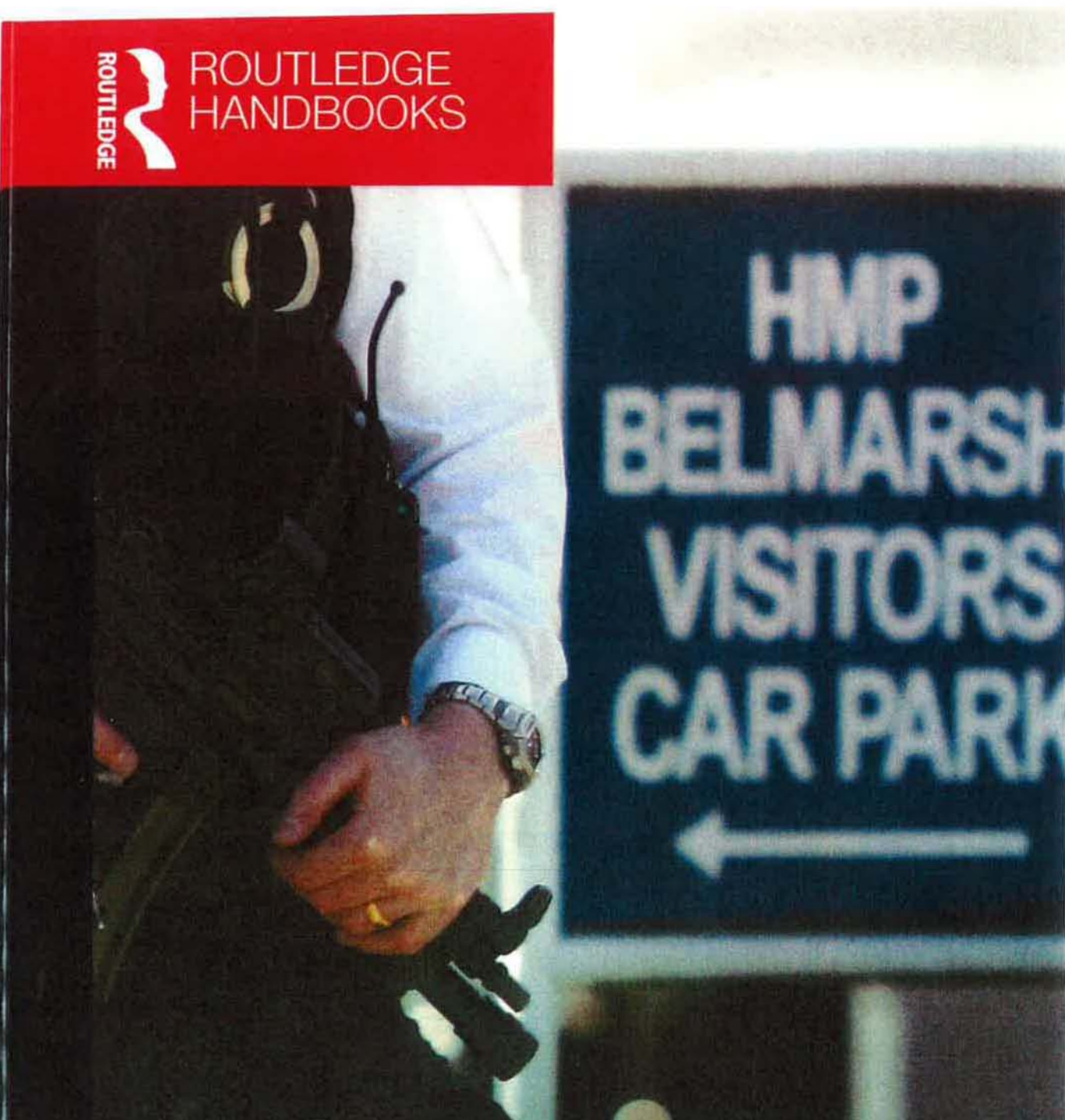


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Routledge Handbook of Law and Terrorism

Edited by Genevieve Lennon and Clive Walker

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The victims of terrorism

Ilaria Bottigliero, Lyal S Sunga, and Clive Walker

Introduction

Since 9/11, public and private security personnel and apparatus have multiplied,¹ while terrorism incidents have continued apace, with a more than fivefold increase in deaths between 2000 and 2013.² Following the 9/11 attacks, world expenditure on counter-terrorism is reckoned to have increased by around US\$70 billion.³ Despite indications that victims of terrorism need greater protection, they often seem to remain at the end of the line of counter-terrorism priorities.⁴ Generally speaking, domestic frameworks remain piecemeal and inadequate. While there have been signs of growing interest in victims' rights and greater attention to the question of redress in human rights circles at the international level, positive legislative and policy change at the domestic level have been more scarce. Terrorist victims' concerns have become integrated into national security debates while the focus on the human rights of victims seems to have become weaker.

This chapter provides an overview of the treatment of terrorism victims by first assessing whether such victims have a claim distinct from that of the victims of ordinary crime or that of the victims of natural catastrophe. Next, contemporary approaches in domestic law to

- 1 See for the UK impact, C Walker and A Staniforth, 'The amplification and melding of counter-terrorism agencies: from security services to police and back again' in A Masferrer and C Walker (eds), *Counter-Terrorism, Human Rights And The Rule Of Law: Crossing Legal Boundaries in Defence of the State* (Edward Elgar, Cheltenham, 2013).
- 2 See Global Terrorism Index 2014 (Institute for Economics and Peace, New York, 2014). For an assessment from the country most heavily involved in counter-terrorism, see BM Jenkins and JP Godges (eds), *The Long Shadow of 9/11: America's Response to Terrorism* (RAND, Santa Monica, 2011).
- 3 See B Lomborg, 'Is counterterrorism good value for money?' (2008)(1) *NATO Review* Available at: www.nato.int/docu/review/2008/04/AP_COST/EN/ accessed 14 November 2014.
- 4 For the leading literature, see DS Greer (ed.), *Compensating Crime Victims* (IUSCRIM, Freiburg, 1996); J Norton Moore (ed.), *Civil Litigation Against Terrorism* (Carolina Academic Press, Durham, 2004); M Faure and T Hartlief (eds), *Financial Compensation for Victims of Catastrophes* (Springer, Vienna, 2006); HJ Albrecht and M Kilching, 'Victims of terrorism protection' in M Wade and A Maljevic (eds), *A War on Terror?* (Springer, New York, 2010); R Letschert, I Staiger, and A Pemberton (eds), *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer, Heidelberg, 2010); I Bottigliero, 'Realizing the right to redress for victims of terrorist attacks' in AMS De Frías, KLH Samuel and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford University Press, Oxford, 2012); I Bottigliero and LS Sunga, 'Victims' Redress Amidst Terrorism's Changing Tactics and Strategies' in B Saul, *Research Handbook On International Law And Terrorism* (Edward Elgar, Cheltenham, 2014); J Argomaniz and O Lynch (eds), *International Perspectives on Terrorist Victimisation* (Palgrave Macmillan, Basingstoke, 2015).

redress for the victims of terrorism are discussed with regard to special state compensation schemes and the options available for private law civil litigation. These approaches are discussed critically against the standards of international law, using comparative examples drawn chiefly from the UK and US experience.

The need for special recognition for victims of terrorism

Several arguments support a special regime for, or special recognition of, the rights of victims of terrorism to ensure that both primary and secondary victims of terrorism (often, next-of-kin), do not suffer disadvantage compared with the victims of ordinary crime. Some of these arguments have been based on the consideration that terrorism victims are usually ‘randomly selected’ – more than crime victims. In that sense, victims of terrorism are similar to victims of natural catastrophes, such as flooding or earthquakes.⁵

‘Equity and social solidarity’, guiding principles cited in the Preamble to the European Convention on the Compensation of Victims of Violent Crimes 1983,⁶ figure at the core of a number of European domestic compensation systems,⁷ which provide for some form of redress to their nationals or, in more limited instances, to foreign nationals within their jurisdiction.⁸ Another important rationale for according special recognition to victims of terrorism has been expressed in terms of the need to mitigate harm inflicted by terrorism to collective interests, such as the stability and effectiveness of the political arena and the economic system. Governments have become increasingly concerned that major or prolonged terrorist attacks could disrupt financial and commercial systems and centres, and that affected parties, such as in the financial centres of London and New York, should not be left uncompensated.⁹

Despite these core arguments, in some countries, such as the UK and US, the development of avenues to allow for special claims for terrorist victims’ redress has met with considerable scepticism, although the collective nature of the threat and serious and prolonged scale of losses has encouraged a more expansive reaction in Northern Ireland.¹⁰

A possible reason for relatively weak concern in Great Britain over the matter of victims of terrorism could be that the number of deaths directly attributable to terrorist incidents between 1969 and 1998 amounted to only 121,¹¹ whereas the equivalent figure for Northern Ireland was 3,636.¹² From 2001 to 2013, there were 62 deaths in Great Britain (including suicide

5 See further A Pemberton, ‘Needs of victims of terrorism’ in R Letschert, I Staiger, and A Pemberton (eds), *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer, Heidelberg, 2010). However, a distinct aspect of protection of terrorism victims may be the support of officers of the state: L’s Application [2009] NIQB 67, para 10 (described below).

6 ETS 116.

7 The public might be termed tertiary victims: R Letschert, I Staiger, and A Pemberton (eds), *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer, Heidelberg, 2010) 19–20.

8 By art 3b, compensation shall be paid only 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’.

9 See for example J Mueller and MG Stewart, ‘Terrorism and counterterrorism in the US: the question of responsible policymaking’ (2014) 18 *International Journal of Human Rights* 228.

10 See C Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) ch 10.

11 Home Office and Northern Ireland Office, *Legislation Against Terrorism* (Cm 4178, London, 1998) para 2.2.

12 D McKittrick, S Kelters, B Feeney, and C Thornton, *Lost Lives* (Mainstream, Edinburgh, 1999).

bombers) and 68 in Northern Ireland.¹³ Thus, the bureaucratic costs of a special scheme catering to such small numbers in Great Britain could be considered by some constituencies to be a waste of resources. Other arguments that militate against special recognition of terrorism victims, at least in the UK, include the imperfect state duty to protect life under Article 2 of the ECHR¹⁴ and a growing hostility to a 'compensation culture'.¹⁵

An even more compelling argument against taking stronger action is that harm inflicted by terrorism ultimately results from some sort of crime such that 'normal' criminal injury compensation schemes in principle should suffice to address the issue, for example, the Criminal Injuries Compensation Authority in Britain and the Compensation Agency for Northern Ireland. The Criminal Injuries Compensation Authority, covering Great Britain, pays monetary compensation to individuals who have been physically or mentally injured because of a violent crime. The scheme,¹⁶ which can be accessed by claimants free of charge, was set up in 1964 and is currently governed by the Criminal Injuries Compensation Act 1995. Awards range from £1,000 to a ceiling of £500,000. Claims must normally be based on crimes reported to the police, but a conviction is not necessary. The Compensation Agency for Northern Ireland follows very similar rules and procedures for the scheme under the Criminal Injuries Compensation (Northern Ireland) Order 2002, which operates according to the Northern Ireland Criminal Injuries Compensation Scheme 2009.¹⁷

Are these systems really sufficient to deliver justice to the victims of terrorism? Many individual victims of terrorism have made claims under these schemes, but the schemes have been criticised as dilatory and ungenerous. This point has been voiced especially by victims of mass attacks, where multiple and complex claims have been lodged around the same time, such as those relating to the 7 July 2005 attacks on London's public transport system.¹⁸ In addition, these systems feature several limitations and exclusions. One limitation has been to exclude claims brought by anyone with a criminal record. Given that a person's criminal record may be entirely irrelevant to the legitimacy of their claim for compensation arising from a terrorist incident, such limitation seems to mete out unfair treatment. Other limits relate to terrorism inflicted overseas on British citizens, as well as exclusion of loss or damage to property and losses suffered by corporate bodies.

13 See CP Walker, *The Anti-Terrorism Legislation* (3rd edn, Oxford University Press, Oxford, 2014) 27. The Criminal Injuries Compensation Authority resolved 42,859 cases in that single period: *Annual Report and Accounts 2013–14* (2013–14 HC 155) 9.

14 See *Osman v United Kingdom*, App No 23452/94, 1998-VIII; *McKerr v United Kingdom*, App No 28883/95, 2001-III; *Jordan v United Kingdom*, App No 24746/94, ECHR 2001-III; *Van Colle v United Kingdom*, App No 7678/09, 13 November 2012; *McCaughey and others v United Kingdom*, App No 43098/09, 16 July 2013.

15 See House of Commons Constitutional Affairs Committee (2006) *Compensation Culture* (2005–2006 HC 754) para 111; Lord Young, *Common Sense, Common Safety* (Prime Minister's Office, London, 2010) 19.

16 See Ministry of Justice, *The Criminal Injuries Compensation Scheme 2012*. Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf accessed 6 November 2014.

17 Available at: www.dojni.gov.uk/agencies/compensation-tariff-scheme-legislation-2009.pdf accessed 6 November 2014.

18 Home Office, *Addressing Lessons from the Emergency Response to the 7 July 2005 London Bombings* (London, 2006) paras 30–35.

Perhaps because of some of these shortcomings, the criminal compensation scheme in Norway was amended following the attacks by Anders Breivik, which killed 77 people on 22 July 2011.¹⁹ The Standing Justice Committee of Norway's Parliament (*Storting*), together with the Ministry of Justice and Emergency Planning, decided to increase the level of compensation as well as the number of eligible victims. Specifically, the Committee set the sum of Norwegian Krone (NOK) 4.75 million (about US\$853,800) as the upper amount of compensation for which a single individual would be eligible, raising it from NOK 3.1 million (about US\$557,200).²⁰

Despite the drawbacks described above, related to the inadequacy of domestic compensation schemes, the plight of victims of terrorist incidents has received increasing recognition globally. The internationalisation of terrorism together with the reach of global news media outlets, have drawn greater public attention to victims and their suffering. Greater awareness of terrorist incidents and their consequences have underlined the realisation also that increasingly anyone anywhere can fall victim to such violence. In certain instances, victims of terrorism have even been identified as heroes, for example, as seen in the US with regard to 9/11 victims (described later in this chapter) or in Israel, where *Yom Hazikaron* (Day of Remembrance for Israeli Fallen Soldiers and Victims of Terrorism) was extended in 2007 to civilian victims.²¹ Finally, it may be noted that the private insurance market does not offer an alternative solution since holiday travel or property insurance for terrorism risk may either be unavailable or only on offer at exorbitant cost.

In the light of these shortcomings, the following section overviews and analyses selected domestic compensation schemes that are more specifically designed to aid victims of terrorism in order to assess their scope and effectiveness.

State compensation schemes for terrorist incidents

Many Western countries have now instituted compensation schemes for victims of terrorist incidents. They vary greatly in their coverage of the kinds of losses and the scale of compensation. The prime examples used here will be from the UK and US; the picture is variable in Europe, even though a compensation scheme for personal loss from violent crime within EU states is now required by the EU Council Directive 2004/08/EC relating to Compensation to Crime Victims. Beyond Europe, many states do not have any compensation schemes or, if they do, these do not recognise non-nationals or they offer very modest payments.²²

Airline insurance

A prominent but interim form of support that developed after the 9/11 attacks related to airlines. As a result of the reassessment of risk immediately after 9/11, it was reported that insurance costs for airlines had risen to unaffordable rates or that sufficient cover was

19 See 22 July Commission, *Report* (Oslo, 2012).

20 W Zeldin, 'Norway: Crime victims' compensation to be increased after July 2011 massacre', *Global Legal Monitor* (Online, 1 March 2012). Available at: www.loc.gov/lawweb/servlet/lloc_news?disp3_1205403009_text accessed 11 November 2014.

21 Memorial Day Law for the Fallen of Israel's Wars 1963, as amended.

22 See *Pike v Indian Hotels* [2013] EWHC 4096 (HC).

unavailable.²³ With the prospect that airlines would have to be grounded, some governments arranged for the reinsurance of commercial coverage.

The US Government used the Air Transportation Safety and System Stabilization Act 2001²⁴ to reduce the liability of airlines, under Title IV, by placing a cap on claims and also providing an alternative 'no-liability' September 11th Victim Compensation Fund specifically for the victims of the 11 September attacks.²⁵ Title I of the Act also allowed the Air Transportation Stabilization Board to issue up to \$10 billion in federal credit guarantees to assist airlines further. Outright compensation from a pool of \$5 billion was given under Title V for the closure of airspace and loss of income from reduced air traffic to the end of 2001. Insurance aspects were dealt with under Title II of the Act by a government offer to reimburse airlines for increased premiums for 180 days and by taking over the responsibility for actual losses caused by terrorism within this period.

In the UK, the government arranged to offer insurance from 24 September 2001 through the Troika Insurance Company Limited.²⁶ Troika was set up by private brokers, although the Treasury kept a controlling share. The company offered cover for third-party war and terrorism insurance for liabilities greater than \$50 million (since this minimal level of cover remained available), with a limit of \$2 billion. At the same time, Troika purchased from the government 100 per cent reinsurance against all policies and paid the government for this reinsurance cover. Initially, the government waived any premium, but it later charged premiums to Troika based on passenger numbers (and also after August 2002 based on the amount of coverage). The European Commission issued guidelines on the level of these premiums to avoid unnecessary government subsidies.²⁷ In so far as the premiums failed to cover any losses, the government agreed to provide an indemnity (an eventuality that did not arise). The scheme ceased to issue new policies on 31 October 2002, by which time private coverage had become available again.

Commercial property loss

Terrorists have sometimes targeted businesses and corporate entities in order to drive away foreign investment, destroy business confidence and destabilise the economy.²⁸ As a result, financial and media concentrations, such as the City of London, have become prized targets for terrorism. The Provisional IRA attacked City of London targets with two large truck-bombs at St Mary Axe in 1992 and Bishopsgate in 1993. Four people died and hundreds were injured. The financial costs were estimated at more than £300 million. When the first IRA ceasefire ended in February 1996, the bombing of economic targets resumed with bombs at Canary Wharf, London, and the Arndale Shopping Centre, Manchester.²⁹

23 See J Doran, 'Wartime laws to help airlines' *The Times* (London, 21 September 2001) 1.

24 PL 107-42. See JW Stempel, 'The insurance aftermath of September 11th' (2002) 37 *Tort & Insurance Law Journal* 817.

25 See 28 CFR Pt104, 66 CFR 66274, 21 December 2001.

26 See C Walker, 'Political violence and commercial risk' (2003) 56 *Current Legal Problems* 531.

27 European Commission (2002), Guidance (C(2002)591 final, 27 February 2002) and Communication of the 2 July 2002 (COM (2002) 320 final).

28 See S Graham (ed.), *Cities, War and Terrorism* (Blackwell, Oxford, 2004); C Walker, 'Political violence and commercial risk' (n 26).

29 T Craig, 'Sabotage! The origins, development and impact of the IRA's infrastructural Bombing Campaigns 1939-1997' (2010) 25 *Intelligence and National Security* 309.

The damage caused by the bombing at St Mary Axe spurred a crisis in the reinsurance market such that a model terrorism exclusion clause issued by the ABI to its members on 12 November 1992 confirmed that, after 1 January 1993, terrorism cover for commercial property would no longer be available. In response, on 21 December 1992, the Secretary of State for Trade and Industry announced that the government would act as insurer of last resort through a new reinsurance company, Pool Re, managed and staffed by insurance industry personnel. Insurers within the scheme are obliged to offer terrorism cover for commercial properties in return for an additional premium, which is remitted to Pool Re. The government agrees to meet 90 per cent of any claims not covered by the fund, and insurance companies meet the remaining 10 per cent. Later revisions to the scheme have applied it to residential buildings owned by commercial companies and insured for a sum in excess of £2.5 million. It was also extended from 'fire and explosion' to an 'all-risks basis', to ensure cover for commercial property against biological or nuclear contamination, impact by aircraft or flood damage.

The scheme is now based on the Reinsurance (Acts of Terrorism) Act 1993, and fleshed out in the Retrocession Agreement between the Secretary of State for Trade and Industry and the Pool Reinsurance Company. Section 2 outlines that the reinsurance arrangements apply to loss or damage (direct and consequential) to property in Great Britain resulting from acts of terrorism. The geographical bounds are confirmed by section 3(2); Northern Ireland is omitted because alternative arrangements apply. By section 2(2), 'acts of terrorism' means 'acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty's government in the United Kingdom or any other government *de jure* or *de facto*'. This definition delimits the perpetrator to an 'organisation', and the purpose is confined to the terrorising of governments and not the public.³⁰ In practice, the application of the definition to a given event is settled by a certificate from HM Treasury. The scheme has built up a financial reserve that was more than adequate to meet the commercial losses from the bombings in 1996. A total of 13 incidents have been certified, with losses of over £600 million.³¹

Corresponding problems for the US commercial property insurance market resulted in the passage of the US Terrorism Risk Insurance Act 2002, which reflects many similar features.³² Several European countries have also initiated public-private schemes of insurance or reinsurance.³³

30 The issuance of a model terrorism exclusion wording by the ABI to its members on 12 November confirmed that, effective from the 1 January 1993, cover was no longer to be available to businesses ('On whom the bomb falls', *ReActions* (London, Jan 1993) 6; S Shapiro, 'UK reinsurers exclude terrorist acts' (1992) 26 Issue 48 *Business Insurance* (23 November) 53-4; G Souter, 'London reinsurers expect restrictions due to catastrophes' 26 Issue 43 *Business Insurance* (26 October) 10-6). The definition in the 1993 Act addressed that exclusion clause. The narrower definition was commented upon as attractive in later debates on what became the broader definition in the Terrorism Act 2000, s 1: Hansard (House of Commons) vol 341 col 186 14 December 1999, Simon Hughes; Hansard (House of Commons) vol 353 col 632 10 July 2000, John McDonnell.

31 Available at: www.poolre.co.uk/history.html accessed 11 November 2014.

32 S2600, PL 107-297. See JW Stempel, 'The Insurance Aftermath of September 11' (2002) 37 *Tort & Insurance Law Journal* 817; RH Jerry II, 'Insurance, Terrorism, and 9/11: Reflections on Three Threshold Questions' (2002-2003) 9 *Connecticut Insurance Law Journal* 95; ME Boardman, 'Known Unknowns: The Illusion of Terrorism Insurance' (2005) 93 *Georgetown Law Journal* 783; AB Marks, 'Under attack: Terrorism risk insurance regulation' (2011) 89 *North Carolina Law Review* 387; L Dixon and others, *The Future of the Terrorism Risk Insurance Act* (RAND, Santa Monica, 2014).

33 B Koch (ed.), *Terrorism, Tort Law and Insurance* (Springer, Vienna, 2004).

By way of assessment, the main objectives of the scheme have been achieved, as evidenced by the fact that affected commercial enterprises did not vacate the City of London and that the premiums charged to larger commercial enterprises were sustainable for them and for the taxpayer. Principal criticisms of these government reinsurance schemes include, first, the expense of taking up terrorism coverage. Availability at a substantial premium means that many property owners, especially small and medium enterprises, decide against coverage, leaving localities vulnerable to a state of disrepair following an attack. Second, the private insurance path accords priority to private over public recovery. Consequently, where loss occurs to an important public space, such as a shopping centre, state grants will still be required to enable recovery of non-commercial property, utilities, and policing costs. Thus, losses most evident to the public are the very ones that are not redressed, whereas the occupants of central city business zones typically are in a position to secure the greatest protection at potential cost to the taxpayer.³⁴ A third problem related to public-private insurance schemes is the disruption of private insurance and lack of incentives to resurrect a commercial market.³⁵

Disaster relief

Some of the funds for disaster recovery can apply to the mitigation of terrorism damage, especially for public sector infrastructure. The 'Bellwin' scheme of emergency financial assistance for local authorities in the UK,³⁶ for example, was applied to help the residents of Docklands, following the IRA attack of 1996, although the grant covered just £6 million out of £70 million of repair costs.

A more complex picture has developed in the US, where both Federal and State schemes of disaster relief must be taken into account. The DHS and FEMA present a much more prominent and extensive structure than UK equivalents, mainly reflecting the greater frequency and scale of natural disasters in the US. As for business and property loss, FEMA, acting under the Robert T. Stafford Disaster Relief and Emergency Assistance Act 1988,³⁷ coordinates emergency planning and response and issues Federal disaster grants to assist State governments. Yet, these US models have proved far from adequate in terms of prompt and effective delivery, as the experience of disaster relief efforts following Hurricane Katrina demonstrated.³⁸

Added to these standing schemes is the September 11th Victim Compensation Fund under the Air Transportation Safety and Safety Stabilization Act 2001, Title IV. The Fund offered no-fault Federal compensation on a generous scale for personal and economic loss and was administered through a Special Master. It was justified as a means by which to overcome the hurdles of civil litigation and to send a strong message of social solidarity with victims and also represented a collective determination to recover from 'an insult to the body politic' and from 'exposed feelings of vulnerability'.³⁹ The Fund successfully averted most (but not all) private litigation. However, even its Special Master expressed doubts as to whether this approach

34 R. Ericson and A Doyleb, 'Catastrophe risk, insurance and terrorism' (2004) 33 *Economy and Society* 135.

35 E Michel-Kerjana and PA Raschkyc, 'The effects of government intervention on the market for corporate terrorism insurance' (2011) 27 *European Journal of Political Economy* S122.

36 For the UK 'Bellwin scheme', see: Local Government and Housing Act 1989, s 155; M Sandford, *The Bellwin Scheme* (SN/PC/00643, House of Commons Library, London, 2014).

37 42 USC ss 5121–5206.

38 See DA Farber and J Chen, *Disaster Law and Policy* (Aspen, Frederick MD, 2009).

39 MS Shapo, *Compensation for Victims of Terror* (Oceana, New York, 2005) xvi.

should be repeated since it unduly discouraged private planning for the risks from terrorist incidents and the assumption of individual responsibility for damage.⁴⁰

Property loss compensation for individuals

Two schemes in Northern Ireland allow for the grant of state compensation to individuals who suffer property losses from terrorism. The main aim of these schemes, which have existed for many decades, has been to avert the widespread destruction of private property or attacks on key infrastructure. The schemes reflect a protective purpose in terms of ensuring community resilience through physical restoration. However, this approach might be criticised for squeezing the private insurance market.⁴¹

The first compensation scheme arises under the counter-terrorism legislation for action taken under the legislation. Under the Justice and Security (Northern Ireland) Act 2007, section 38 and schedule 4, paragraph 1, compensation can be provided wherever 'real or personal property is taken, occupied, destroyed or damaged, or... any other act is done which interferes with private rights of property' in exercising powers under sections 21–32, such as requisitions or defensive works. Since the 'Peace Process' of 1998, many military and security installations have been dismantled, and payments have been diminishing as a consequence.⁴² An additional 'Terrorism Act Compensation Scheme', administered by the Compensation Agency, deals with property damage from search operations conducted under special powers.

Next, the Criminal Damage (Compensation) (Northern Ireland) Order 1977⁴³ contains a much more ambitious scheme of property compensation, without counterpart in Britain. The scheme reflects a long tradition of state compensation for criminal damage to private property arising from political violence, based upon social solidarity and reflecting the unavailability or unaffordability of private insurance coverage.⁴⁴ Under the Order, the Secretary of State is liable to pay for financial loss above £200 in respect of property affected by damage as a result of an act committed maliciously by a person acting on behalf of, or in connection with, an unlawful association or any malicious and wanton damage caused to agricultural buildings and property or to community (mainly Unionist) halls. The scheme is not confined to commercial property, but most claims have related to commercial or communal property since they have been the predominant (and uninsurable) targets. Exclusions arise for failure to take reasonable precautions, for any unlawful use of the property or provocative or negligent behaviour, and for involvement in an unlawful association or engagement in terrorist activity, even if unrelated to the damage.⁴⁵ Substantial amounts have been paid over many years under this scheme: in 1972 to 1973, the figure was £26.6 million, in 1982 to 1983 £31.1 million, and in 1992 to 1993 £75.9 million (the highest annual total).

40 KR Feinberg, *What is Life Worth?* (Public Affairs, New York, 2005) 178.

41 See further *Report of a Committee to Review the Principles and Operation of the Criminal Injuries to Property (Compensation Act) (Northern Ireland)* (HMSO, Belfast, 1977).

42 For details, see C Walker, *Terrorism and the Law* (Oxford University Press, Oxford, 2011) ch 11.

43 SI 1977/1247, SI 2009/884.

44 J Waddell, *Report of a Committee to Review the Principles and Operation of the Criminal Injuries to Property (Compensation Act) (Northern Ireland)* (Belfast, 1971). The position has not changed much since that time: Northern Ireland Affairs Committee, *The Compensation Agency* (2003–04 HC 271) para 37.

45 See *Re Mahood* [2009] NIQB 100.

Physical protection for individuals

In cases of specific or known terrorist threats to identified individuals, states have a duty to protect their citizens and will also have a policy interest in ensuring the protection of public office-holders in so far as they are the targets.⁴⁶ A prominent example is Salman Rushdie, who has received special police protection since the publication in 1998 of his book, *The Satanic Verses*, resulted in the issuance of a *fatwa* from Ayatollah Ruhollah Khomeini on 14 February 1989.⁴⁷ Another example arose under the Northern Ireland's Key Persons Protection Scheme, funded by the Northern Ireland Office.⁴⁸ The scheme was replaced by the Limited Home Protection Scheme in 2006, which has received less funding.⁴⁹ Under the scheme, the selection of subjects involves 'individuals whose death or injury as a result of terrorist attack could damage or seriously undermine the democratic framework of government, the effective administration of government and/or the criminal justice system or the maintenance of law and order'.⁵⁰ Where the threat to an individual is assessed as severe or substantial and where he or she also falls within a list of specified occupations or public appointments, such individual is automatically admitted to the Scheme. Otherwise, the Minister exercises discretion, subject to advice from the Northern Ireland Committee on Protection.

Injury sustained by terrorism abroad

Finally, a more recently developed special scheme in the UK relates to the victims of terrorism abroad. Between 2001 and 2008,⁵¹ 141 British citizens died as a result of terrorist incidents; however, the Criminal Injuries Compensation Scheme does not apply to terrorism inflicted overseas on British citizens. Sustained lobbying following the deaths arising from terrorism in Bali in 2002, Sharm el-Sheikh in 2005, and Mumbai in 2008,⁵² eventually prompted a change in policy by way of 'the Victims of Overseas Terrorism Compensation Scheme', which was added to the Crime and Security Act 2010 and brought into force in 2012.

By section 47, the Secretary of State for Foreign and Commonwealth Affairs may make arrangements for payments for injuries and fatalities arising from a 'designated' terrorist act occurring outside the UK on or after 18 January 2010 (the date when the scheme was first announced), which, in the view of the Secretary of State, constitutes 'terrorism', and in respect of which, having regard to all the circumstances (such as whether a Foreign Office travel advisory had warned against a visit), the Secretary of State considers that it would be appropriate to designate it as such. For injuries sustained in the period between 1 January 2002 and the coming into effect of the Act, the government conceded that *ex gratia* payments could be

46 In *L's Application* [2009] NIQB 67 [10], it was stated that the purpose of the Limited Home Protection Scheme (described below) 'is to protect those individuals whose death or injury as a result of terrorist attack could damage or seriously undermine the democratic framework of government, the effective administration of government and/or the criminal justice system or the maintenance of law and order.'

47 See S Rushdie, *Joseph Anton* (Jonathan Cape, London, 2012).

48 See Northern Ireland Human Rights Commission, *Compatibility of Key Person Protection Scheme with the ECHR* (Belfast, 2002).

49 Hansard (House of Commons) vol 487 col 22w (26 January 2009).

50 *Re L* [2009] NIQB 67 [10].

51 Hansard (House of Commons) vol 481 col 249WH (29 November 2008).

52 See *Pike v Indian Hotels* [2013] EWHC 4096 (HC).

made for continuing injuries (but not deaths). Eight attacks had been designated as ‘terrorism’ under the Act by the time of writing, ranging from bombings in Bali in 2002 to the hostage crisis that took place at the gas plant at In Amenas in Algeria, bordering Libya, in 2013.⁵³ Eligibility to apply under section 49 may be determined by nationality, place, or length of residence, and any other factor considered appropriate. Procedures and payments mirror the standard Criminal Injuries Compensation Scheme.

This Victims of Overseas Terrorism Compensation Scheme should be considered a welcome development. However, given that only a third of travel insurance policies typically cover terrorism risk and that 24 per cent of travellers do not purchase travel insurance,⁵⁴ it is surprising that encouragement of insurance coverage, so prominent in the commercial sphere, did not figure as part of the reform package. The scheme embodies some advantages over legislation in many European countries.⁵⁵ However, it is less generous than the US Anti-terrorism and Effective Death Penalty Act of 1996,⁵⁶ Title II of which provides for compensation for victims of terrorism, including terrorism committed abroad, under the International Terrorism Victims Compensation Program – a programme implemented by the Terrorism and International Victims Unit in the US Department of Justice’s Office for Victims of Crime.⁵⁷ The Office administers other forms of compensation including Crisis Response Grants and Consequence Management Grants (to rebuild capacities and help victims to adapt), Criminal Justice Support Grants (to allow victim’s participation in proceedings), Crime Victim Compensation Grants (to reimburse expenses) and Training and Technical Assistance.

Private law solutions

In contrast to the foregoing compensation schemes, civil litigation has the advantage of giving victims their day in court and holding out the prospect of exhausting the resources of terrorists. On the other hand, civil litigation inevitably ties up claimants in the complexity, delay, and expenses of the court system, while the financial assets of terrorists may in reality prove very limited or very difficult to access. At the same time, victims might sometimes consider that a public accounting of the events and responsibilities surrounding a particular terrorist incident is sufficient recompense for the effort, in effect through ‘a litigator’s form of truth

53 See further Criminal Injuries Compensation Authority, *A guide to the Victims of Overseas Terrorism Compensation Scheme 2012*. Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/230117/victim-of-overseas-terrorism-scheme-guide-2012.pdf accessed 11 November 2014.

54 Hansard (House of Commons) Public Bill Committee col 446 (23 February 2010). Available at: <http://abta.com/news-and-views/press-zone/numbers-travelling-abroad-uninsured-on-the-rise> accessed 11 November 2014.

55 See HJ Albrecht and M Kilching, ‘Victims of terrorism protection’ in M Wade and A Maljevic (eds), *A War on Terror?* (Springer, New York, 2010) 239. Some other EU states already had protection for victims of terrorism abroad (especially in France under Le Fonds de Garantie des victimes des actes de Terrorisme et d’autres Infractions: Laws no 86-1020 of 9 September 1986 and 90-58912 of 6 July 1990) while some other (such as Germany: www.un.org/victimsofterrorism/en/member-states/germany, accessed 27 December 2014) have reportedly also taken up the idea. For a survey, see R Letschert and K Ammerlaan, ‘Compensation and reparation for victims of terrorism’ in R Letschert, I Staiger, and A Pemberton (eds), *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer, Heidelberg, 2010) 231–7.

56 42 USC s 10602, as amended.

57 Available at: www.ovc.gov/help/international.html accessed 11 November 2014.

commission'.⁵⁸ Aside from victim-oriented advantages and disadvantages, an additional disadvantage is that this tactic when used against state-sponsors of terrorism may damage what the state views as the public interest by compromising foreign relations and diplomacy.⁵⁹

In the context of counter-terrorism operation, civil litigation against one's own government has usually arisen from the application of excessive or misdirected lethal force applied by the security forces, such as the shooting of Jean Charles de Menezes in 2005.⁶⁰ Rather less straightforward has been to prove governmental fault for attacks by terrorists,⁶¹ although actions against private third parties, including airlines such as PanAm for the Lockerbie bombing⁶² or banks⁶³ have achieved some success in the US. In *Re Terrorist Attacks on September 11, 2001*, relatives of victims sought damages from hundreds of defendants (mainly linked to Saudi Arabia) who funded charities, which allegedly helped Al Qaeda.⁶⁴

There have also been some civil actions directed against the alleged terrorists themselves. In the UK, the sole example arose out of the Omagh bombing, when victims were encouraged to mount civil claims against the alleged perpetrators.⁶⁵ Controversially, the government took sides by granting special legal aid funding for victims but not for defendants.⁶⁶ Civil terrorism litigation has been more pronounced in the US, as encouraged by four legal measures.⁶⁷ First, the Alien Tort Claims Act of 1789 allows jurisdiction over torts committed by aliens in violation of the laws of nations or of a treaty.⁶⁸ Second, the Antiterrorism Act of 1990 allows US citizens only affected by 'an act of international terrorism' except by a foreign state or official the right to seek threefold damages.⁶⁹ Third, amendments in the Anti-terrorism and Effective Death Penalty Act 1996 to the Foreign Sovereign Immunities Act 1977 allow actions by US nationals for specified terrorism offences and remove immunity from those foreign states, which have been designated as sponsors of terror.⁷⁰ The numerous suits under this measure have usually been followed by default judgments, which have been largely unenforceable because of the absence of seizable assets within the jurisdiction. Fourth, the Racketeer Influenced and Corrupt Organizations Act 1970⁷¹ was amended by the USA PATRIOT Act 2001, section 813, so as to include various acts of terrorism within the definition of racketeering as a prelude to civil and criminal litigation under the 1970 Act.

58 R. Wedgewood, 'Civil remedies and terrorism' in J Norton Moore (ed.), *Civil Litigation Against Terrorism* (Carolina Academic Press, Durham, 2004) 170.

59 See J Norton Moore (ed.), *Civil Litigation Against Terrorism* (Carolina Academic Press, Durham, 2004) 16 (J Norton Moore), 147 (J Goldsmith and R Goodman), 177 (R Wedgewood).

60 See P Kennison and A Loumankys, 'Shoot to kill – understanding police use of force in combating suicide terrorism' (2007) 47 *Crime Law and Social Change* 151.

61 See *Donaldson v Chief Constable of the Royal Ulster Constabulary* (1990) 4 BNIL n 106 (QBD); *Rush v Chief Constable of the PSNI* [2010] NI Master 6.

62 *Re Lockerbie Air Disaster* (1992) *The Times* 20 May (CA).

63 See *Linde v Arab Bank, New York Times* 23 September 2014, A1; *Weiss v National Westminster* 768 F.3d 202 (2014). See G Sant, 'So banks are terrorists now?' (2013) 45 *Arizona State Law Journal* 534.

64 (2008) 538 F 3d 71.

65 See *Breslin v McKenna* [2008] NIQB 50 and [2011] NICA 33; *Breslin v Murphy* [2013] NIQB 35.

66 *Murphy and Daly v Lord Chancellor* [2008] NICA 34.

67 See J Norton Moore (ed.), *Civil Litigation Against Terrorism* (Carolina Academic Press, Durham, 2004).

68 28 USC s 1350.

69 18 USC s 2333.

70 28 USC s 1605(a)(7). See MS Shapo, *Compensation for Victims of Terror* (Oceana, New York, 2005) ch 3.

71 18 USC s 1961.

Victims' redress beyond domestic schemes

Many countries have set up compensation schemes that in some way provide a measure of redress for victims of terrorism-related incidents. One of their shortcomings is that there has been considerable variation in the coverage and effectiveness of such schemes such as the Antiterrorism Act of 1990. Therefore, the domestic application of victims' redress could benefit from international guidelines drawing from best country practices, including the provision of compensation to nationals of other countries⁷² and non-monetary forms of redress. As discussed below, the question has been approached at the UN and in other intergovernmental fora.

UN

The issue of the right to redress for victims of terrorist incidents began to gain momentum in 2004 with the Report of the United Nations High-level Panel on Threats, Challenges and Change, which referred to the need to develop a comprehensive strategy against terrorism.⁷³ More specifically, in a report of 2006, UN Secretary-General Kofi Annan observed that since victims of terrorism were denied their most fundamental human rights, protection of their rights had to be considered as an essential component of an effective counter-terrorism strategy.⁷⁴ For a time, this interest seemed to stall, but encouraging developments have arisen out of certain recent UN Human Rights Council resolutions on terrorism and following the appointment of Ben Emmerson as the second UN Special Rapporteur on human rights and counter-terrorism.

In resolution 19/19, adopted in 2012, on the protection of human rights and fundamental freedoms while countering terrorism, the Human Rights Council expressed its profound solidarity with victims of terrorism and their families. It further called upon states

to ensure that any person whose human rights or fundamental freedoms have been violated has access to an effective remedy and that victims will receive adequate, effective, and prompt reparations where appropriate, including by bringing to justice those responsible for such violations.⁷⁵

The Special Rapporteur put forward the 'Framework principles for securing the human rights of victims of terrorism' in his first annual report,⁷⁶ and urged states to recognise that terrorist violence perpetrated by non-state actors violates the human rights of victims. He emphasised that international human rights law requires a response in terms of victims' protection even if 'a conflict situation has escalated to the level of a full-blown insurgency or internal armed conflict' and even if the injury arises from non-state actors.⁷⁷ The Special Rapporteur goes on

72 Even the European Convention on the Compensation of Victims of Violent Crimes 1983 has been ratified by just 25 states.

73 UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (A/59/565, 2 December 2004) para 38.

74 See *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy* (A/60/825, 27 April 2006) paras 6, 118.

75 Human Rights Council, *Protection of human rights and fundamental freedoms while countering terrorism* (A/HRC/19/L.25/Rev.1, 23 March 2012) paras 4, 9.

76 Ben Emmerson, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Framework principles for securing the human rights of victims of terrorism* (A/HRC/20/14, 4 June 2012).

77 *Ibid* para 12.

to argue that victims of terrorism should be recognised in international law and that this principle should be enshrined in a specific international instrument on the rights of victims of terrorism.⁷⁸ The Special Rapporteur also called for the victims of terrorism to be recognised in domestic law not only by effective criminal law provisions and participation in legal processes and official investigations but also by respect for privacy against unjustified media intrusion, the right to form representative organisations, the right to reparation, which includes financial compensation, and medical and social rehabilitation, and the prohibition of life insurance policies that exclude terrorism liability. Thus, the Special Rapporteur's framework principles constitute an encouraging and concrete contribution towards fuller recognition of the right of victims of terrorist incidents to redress.

Regional developments

At the regional level, the Council of Europe adopted a Convention on the Prevention of Terrorism in 2006,⁷⁹ as well as Guidelines on the Protection of Victims of Terrorist Acts.⁸⁰ Article 13 of the Council of Europe Convention obliges states parties to adopt 'such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory'. Such measures may include, 'through the appropriate national schemes and subject to domestic legislation, inter alia, financial assistance and compensation for victims of terrorism and their close family members'. The guidelines emphasise the duty of the state to investigate terrorist incidents and prosecute suspected perpetrators as well as to make sure that victims can access justice and receive timely compensation. By contrast, while the Organization of American States adopted the Inter-American Convention against Terrorism in 2002, that instrument does not mention the right of victims to redress,⁸¹ and the same is true of ASEAN's Convention on Counter Terrorism 2007. Next, in Article 23(2)(b) of the African Charter on Human and Peoples' Rights, states must ensure that 'their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter'.⁸²

International Criminal Tribunals and the ICC

More concrete developments towards affording greater participation of victims in criminal proceedings have become evident in both international criminal law and transnational criminal law. The ICC Statute⁸³ ensures victims a central role in the proceedings with the support of a Victim and Witnesses Unit. Victims are entitled to access a Trust Fund, which was set up specifically for victims and their families.⁸⁴ Victims can also seek and obtain reparations directly from the ICC and, in instances where a guilty verdict is sustained, the ICC can determine the scope and extent of damages, losses, and injuries suffered by victims on the basis of principles relating to reparations, including restitution, compensation, and rehabilitation. Since the ICC's

78 *Ibid* para 14.

79 CETS 196.

80 Council of Europe Committee of Ministers, *Guidelines on the Protection of Victims of Terrorist Acts* (Strasbourg, 2005).

81 OAS Treaty A-66.

82 1520 UNTS 217 ('Banjul Charter').

83 2187 UNTS 90.

84 Rome Statute, arts 75 et seq. See L Moffat, *Justice for Victims before the International Criminal Court* (Routledge, Basingstoke, 2014).

jurisdiction covers aggression, genocide, war crimes, and crimes against humanity, any terrorist instance involving Rome Statute crimes could fall within ICC jurisdiction. The *ad hoc* international criminal tribunals have been criticised for having contributed little towards more effective redress for victims.⁸⁵

Conclusion

Most states have failed to grapple comprehensively with compensation and financial redress for the victims of terrorism. The wider interests of victims of terrorism – justice, transparency and closure – have also been addressed in a fragmented fashion. Attempts at comprehensive responses along the lines of the South African Truth and Reconciliation Commission under the Promotion of National Unity and Reconciliation Act 1995 have rarely been delivered to the satisfaction of all parties to a former conflict.⁸⁶

The international community should engage more meaningfully in efforts to develop and implement principles to guide redress for victims of terrorist attacks which could be used around the world. A more global approach would fall more closely in line with former UN Secretary-General Kofi Annan's call upon states 'to put in place a system of assistance that would promote the rights of victims and their families, by doing everything possible to reintegrate them into society and to facilitate their transition back to a dignified and fruitful life'.⁸⁷ For a start, international principles could draw upon the already-accepted reparation principles for victims of similar crimes, such as the *UN Basic Principles and Guidelines on the Right to Reparations for Victims of Gross Human Rights and Humanitarian Law Violations*,⁸⁸ the *Joinet Principles*,⁸⁹ and the *UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power*,⁹⁰ as well as regional best practices. Important elements drawn from these instruments include the basic principle that reparations should take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, and the recognition of a state obligation to provide redress. Additionally, compensation funds should be designed broadly enough to encompass a range of possibilities for restorative justice, such as official apology

85 I Bottigliero, *Redress for Victims of Crimes under International Law* (Nijhoff, Dordrecht, 2004) 196 et seq.

86 Compare in the UK, *Report of the Bloody Sunday Inquiry* (2010–12 HC 29). See AR Chapman and H Van Der Merwe (eds), *Truth and Reconciliation in South Africa: Did the TRC Deliver?* (University of Pennsylvania Press, Philadelphia, 2008); P McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (Routledge, Basingstoke, 2013); S Loytomaki, *Law and the Politics of Memory: Confronting the Past* (Routledge, Basingstoke, 2014).

87 See *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy* (A/60/825, 2006), para 14.

88 See UN Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, (E/CN.4/Sub.2/1997/104, 1997); M Bassiouni (Special Rapporteur), *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity* (E/CN.4/2000/62, 2000).

89 See UN Commission on Human Rights, *The Administration of Justice and the Human Rights of Detainees*, (E/CN.4/RES/1985/23, 1985); L Joinet, *Question of the impunity of perpetrators of human rights violations (civil and political): Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119*, (E/CN.4/Sub.2/1997/20/Rev.1, 1997).

90 UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, UN General Assembly Res 40/34 (29 November 1985).

(where appropriate), rehabilitation, recognition and remembrance,⁹¹ and public tributes. Discovery of the truth about terrorist incidents should be facilitated by conducting inquiries and by the timely release of documents relating to terrorist incidents. Finally, the state must recognise its responsibilities to address the consequences of terrorism by a thorough and effective investigation of the incidents, and by prosecuting and punishing the perpetrators.

The recognition and fair treatment of victims of terrorism should not be considered exclusively within security and counter-terrorism debates, since it is fundamentally a human rights concern, as the UN Human Rights Council has pointed out in numerous resolutions. Thus, the migration of the matter of the rights of victims of terrorist incidents from mainly criminal law and security approaches to the human rights arena, rich with norms and implementation mechanisms, seems to offer renewed hope for better redress for victims of terrorism.

91 See for example K Bloomfield, *We Will Remember Them* (Northern Ireland Office, Belfast, 1998).