casadevante Romani, *La inclusión del terrorismo entre los crímenes internacionales previstos en el Estatuto de la Corte Penal Internacional. (Una propuesta del Colectivo de Víctimas del Terrorismo en el País Vasco, COVITE, para la Conferencia de Revisión del Estatuto de la Corte Penal Internacional)*, 2009.

¹⁰⁷ For example, in resolutions 2002/35 and 2004/44 about “Human Rights and Terrorism” and in resolutions 2003/68 and 2004/87 about “Protection

mind that “the most essential and basic human right is the right to life”,¹⁰⁸ as well as “profoundly deploring the large number of civilians killed, massacred and maimed by terrorists in indiscriminate and random acts of violence and terror, which cannot be justified under any circumstances”¹⁰⁹, nothing has really happened. Only some insufficient actions have been taken.^{110 111}

Fact is that, unlike the Council of Europe, the United Nations has paid far less attention to victims of terrorism¹¹² and that this attention has been limited to expressions of mere courtesy deprived of any legal obligation.¹¹³ So, although terrorism is an international crime that seriously violates human rights, the paradox is that, unlike other categories

of Human Rights and Fundamental Freedoms while Countering Terrorism.”

¹⁰⁸ So, for example, in resolutions 2002/35 and 2004/44, see note 107.

¹⁰⁹ Ibid.

¹¹⁰ See note 19.

¹¹¹ See resolution 2003/37 of the Commission on Human Rights adopted on 23 April 2003 and related to the establishing of an International Fund to compensate victims of terrorist acts.

¹¹² The attention of the Council of Europe to victims of terrorism is specified in its Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers on 2 March 2005. It contains measures and services that are granted independently of the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act. They concern emergency and continuing assistance, investigation and prosecution, effective access to law and to justice, administration of justice, compensation, protection of the private and family life of victims of terrorist acts, protection of the dignity and the security of victims of terrorist acts, information for victims of terrorist acts, specific training for persons responsible for assisting victims of terrorist acts and the possibility for states to increase protection of this category of victims (Council of Europe, Committee of Ministers-CM/Del/Dec(2005)917).

¹¹³ Contrary to the silence of the United Nations with regard to victims of terrorism it has frequently – and correctly – been pointed out the obligation of states to respect human rights when combating terrorism. In this line the Commission on Human Rights on 21 April 2005 appointed, for a period of three years, a Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while countering terrorism. This shows a clear and concrete endorsement by Member States of the need to make the honouring of human rights commitments an integral part of the international fight against terrorism.

of victims, no international norm on victims of terrorism and their rights has yet been adopted.

Concerning the other types of victims, several international norms have been adopted as has been shown to take into account most of the different categories of victims. In order to change this situation it is urgent that in particular the United Nations, in line with the actions concerning the five categories of victims being mentioned, and like the acts carried out by the Council of Europe, promote an international norm affirming the status of victims of terrorism. That is to say, a statute made up of a catalogue of rights inherent to the condition of victims of terrorism based upon the effective right to justice and the prevention of impunity, connected to the jurisdiction of the ICC. It is the only way in which the “universal” right of each victim of terrorism to justice can be guaranteed.¹¹⁴

The progressive emergence of victims within the framework of the European Union, analysed in the preceding pages, took a further step with the *Council Framework Decision of 13 June 2002 on Combating Terrorism* (2002/475/JHA).¹¹⁵ In its article 10, it takes into account the protection and assistance given to victims of terrorism. According to this article and related to the concept of “terrorist offences” which is developed in the long list of article 1 of this Council Framework Decision, article 10 states that Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, “at least if the acts were committed on the territory of the Member State.”¹¹⁶ Furthermore, on 2 March 2005 the Committee of Ministers adopted the *Guidelines on the Protection of Victims of Terrorist Acts*.¹¹⁷ These Guidelines are based on the principle that states “should ensure that any person who has suffered direct physical or psy-

¹¹⁴ Without the intervention of the ICC most victims of terrorism would lack, *de facto* – as is the situation today – their right to justice because its effective exercise depends upon the correct functioning of state structures and presently many states affected by terrorism are either failed states or states in which the effective exercise of this right is impossible because of the weakness of the existent state structures. In such conditions the right to redress is also impossible. As a consequence many victims of terrorism lack basic human rights.

¹¹⁵ OJEC L 164 of 22 June 2002.

¹¹⁶ Article 10 para. 1, *ibid.*

¹¹⁷ See note 37.

chological harm as a result of a terrorist act as well as, in certain circumstances, their close family, can benefit from the services and measures prescribed” by these Guidelines.¹¹⁸ These are measures and services which are granted independently of the identification, arrest, prosecution or conviction of the perpetrator of the terrorist act. They include emergency and continuing assistance, investigation and prosecution, effective access to the law and to justice, administration of justice, compensation, protection of the private and family life of victims of terrorist acts, protection of the dignity and security of victims of terrorist acts, information for victims of terrorists acts, specific training for persons responsible for assisting victims of terrorist acts, as well as the possibility for states of adopting more favourable services and measures than described in these Guidelines.

aa. The Concept of Victim of Terrorism and the Concept of Terrorism as Such

Due to the clear link between both concepts, before dealing with the question relating to the concept of victim of terrorism, it will be dealt with the definition of terrorism.

On the occasion of the international fight against terrorism and, more precise and as an example, for the qualification of terrorism as a crime against humanity by the statute of the ICC,¹¹⁹ as well as the concept of “victims of terrorism”, the difficulty of this task is always alleged due to the fact that a binding definition of terrorism does not exist. Still practically all forms of terrorism are prohibited by the thirteen international conventions on terrorism actually existent as well as by customary international law.¹²⁰ Indeed, in international law there is no field or sector in which terrorism is not forbidden. It is a prohibition that exists independently of the context in which the terrorist activity takes place: in time of war or in time of peace. In time of war the inter-

¹¹⁸ The concept of a “victim of terrorism” chosen by these Guidelines is a broad one.

¹¹⁹ Regarding this question see Bou Franch/ Fernández de Casadevante Romani, see note 106.

¹²⁰ This aspect is also underlined by the Report of the High-level Panel on Threats, Challenges and Change. Again it was stated that practically all forms of terrorism are prohibited by the thirteen international conventions on terrorism actually existent as well as by customary international law, the Geneva Conventions or the ICC statute, see Press Release SG/SM/8891 of 23 September 2003.

national norms applied to international and non international armed conflicts expressly prohibit the resort to terrorism against combatants and civilians. Such a prohibition derives clearly from the Geneva Conventions of 1949¹²¹ as well as the additional Protocols of 1977.¹²²

In time of peace terrorism is an international crime that is prohibited. The thirteen existing international treaties actually relating to terrorism¹²³ cover most of the various forms of terrorism and oblige states to take the necessary measures to ensure that such acts are defined as offences under national law. It has to be remembered that the Geneva Conventions as well as their Protocols and the thirteen international treaties specifically related to terrorism are complementary.

To complete this description, it is necessary to add that terrorism is also envisaged by international criminal law.¹²⁴ Terrorism is one of the most serious international crimes. Even if it is not expressly qualified as a crime under the jurisdiction of the ICC, much of the conducts envisaged by the international treaties relating to terrorism are, at the same time, conducts appertaining to the “crime against humanity”.¹²⁵

¹²¹ In this regard see arts 27, 33 and 34 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. As an example, article 33 states: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.” See also article 51 para. 2 of Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, and arts 4 and 13 of Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977.

¹²² So, for example, article 51 para. 2 of Protocol I, see note 121, which states, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.” Also article 13 para. 2 of Protocol II, see note 121.

¹²³ Security Council Resolution S/RES/1377 (2001) of 12 November 2001 obliges states to rapidly ratify these treaties.

¹²⁴ In this respect see A. Cassese, *International Criminal Law*, 2008, 162 et seq.; M.D. Bollo Arocena, *Derecho Internacional Penal. Estudio de los Crímenes internacionales y de las técnicas para su represión*, 2004.

¹²⁵ International legal doctrine and jurisprudence agree on this matter. In this line also the president of the ICC, see note 104. In Spain, the Criminal Code has been just reformed in order to avoid the prescription of crimes of

In order to prosecute before the ICC those terrorist conducts actually defined as crimes against humanity, according to article 7 of the ICC statute, it would be necessary that the Prosecutor proves the four elements which constitute a crime against humanity. Firstly, the commission of certain acts; second, that those acts have been committed as a part of a widespread or systematic attack. Third, that the attack was directed against any civilian population in application or execution of the politics of a state or of an international organization. Finally, the knowledge the author of such acts had of the fact that such acts were part of a widespread or systematic attack.¹²⁶ As an international crime the principle *aut dedere aut iudicare* applies.

It can be concluded that acts of terrorism are generally envisaged, defined and incriminated,¹²⁷ which will be further examined now.

-The Frame of the United Nations

Even though Resolution 1566 (2004) adopted by the Security Council on 8 October 2004¹²⁸ does not contain a general definition of “terrorism”, it lists several conducts being considered terrorism. The quoting of such conducts is made by reference to the existing international treaties on terrorism. This list of conducts in Resolution 1566 is made “Acting under Chapter VII of the Charter of the United Nations”, i.e., in exercise of the Security Council’s primary responsibility for the maintenance of international peace and security conferred upon it by Article 24 of United Nations Charter and with the binding effects that resolutions adopted under Chapter VII of the Charter have. The Security Council in op. para. 3,

“Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general

terrorism. This reform, made by a bill (the Ley Orgánica 5/2010 of 22 June) concerns the non prescription of terrorist offences with the result of death or serious injuries.

¹²⁶ Kirsch, see note 104. In practice only some acts of terrorism are excluded from the jurisdiction of the ICC, e.g. those committed in time of peace which do not fulfil the constitutive elements of the qualification of a crime against humanity. G. Doucet, “Terrorisme: définition, juridiction pénale internationale et victims”, *Victimes et Terrorisme, Revue Internationale de Droit Penal* 76 (2005), 271 et seq.

¹²⁷ See Doucet, see note 126.

¹²⁸ S/RES/1566 (2004) of 8 October 2004.

public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.”¹²⁹

As may be seen in this paragraph there is no definition *stricto sensu* of terrorism. Operative para. 3 of Resolution 1566 (2004) presents several aspects. It is the first time that this organ of the United Nations refers to terrorism so detailed. An analysis of op. para. 3 reveals that it embraces all *criminal acts* including those against civilians as well as against the military.¹³⁰ These acts are committed with the intent to cause death or serious bodily injury, or the taking of hostages. They are committed with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act. These acts constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.¹³¹ Finally, they are criminal acts, that are under no

¹²⁹ In the opinion of L.M. Hinojosa Martínez this definition is not technically precise, see his work L.M. Hinojosa Martínez, *La financiación del terrorismo y las Naciones Unidas*, 2008, 604, footnote 222.

¹³⁰ Even though there is no express reference to military personnel it can be included since resort to terrorism is prohibited in International Humanitarian Law, see note 121. See also article 4 para. 2 lit. d of Additional Protocol II, see note 121, according to which acts of terrorism against “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted”, are and shall remain prohibited at any time and in any place whatsoever.

¹³¹ Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973; International Convention against the Taking of Hostages of 17 December 1979; Convention on the Physical Protection of Nuclear Material of 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 24 February 1988; Protocol for the Suppres-

circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. Consequently, the Security Council calls upon all states to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

Concerning the reference to international conventions and protocols relating to terrorism it should be mentioned that some of these treaties, even if they do not directly refer to terrorism, name a series of conducts actually considered being terrorism. This is the case with wrongful acts against the safety of the civil aviation and wrongful acts at airports serving international civil aviation;¹³² and the use of unmarked and undetectable plastic explosives.¹³³

Together with these international conventions there are others that directly envisage terrorist conducts. According to them the following acts are qualified as terrorist acts,

1.- the “intentional commission of a murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger this person or his liberty”, “a threat to commit any such at-

sion of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 14 October 2005; Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1 March 1991; International Convention for the Suppression of Terrorist Bombings of 15 December 1997; International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005.

¹³² That constitutes the subject of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, UNTS Vol. 974 No. 14118.

¹³³ That constitutes the subject of the Convention on the Marking of Plastic Explosives for the Purpose of Detection, see note 131. Its object is to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am flight 103 bombing). With this aim States Parties are obliged within their respective territories to ensure effective control over “unmarked” plastic explosives.

tack”, “an attempt to commit any such attack” and “an act constituting participation as an accomplice in any such attack;”¹³⁴

2.- the seizure, detention and threat of a person “to kill, to injure or to continue to detain another person in order to compel a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage;”¹³⁵

3.- the unlawful and intentional deliverance, placement, discharging or detonating of “an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility” with the intent to cause death or serious bodily injury or with the intent to cause extensive destruction of such a place, facility or system, “where such destruction results in or is likely to result in major economic loss;”¹³⁶

4.- the possession of radioactive material or the making or possession of a device with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment, as well as the use in any way of radioactive material or a device, or the use or damage of a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment; or with the intent to compel a natural or legal person, an international organisation or a state to do or refrain from doing an act;¹³⁷

5.- the intentional commission of “an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property.”

¹³⁴ See article 2 para. 1 lit. a of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973, UNTS Vol. 1035 No. 15410.

¹³⁵ Article 1 para. 1 of the International Convention against the Taking of Hostages of 17 December 1979, UNTS Vol. 1316 No. 21931.

¹³⁶ Article 2 para. 1 of the International Convention for the Suppression of Terrorist Bombings of 15 December 1997, UNTS Vol. 2149 No. 37517.

¹³⁷ Article 2 para. 1 of the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005, see note 131. This Convention includes as an offence the threat to commit the offences just quoted (see article 2 para. 2).

Also the theft or robbery of nuclear material in order to compel a natural or legal person, international organisation or state to do or to refrain from doing any act, as well as the attempt to commit any of the offences just described;¹³⁸

6.- the provision or collection of funds “with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex”¹³⁹ or “any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, 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;”¹⁴⁰

7.- the unlawful and intentional seizure or exercise of control over a ship by force, threat or any other form of intimidation in order to commit an act of terrorism; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other

¹³⁸ Article 7 para. 1 of the Convention on the Physical Protection of Nuclear Material of 3 March 1980, UNTS Vol. 1456 No. 24631.

¹³⁹ Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 14 December 1973; International Convention against the Taking of Hostages of 17 December 1979; Convention on the Physical Protection of Nuclear Material of 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 24 February 1988, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 10 March 1988 and its Protocol of 14 October 2005, see note 143; International Convention for the Suppression of Terrorist Bombings of 15 December 1997.

¹⁴⁰ Article 2 para. 1 of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, UNTS Vol. 2178 No. 38349.

acts against the safety of ships.¹⁴¹ Also, the use of a ship as a device to further an act of terrorism; the transport on board a ship of various materials knowing that they are intended to be used to cause, or in a threat to cause death or serious injury or damage to further an act of terrorism; as well as the transporting on board a ship of persons who have committed an act of terrorism;¹⁴²

8.- the unlawful and intentional seizure or exercise of control over a fixed platform by force or threat thereof or any other form of intimidation; the performance of an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; the destruction of a fixed platform or the causing of damages to it which is likely to endanger its safety; the placement or causing to be placed on a fixed platform, by any means whatsoever, of a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; the injuring or killing of any person in connection with the commission or the attempted commission of any of the offences just described.¹⁴³

Consequently, although there is no generally accepted definition of terrorism, it is possible to build an objective definition of terrorism based upon the commission of concrete acts that comprehend the great majority of terrorist acts. Such concrete acts and conducts are those envisaged by the international conventions quoted above.¹⁴⁴ Despite the value of this catalogue of conducts considered as criminal offences that is made by reference to the international treaties on terrorism, it should be added that such catalogue does not cover all forms of terrorism. In other words, there are forms of terrorism other than those envisaged in the treaties just quoted. Such is the case of urban violence, extortion or political prosecution which were denounced e.g. by the Human Rights Commissioner of the Council of Europe in his report regarding his visit to the Autonomous Basque Community.¹⁴⁵

¹⁴¹ See article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988, UNTS Vol. 1678 No. 29004.

¹⁴² See the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 14 October 2005.

¹⁴³ See article 2 para. 1 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf of 14 October 2005, UNTS Vol. 1678 No. 29004.

¹⁴⁴ Hinojosa Martínez, see note 129, 60.

¹⁴⁵ Cf. Council of Europe, The Commissioner for Human Rights, *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to*

-The Concept within the European Union

As stated above, in the frame of the European Union the non-existence of a generally accepted concept of terrorism is to some extent covered by the qualification as “terrorist offences” of the conducts listed in Council Framework Decision (2002/475/JHA) of 13 June 2002. Article 1 lists a series of intentional acts which are considered “terrorist offences” and oblige Member States to take the necessary measures to ensure that such acts are defined as offences under national law.¹⁴⁶

Such acts are:¹⁴⁷

- seriously intimidating a population,
- unduly compelling a government or international organisation to perform or abstain from performing any act,
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

According to article 1 the following intentional acts 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

Spain and the Basque Country 5-8 February 2001 for the Committee of Ministers and the Parliamentary Assembly, Strasbourg, 9 March 2001, CommDH (2001) 2. In this respect see C. Fernández de Casadevante Romani, *La nación sin ciudadanos: el dilema del País Vasco*, 2006. Also, F. Lozano Contreras, “Enforcement of the Notion of Due Diligence in the Report of the Human Rights Commissioner of the Council of Europe Regarding his Visit to the Autonomous Basque Community”, *Spanish Yearbook of International Law* 8 (2001-2002), 17 et seq.

¹⁴⁶ According to article 1 of the Council Framework Decision 2002/475/JHA, “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, shall be deemed to be terrorist offences.”

¹⁴⁷ Article 4 also envisages the fact of inciting or aiding or abetting an offence referred to in article 1 para. 1 and in arts 2 or 3.

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;

(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).

As can be seen, terrorism is not exhaustively described.¹⁴⁸ This is why Council Framework Decision (2008/919/JAH) of 28 November 2008, provides “for the criminalisation of offences linked to terrorist activities in order to contribute to the more general policy objective of preventing terrorism through reducing the dissemination of those materials which might incite persons to commit terrorist attacks.”¹⁴⁹ By this states are obliged to take the necessary measures to ensure that offences linked to terrorist activities include the following acts:

(a) public provocation to commit a terrorist offence;

(b) recruitment of terrorists;

(c) training of terrorists;

(d) aggravated theft with a view to committing one of the offences listed in article 1 (1) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, just quoted;

(e) extortion with a view to the perpetration of one of the offences listed in article 1 (1) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism, just quoted;

(f) drawing up false administrative documents with a view to committing one of the offences listed in article 1 (1)(a) to (h) and article 2

¹⁴⁸ Some criminal conducts present in the terrorist acts of ETA remain outside this catalogue. This is the case with political prosecution (which can lead to exile). Extortion is covered by the revision made by the Council Framework Decision 2008/919/JHA of 28 November 2008.

¹⁴⁹ Para. 7 of its preamble, OJEU L 330 of 9 December 2008.

(2)(b) of the Council Framework Decision (2002/475/JHA) of 13 June 2002, on combating terrorism.

bb. There are Sufficient Elements to Build a Concept of Terrorism

In the frame of the United Nations as well as in the regional frame of the European Union there are sufficient elements to conclude which conducts may be actually qualified as terrorism. In the case of the United Nations, Resolution 1566 (2004) of the Security Council states that terrorist acts are criminal acts committed against civilian and military with a concrete intentional element: that of causing death or serious bodily injury, or taking of hostages. These are acts with a concrete purpose: that of provoking a state of terror in the general public or in a group of persons; intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act. Such criminal acts committed against civilian and military are under no circumstances justifiable. Such criminal acts committed against civilian and military with the intention and purpose just quoted actually constitute criminal offences which are defined as such in international treaties on terrorism; treaties which comprehend the great majority of terrorist conducts.¹⁵⁰

In the case of the European Union the benefits deriving from Council Framework Decisions (2002/475/JHA) of 13 June 2002, and (2008/919/JAH) of 28 November 2008 are more obvious because they oblige Member States to take the necessary measures to ensure that the intentional acts referred to become punishable as criminal offences. This is why it is possible to conclude that the legal frame built in the European Union constitutes a great advance both from the point of view of the definition of terrorism and of its consequences in the legal field.

cc. The Lack of a Concept of "Victim of Terrorism": Proposals

The lack of a concept of "victim of terrorism" can be filled with the definitions and the common elements present in the different international norms analysed in the preceding pages. Besides, and with regard to the European Union, Council Framework Decision (2002/475/JHA)

¹⁵⁰ They are annexed to Security Council Resolution S/RES/1566, see note 128.

of 13 June 2002 on combating terrorism allows a more intense particularisation with regard to the conducts closely linked to terrorism.

Accordingly two kinds of victims could be envisaged: direct and indirect victims. The concept of direct victims is based upon the following elements:

- They are natural persons (individual or collectively);
- They have suffered harm, including physical or mental injury, emotional suffering or economic loss, and
- such harm has been directly caused by acts or omissions that are in violation of the criminal law of the concerned state.¹⁵¹

On the other hand, two kinds of persons are considered indirect victims:

- The relatives or dependants having an immediate relationship with the direct victim;
- Persons who have suffered harm while intervening to assist victims in distress or to prevent victimisation.¹⁵²

Consequently, although there is a lack of a specific concept of “victim of terrorism” it is possible to resort to the general concept of “victim” envisaged by the international norms quoted in this work in order to include them into a more specific concept. This would also allow the inclusion of victims of terrorism.

It is sufficient to define as criminal offences under national law conducts such as terrorism, genocide, crimes of war and crimes against humanity – or others – to arrive at a more expanded concept of victim.

¹⁵¹ Instead of that general concept of direct victim, “victims of abuse of power” are “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 do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (para. 18 of the Declaration, see note 6).

¹⁵² With regard to the question of indirect victims the Draft Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers of the Council of Europe on 2 March 2005 quoted case-law of the European Court of Human Rights in order to include the concept of “indirect victims” as regards the family of a disappeared person (see European Court of Human Rights, *Cyprus v. Turkey*, Judgement of 10 May 2001, Reports of Judgments and Decisions ECtHR 2001-VII, 1 et seq.).

And this, in the triple dimension adopted by the different international norms related to victims: persons who have suffered harm; relatives or dependants having an immediate relationship with the direct victim, as well as persons who have suffered harm while intervening to assist victims in distress or to prevent victimisation.

This holds true independently of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the family relationship between the perpetrator and the victim¹⁵³ and observes the principle of non discrimination.¹⁵⁴ The *Guidelines on the Protection of Victims of Terrorist Acts* adopted by the Committee of Ministers of the Council of Europe on 2 March 2005 add a third principle. According to it, “States must respect the dignity, private and family life of victims of terrorist acts in their treatment.”¹⁵⁵

III. Conclusions

Victims have become the object of international law, albeit belatedly. Since 1985 a plurality of norms of different legal nature and territorial

¹⁵³ This principle is present in the following international norms: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see note 6; Guidelines on the Protection of Victims of Terrorist Acts adopted by the Committee of Ministers of the Council of Europe on 2 March 2005; European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983; Recommendation (2006) 8 of the Committee of Ministers of the Council of Europe on the assistance to victims of crime.

¹⁵⁴ According to which the rights linked to the condition of victim shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

¹⁵⁵ This principle is laid down in para. 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see note 6: “Victims should be treated with compassion and respect for their dignity.” Also in article 2 para. 1 of the Council Framework Decision, see note 36: “Each Member State shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings.”

scope envisage different categories of victims: victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law and, finally, victims of terrorism. As a consequence, most of these categories of victims have their own definitions of “victim” related to the category concerned as well as a catalogue of listed rights. Nevertheless, despite the diversity in all these definitions there are common elements upon which it is possible to build an international concept of victim (in general) including both direct and indirect victims, as well as the members of such groups. These common elements are also useful in order to cover the gaps existing in some definitions of the related categories of victims. In the same way, it must be taken into account that all categories of victims have in common the fact of becoming a victim of a crime. From this perspective they are at the same time victims of crime as well as victims of the category concerned.

The catalogue of rights recognised to the different categories of victims by the international norms related to each of them builds the legal status of each category of victim. At the same time these rights constitute obligations on the part of states because they have implemented those rights. Despite the diversity and despite the particularisation with regard to the category of victim concerned, it is possible to conclude that a common legal status of victim (in general) which is composed of most of these rights exists. At least, of all those rights firmly enshrined in the existent human rights treaties. Moreover, it must not be forgotten that the victim is a natural person and, as such, is entitled to the rights that international treaties on human rights recognise for “everyone”. These rights are *lex lata*. At the same time, these are rights that states shall safeguard and make effective.

The most important lack in this field of international law related to victims concerns victims of terrorism. Only the Council of Europe has paid attention to it by way of an institutional norm. The European Union has only included certain references in its Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. As the United Nations has paid attention to all other categories of victims in the form of international norms it is all the more surprising that this is not the case with victims of terrorism. Although it has recognised that terrorism is an international crime that seriously violates human rights no international norm on victims of terrorism and their rights has yet been adopted by the United Nations. The responsibility of such a de-

fault rests with the United Nations and its Member States and it is their responsibility to change this situation. Furthermore, it is urgent that the United Nations and its Member States promote an international norm affirming the international status of victims of terrorism in line with the action of the Council of Europe, as well as with the action of the UN itself and concretised in the international norms it has encouraged with regard to the other categories of victims.

An international treaty of a general character related to the international legal status of the victim (in general) could serve to improve this field of international law. This treaty, actually non-existent, could be inspired by the international norms relating to the different categories of victims. Preceded by a general and broader definition of the term “victim” (including both direct and indirect victims) the object of this treaty would be the listing of a catalogue of rights inherent to the condition of a victim; a catalogue actually already existing in the international norms relating to victims. Such a treaty would also be useful to recognise for all victims a common denominator of rights that states have to ensure, safeguard and make effective. At the same time, a treaty of this kind would not hinder the further adoption of particular norms related to special categories of victims and from applying to these individualised categories the international norms actually existing. Both lines of action would be complementary.