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THE IMPACT OF THE INTERNATIONAL NORMATIVE FRAMEWORK ON THE POSITION OF VICTIMS OF TERRORISM

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Resumen: Poniendo a las víctimas en el centro de atención, el presente trabajo se centra en los desarrollos habidos en los últimos años en el seno de diferentes organizaciones (ONU, Consejo de Europa, Unión Europea) por lo que respecta a la política y legislación concerniente a las víctimas del terrorismo. Tras una breve introducción sobre los derechos de las víctimas, se analiza si se encuentra justificada la distinción entre derechos de las víctimas de los delitos convencionales y los derechos de las víctimas del terrorismo, particularmente a la vista de las dificultades que suscita el contexto de la victimización terrorista en cuanto al ejercicio de los derechos y muy en especial en los casos de victimización de masas.

Laburpena: Biktimak arreta gunean jarriz, lan honek azken urteetan hainbat erakundetan (NBE, Europako Kontseilua, Europar Batasuna) egondako aurrerapenak ditu ardatz, terrorismoaren biktimei buruzko legediari eta politikari dagokienez. Biktimen eskubidei buruzko sarrera labor baten ondoren, delitu arrunten biktimen eskubideen eta terrorismoaren biktimen eskubideen arteko bereizketa egitea justifikatuta ote dagoen aztertuko da; batik bat, biktimizazio terroristaren testuinguruak sortzen dituen zailtasunak ikusita, eskubideak gauzatzeari dagokionez eta, bereziki, masen biktimizazioko kasuei dagokienez.

Résumé : Cet article, en mettant l'accent sur les victimes, est centré sur les développements de ces dernières années au sein des différentes organisations (Nations Unies, Conseil de l'Europe, l'Union européenne) en matière de politique et législation concernant les victimes du terrorisme. Après une brève introduction sur les droits des victimes, l'auteur analyse si la distinction entre les droits des victimes de la criminalité classique et les droits des victimes du terrorisme est justifiée, compte tenu les significatives difficultés dérivant du contexte de victimisation terroriste en ce qui concerne l'exercice des droits et, en particulier, dans les cas de victimisation des masses.

Summary: This work focuses on victims, and examines the developments that have taken place in recent years within different organisations (The UN, The Council of Europe, The European Union) with regard to policy and legislation concerning victims of terrorism. After a brief introduction that discusses the rights of victims, the work goes on to analyse whether the distinction between the rights of victims of conventional crimes and victims of terrorism is justified, especially in the light of the difficulties raised by the context of terrorist victimisation with regard to the exercise of rights, especially in the cases of mass victimisation.

Palabras clave: Víctimas del terrorismo, victimización de masas, derechos de las víctimas, Consejo de Europa, Unión Europea, ONU.

Gako-hitzak: terrorismoaren biktimak, masen biktimizazioa, biktimen eskubideak, Europako Kontseilua, Europar Batasuna, NBE.

Mots clef : Victimes du terrorisme, Victimization de masse, droits des victimes, Conseil de l'Europe, Union Européenne, ONU.

Key words: Victims of terrorism, mass victimisation, rights of victims, The Council of Europe, The European Union, The UN.

This conference puts victims at the centre: on 9/11 2001, more than 2600 people died at the World Trade Center, 125 died at the Pentagon, and 256 died on the four planes, while some 250 others got injured. In Madrid, on 11/3 2004, 192 people were killed and more than 1800 injured. The Bali bombings of 12 October 2002 killed 202 people, 164 of whom were foreign nationals (resulting in so-called cross-border victims), and 38 Indonesian citizens. A further 209 people were injured. The Beslan School Hostage that began on 1 September 2004 killed 334 civilians, including 186 children and hundreds more were wounded.¹ It has been argued by Schmid, and I quote that “times have changed and we have “progressed” – or perhaps “regressed” – from individual terror to “mass terror”. Since the terrorism of the late 19th century, there appears to be an erosion of moral inhibitions. While an anarchist terrorist would not throw a bomb against the police chief if he was in company of his wife and children, today – as we saw in Beslan – children are explicitly targeted. They were targeted not despite but because of their innocence, which, presumably, enhances in the reasoning of the perpetrators, the terrorists’ bargaining power.”²

In this paper, I will focus on developments within different international organizations with regard to policy and legislation relating to victims of terrorism, namely the UN, CoE, and the EU. I will consistently use the word victims instead of survivors, considering that this is also the term used in the international framework.

First, however, I will give a brief introduction on victims’ rights in general and secondly I will assess whether there is a need or legitimization to differentiate between rights for victims of conventional crime and victims of terrorism.

Since the mid-1980s, several international instruments have been adopted defining basic minimum rights for victims of crime in the criminal justice system and beyond, such as the pioneer Declaration adopted in 1985 by the UN General Assembly on *Basic Principles of Justice for Victims of Crime and Abuse of Power*. Other examples include the *EU Council Framework Decision on the Standing of Victims in Criminal Proceedings* adopted in 2001, and in 2006 the Council of Europe adopted *Recommendation (2006)8 on Assistance to Crime Victims*.³ These general instruments include a variety of victims’ rights, from the right to information, the right

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

2. Alex SCHMID, *Magnitudes and Focus of Terrorist Victimization*, in: Dilip. K. Das and Peter C. Kratoski (Eds.), *Meeting the Challenges of Global Terrorism: Prevention, Control and Recovery*, Lanham, LeLington Books, 2003, pp. 33-74.

3. For an overview of existing victims’ rights instruments, see Groenhuijsen & Letschert, *Compilation of International Victims’ Rights Instruments*, 2008, Wolf Publishers.

to compensation, the right to adequate victim support, to the right to meditation. Increasingly, we see that general victim of crime policies branch out into specialized policies and legislation for particular groups of victims, such as victims of trafficking or child victims.⁴ And more and more attention is also given to the specific needs of victims of terrorism.

An important question that merits discussion is whether the existing general victims of crime instruments are not sufficient to address the needs of victims of terrorism. In 2008, the EU asked a consortium of research groups (Catholic University of Leuven as principal leader, INTERVICT and the Centre for the Study of Political Violence) to conduct a study into the needs of victims of terrorism, aiming to identify possible reasons for the adoption of a specific EU recommendation relating to the rights of victims of terrorism.⁵

The results show that the legal position of victims of terrorism is mostly identical to that of victims of (violent) crime. Victims' rights are closely connected to their needs and in general it is safe to say that the needs of victims of terrorism do not differ as much from those of victims of crime. For instance, *all* victims need to be treated with respect and recognition, and may require financial, medical and psycho-social assistance.

In 2009, an analysis of a survey carried out by the OSCE regarding the position of victims of terrorism in their countries was carried out.⁶ The OSCE contains 56 participating States, including the US, Canada and Russia. The questionnaire consisted of 34 mostly closed-ended questions and was aimed at gathering detailed relevant information on laws and practice of States on solidarity with victims of terrorism with a view to identifying best practices in this area.

24 of the 56 participating States filled out and returned the questionnaire. In general we found that in most States legislation relating to the rights of victims of terrorism is not different from provisions for victims of crime. 17 of the respondent states have no specific legislation concerning victims of terrorism whereas six countries do; namely Macedonia, Serbia, Spain, France, Canada and Tajikistan. For the most part, those countries without specific legislation for victims of terrorism apply the legislation for victims of crime to this group of victims. The additional specific legislation in Macedonia, Serbia, Spain, France, Canada and Tajikistan is mainly related to state compensation to victims of terrorism and provides no further or substantial different protection relating to victim assistance or support schemes. The main differences indeed seem to lie in the sphere of compensation arrangements where sometimes, mostly based on solidarity, ad hoc structures are set up (Spain after 11 March), or full compensation or up-front payment is provided (France, Tajikistan).

4. See Letschert, R.M., Groenhuijsen, M.S., *Global Governance and Global Crime, Do Victims Fall in Between?* In Letschert and Van Dijk, *The New Faces of Victimhood*, 2011, Springer.

5. See Letschert, Staiger and Pemberton, *Victims of Terrorism, Towards a European Standard of Justice*, Springer Press, 2010.

6. LETSCHERT, R.M., & PEMBERTON, A. (2008). Addressing the needs of victims of terrorism in the OSCE region. *Security and Human Rights*, 19(4), 298-311.

This being said, our EU study into the needs of victims of terrorism did conclude that additional complexities may arise in implementing existing general victims' rights in the context of terrorist victimization in particular when resulting in mass victimization. To illustrate, in the study it was shown that the need for compensation may not be different *in kind* when comparing victims of terrorism and victims of crime. However, this does not rule out the possibility that the need may be different *in degree*, in other words, there is a more pressing or urgent need for compensation when it concerns victims of terrorism. Moreover, State compensation may also be an expression of the State's attempt to meet a different need, as State compensation is not only related to the mere need of victims to have the damages incurred compensated, but is also an expression of State and societal acknowledgement for victims.⁷ In varying ways the study has shown that this societal acknowledgement is an important consideration in the development of specific State compensation schemes for victims of terrorism.

Similar considerations apply to psycho-social assistance structures for victims of terrorism. Our study shows that in particular for terrorist attacks resulting in mass victimization, additional measures may have to be implemented to meet the need for assistance and support inherent to an incident of this scale. Moreover, the differences are not measurable in terms of the types of support and assistance available, for example in psychological and medical assistance but in the more precise form of these methods of meetings victims' needs and in the way they are implemented. This also relates to the possible added value of establishing and maintaining specialized centres for victims of mass-terrorist attacks.

On the basis of this study, the consortium drafted a set of recommendations containing guidelines for States on how to guarantee the rights of victims of terrorism. The proposed draft *EU Recommendation on Assistance to Victims of Acts of Terrorism* covers a more extensive approach (compared to other general victims of crime instruments) for the assistance to victims of terrorism, including, among other things, provisions relating to psycho-social assistance (both emergency and continuing assistance), access to justice, compensation, information strategies, and access for victims of terrorism to restorative justice practices and procedures.

With regard to access to justice and administration of justice, particular focus should be put on participatory rights for victims of terrorism and providing legal aid. Considering that victimization by terrorist acts often results in cross-border victimization, complicating access to justice and the provision of legal assistance, requires to reflect on how the needs of so-called cross-border victims in this regard could be addressed. In addition, the recommendation calls on Member States not only to launch effective and independent criminal investigations into the terrorist act, but also consider independent public inquiries in order to give full and public disclosure of the background, circumstances and responsibilities, especially where the perpetrators died, cannot be found or identified because of which no trial takes place at all.

7. This need for public acknowledgment is also explicitly included in the 'UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', of 16 December 2005. The document contains extensive forms of reparation, which goes much further than only financial compensation. The need for public acknowledgement is also included in the draft EU Recommendation in the form of commemorations.

Also, the compensation provision does not only focus on ensuring adequate financial compensation, but also calls upon States to consider other reparative measures such as commemorations and tributes to the victims or proper reburial of the bodies, in line with existing examples for victims of international crimes such as genocide or crimes against humanity.⁸

The study also concluded that the scope of victimization is wider than only the group of direct victims. Terrorist acts do not only have a devastating effect on the quality of life of primary and secondary victims, but on all others who have reason to fear to be targeted, in fact the community as a whole. Addressing the needs of this so-called tertiary victim group is therefore important, also to prevent backlash attacks on members of communities associated with the perpetrator group. The recommendation therefore urges Member States to prepare adequate information strategies with a view to minimizing undue apprehension, fears and social stigmatization among the larger public.

Until now, the EU has not addressed the recommendations following from our study. Let me now explain what the three international and regional organizations are doing, starting with the EU.

EUROPEAN UNION

The EU acknowledges that increasingly the open area of free movement could be abused by terrorists to pursue their objectives. In this context, concerted and collective EU level action is indispensable. Therefore, the EU has developed a holistic counter-terrorism response – the EU Counter-Terrorism Strategy.⁹ Adopted in 2005, this strategy commits the Union to combating terrorism globally, while respecting human rights and allowing its citizens to live in an area of freedom, security and justice. According to this strategy, assistance to victims of terrorism and their families is a key part of EU counter-terrorism efforts. However, victims and their associations can also contribute to preventing terrorist radicalisation and send a message of non-violence and reconciliation. Their testimony is indispensable for the global recognition of the dangers that terrorism presents to human life, welfare and our way of living.

Also, every year, the 11th of March marks the anniversary of the 2004 Madrid-Atocha train bombings that killed 192 and injured at least 1 800 people commuting to work. Thus, the EU has devoted that date to remembering all victims of terrorist attacks in Europe and elsewhere in the world.

The recent Stockholm Programme calls for examining how legislation and practical support measures for the protection of victims, including the victims of terrorism, could be further improved. The EU has already adopted a Framework Decision on the standing of victims in criminal proceedings and a Directive on compensation to crime

8. See LETSCHERT and VAN BOVEN, Providing Reparation in Situations of Mass Victimization – Key challenges involved, in Letschert, Haveman, De Brouwer and Pemberton, *Victimological Approaches to International Crimes*, Intersentia, 2011.

9. From http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33275_en.htm.

victims. In addition, a Framework Decision on combating terrorism ensures appropriate assistance for victims' families. The victims' package adopted recently by the European Commission (on 18 May 2011) also refers to the specific needs of victims of terrorism being labeled as particular vulnerable victims that require specialist support services due to the particular characteristics of the crime they have fallen victim to.¹⁰ This victims' package is part of the process of adopting an EU Directive on Victims of Crime, revising the 2001 Framework Decision on the Standing of Victims in Criminal Proceedings.

The Commission has also been providing funding for projects led by public and private organisations. An average of EUR 1.8 million a year have helped victims and/or their families to recover from the consequences of a terrorist attack. The EU co-financed projects led by victims' organisations and associations offer social or psychological support and training for practitioners or contribute to raising awareness of the European public.

Lastly, the Commission has set up a European Network of Associations of Victims of Terrorism (NAVt). The main aim of this network is to stimulate trans-national cooperation between associations of victims of terrorism and enhance the representation of victims' interests at the EU-level. On its website, the network provides useful information, including the mapping of associations and organisations specialised in supporting victims of terrorism, funding opportunities, a calendar of events, a library with relevant publications as well as a chat forum.¹¹

COUNCIL OF EUROPE

The Council of Europe (CoE) addressed the issue of victims of terrorism in 2005, when it adopted guidelines that focus specifically on victims of terrorism.¹² The guidelines address the needs and concerns of victims of terrorist acts, in identifying the means to help them, and to protect their fundamental rights.¹³ Comparing the content of the more general victims' rights instruments and these specific guidelines, some minor differences can be identified. The CoE Guidelines contain a provision relating to continuing and emergency assistance and a provision on the possible negative effects of media exposure, which cannot be found in most of the other instruments. However, overall, the main bearing of the existing instruments is the same, containing the classical victims' rights such as the right to information and the right to receive compensation. Furthermore, the Council of Europe's Convention on the Prevention of Terrorism (CETS No. 196, opened for signature in 2005 and entered into force in

10. COM (2011) 0274, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions*, Strengthening victims' rights in the EU.

11. <http://www.europeanvictims.net/>.

12. See Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Victims of Terrorist Acts, 2 March 2005. The CoE also adopted Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers at its 804th meeting (11 July 2002), which address victims compensation issues in paragraph 1VII.

13. Preamble, para. h.

2007) contains a provision specifically dealing with the protection and compensation of and assistance to victims of terrorism. The CoE continues its activities with regard to this topic, as can also be viewed from the conference they organised in June 2011, in San Sebastian (Spain).

UNITED NATIONS

While in the immediate years following the 9/11 events, the issue of terrorism has been addressed with an almost exclusive focus on the suspected perpetrators, the issue of victims' rights has gradually moved to the centre of the debate within UN circles. The United Nations Global Counter-terrorism Strategy stresses "the need to promote and protect the rights of victims of terrorism" and points to the dehumanization of victims of terrorism as one of the conditions conducive to the spread of terrorism. The Global Counter-terrorism Strategy also includes a pledge of all Member States to "consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives." This Strategy was reaffirmed twice by the General Assembly, in 2008 and 2010.

In 2008, the Secretary-General of the United Nations hosted a symposium on supporting victims that brought together victims of terrorist attacks from all over the world. The report following the symposium contains a set of recommendations directed towards Governments. Especially a strong request was made to strengthen legal instruments at both the international and national levels, providing victims of terrorism with legal status and protection of their rights. Also, a call was made to establish a UN voluntary fund for victims of terrorism.¹⁴

Since last year, not New York but Geneva was the place where the topic was discussed. The Human Rights Framework, in particular the UN Human Rights Commissioner, put the issue on the agenda of several meetings, most notably of the UN Human Rights Council. In a resolution adopted on 26 March 2010, the UN Human Rights Council "deeply deplore[d] the suffering caused by terrorism to the victims and their families and expresse[d] its profound solidarity with them, and stresse[d] the importance of providing of them with proper assistance."¹⁵ This resolution was the result of the strong and successful lobby of the Spanish Government and the Spanish NGO 'Victims of Terrorism Foundation'.

In June 2011, during the 17th session of the UN Human Rights Council, a panel discussion was held which offered a forum to enhance the understanding on the issue of human rights of victims of terrorism, exchange information on relevant efforts undertaken at international, regional and national levels, and share good practices with a view to increasing the capacity of States to respond to the needs for protection of the rights of victims of terrorism and their families, while taking into account their international human rights obligations.

14. Other initiatives on UN level include an event co-organised in December 2010 by the UN Counter Terrorism Implementation Taskforce and the International Institute of Higher Studies in Criminal Science: <http://www.isisc.org/public/Agenda%20FINAL.pdf>.

15. A/HRC/RES/13/26, para. 3.

Lastly, the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism has on various occasions stressed the importance of addressing the human rights of victims (and not only perpetrators), in particular their right to effective remedies.¹⁶ In his 2010 report he specifically draws attention to the need for model provisions for reparations and assistance.¹⁷ The recently appointed new special rapporteur, Ben Emmerson, stated on 26 October 2011 that, although there are some differences in view among States on this issue, he believes States have a legal obligation towards victims of terrorism and their families. For example, they should provide health support and psychosocial assistance. He added that solidarity with victims is one of the areas of common interest between the Counter-Terrorism Committee and his mandate.

CONCLUSIONS

The international normative framework is increasingly paying attention to the plight of victims of terrorism. Resolutions and recommendations from various organisations stress the need to pay particular attention to this group of victims. Whereas victims of international crimes such as genocide, crimes against humanity and war crimes can rely on several legally binding documents, for victims of terrorism the existing instruments often reflect a political commitment, or contain only a few provisions relating to this particular group in what are often called quasi-legal instruments or soft law. Does this mean that more efforts should be made to draft new international binding legislation? I would be hesitant to recommend that in the first place. Increasingly, research reveals the gap between law on paper and law in practice. The huge gap between international norms and implementation and compliance on the ground justifies a careful consideration whether new norms would improve real access to legal rights for victims of terrorism.

I have explained that in most cases, the needs of victims of conventional crime are not different in kind compared to victims of terrorist acts. Nevertheless, what does differ relates to difficulties in implementing the existing victim rights in the context of terrorist victimization, in particular when resulting in mass victimization. Our analysis of mostly European countries' national legislation and policies shows that most states do not have specific provisions for victims of terrorism. With regard to States that do have such provisions, our study did not assess how this actually works in practice. To be able to label a particular country's strategy of meeting the needs of victims of terrorism for, for instance, compensation and assistance as a best practice, more research is needed.

16. E/CN.4/2006/98, 28 December 2005, para. 66.

17. *Practice 6. Model provisions on reparations and assistance to victims*: 1. Damage to natural or legal persons and their property resulting from an act of terrorism or acts committed in the name of countering terrorism shall be compensated through funds from the State budget, in accordance with international human rights law. 2. Natural persons who have suffered physical or other damage, or who have suffered violations of their human rights as a result of an act of terrorism or acts committed in the name of countering terrorism shall be provided with additional legal, medical, psychological and other assistance required for their social rehabilitation through funds from the State budget. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Ten areas of best practices in countering terrorism, A/HRC/16/51, 22 December 2010.

Two considerations should guide further research. First of all the differences in needs between victims of crime and victims of terrorism mainly relate to differences in degree and implementation. This means that it is necessary to review the implementation of the variety of schemes in practice to be able to discern relevant characteristics of good practice. This should imply a more in-depth analysis of the content of these schemes and of the way that they are implemented. To the extent possible, it should be further ascertained whether the legislation concerning compensation and the organisational structures available for compensation and assistance suffice to meet the needs of actual victims of terrorism.

Second, differing experiences with terrorism may imply a variety of best practices. In the results of the survey it was shown that experience with terrorism could be a driver for the development of policy. For one thing there are many countries that fortunately have no experience with terrorist attacks, while others experience terrorism on a regular if not daily basis. Moreover, those who do experience terrorism, have varying experiences as well. Some experience a large number of small scale domestic attacks, while others are confronted with one-time, large scale attacks. Best practice may therefore be context-specific and differ according to the experience with terrorism. It is as yet unclear what the practical value is of the experience of countries often confronted with terrorism and with more elaborate schemes for victims of terrorism for countries that have yet to suffer terrorist attacks. The consequences of these two considerations imply first that follow-up research should more fully and extensively review the implications of the compensation and assistance programmes across countries and its relation to the experience that these states have with terrorism. Such a study should have a more qualitative approach, using in-depth interviews rather than standardized surveys. It should query the relationship between the various elements of the compensation and assistance programmes in combination, their underlying motivations, in particular where it relates to differences between victims of violent crime and terrorism and the relationship with experience with terrorist attacks.

Based on such research, conclusions could be drawn whether new legislation is really needed. Domestic and international NGOs have worked hard to put the issue on the agenda of international organisations, with more and more success. Considering that States increasingly demonstrate what is called *convention fatigue*, their lobbying and advocacy work should also focus on practical steps such as the establishment of a voluntary fund and collecting best practices from different countries, regions, and contexts.

This would be a worthwhile step forward in the international effort to combat the detrimental effects of terrorist attacks for the victims who have the misfortune to be confronted with it.