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Edited by **Ben Saul**



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RESEARCH HANDBOOKS IN INTERNATIONAL LAW

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31. Victims' redress amid terrorism's changing tactics and strategies

Ilaria Bottigliero and Lyal S. Sunga

1. INTRODUCTION: A SHIFT IN STRATEGY?

It seems that on 3 June 2011, Ilyas Kashmiri, veteran of the Soviet-Afghan war, leader of the Harkat-ul-Jihad al-Islami and possible successor to Osama bin Laden as head of Al Qaeda, and whom bin Laden reportedly asked to assassinate United States President Barack Obama, was killed in a US drone strike in Pakistan's South Waziristan region.¹ Only a few days later, on 8 June 2011, Fazul Abdullah Mohammed, subject of an Interpol arrest warrant for his suspected participation in the 1998 US embassy bombings in East Africa, was killed along with another person following a firefight at a Mogadishu security checkpoint.² Yet another key Al Qaeda operative, Atiya Abdul Rahman, second-in-command under new leader Ayman Al Zawahiri, seems to have been killed on 22 August 2011 in Pakistan by a US drone,³ as later confirmed by Al Zawahiri in a video message. This was soon followed by the killing of American radical cleric Anwar al Awlaki, Al Qaeda's Arabian Peninsula chief of external operations, on 30 September 2011 in Yemen by an air-to-ground Hellfire missile launched from a US drone. Also killed was Samir Khan, the editor of *Inspire*, an English language online extreme Islamist magazine, who was perhaps the most influential propagandist for Al Qaeda.⁴

¹ Ilyas Kashmiri was originally thought to have been killed in September 2009. Since that proved false, reports of his death and that of certain other terrorists, have to be taken with a healthy dose of scepticism. See Lee Ferran, Rym Momtaz and Mark Shone, 'Reports of terrorist deaths greatly exaggerated (maybe)', *ABC News* (Online, 20 April 2012) <abcnews.go.com/Blotter/mullah-omar-latest-suspected-terrorist-back-grave/story?id=14126124#>.

² DNA tests on the deceased were reported to have confirmed his identity. See 'US Africa embassy bomber Fazul Abdullah Mohammed dead', *BBC Africa News* (Online, 11 June 2011) <www.bbc.co.uk/news/world-africa-13737942>.

³ See Mark Mazzetti, 'CIA drone is said to kill Al Qaeda's No. 2', *The New York Times* (Online, 27 August 2011) <www.nytimes.com/2011/08/28/world/asia/28qaeda.html>.

⁴ Paul Harris and Jamie Doward, 'How US tracked Anwar al-Awlaki to his death in Yemen', *The Guardian* (Online, 1 October 2011) <www.guardian.co.uk/world/2011/oct/01/yemen-drone-killing-ibrahim-al-asiriri>.

Quite possibly, this string of successful targeted assassinations of Al Qaeda leaders and operatives spelt the beginning of the end of Al Qaeda. At the same time however, terrorist attacks have not been eliminated and the number of victims of such attacks is not decreasing. One of the more evident trends over the past few years has been the rise in 'lone wolf' terrorist attacks, which have approached the deadliness of attacks carried about by organized entities, but which seem far more difficult to detect and prevent. Since Timothy McVeigh killed 168 people with a truck bomb in Oklahoma City on 19 April 1995,⁵ lone wolf terrorism has injured or killed numerous victims while prospects for compensation remained entirely unclear.

To take a few recent examples, in March 2012 Mohammed Merah was alleged to have attacked soldiers and Jews in Toulouse and Montauban, France, until police killed him during a prolonged shootout.⁶ In the aftermath of the killings, lawyers for the families of the victims demanded a parliamentary inquiry to look into possible state responsibility for having overlooked intelligence ahead of the killings that identified Merah as a terrorist threat. The question remains an open one, as does the issue of victims' compensation.

Far-right extremist Anders Breivik attacked several government buildings with a car bomb in Oslo which killed eight people, and went on to shoot another 69 dead at Utoya Island, Norway, on 22 July 2011.⁷ In this case, both victims and survivors qualified for state compensation, even though Breivik was found to have been directly responsible for the death and injury he inflicted.⁸ Following the request of lawyers and representatives of a national support group formed after the attacks, the Standing

⁵ See Jeffrey Simon, *Lone Wolf Terrorism: Understanding the Growing Threat* (Prometheus Books, 2013); Ramón Spaaij, *Understanding Lone Wolf Terrorism: Global Patterns, Motivations and Prevention* (Springer, 2012); George Michael, *Lone Wolf Terror and the Rise of Leaderless Resistance* (Vanderbilt University Press, 2012); and Peter Phillip (ed.), *In Pursuit of the Lone Wolf Terrorist: Investigative Economics and New Horizons for the Economic Analysis of Terrorism* (Nova Science Publications Inc, October 2013).

⁶ Edward Cody, 'Mohammed Merah: Face of the new terrorism', *Washington Post* (Online, 22 March 2012) <articles.washingtonpost.com/2012-03-22/world/35450206_1_merah-french-soldier-french-council>.

⁷ Max Fisher, 'A different justice: Why Anders Breivik only got 21 Years for killing 77 People', *The Atlantic* (Online, 24 August 2012) <www.theatlantic.com/international/archive/2012/08/a-different-justice-why-anders-breivik-only-got-21-years-for-killing-77-people/261532/>.

⁸ Breivik had admitted to the killings but pleaded not guilty. He was convicted of mass murder, causing a fatal explosion, and terrorism. On 24 August 2012, Breivik was declared sane and sentenced to containment – a special form of

Justice Committee of Norway's Parliament (the *Storting*), together with the Ministry of Justice and Emergency Planning, decided to increase the amount of compensation as well as the number of victims eligible for it.⁹ 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 the previous maximum compensation limit of NOK 3.1 million (about US \$557 200). It was decided that the revised amounts would apply not only to the victims of the 22 July attack, but to all other violent crime victims as well.¹⁰

On 15 April 2013, Tamerlan Tsarnaev and his younger brother Dzhokhar Tsarnaev allegedly set off two pressure cooker bombs near the finish line of the Boston Marathon, killing three and injuring more than 250 others, many of whom lost limbs immediately or had to have one or more limbs amputated subsequently. Police interrogations of Dzhokhar revealed that the brothers had been following *Inspire* magazine online, were motivated by Anwar al Awlaki's internet lectures, and had planned to set off explosives in New York City's Times Square.¹¹ Again, victims' compensation will be based on ad hoc solutions and most likely riddled with difficulties, as the 9/11 experience shows.¹²

Communicating and planning with very few others, or no one at all, lone wolves seem to operate beyond the pale of measures all targeting larger terrorist networks, such as intensified human intelligence gathering, electronic interception (including surveillance of telephone landlines,

a prison sentence that can be extended indefinitely – with a time frame of 21 years and a minimum time of ten years, the maximum penalty in Norway.

⁹ Julie Ryland, 'Increased crime victim compensation', *The Norway Post* (Online, 8 December 2011) <www.norwaypost.no/index.php/news/latest-news/26092-increased-crime-victim-compensation--26092>. See also 'More compensation for terror victims', *Views and News from Norway* (Online, 6 December 2012) <www.newsinenglish.no/2012/12/06/more-compensation-for-terror-victims/>.

¹⁰ 'Maximum and minimum compensation amounts are set forth under section 11 of the Compensation for Victims of Violent Crime Act; the maximum amount is at present 40 times the national insurance basic amount laid down in the National Insurance Act': Wendy Zeldin, 'Norway: Crime victims' compensation to be increased after July 2011 massacre', *Global Legal Monitor* (Online, 1 March 2012) <www.loc.gov/lawweb/servlet/lloc_news?disp3_1205403009_text>.

¹¹ Eric Schmitt, Mark Mazzetti, Michael Schmidt and Scott Shane, 'Boston plotters said to initially target July 4 for attack', *New York Times* (Online, 2 May 2013) <www.nytimes.com/2013/05/03/us/Boston-bombing-suspects-planned-july-fourth-attack.html?pagewanted=all&_r=0>.

¹² Ilaria Bottigliero, 'Realizing the right to redress for victims of terrorist attacks' in Ana Maria Salinas de Frias, Katja Samuels and Nigel White (eds), *Counter-Terrorism: International Law and Practice* (OUP, 2012) 908, 910–11.

mobile phones and internet traffic), or increased efforts to disrupt financing, planning and recruitment through systematic penetration of terrorist cells. Such measures are less suited to snare lone individuals or very small groups. Just to mention a few other cases, on 22 May 2013 in Woolwich, south-east London, Michael Adebowale allegedly ran over British soldier Lee Rigby with a car, dismembered the corpse with a meat cleaver and knife, and made no attempt to escape from the scene while police arrived, all the while proclaiming he was guided by extreme Islamist ideology.¹³ On 26 May 2013 near Paris, a man stabbed 23-year-old uniformed French soldier Cedric Cordier in the throat, who fortunately survived.¹⁴ Suspect Alexandre Dhaussy, thought to be a recent convert to Islam, was taken into custody on 29 May, during which he reportedly confessed to the crime.¹⁵

Since the 9/11 attacks, countries around the world increased spending on counter-terrorism and other domestic security measures by a total of around US \$70 billion. This is reckoned to have reduced transnational terrorist attacks by some 34 per cent, but the average number of terrorist related deaths per year on average increased by 67 over the same period.¹⁶ Terrorists continue to shift strategies and change tactics. They can easily access information from a wide choice of websites¹⁷ on how to adopt more deadly means and methods of attack, including how to acquire or make

¹³ Early investigations turned up several possible co-conspirators but the UK Home Secretary indicated it was very likely a lone wolf attack: Dani Garavelli, 'Do it yourself terrorism', *The Scotsman* (Online, 26 May 2013) <www.scotsman.com/lifestyle/features/dani-garavelli-do-it-yourself-terrorism-1-2944741>.

¹⁴ Angélique Chrisafis, 'French police hunt man who stabbed soldier in Paris', *The Guardian* (Online, 26 May 2013) <www.guardian.co.uk/world/2013/may/26/french-police-soldier-stabbed-paris>.

¹⁵ 'French soldier stabbing: Man on terrorism-linked charges', *BBC News* (Online, 31 May 2013) <www.bbc.co.uk/news/world-europe-22735883>.

¹⁶ See Bjorn Lomborg, 'Is counterterrorism good value for money?' (*NATO Review*, 2008) <www.nato.int/docu/review/2008/04/AP_COST/EN/>.

¹⁷ See UNODC, *The Use of the Internet for Terrorist Purposes* (United Nations Publication, 2012) [24], which observed that:

Some sensitive information that may be used by terrorists for illicit purposes is also made available through Internet search engines, which may catalogue and retrieve inadequately protected information from millions of websites. Further, online access to detailed logistical information, such as real-time closed-circuit television footage, and applications such as Google Earth, which is intended for and primarily used by individuals for legitimate ends, may be misused by those intent on benefiting from the free access to high-resolution satellite imagery, maps and information on terrain and buildings for the reconnaissance of potential targets from a remote computer terminal.

explosive devices and to equip these with nuclear, chemical or biological materials capable of inflicting mass casualties.¹⁸ As Lomborg notes, defensive hardening of airports, police and military installations seems merely to have caused terrorists to shift focus towards softer targets instead of reducing the overall risk of terrorist attack.¹⁹ This trend is especially clear in fragile countries and situations, such as in Afghanistan, where recent attacks in Kabul show a steep rise in indiscriminate attacks and increased preference away from hard to soft targets.²⁰

The continued ability of Al Qaeda franchise operations and surrogates to spring up and organize themselves as influential fighting forces in countries where the whole or part of the territory suffers from non-existent or ineffective governmental control, armed rebellion or even civil war has been another worrying trend, although it is by no means a new one. In Yemen, Al Qaeda in the Arab Peninsula (AQAP) – branded by US President Obama as ‘Al Qaeda’s most active operational affiliate’²¹ – was reported to have killed over 60 Yemeni security and intelligence officers in 2012 and 2013.²² The US Government claimed that the al-Nusra Front for the People of the Levant, one of the rebel groups fighting to overthrow Syrian President Bashar al-Assad’s regime, was a front organization for Al-Qaeda in Iraq (AQI), and blacklisted it as a ‘foreign terrorist organisation’.²³ The US State Department contended that the Syrian Civil War, which by July 2013, was estimated by the UN to have claimed over

¹⁸ Rolf Mowatt-Larssen, ‘Al Qaeda weapons of mass destruction threat: Hype or reality?: A timeline of terrorists’ efforts to acquire WMD’ (Belfer Center for Science and International Affairs, January 2010) <belfercenter.ksg.harvard.edu/publication/19852/al_qaeda_weapons_of_mass_destruction_threat.htm>.

¹⁹ Lomborg, above n 16.

²⁰ Mowatt-Larssen, above n 18; See also ‘Afghan Taliban battle police in central Kabul’, *BBC News* (Online, 24 May 2013) <www.bbc.co.uk/news/world-asia-22656758>.

²¹ Mark Mazzetti, Eric Schmitt and Robert F Worth, ‘Two-year manhunt led to killing of Awlaki in Yemen’, *New York Times* (Online, 30 September 2011) <www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all>.

²² Ian Black, ‘Yemen home to al-Qaida’s most active local franchise: Al-Qaida in the Arabian Peninsula is sustained by factors including wild terrain and the weakness of the Yemeni state’, *The Guardian* (Online, 5 August 2013) <www.theguardian.com/world/2013/aug/05/yemen-al-qaida-franchise>.

²³ Ewen MacAskill, ‘US blacklists Syria’s al-Nusra Front as terrorist group: Obama administration imposes sanctions on Syrian resistance group and says al-Qaida has been supplying cash and weapons’, *The Guardian* (Online, 11 December 2012) <www.theguardian.com/world/2012/dec/11/us-blacklists-syria-al-nusra-front-terrorist>.

100 000 lives,²⁴ was helping Al Qaeda reinvigorate its operations in Iraq.²⁵ Boko Haram, responsible for scores of attacks on police, army and schools in northern Nigeria, seems to be affiliated loosely with Al Qaeda,²⁶ and Al Qaeda affiliates in Afghanistan, the Maghreb (Al Qaeda in the Maghreb), Somalia (Al Shabaab), Pakistan (Lakshar-e-Taiba), Philippines (Abu Sayyaf), Egypt,²⁷ Saudi Arabia (Al Qaeda in the Arabian Peninsula), Indonesia (Jemaa Islamiyah). In September 2013, Al Qaeda leader al Zawahiri himself issued a 9/11 anniversary message urging followers to carry out lone wolf attacks and to impose an economic boycott on the US, although this resembled more a sign of diminishing ambitions rather than robust confidence in the capacity to conduct large-scale terrorist attacks.²⁸

In short, Al Qaeda and certain other organized terrorist networks might possibly be in the process of being dismantled, or feeling the pressure of more systematic and sustained pursuit by military and police in one or more countries. Security forces the world over seem to have become better equipped to disrupt terrorist networks and to do so through inter-state intelligence sharing. All the same, the risk of terrorist incidents does not seem to have abated owing to changing tactics, means and methods, shifting choice of targets as well as an apparent rise in the lone wolf phenomenon. In the meantime, not much has changed as far as victims’ rights are concerned. Domestic and regional frameworks remain mostly inadequate and the ongoing debate has dragged on at the international level, despite all indications that the rights of victims of terrorist attacks are in ever-greater need of protection.

Perhaps one exception has been the growing interest in victims’ rights and the question of redress in human rights circles, including by the UN Special Rapporteur on human rights and counter terrorism, Ben

²⁴ ‘Syria death toll now above 100,000, says UN chief Ban’, *BBC News* (Online, 25 July 2013) <www.bbc.co.uk/news/world-middle-east-23455760>.

²⁵ Michael R Gordon and Tim Arango, ‘Syrian War fueling attacks by Al Qaeda in Iraq, officials say’, *New York Times* (Online, 15 August 2013) <www.nytimes.com/2013/08/16/world/middleeast/syrian-war-fueling-attacks-by-al-qaeda-in-iraq-officials-say.html>.

²⁶ Karen Leigh, ‘Nigeria’s Boko Haram: Al-Qaeda’s new friend in Africa?’, *Time Magazine* (Online, 31 August 2011) <<http://content.time.com/time/world/article/0,8599,2091137,00.html#ixzz2f7ubaKjK>>.

²⁷ Ali Abdelaty, Sami Aboudi and Louise Ireland, ‘Al Qaeda affiliate urges attacks on Egyptian army’, *Reuters* (Online, 31 August 2013) <<http://www.reuters.com/article/2013/08/31/us-egypt-security-alqaeda-idUSBRE97U04X20130831>>.

²⁸ Gordon Corera, ‘Al-Qaeda chief Zawahiri urges “lone-wolf” attacks on US’, *BBC News* (Online, 13 September 2013) <www.bbc.co.uk/news/world-middle-east-24083314>.

Emmerson, whose contribution is analysed below. While this is an encouraging sign, it has not seemed to have dispelled the stagnation which continues to pervade discussions on victims' rights after terrorist attacks. Weak consideration for victims seems all the more inadequate against the contrasting scenario of massive global increases in counter-terrorism measures and spending at all levels. Arguably, theory and practice on redress for terrorism victims have benefited little from advances in modern victimology theory or increasing interest in victims' rights in relation to human rights violations generally.²⁹ Terrorist victims' issues seem locked into and confined by national security debates, instead of prime focus being placed on the human rights of the victims.

Against this backdrop, the present chapter briefly reviews international and regional legal frameworks concerning the right to redress for victims of terrorist incidents, including the recent efforts of the Special Rapporteur on terrorism to develop guidelines for victims' redress, before offering some concluding reflections.

2. OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK ON VICTIMS' REDRESS FOR TERRORIST CRIMES

The issue of the right to redress of victims of terrorist incidents began to gain momentum in December 2004 with the Report of the United Nations High-level Panel on Threats, Challenges and Change,³⁰ which referred to the need to develop 'a comprehensive strategy to fight terrorism that addresses factors that facilitate terrorism, and strengthens the capacity of states and the rule of law, while also promoting fundamental human

²⁹ A number of UN Special Rapporteurs have focused in recent reports on the question of victims' redress, including the Special Rapporteur on human trafficking and the Special Rapporteur on extreme poverty. See Joy Ezeilo, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/66/283 (9 August 2011) Chapter III of which focuses on 'the right to an effective remedy for trafficked persons'; see also Human Rights Council Res 20/1, *Trafficking in persons, especially women and children: access to effective remedies for trafficked persons and their right to an effective remedy for human rights violations*, UN Doc A/HRC/20/L.1 (18 July 2012); Magdalena Sepúlveda Carmona, *Report of the Special Rapporteur on extreme poverty and human rights*, UN Doc A/66/265 (9 August 2012), which focuses on legal avenues for redress.

³⁰ UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2 December 2004).

rights'.³¹ More specifically, in a report of May 2006 UN Secretary-General Kofi Annan observed that since victims of terrorist acts were denied their most fundamental human rights,³² protection of their rights had to be considered as an essential component of an effective counter-terrorism strategy.³³

However, while there were a number of interesting developments in legal and political frameworks dealing with terrorism in the wake of 9/11, progress seems to have slowed considerably since then. Overall, international legal norms and standards relating specifically to the right of victims of terrorist crimes to receive redress have been few and far between.

A. International Criminal Courts and Tribunals

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 International Criminal Court (ICC) Statute³⁴ allows victims a central role in the proceedings with the support of a Victim and Witnesses Unit, and victims are entitled to access a Trust Fund, which was set up specifically for victims and their families.³⁵ Victims can also seek and obtain reparations directly from the Court and in instances where a guilty verdict has been handed down, the Court 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 jurisdiction covers aggression, genocide, war crimes and crimes against humanity, incidents of terror that fall within the definition of these crimes could become subject to ICC prosecution and in such cases, victims could seek redress through the ICC Trust Fund.

Another notable development in international criminal law relating to redress for victims of terrorist incident has come from the Special Tribunal

³¹ See UN, *United Nations Action to Counter Terrorism* <www.un.org/terrorism/>.

³² See *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (27 April 2006) [6].

³³ *Ibid* [118].

³⁴ Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute').

³⁵ See Rome Statute, arts 75 et seq. For further reference, see Ilaria Bottiglieri, 'The International Criminal Court: Hope for the victims' (2003) 32 *SGI Quarterly* 13, 13–15.

for Lebanon,³⁶ which was established 'to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri',³⁷ and which applies, inter alia, 'the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism'.³⁸ First, Article 17 of the Tribunal's Statute provides that the Tribunal shall permit victims to present their 'views and concerns' at given stages of the proceedings. Second, Article 25(3) explicitly recognizes the right of 'a victim or persons claiming through the victim' to 'bring an action in a national court or other competent body to obtain compensation'. However, the Tribunal's recognition of the victim's right to seek redress in other fora, without itself being empowered to do so, approximates the unsatisfactory approach taken by the international criminal tribunals for the former Yugoslavia and Rwanda, which were rightly criticized for having contributed little towards more effective redress for victims.³⁹

B. The Contribution of the UN Human Rights Council's Special Rapporteur on Human Rights and Counter-terrorism

More encouraging developments have come from recent UN Human Rights Council resolutions on terrorism and the efforts of the UN Special Rapporteur on human rights and counter-terrorism to develop guidelines for victims' redress. In Resolution 19/19 on the protection of human rights and fundamental freedoms while countering terrorism, for example, 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'.⁴⁰

In his first annual report, the Special Rapporteur put forward his

³⁶ See UN Security Council Res 1757 (30 May 2007) annex: 'Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon'.

³⁷ *Ibid*, art 1.

³⁸ *Ibid*, art 2.

³⁹ As of 2004, in both the ICTY and ICTR there had been no cases of domestic deferral for compensation purposes. For a critical review of compensation procedures in the ICTY and ICTR, see Ilaria Bottigliero, *Redress for Victims of Crimes under International Law* (Martinus Nijhoff, 2004), 196 et seq.

⁴⁰ Human Rights Council Res 19/19, Protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/HRC/19/L.25/Rev.1 (23 March 2012) [4], [9].

'Framework principles for securing the human rights of victims of terrorism',⁴¹ and urged states to recognize that terrorist violence perpetrated by non-state actors violates the human rights of victims wherever death or serious physical or psychological injury results, and regardless of state responsibility. He made the point that international human rights law was intended to promote and protect human rights as broadly as possible, and should not be impeded by technical considerations as to whether 'the degree of organization, territorial control and State recognition involved in a conflict situation has escalated to the level of a full-blown insurgency or internal armed conflict', emphasizing as well that in certain instances international legal responsibility covered non-state actors.⁴²

As the Special Rapporteur pointed out, in any case, Article 6 of the International Covenant on Civil and Political Rights enunciates a general international legal obligation on the state party to respect the right to life and prevent the arbitrary deprivation of life, which implies general state responsibility to provide human rights protection to everyone within its territory.⁴³ The Special Rapporteur goes on to argue that victims of terrorism should be recognized in international law 'as individuals whose fundamental human rights have been violated', and that this principle should be enshrined in a specific international instrument on the rights of victims of terrorism.⁴⁴

The Special Rapporteur further urged states to review their law and practice to ensure that criminal law effectively deterred the incitement, preparation and commission of terrorist offences. He also reiterated the international customary law obligation upon states to prosecute individuals for inciting, preparing, instigating or committing any terrorist act, through ordinary criminal law, or to extradite them for trial in another jurisdiction. He highlighted the obligation of the state to conduct a fair and effective investigation, as well as the right of victims or next-of-kin of

⁴¹ 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*, UN Doc A/HRC/20/14 (4 June 2012).

⁴² *Ibid*, [12].

⁴³ International Covenant on Civil and Political Rights, adopted 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). See also UN Human Rights Committee, General Comment No 6: Article 6 – The right to life, UN Doc HRI/GEN/1/Rev.6 (12 May 2003) 127, [3], which notes that: 'The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.'

⁴⁴ *Ibid*, [14].

victims to participate in judicial proceedings governed by basic elements of fair trial. This includes the right to information, right to interpretation, the right to receive reasons for a judicial decision, and the right to privacy in relation to various stages of proceedings.⁴⁵

The Special Rapporteur also argued that, beyond the situation where the actions of a public official directly or indirectly triggers state responsibility to make reparation, states should recognize an international obligation 'to provide reparation where death or serious injury results from an act of terrorism committed on their territory', which should encompass possibilities for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁴⁶ Thus, the Special Rapporteur's framework principles constitute an encouraging contribution towards fuller recognition of the right of victims of terrorist incidents to redress. Hopefully, the principles, once fully developed and refined, could remind and guide governments to improve their law, policy and practice on this issue.

C. Regional and Sub-regional Developments

At the regional level, the Council of Europe adopted a Convention on the Prevention of Terrorism in 2006,⁴⁷ as well as Guidelines on the Protection of Victims of Terrorist Acts.⁴⁸ 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'. The provision specifies that 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 emphasize 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 compensation in a timely fashion. 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.⁴⁹

⁴⁵ Ibid, [66]–[67].

⁴⁶ Ibid.

⁴⁷ Council of Europe Convention on the Prevention of Terrorism, adopted 16 May 2005, CETS 196 (entered into force 1 June 2007) ('Council of Europe Convention').

⁴⁸ Council of Europe Committee of Ministers, *Guidelines on the Protection of Victims of Terrorist Acts* (2 March 2005).

⁴⁹ Inter-American Convention Against Terrorism, adopted 3 June 2002, OAS Treaty A-66 (entered into force on 10 July 2003).

In the African regional context, it is interesting to note that Article 23(2) (b) of the African Charter on Human and Peoples' Rights obliges states parties to 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'.⁵⁰ The Charter, together with its Protocol,⁵¹ seems to open up possibilities for individuals to bring human rights claims, including for redress, against states parties in relation to terrorist incidents wherever the state may have failed in its obligations to ensure access to justice for victims.

At sub-regional levels, progress continues on ratification of instruments on terrorism, for example, those adopted by the Southern African Development Community and the East African Community.⁵² By January 2013, all ten members of the Association of Southeast Asian Nations (ASEAN) had ratified its Convention on Counter Terrorism.⁵³ Unfortunately, none of these instruments make much reference to the rights of victims of terrorist incidents.

3. A WORD ON THE LIMITATIONS OF DOMESTIC FRAMEWORKS

Currently, domestic level compensation schemes share a number of shortcomings which could be better addressed by an international framework. Many state compensation schemes have been set up and administered on an ad hoc and discretionary basis, rather than in recognition of the right of victims to receive redress. This approach is not only less systematic, but less efficient and less just for victims who deserve to be treated equally, and to benefit from predictable, established and fair systems of redress, rather than to have to rely on the whims of a government or the political pressures and priorities of the day. For example, while many European

⁵⁰ African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) ('Banjul Charter').

⁵¹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human Rights on Human and Peoples' Rights, adopted 10 June 1998, OAU Doc CAB/LEG/66/5 (entered into force 25 January 2004).

⁵² See Southern African Development Community, *Declaration on Terrorism*, adopted 14 January 2002; East African Community, *Protocol on Peace and Security*, adopted January 2012; East African Community, *Conflict Prevention, Management and Resolution*, adopted January 2012.

⁵³ ASEAN Convention on Counter Terrorism, adopted 13 January 2007 (entered into force 27 May 2011).

countries set up compensation schemes covering their own nationals, and to a certain extent other EU nationals, for harm suffered as a consequence of violent crime (including terrorism) in their own territory, such entitlement is based on principles of 'equity and social solidarity', rather than on the individual's legal right to redress.⁵⁴ In addition, the payment of compensation under such domestic schemes has been extended only exceptionally to nationals of other countries, and generally only on the basis of prior mutual bilateral agreement.

Also, many countries still have restrictive procedural conditions on who can bring a court action (*locus standi*) against the state for redress in case of terrorism. Most state compensation schemes also devote inadequate attention to non-monetary forms of redress, such as psychological and medical rehabilitation, or assistance to help victims reintegrate into the employment market following trauma related to a terrorist incident.

4. CONCLUSION

The international community should engage more meaningfully in efforts to develop 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'.⁵⁵ 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,⁵⁶ the Joinet Principles,⁵⁷ the UN Declaration of Basic Principles of Justice

⁵⁴ See European Convention on the Compensation of Victims of Violent Crimes, adopted 24 November 1983, 1525 UNTS 37 (entered into force 1 February 1988). At the time of writing, the Convention had been ratified by 25 states.

⁵⁵ See *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (27 April 2006), [14].

⁵⁶ See UN Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment*, UN Doc E/CN.4/Sub.2/1997/104 (16 January 1997); M Bassiouni (Special Rapporteur), *Civil and Political Rights, Including Questions of: Independence of the Judiciary, Administration of Justice, Impunity*, UN Doc E/CN.4/2000/62 (18 January 2000).

⁵⁷ See UN Commission on Human Rights, *The Administration of Justice and the Human Rights of Detainees*, UN Doc E/CN.4/RES/1985/23 (11 March 1985);

for Victims of Crimes and Abuse of Power,⁵⁸ as well as the many regional standards mentioned above. Important elements could be drawn from these instruments, including 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, while leaving each state free to choose the particular means it wishes to employ within the framework of its domestic law.

Furthermore, redress for victims has to be applied on a non-discriminatory basis, fully in line with international human rights law, to avoid unjustifiable differentiation on the grounds of such arbitrary characteristics as race, colour, gender, religion and so on. Additionally, compensation funds should be designed broadly enough to encompass a range of possibilities for restorative justice, such as the provision of state apologies (where appropriate), rehabilitation programmes, days of recognition and remembrance, public tributes, and the installation of monuments and so forth. In many situations, discovery of the truth surrounding the facts and responsibility for terrorist incidents can constitute an important element of justice for victims and survivors. In this connection, governments should steer away from the unfortunate tendency to classify masses of materials as 'state secrets' without good reason. They should also mandate and encourage the public service to release documents relating to terrorist incidents that should be in the public domain, exercising due diligence to avoid defamation or the causing of prejudice to individuals and groups. Finally, it is worth reiterating that among the state's responsibilities to deal with terrorism are the fundamental duties of investigation, prosecution and punishment of individual perpetrators. These include an obligation to engage fully in international, regional and transnational cooperation and assistance and to establish effective domestic mechanisms such as truth and reconciliation commissions, commissions of enquiry, fact-finding commissions and other justice mechanisms as may be called for by the country context and situation at hand.

While terrorists change tactics and strategy and terrorism acquires new international and transnational dimensions, the need for victims' redress has not changed. As lone wolves prey on soft targets, and governments try to keep up with and adapt to new ways of communicating, networking

Louis 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*, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997).

⁵⁸ UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, UN General Assembly Res 40/34 (29 November 1985).

and organizing terror-related crime, states should not lose focus on victims' rights. If anything, it has become even more important to develop an international normative framework to guide states to provide adequate redress to victims of terrorist incidents. Ultimately, victims of terrorism should not be lumped together with 'regular' crime victims, because their unique situation and needs should be recognized as such. Similarly, the question of compensating victims of terrorism should not be considered exclusively within security and counter-terrorism debates, since it is fundamentally a human rights issue, as the UN Human Rights Council has pointed out. Thus, the migration of the issue 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.

PART IV
TERRORISM AND THE
UNITED NATIONS
SYSTEM