

RESEARCH HANDBOOK ON  
**International Law  
and Terrorism**

Edited by  
**Ben Saul**

**SECOND EDITION**



# Research Handbook on International Law and Terrorism

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*Edited by*

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## 33. Redress for victims of terrorist acts in a deteriorating international political climate

*Ilaria Bottigliero and Lyal S Sunga*

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### 1 INTRODUCTION: VICTIMS' REDRESS IN A DETERIORATING INTERNATIONAL POLITICAL CLIMATE

The 2018 Global Terrorism Index report noted that the number of terrorist incidents worldwide and the number of victims since 2016 had shown marked decrease.<sup>1</sup> However, the threat of terrorism should not be dismissed or underestimated. Terrorist violence remains an important threat in armed conflict situations and there persists considerable risk that terrorist attacks can be easily scaled up both in frequency and degree of fatality inside and outside armed conflict situations. Despite US President Donald Trump's claim in December 2018 that the United States had beaten the Islamic State terrorist group,<sup>2</sup> the Pentagon, many commanders, counter-terrorism officials and terrorism experts strongly disagreed with Trump's declaration.<sup>3</sup> As Islamic State lost control of territory in Syria and Iraq and was largely vanquished militarily in those areas, Islamic State and other terrorist groups, such as Al-Shabaab operating from Somalia, abandoned pretensions to set up or control sovereign statehood, and instead receded into classical insurgency and guerrilla mode, shifting to tactics of retreat, dispersion and regrouping into operational cells. Even as US-backed Syrian Democratic Forces pummeled ISIS out of its last Syrian territorial stronghold in Baghouz village, hundreds of ISIS fighters crossed the border into Iraq's Al Anbar province, quite possibly to hide among supportive elements of the local population. At the same time, President Trump threatened to release 800 ISIS fighters that the US had captured unless European allies took them and put them on trial.<sup>4</sup>

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<sup>1</sup> Institute for Economics and Peace, Global Terrorism Index 2018: Measuring the impact of terrorism, November 2018, (online 1 February 2019) <http://visionofhumanity.org/reports> at 2: The Global Terrorism Index noted that although Europe had seen returnees from conflict zones and intensified online radicalization, the 'number of deaths in Western Europe fell from 168 in 2016 to 1 in 2017. Turkey, France, Belgium, and Germany recorded the most significant falls, with only the UK, Spain, Sweden, Finland, and Austria registering increases.'

<sup>2</sup> Martin Farrer, 'Trump says Isis defeated. No it isn't, says UK', *The Guardian*, 20 December 2018, (online 1 February 2019) <https://www.theguardian.com/world/2018/dec/20/thursday-briefing-trump-says-isis-defeated-no-it-isnt-says-uk>.

<sup>3</sup> Sean Philip Cotter, 'Experts: Trump tweet proclaiming victory over ISIS premature Plan contradicts military leaders' strategy', *Boston Herald* (online 1 February 2019) <https://www.bostonherald.com/2018/12/20/experts-trump-victory-tweet-over-isis-premature/>.

<sup>4</sup> Patrick Wintour, 'Trump: EU must take back 800 Isis fighters captured in Syria: US doesn't want to watch "fighters permeate Europe" with caliphate "ready to fall", says president', *The Guardian*, 17 February 2019, online 18 February 2019 <https://www.theguardian.com/world/2019/feb/17/islamic-state-isis-baghu-z-trump-calls-on-european-allies-to-take-800-fighters-captured-in-syria>, Trump tweeted: 'The United States is asking Britain, France, Germany and other European allies to take back over 800

Terrorist cells can bide their time before striking soft civilian targets, as seen in the Al-Shabaab attack on Dusit Hotel in Nairobi that killed 21 plus the five attackers in January 2019,<sup>5</sup> or many attacks in Pakistan<sup>6</sup> and Afghanistan, including the 27 January 2018 Kabul ambulance suicide car bombing that killed 103 plus the perpetrator and injured 235. Europe has suffered serious terrorist attacks over the last several years,<sup>7</sup> such as the 13–14 November 2015 Paris attacks that claimed the lives of 137 and injured 413, bombings in Brussels that killed 35 and injured 340 on 22 March 2016, an attack in Nice on 14 July 2016 where a truck was used to kill 87 and injure 434, an attack on 19 December 2016 on a Berlin Christmas market that killed 12 and injured 56, a bombing of Manchester Arena during a popular music concert of 22 May 2017 that killed 23 and injured 250, a 3 June 2017 London Bridge attack that killed 11 and injured 48, and the 17–18 August 2017 attacks in Barcelona which killed 24 including eight suspected perpetrators and injured 152, all suspected to have been sponsored by Islamic State.

To make matters worse, public opinion in western countries seemed to harden against asylum seekers and migrants in general alongside growing intolerance against minorities. Rightwing populism and policy, seen for example in President Trump's 'Muslim ban' and his rhetoric denigrating certain racial, ethnic and religious minorities,<sup>8</sup> could only serve to exclude and alienate these groups, and quite possibly, to increase the propensity of some individuals towards radicalization.<sup>9</sup> Many western European countries faced persistent economic sluggishness and income inequality together with heavy inflows of refugees and economic migrants arriving from Libya, Syria and Iraq and elsewhere. Throughout the European Union, but particularly evident in Hungary, Poland, France, the UK, Germany, the Netherlands,

Isis fighters that we captured in Syria and put them on trial. The Caliphate is ready to fall. The alternative is not a good one in that we will be forced to release them.'

<sup>5</sup> Joseph Mwihiia, 'Al-Shabab extremists claim deadly attack on Nairobi hotel', *Associated Press*, 16 January 2019 <https://www.apnews.com/255166d15003459e97d84af181d2cf29> online 1 February 2019; 'Major al-Shabab attacks targeting Kenya: Here's a list of deadly attacks carried out by the armed group against Kenya and its military installations', *Aljazeera*, 15 January 2019, online 1 February 2019 <https://www.aljazeera.com/news/2019/01/major-al-shabab-attacks-targeting-kenya-190115143008990.html>.

<sup>6</sup> '262 terror attacks killed 595 people in Pakistan in 2018: Report', *Economic Times*, 7 January 2019, online 1 February 2019 <https://economictimes.indiatimes.com/news/defence/262-terror-attacks-killed-595-people-in-pakistan-in-2018-report/articleshow/67417709.cms>.

<sup>7</sup> See generally Europol, 'European Union Terrorism Situation and Trend Report 2018 (TESAT 2018)', European Union Agency for Law Enforcement Cooperation, 2018 (online 1 February 2019) <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-2018-tesat-2018>.

<sup>8</sup> David Leonhardt and Ian Prasad Philbrick, 'Donald Trump's racism: The definitive list', *New York Times*, 15 January 2018 (online 1 February 2019) <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html>; Colbert I King, 'Trump's racist policies have been even worse than we feared', *The Washington Post*, 30 November 2018 (online 1 February 2019) [https://www.washingtonpost.com/opinions/who-knew-just-how-damaging-and-degrading-a-trump-presidency-would-be/2018/11/30/4a30f536-f4bb-11e8-aeaa-b85fd4449f5\\_story.html?noredirect=on&utm\\_term=.fcc9505266d9](https://www.washingtonpost.com/opinions/who-knew-just-how-damaging-and-degrading-a-trump-presidency-would-be/2018/11/30/4a30f536-f4bb-11e8-aeaa-b85fd4449f5_story.html?noredirect=on&utm_term=.fcc9505266d9). Andrew Buncombe, 'Islamophobia even worse under Trump than after 9/11 attacks, says top Muslim activist', *Independent*, 27 December 2017 (online 8 February 2019) <https://www.independent.co.uk/news/world/americas/us-politics/trump-islam-muslim-islamophobia-worse-911-says-leader-a8113686.html>.

<sup>9</sup> S Lyons-Padilla et al. 'Belonging nowhere: Marginalization and radicalization risk among Muslim immigrants' (2015) *Behavioral Science and Policy*.

Sweden and Denmark and Italy,<sup>10</sup> xenophobia, racism and racial discrimination rose, signalling limited solidarity with marginalized religious minorities, refugees and economic migrants from war torn Middle Eastern countries. Throughout Europe, hate speech and violent attacks against both Jews<sup>11</sup> and Muslims increased.<sup>12</sup>

Alarming, the potential for terrorist cells or lone wolves to scale up operations by launching more frequent terrorist attacks of greater lethality persists because such self-radicalizing single terrorists remain difficult to detect, although often their capacity to inflict damage can be limited by a lack of operational support. Terrorist deployment of weapons of mass destruction such as sarin gas, biological agents or toxins associated with them, against civilians would be a game changer. As INTERPOL indicated to the UN Security Council in August 2016,<sup>13</sup> Al Qaida, Aum Shinrikyo and other terrorist organizations declared their intention to deploy weapons of mass destruction against civilians and they followed up these threats with actual attempts to procure materials required to make and deploy these weapons. Preventing such groups from acquiring and successfully deploying biological agents such as anthrax, botulin or *Yersinia pestis*, the bacterium that causes bubonic plague, has become more difficult because of the complexity and sophistication of modern transnational terrorist networks that can access and use chemical, biological, radiological and nuclear expertise to develop workable plans and operations with increasing ease. Moreover, new technological advances have broadened access to viral agents beyond medical and military research laboratories, which increases the risk of such elements falling into the hands of terrorists. INTERPOL also indicated that it established a database to track more than 40 persons suspected of trafficking highly enriched uranium which, if deployed as a dirty bomb, would have devastating consequences.<sup>14</sup>

It is also important to bear in mind that while the media, decision makers and the public in many western countries tend to focus more on Islamic State and its potential to carry out terrorist threats in Europe, in 2017, two-thirds of failed, foiled or completed attacks involved separatist efforts, 12 per cent left wing violence, 3 per cent right wing violence, and only 16 per cent involved jihadists.<sup>15</sup>

The currently deteriorating political climate militates against progress in strengthening redress for victims of terrorism in at least four ways.

First, terrorist incidents kill and injure people of various nationalities indiscriminately, and therefore it calls for a global regime to provide redress for the victims. With deterioration in

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<sup>10</sup> William A Galston, 'The rise of European populism and the collapse of the center-left', *Brookings Institute*, 8 March 2018 (online 1 February 2019) <https://www.brookings.edu/blog/order-from-chaos/2018/03/08/the-rise-of-european-populism-and-the-collapse-of-the-center-left/>.

<sup>11</sup> European Fundamental Rights Agency, *Experiences and perceptions of anti-semitism: Second survey on discrimination and hate crime against Jews in the EU*, report of 10 December 2018 (online 8 February 2019) <https://fra.europa.eu/en/publication/2018/2nd-survey-discrimination-hate-crime-against-jews>.

<sup>12</sup> 'Anti-Muslim "incidents" surge in Germany, Spain', *Al-Jazeera*, 4 March 2018 (online 8 February 2019) <https://www.aljazeera.com/news/2018/03/anti-muslim-hate-crimes-surge-germany-spain-180303142227333.html>.

<sup>13</sup> See UN Security Council Procès Verbale of 23 August 2016 (morning); S/PV.7758 at 4.

<sup>14</sup> Ibid.

<sup>15</sup> See European Union Agency for Law Enforcement Cooperation, *European Union Terrorism Situation and Trend Report 2018* (online 8 February 2019) <https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-2018-tesat-2018>, Figure 2 at 9.

East-West relations however, international cooperation at the global level to develop redress for victims of terrorist acts seems to have become more difficult.

Second, US President Trump has issued numerous confusing statements over whether the United States should remain committed to the North Atlantic Treaty Organization, or even withdraw from it,<sup>16</sup> and to reduce support for the United Nations, as well as certain other key economic, security and trade alliances. The withdrawal of the United States from the UN Human Rights Council seemed to signal American retreat from full multilateral cooperation in the field of human rights, which, over the last several years, contributed much to developing standards and guidelines on victims' redress. Many other countries across the globe have been adopting nationalist policies with less regard for international standards and cooperation.

Third, the failure of multilateral cooperation to address terrorism and its victims remains seriously hampered by a lack of progress at United Nations level on developing a universally agreeable definition of 'terrorist act' or adopting a comprehensive global convention outlawing terrorist acts.

Finally, Governments have been increasingly resorting to counter-insurgency strategies and tactics that blur the lines between legal and illegal means and methods of warfare which makes it more difficult to distinguish terrorism perpetrated by non-state actors from terrorism perpetrated by states and their proxies. The seemingly endless 'Global War on Terror' and long-term military engagements associated with it in Afghanistan (Operation Enduring Storm launched by the George W Bush administration in December 2001), Somalia – a fragile state since 1991 plagued by rampant terrorism perpetrated mainly by Al-Shabaab – Pakistan, Iraq, Syria and Yemen, as well as massive spending on national security, counter-insurgency and counter-intelligence measures by the US and its allies, normalizes the militarization of foreign policy and numbs the public to constant warmongering and heightened levels of violence from both terrorism and counter-terrorism measures, and even torture.<sup>17</sup> This distortion of values and priorities could relegate the issue of redress for victims of terrorism further to the margins.

Despite deterioration in the international political climate, some positive developments for a more coherent multilateral regime to provide adequate redress for victims of terrorism deserve note.

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

In December 2004, the Report of the United Nations High-level Panel on Threats, Challenges and Change<sup>18</sup> 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

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<sup>16</sup> Julian E Barnes and Helene Cooper, 'Trump discussed pulling U.S. From NATO, aides say amid new concerns over Russia', *The New York Times*, 14 January 2019 (online 8 February 2019) <https://www.nytimes.com/2019/01/14/us/politics/nato-president-trump.html>.

<sup>17</sup> On this point, see Marina Aksenova, 'Of Victims and villains in the fight against international terrorism' (2017) 10 *European Journal of Legal Studies* 17.

<sup>18</sup> UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2 December 2004).

of law, while also promoting fundamental human Rights'.<sup>19</sup> In his report of May 2006,<sup>20</sup> UN Secretary-General Kofi Annan pointed out that effective counter-terrorism strategy had to encompass protection for the rights of victims since victims of terrorist acts were denied their most fundamental human rights, protection of their rights.<sup>21</sup>

On 21 August 2018, UN Secretary-General António Guterres inaugurated the first International Day of Remembrance and Tribute to the Victims of Terrorism.<sup>22</sup>

Although legal norms and institutional frameworks capable of addressing redress for victims of terrorist acts remain somewhat scattered and uneven across the globe, some concrete developments are discussed below.

## **A The Contribution of the UN Human Rights Council's Special Rapporteur on Human Rights and Counter-terrorism**

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 have kept up attention on the question of redress for victims of terrorism. In April 2018, for example, the Human Rights Council 'deeply deplore[d]

the suffering caused by terrorism to the victims and their families and, while stressing the need to promote and protect the rights of victims of terrorism, in particular women and children, reaffirming its profound solidarity with them and stressing the importance of providing them with proper support and assistance while respecting, inter alia, considerations regarding remembrance, dignity, respect, accountability, truth and justice, in accordance with international law

and in paragraph 5, reaffirmed

its profound solidarity with the victims of terrorism and their families, and acknowledges the importance of protecting their rights and providing them with proper support, assistance and rehabilitation while taking into account, when appropriate, considerations regarding remembrance, dignity, respect, justice and truth in such a way that promotes accountability and ends impunity, and encourages the enhancement of international cooperation and the exchange of expertise in that respect, in accordance with international law.

In the next paragraph, the Council stressed the importance of access to justice, due process and an effective remedy for 'victims of human rights violations and abuses' so that they 'receive adequate, effective and prompt remedy and reparations, which should include, as appropriate,

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<sup>19</sup> See UN, *United Nations Action to Counter Terrorism* [www.un.org/terrorism/](http://www.un.org/terrorism/).

<sup>20</sup> See *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (27 April 2006) [6].

<sup>21</sup> *Ibid* [118].

<sup>22</sup> See UN General Assembly resolution 72/165 on an International Day of Remembrance of and Tribute to the Victims of Terrorism; adopted on 19 December 2017; A/RES/72/165 of 25 January 2018. The resolution records the Assembly's decision to proclaim the International Day of Remembrance 'in order to honour and support the victims and survivors of terrorism and to promote and protect the full enjoyment of their human rights and fundamental freedoms'.

restitution, compensation, rehabilitation and guarantees of non-repetition as a fundamental basis of any strategy to counter terrorism and violent extremism conducive to terrorism'.<sup>23</sup>

In 2012, UN Special Rapporteur Ben Emmerson put forward his 'Framework principles for securing the human rights of victims of terrorism',<sup>24</sup> and he 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, regardless of issues of state responsibility or other issues relating, for example, to the technical application of international humanitarian law. In this sense, international human rights law should be interpreted to apply 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', whether the perpetrators were state or non-state actors.<sup>25</sup>

In any case, said the Special Rapporteur, Article 6 of the International Covenant on Civil and Political Rights enunciates a general international legal obligation upon state parties to respect the right to life and prevent the arbitrary deprivation of life. That implies general state responsibility to provide human rights protection to everyone within its territory.<sup>26</sup> He also proposed that a specific international instrument should be developed on the rights of victims of terrorism that recognizes them 'as individuals whose fundamental human rights have been violated'.<sup>27</sup> Further, he urged states to review their law and practice to ensure criminal law effectively deterred incitement, preparation and commission of terrorist offences. Mr Emmerson also underlined that international customary law obliges states either to prosecute individuals for inciting, preparing, instigating or committing any terrorist act, through domestic criminal law, or extradite them for trial in another jurisdiction. He highlighted the obligation of the state to conduct fair and effective investigations, as well as the right of victims or next-of-kin of victims to participate in judicial proceedings governed by basic elements of fair trial. This encompasses 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.<sup>28</sup>

Moreover, the Special Rapporteur argued that states should provide redress beyond situations where the actions of a public official directly or indirectly engage state responsibility 'to provide reparation where death or serious injury results from an act of terrorism committed on their territory'. Reparation should include possibilities for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>29</sup>

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<sup>23</sup> UN Human Rights Council resolution 37/27 on Terrorism and Human Rights, adopted 23 March 2018; A/HRC/RES/37/27.

<sup>24</sup> 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).

<sup>25</sup> *Ibid.*, [12].

<sup>26</sup> 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.'

<sup>27</sup> Emmerson, above n 24, [14].

<sup>28</sup> *Ibid.*, at 66–7.

<sup>29</sup> *Ibid.*

In short, the Special Rapporteur's framework principles contribute towards fuller recognition of the right of victims of terrorist incidents to redress and they also help to guide states towards development of practical implementation measures in this regard. In February 2016, for example, the UN Counter-Terrorism Centre (UNCCT), which functions under the authority of the Counter-Terrorism Implementation Task Force (CTITF) Working Group on Supporting and Highlighting Victims of Terrorism, convened a 'Conference on the Promotion and Protection of Human Rights of Victims of Terrorism'. The Conference revisited the Framework Principles for Securing the Human Rights of Victims of Terrorism discussed next.

## **B UN High-level Conference on Counter-terrorism**

In June 2018, the UN Secretary-General convened the High-Level Conference on Counter-Terrorism attended by more than 1,000 participants coming from 150 states, 51 civil society organizations, 31 international and regional organizations and 25 United Nations entities and during which a side-event was held specifically dedicated to 'Standing in Solidarity for the Rights of Victims of Terrorism'.<sup>30</sup> The Conference identified practical measures states should take to counter the threat of terrorism and to ensure victims receive redress.

## **C UN Office of Drugs and Crime**

In 2012, the UNODC published a revised version of 'The Criminal Justice Response to Support Victims of Acts of Terrorism',<sup>31</sup> which provides background on the existing international standards and norms relating to victims of crimes, and it surveys the incorporation of rights of victims of acts of terrorism in domestic criminal justice systems. Part IV of the publication endorses recommendations from the first Global Symposium on Supporting Victims of Terrorism, held on 9 September 2008 in New York. Victims should be given 'a face and a voice' to avoid their becoming depersonalized through the criminal process, and they should be supported with regard to their administrative, medical and social needs related to the criminal process. Victims' participation in criminal trials, their right to be kept informed of the proceedings, and above all, that perpetrators are brought to justice in the first place, remain essential. Victims should also have free-of-charge access to medical and psycho-social support on a systematic, easily accessible basis that extends beyond the immediate post-event period. At the policy level, states should ensure compensation and financial assistance to victims and commemorate victims of terrorism in a spirit of solidarity with them. Journalists should be trained on how to cover terrorist incidents fairly, responsibly and sensitively.<sup>32</sup>

UNODC also published a manual in 2015 on 'Good Practices in Supporting Victims of Terrorism with the Criminal Justice Framework',<sup>33</sup> which sets out international, regional and

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<sup>30</sup> Report of the of the United Nations High-Level Conference on Counter-Terrorism, 28–29 June 2018, UNHQ, New York, UN Office of Counter-Terrorism, (online 1 March 2019) [https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/Report\\_UNHLC\\_FINAL\\_WEB.pdf](https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/Report_UNHLC_FINAL_WEB.pdf).

<sup>31</sup> United Nations Office of Drugs and Crime, 'The Criminal Justice Response to Support Victims of Acts of Terrorism' 2012 online 1 March 2019 [http://www.un.org/en/terrorism/ctitf/pdfs/victims\\_rights\\_e-book\\_en.pdf](http://www.un.org/en/terrorism/ctitf/pdfs/victims_rights_e-book_en.pdf).

<sup>32</sup> *Ibid*, at para. 390.

<sup>33</sup> United Nations, 'Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework', 2015, online 1 March 2019 [https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good\\_practices\\_victims\\_E.pdf](https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf).

other multilateral instruments and arrangements relating to the right to victims of terrorism to redress. Part II surveys country good practices in terms of developing an adequate legal framework, institutional capacity and coordination to ensure redress for victims of terrorism. Part III enumerates good practices specifically relating to the need for assistance and support for victims of terrorism during criminal investigations and prosecutions. The manual helpfully underlines the need for a victim-centred approach to investigation and prosecution of acts of terrorism. It is essential to include, support and empower victims for the duration of criminal proceedings, and to take account of any special needs, including physical protection measures, that victims may have, such as instances where the victim is a witness in a criminal investigation or trial. Victims can also be empowered by being fully informed about the proceedings and their role in the judicial process in ways they can easily understand.<sup>34</sup> It is also important that victims are given the chance to make an impact statement at any criminal trial of the perpetrator of the act of terror from which they suffered. These and other measures should be provided through multi-disciplinary expertise and institutional support.

#### **D International Criminal Courts and Tribunals**

Significant developments on the scope for greater participation of victims in criminal proceedings have come from international criminal law and transnational criminal law standard setting and implementation. The Rome Statute of the International Criminal Court (ICC)<sup>35</sup> does not include the crime of terrorism in its field of material competence, but many acts of terrorism, depending upon the facts at hand, can qualify as acts of genocide, war crimes or crimes against humanity, which ICC jurisdiction does cover, particularly since the vast majority of terrorist incidents occur within, or close to, armed conflict situations where ICC jurisdiction is more likely to have been triggered. In this connection, it is important to recall that the Rome Statute affords victims a central role in the proceedings with the support of a Victim and Witnesses Unit. Victims are entitled to access a Trust Fund set up specifically for victims and their families.<sup>36</sup> They are also entitled to seek and obtain reparations directly from the Court, and importantly, wherever 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. In short, the ICC's jurisdiction covers aggression, genocide, war crimes and crimes against humanity, so the ICC could prosecute acts of terror coming within the definition of any of these Rome Statute crimes, which in turn allows victims to seek redress from the ICC Trust Fund.

Another major development in international criminal law on redress for victims of terrorist incident comes from the establishment and operation of the Special Tribunal for Lebanon,<sup>37</sup> which is mandated 'to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri',<sup>38</sup> and which applies, inter

<sup>34</sup> *Ibid*, paras 98–100.

<sup>35</sup> Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute').

<sup>36</sup> See Rome Statute, arts 75 et seq. For further reference, see Ilaria Bottigliero, 'The International Criminal Court: Hope for the victims' (2003) 32 *SGI Quarterly* 13, 13–15.

<sup>37</sup> 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'.

<sup>38</sup> *Ibid*, art 1.

alia, ‘the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism’.<sup>39</sup> In this regard, it is important to note first that 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) preserves and 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 Special Tribunal’s approach to guaranteeing the victim’s right to seek redress in other fora, without itself being empowered to do so, in effect replicates the unsatisfactory approach to victims’ redress adopted by the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, which themselves contributed little towards more effective redress for victims.<sup>40</sup>

## **E Regional and Sub-regional Developments**

In the European Union, since 2004, 11 March has been designated as the European Day in Remembrance of Victims of Terrorism. European Directive 541 of 2017 on combating terrorism updates a 2002 EU Directive.<sup>41</sup> The Directive recommends that ‘glorification and justification of terrorism or the dissemination of messages or images online and offline, including those related to the victims of terrorism as a way to gather support for terrorist causes or to seriously intimidate the population’ should be penalized as an offence of public provocation.<sup>42</sup> Directive 541 also reiterates the importance that Member States ensure a comprehensive response to the specific needs of victims of terrorism immediately after a terrorist attack as long as needed as part of the domestic emergency response framework. It further recommends that states set up a website to provide information for victims who need to reach emergency support and to assist family members in accessing psychological first aid and emotional support. The Directive further recommends cooperation among Member States to ensure victims have access to information on how to claim their right to long-term support services in the Member State of their residence, regardless of the state in the European Union that may have suffered from terrorist attack.<sup>43</sup>

In 2006, the Council of Europe adopted a Convention on the Prevention of Terrorism,<sup>44</sup> and Guidelines on the Protection of Victims of Terrorist Acts.<sup>45</sup> Member States of the Council of Europe are bound by Article 13 of the Council of Europe Convention to adopt ‘such measures as may be necessary to protect and support the victims of terrorism that has been committed within its own territory’. Article 13 makes clear that such measures may include, ‘through the

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<sup>39</sup> Ibid, art 2.

<sup>40</sup> 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.

<sup>41</sup> European Union Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, online 1 March 2019 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L0541&from=EN>.

<sup>42</sup> Ibid, at para 10.

<sup>43</sup> Ibid, at para 30.

<sup>44</sup> 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’).

<sup>45</sup> Council of Europe Committee of Ministers, *Guidelines on the Protection of Victims of Terrorist Acts* (2 March 2005).

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 also stress the duty of the state to investigate terrorist incidents and prosecute suspected perpetrators and to ensure victims can access justice and receive compensation in a timely fashion. In 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.<sup>46</sup>

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'.<sup>47</sup> The Charter, together with its Protocol,<sup>48</sup> 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.<sup>49</sup> By January 2013, all ten members of the Association of Southeast Asian Nations (ASEAN) had ratified its Convention on Counter Terrorism;<sup>50</sup> however, these instruments make scant reference to the rights of victims of terrorist acts.

### 3 A WORD ON THE LIMITATIONS OF DOMESTIC FRAMEWORKS

While it is important that many states continue to elaborate compensation schemes for victims of crime, including terrorism, a more comprehensive international framework could help reduce unevenness and gaps within and among state regulatory regimes. State compensation schemes tend to have been established on an ad hoc basis, and they are not necessarily focused on the right of victims to receive redress. Such an approach can be less systematic, and less efficient for victims who deserve to be treated equally, and to benefit from predictable, well-established and fair systems of redress, rather than to have to rely on ad hoc arrangements. Many European 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, but such entitlement is based on principles of

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<sup>46</sup> Inter-American Convention Against Terrorism, adopted 3 June 2002, OAS Treaty A-66 (entered into force on 10 July 2003).

<sup>47</sup> African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) ('Banjul Charter').

<sup>48</sup> 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).

<sup>49</sup> 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.

<sup>50</sup> ASEAN Convention on Counter Terrorism, adopted 13 January 2007 (entered into force 27 May 2011).

'equity and social solidarity', rather than on the individual's legal right to redress.<sup>51</sup> Moreover, 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, which can produce obvious injustice through unequal treatment for the same harm.

Another problem is that many countries maintain procedural conditions that restrict who can bring a court action (*locus standi*) against the state for redress in cases of terrorism. Many state compensation schemes also devote inadequate attention to non-monetary forms of redress, such as psychological and medical rehabilitation, or assistance to help victims to reintegrate into the employment market following trauma related to a terrorist incident.

#### 4 CONCLUSION

Over the last several years, the issue of redress for victims of acts of terrorism has been gaining greater recognition within UN and regional frameworks through inauguration of the symbolic annual commemoration of an International Day of Remembrance and Tribute to the Victims of Terrorism.

More substantive progress has been made through the work of the UN Human Rights Council special rapporteur on Human Rights and Counter-Terrorism, building upon the work of UN special rapporteurs and independent experts for the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN Human Rights Commission on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>52</sup> The ICC regime holds a certain measure of promise for victims of terrorist crimes wherever such crimes qualify as one of the crimes coming within ICC jurisdiction and the ICC asserts jurisdiction over a particular situation where the terrorist incident may have been perpetrated.

Regional and domestic jurisdictions, as noted above, have also made some progress in developing standards, norms and mechanisms to address the issue of victims' redress specifically in connection with terrorist incidents.

That said, until now, a more global approach is still needed to meet 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'.<sup>53</sup> A more comprehensive system should embody the reparation principles set out in the UN Basic Principles and Guidelines on the Right to Reparations for Victims of Gross Human Rights and Humanitarian

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<sup>51</sup> 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.

<sup>52</sup> See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; A/RES/60/147 of 21 March 2006.

<sup>53</sup> See *Uniting Against Terrorism: Recommendations for a Global Counter-terrorism Strategy*, UN Doc A/60/825 (27 April 2006), [14].

Law Violations,<sup>54</sup> the Joinet Principles,<sup>55</sup> the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power,<sup>56</sup> as well as regional standards discussed above. By envisaging reparations to encompass restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, the Basic Guidelines and Principles offer broad-ranging and comprehensive guidance to individual States while at the same time leaving each country considerable scope to develop institutional responses in ways best suited to its own particular constitutional and legislative context.

A remaining challenge is that redress for victims of terrorist acts should be applied on a non-discriminatory basis without regard to nationality, race, colour, gender, religion and so on, particularly since terrorist incidents often kill and injure random individuals. Another important consideration is that compensation funds should encompass a range of possibilities for restorative justice, such as the provision of state apologies (where this may be appropriate), rehabilitation programmes, days of recognition and remembrance, public tributes, and the installation of monuments and so forth. In this regard, investigation and documentation of facts and responsibilities surrounding terrorist incidents can go a considerable way in meeting the needs of victims, survivors, and society at large, for truth and justice in a wider sense. Unfortunately, Governments around the world have become increasingly secretive, using 'national security' to justify releasing as little information as possible. Information concerning terrorist incidents should be placed in the public domain to the extent that it does not jeopardize counter-intelligence efforts or ongoing criminal investigations. Finally, states have to ensure that they fulfil their responsibilities diligently to investigate, prosecute and punish individual perpetrators, and to this end, to engage fully in the range of available avenues for international, regional, transnational cooperation and assistance as well as to establish more effective domestic mechanisms such as truth and reconciliation commissions, commissions of enquiry, fact-finding commissions and other justice mechanisms as may be needed.

With increasing political tensions on the international scene, multilateral cooperation to address terrorism has become more of a challenge, but the needs of victims of terrorism remain undiminished, and these needs may increase in future.

An international normative framework guiding states to provide adequate redress to victims of terrorist incidents is therefore needed since the threat of terrorism still looms large. Victims of terrorism often require more specialized treatment than 'regular' crime victims because of the intensity of their trauma, and their special needs should be recognized as such. For that reason, redress for victims of terrorism should be considered mainly as a human rights issue, as the UN Human Rights Council has pointed out on several occasions, and not merely as an aspect of security or counter-terrorism efforts. Continued attention from international, regional

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<sup>54</sup> 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).

<sup>55</sup> 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); 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).

<sup>56</sup> 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 domestic authorities on the rights of victims of terrorist incidents in terms of international human rights law, which offers a rich array of multi-disciplinary and multifaceted norms to the question, rather than solely as a criminal law and security problem, remains essential to establish a more comprehensive and fair system that places victims of terrorist violence squarely at the centre of the process and to ensure their special needs are fully met.

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