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Victims of Terrorism and Reparation

Applying the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation

Niki Siampakou

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International Centre for
Counter-Terrorism

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Abstract

While victims of terrorism undergo significant harm, there is currently no specific legal framework addressing their right to reparation. Certain regional provisions focus on establishing compensation funds under national law but do not explicitly acknowledge an existing right to reparation which includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non repetition. To fill this gap, this Policy Brief argues that the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines) should be applicable to terrorism victims. The brief initially explores the absence of an internationally proclaimed right to reparation for this category of victims. Subsequently, it illustrates that considering the shared characteristics between victims of terrorism and those of international crimes, gross violations of International Human Rights Law, or serious violations of International Humanitarian Law as well as the common elements between terrorism and international crimes, gross violations of human rights and humanitarian law, the UN Basic Principles and Guidelines should extend to victims of terrorism. This application is seen as a recognition of their right to reparation, fulfilling states' responsibility to provide a comprehensive framework for the harm suffered by victims and consequently enhancing the international protection of terrorism victims.

Keywords: victims, reparation, remedy, terrorism, prosecution, international crimes

Introduction

Despite the intensity of the harm victims of terrorism experience, there is no specific legal instrument dedicated to their right to reparation. Some existing provisions at a regional level concern the establishment of compensation funds under national law without referring to an actual right to reparation.¹ This Policy Brief argues that the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles and Guidelines) should apply to victims of terrorism.² To do so, it will first discuss why a right to reparation is not proclaimed at an international level for this category of victims. Then it will demonstrate that commonalities are shared between victims of international crimes, gross violations of International Human Rights Law (IHRL) or serious violations of International Humanitarian Law (IHL), and victims of terrorism. Finally, it argues that as terrorist conduct often amounts to international crimes, gross violations of IHRL and serious violations of IHL, the UN Basic Principles and Guidelines should equally apply to victims of terrorism. Applying the UN Basic Principles and Guidelines to victims of terrorism recognises their right to reparation and fulfils states' obligation to provide for a holistic response to the harm inflicted on them, in turn resulting in a broader protection for victims of terrorism at the international level.

Reparation for Victims of Terrorism: Exploring the Lack of a Recognised Right to Reparation

Until recently, victims of terrorism have been widely disregarded within the context of counter-terrorism.³ Indeed, legal instruments related to terrorism provide limited reference to victims and there is no international binding legal instrument dedicated to their needs. Regarding victims' reparation, some laconic references include the possibility to obtain restitution⁴ and/or compensation,⁵ yet the enforcement of benefits via domestic initiatives cannot be guaranteed. The only state obligation which appears to be widely accepted regarding reparation is the one to provide compensation through compensation funds. For instance, under EU Directive 2004/80/EC relating to compensation to victims of crimes – also applicable to victims of terrorism as victims of violent intentional crimes – EU Member States must establish state compensation schemes to which victims of such crimes have access. Particularly in the case of terrorism, according to

1 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, Article 24; Protocol to the OAU Convention on the prevention and combating terrorism, 26 February, 2014, Article 1: "States parties' commitments the obligation to "identify, detect, confiscate and freeze or seize any funds and any other assets used or allocated for the purpose of committing a terrorist act, and to establish a mechanism to use such funds to compensate victims of terrorist acts or their families"; See also European Convention on the Compensation of Victims of Violent Crimes, 1 February, 1988.

2 UN General Assembly Resolution 60/147, A/RES/60/147, 16 December 2005, 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.

3 Recent developments on the topic include: the establishment of the UNOCT/UNCCT's Victims of Terrorism Unit <https://www.un.org/counterterrorism/cct/victims-of-terrorism>; the organisation of the First United Nations Global Congress of Victims of Terrorism which took place on 8 and 9 September 2022 in New York <https://www.un.org/counterterrorism/2022-un-global-congress-victims-terrorism>; the publication of the Model Legislative Provisions by the UNCCT, the UNODC and the Inter-Parliamentary Union. https://www.un.org/counterterrorism/sites/www.un.org/counterterrorism/files/220204_model_legislative_provisions.pdf

4 International Convention against the Taking of Hostages, 3 June 1983, Article 3(2).

5 International Convention for the Suppression of the Financing of Terrorism, 10 April 2002, Article 8(4); Protocol to the Organization of the African Union Convention on the Prevention and Combating of Terrorism, 6 December 2002, Article 3; Council of Europe Convention on the Prevention of Terrorism, 1 June 2007, Article 13; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 1 May 2008, Article 25(2).

the EU Directive 2017/541 on combating terrorism, Member States should provide confidential, free of charge and easily accessible support services to victims of terrorism. They shall include, inter alia, “assistance with claims regarding compensation for victims of terrorism available under the national law of the Member State concerned”.⁶ Several EU Member States have established compensation funds for victims of terrorism or have given the possibility to the latter to access already existing funds for victims of violent crimes.⁷ Similar to the EU, at the African Union the 2004 Protocol to the OAU Convention on the prevention and combating terrorism includes the obligation for states to establish a compensation mechanism.⁸

However, the obligation to establish national compensation funds does not fully reflect the internationally recognised obligation to provide reparation to victims. Reparation refers to a more holistic idea than solely compensation, considering that it encompasses restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. In addition, the right to truth and justice are closely linked to reparation. It could be argued that the idea of symbolic reparation measures is incorporated in the 2017 Revised Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Victims of Terrorist Acts. The Revised Guidelines encourage Member States “to consider, depending on the circumstances, taking other measures to mitigate the harmful consequences of the terrorist act suffered by the victims”.⁹ Nonetheless, the “other measures”, or whether the latter are to be taken in the context of reparation to victims, is not defined.

In light of the above, it follows that the situation of victims of terrorism concerning their right to reparation is problematic. The position of victims of gross human rights violations and international crimes appears more advantageous when compared to victims of terrorism as the former have a recognised right to reparation. Therefore, the question arises as to why victims of terrorism have been ignored on such an important question while the intensity of the harm suffered justifies a broader protection. Two possible reasons are discussed below.

Firstly, within the counter-terrorism context, victims have not been a priority in general, let alone their right to reparation.¹⁰ Indeed, the international interest in the question of compensation intensified after 9/11.¹¹ Following 9/11 and the subsequent terrorist attacks, ad hoc organs or administrative domestic procedures providing for compensation of the specific terrorist attacks were established,¹² but there had not been any in-depth discussion at an international level

6 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, Article 24.

7 Rianne Letschert and Karin Ammerlaan, “Compensation and Reparation for Victims of Terrorism” in *Assisting Victims of Terrorism: Towards a European Standard of Justice*, eds. Rianne Letschert, Ines Staiger, and Antony Pemberton (Dordrecht: Springer, 2010), p. 221-242.

8 Protocol to the OAU Convention on the prevention and combating terrorism, 26 February 2014, Article 1: “States parties’ commitments the obligation to “identify, detect, confiscate and freeze or seize any funds and any other assets used or allocated for the purpose of committing a terrorist act, and to establish a mechanism to use such funds to compensate victims of terrorist acts or their families”.

9 Article 8(4), Revised Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorist acts, adopted by the Committee of Ministers at its 127th Session, Nicosia, 19 May 2017 <https://rm.coe.int/protection-of-victims-of-terrorist-acts/168078ab54>

10 Alex P. Schmid, “Strengthening the Role of Victims and Incorporating Victims in Efforts to Counter Violent Extremism and Terrorism”, *The International Centre for Counter-Terrorism* 3, no. 7 (2012): 1, <http://dx.doi.org/10.19165/2012.1.07>; John Jupp “Strengthening Protection and Support for Victims of Terrorism in Criminal Proceedings in Afghanistan”, *Studies in Conflict & Terrorism*, 45:2 (2022): 133-134.

11 See for instance: Edward L. Lascher and Ellen E. Martin. “Beyond the September 11 Victim Compensation Fund: Support for Any Future American Terror Casualties.” *PS: Political Science & Politics* 41, no. 1 (2008): 147-52; Saul Levmore and Kyle D. Logue. “Insuring against Terrorism -- and Crime.” *Michigan law review* 102.2 (2003): 268–327; Marshall Shapo, *Compensation for Victims of Terrorism* (Oxford University Press, 2005).

12 See for instance the September 11 Victim Compensation Fund <https://www.vcf.gov/#:~:text=The%20September%2011th%20Victim%20Compensation,Pennsylvania%20crash%20site%2C%20at%20some> and the

on adequate reparation measures, access to the benefits, eligibility criteria, etc.¹³ The crimes committed by ISIL in Syria and Iraq raised the question about the recognition of victims of sexual and gender based violence (SGBV) committed by terrorists as victims of terrorism and their access to reparation programmes. That recognition came in the UN Security Council's resolution 2331(2016).¹⁴ In parallel, the terrorist attacks after 2015 on European territory resulted in hundreds of casualties and brought the issue of victims' needs on the scene. Questions about how to repair this category of victims, the incapacity or inappropriateness of the existing domestic mechanisms, and the inexistence of an international fund started attracting attention at an international level in the last years. The revised version of the UN Global Counter-Terrorism Strategy encourages Member States to take into account considerations regarding inter alia reparation.¹⁵ The establishment of the UNOCT/UNCCT's Victims of Terrorism Unit as well as the publication of the Model Legislative Provisions to Support the Needs and Protect the Rights of Victims of Terrorism in 2022 by the UNCCT, the UNODC and the Inter-Parliamentary Union attest to the emergent interest in victims.¹⁶ Nonetheless, this delayed focus on victims of terrorism could explain the only recent evolutions on the question of reparation.

On the contrary, within IHRL and international criminal law, the focus on victims and their right to reparation already emerged in the early 1990s.¹⁷ With the early decisions of the Inter-American Court of Human Rights on reparation,¹⁸ the discussion of the possibility of providing for compensation within the ad hoc criminal tribunals,¹⁹ and later the inclusion of Article 75 in the

Fondo de Ayuda for the victims of the March 11 Madrid terrorist attack <https://laadministracionaldia.inap.es/noticia.asp?id=1120716>

¹³ In 2004 the UNSC Resolution 1566 (2004) noted that the Council “decides to establish a working group consisting of all members of the Security Council [...] to consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families” (UN Security Council Resolution 1566, S/RES/1566 (2004), 8 October 2004, para 10)

Likewise, the UN General Assembly Resolution 59/195 refers to the possibility of an international funds (UN General Assembly Resolution 59/195, A/RES/59/195, 20 December 2004, para 15). Nonetheless, there has been no further development on this possibility.

¹⁴ UN Security Council Resolution 2331, S/RES/2331, 20 December, 2016, para 10.

¹⁵ UN General Assembly Resolution 77/298, A/RES/77/298, 22 June 2023, para 117.

¹⁶ The Model Legislative Provisions by the UNCCT, the UNODC and the Inter-Parliamentary Union intend to assist Member States- in protecting the rights and supporting the needs of victims of terrorism in their national laws.

Chapter VI provides for a right to reparation. https://www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/220204_model_legislative_provisions.pdf

¹⁷ Nevertheless, considering that within public international law the principle of reparation has been recognised since 1927, victims' right to reparation took time to be established even within this field. See Case Concerning the Factory at Chorzów (Germany v. Poland) (Judgement), 1927, P.C.I.J. Rep. Series A no. 9, 21 (July 26). “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”.

¹⁸ See among others Velasquez Rodriguez v. Honduras, Reparations and Costs, Inter-Am. Ct H.R. (ser. C) No. 7 (July 21, 1989); Loayza Tamayo v. Perou, Reparations and Costs, Inter-Am. Ct H.R. (ser. C) No. 42 (November 27, 1998); Blake v. Guatemala, Reparations and Costs, Inter-Am. Ct H.R. (ser. C) No. 48 (January 22, 1999).

¹⁹ UNSC Verbatim Record (2 June 2000) UN Doc S/PV/4150, p. 5; ICTY, Press Release “Address to the Security Council by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council” (24 November 2000) JL/P.I.S./542-e <http://www.icty.org/en/press/address-security-council-carla-del-ponte-prosecutor-international-criminal-tribunals-former>; UNGA, UNSC, “Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” (17 September 2001) UN Doc A/56/352–S/2001/865, para 49; UNSC, Appendix to “Letter dated 12 October 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General” annexed to “Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council” (3 November 2000) UN Doc S/2000/1063; UNSC, “Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General” annexed to “Letter dated 14 December 2000 from the Secretary-General addressed to the President of the Security Council” (15 December 2000) UN Doc S/2000/1198; “Statement by the President of the ICTR to the United Nations General Assembly by Judge Navanethem Pillay, President” (28 October 2002) <http://ictr-archive09.library.cornell.edu/ENGLISH/speeches/pillay281002ga.html>; “Statement by the President of the ICTR to the United Nations Security Council by Judge Navanethem Pillay” (29

Rome Statute, the recognition of such a right was concretised in 2005 by the adoption of the UN Basic Principles and Guidelines. This document elaborates on the remedies owed to victims of gross violations of IHRL and serious violations of IHL, including their right to equal and effective access to justice, their right to adequate, effective, and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms. It was developed having with the violations constituting international crimes under the Rome Statute of the International Criminal Court in mind and it is, therefore, limited to victims of the “worst violations”.²⁰ The Basic Principles and Guidelines do not create new international or domestic legal obligations, but instead “identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations” under IHL and IHRL.²¹ Despite their non-binding nature, they have been cited by jurisprudence and are considered an essential legal document in the field of victims’ rights.²² Thus, the right to reparation for these categories of victims is today established. In contrast to victims of international crimes, gross violations of IHRL, and serious violations of IHL, the road to recognition for a right to reparation for victims of terrorism, as explained above, has only recently started.

A second reason contributing to the lack of a proclaimed right to reparation for victims of terrorism is the absence of an international legal definition of terrorism, as well as a definition of the aim and purpose of terrorism. Reparation is linked to the recognition of a person as a victim of a wrongful conduct, but if the latter is not defined, the size of the group of victims is unspecified. Additionally, considering that terrorism acts aim to spread fear among the population, the circle of victims is difficult to be determined. The incapacity to define the group of victims impacts questions linked notably to who is eligible to receive reparation, the different benefits to distribute, and the required amount for funding the reparation measures. Although the status of direct and indirect victims of terrorist attacks seems to be straightforward, the number of people affected by terrorism can be considerably broader. For instance, should the first responders, the larger community where the terrorist act took place, the victims of crimes related to terrorism, or the victims of human rights violations committed in the context of counter-terrorism victims of terrorism have access to reparation? The 2015 Paris attacks trial constitutes a thought-provoking example. In this case, proving direct harm was a precondition for victims to be recognised as a civil party. Adopting this approach, the Court distinguished between “direct victim” and “unlucky witness”.²³ Individuals who happened to pass near the places where the attacks took place were considered “unlucky witnesses” and their applications to become civil parties were rejected. Although in the French system there is no need to be a civil party to receive compensation,

October 2002); “Address by Judge Erik Mose, President of the International Criminal Tribunal for Rwanda to the United Nations General Assembly” (9 October 2003); “The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina” Press Release (17 May 2001) JL/P.I.S./591-e.

20 Theo van Boven, “The United Nations 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” (United Nations Audiovisual Library of International Law, 2010), p. 2 https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf. See Principle 26 on non-derogation: “[I]t is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law”.

21 Basic Principles and Guidelines, preambular para 7.

22 See: Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3129, Judgment on the appeals against “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2 (ICC, Appeals Chamber March 3, 2015); Prosecutor v. Germain Katanga, ICC-01/04-01/07-3728-tENG, Order for Reparations pursuant to Article 75 of the Statute (ICC, Trial Chamber II March 24, 2017); Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order (ICC, Trial Chamber VIII August 17, 2017); Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-2659, Reparations Order (ICC, Trial Chamber VI March 8, 2021).

23 Sandrine Lefranc, and Sharon Weill, “Le procès V13 comme expérimentation judiciaire : entre justices pénale et transformative,” *Les Cahiers de la Justice* 1, no. 1, (2023): 41-57.

being granted this status by the Court can reinforce their application.²⁴ Furthermore, many of these individuals can experience psychological harm which impacts their lives.²⁵ While victims of terrorism are fighting to get legally recognised as victims of terrorism – the first step to be able to exercise their rights, including their right to reparation – victims of international crimes are in a comparatively better position. In addition, considering the gravity of the crime, there might be a considerably large number of potential victims which means that states might have to invest a substantial amount of money in reparation measures.

The emerging interest in victims and the lack of a definition of terrorism, as well as its aim to spread fear among the population, can explain why the question of victims' reparation has not received adequate attention in the counter-terrorism context. Both justifications are linked to the incapacity and/or unwillingness of states and the international community to prioritise the victims in their political agendas when it comes to terrorism. Several states do not have the financial means and/or the adequate operational capacity to deal with the question, while others are unwilling to make victims' needs their top priority and, thus, push for the recognition of victims of terrorism and their right to reparation.

Searching for Other Avenues

Having discussed the reasons why a right to reparation is not proclaimed at an international level for victims of terrorism, this section will demonstrate why victims of terrorism should be treated as victims of international crimes, gross violations of IHRL, or serious violations of IHL when it comes to reparation.

Victims of Terrorism and Victims of International Crimes: Shared Commonalities

According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:²⁶

1. 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

²⁴ In the French system, the compensation of victims of terrorism is separated from the judicial proceedings. Victims should apply for compensation to the Guarantee Fund for Victims of Terrorist Acts and Other Offences (Fonds de garantie des victimes des actes de terrorisme et d'autres infractions). Although this fund has its autonomy to decide on the capacity of an individual as a victim, the constitution of civil party is considered as an indication. Chantal Bussière, Mission sur l'amélioration du dispositif d'indemnisation des victimes du préjudice corporel en matière de terrorisme [Mission on improving the compensation system for victims of bodily injury in matters of terrorism] (Mars 2018), 34 https://www.fondsdegarantie.fr/wp-content/uploads/2018/04/Rapport_definitif_indemnisation_victimes_terrorisme.pdf; Cour des comptes, La prise en charge financière des victimes du terrorisme [Court of Auditors, Financial support for victims of terrorism]; Communication à la commission des finances du Sénat [Communication to the Senate Finance Committee], (December 2018) <https://www.ccomptes.fr/system/files/2019-01/20190130-Indemnisation-victimes-terrorisme.pdf>

²⁵ Benoît Springer and Xavier Thomann, "Procès des attentats du 13 novembre 2015, jour 120 : 'Nous ne sommes pas des témoins malheureux. Je suis un citoyen fier d'avoir porté secours,'" Trial of the November 13, 2015 attacks, day 120: ["We are not unhappy witnesses. I'm a proud citizen who came to provide aid"] Charlie Hebdo (6 May 2022) <https://charliehebdo.fr/2022/05/proces-13-novembre-2015/proces-des-attentats-du-13-novembre-2015-jour-121-nous-ne-sommes-pas-des-temoins-malheureux-je-suis-un-citoyen-fier-davoir-porte-secours/>

²⁶ UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985) UN Doc A/RES/40/34.

2. [...] The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.²⁷

This definition, dating back to 1985, refers to every victim of (ordinary) crime and abuse of power and has constituted the basis for defining victims of human rights violations and international crimes. In particular, the drafters of the Rome Statute referred to the Declaration’s definition of victim and – at that moment – the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law.²⁸ Rule 85 of the ICC’s Rules of Procedure and Evidence defines, laconically, victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”.²⁹

Based on the aforementioned definition, victims of international crimes include individuals who have directly suffered harm, collective victims such as communities, family members or dependent of the direct victim (indirect victims), and individuals who have suffered harm while intervening to prevent the violation. The harm suffered should be the result of the commission of a crime under the jurisdiction of the ICC. Regarding victims of terrorism, there is currently no international binding legal text providing a definition. Generally speaking, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is also applicable to them.³⁰ In 2012, the Special Rapporteur’s report identified four categories: direct, secondary, indirect, and potential victims.³¹

27 UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985) UN Doc A/RES/40/34. See also UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (16 December 2005) UN Doc A/RES/60/147, Principles 8 and 9 (hereinafter referred to as ‘UN Basic Principles and Guidelines’).

28 “Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117” (24 May 1996) E/CN.4/Sub.2/1996/17. See “Report of the Preparatory Committee on the Establishment of an International Criminal Court” UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June-17 July 1998) (14 April 1998) UN Doc A/CONF.183/2/Add.1, 116, fn 22,

29 In particular, the latter defines victims as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court’. The second paragraph of rule 85 adds in this definition organisations or institutions ‘that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’.

30 UNODC, *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework* (New York: United Nations, 2015), p. 1 https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf; Rianne Letschert, “International Initiatives and Activities Focusing Specifically on Victims of Terrorism, Including Existing International Instruments” in *Assisting Victims of Terrorism: Towards a European Standard of Justice*, eds. Rianne Letschert, Ines Staiger, and Antony Pemberton (Dordrecht: Springer, 2010), p. 33.

31 Direct victims of terrorism: Natural persons who have been killed or have suffered serious physical or psychological injury as the result of an act of terrorism.

Secondary victims of terrorism: Natural persons who are the next of kin or dependents of a direct victim of terrorism.

Indirect victims of terrorism: Individuals who have suffered serious physical or psychological injury as the indirect result of an act of terrorism. This category includes (a) members of the public (such as hostages or bystanders) who have been killed or injured through the use of potentially lethal force against suspected terrorists; (b) eyewitnesses who have sustained serious psychological harm as the result of witnessing a violent terrorist incident or its immediate aftermath; (c) individuals who have been subjected to potentially lethal force by a public authority after being mistakenly identified as a suspected terrorist; (d) rescue workers who suffer serious physical or psychological harm as the result of taking part in emergency relief.

Potential victims of terrorism: The beneficiaries of the state’s positive obligations under Article 6 of the International Covenant on Civil and Political Rights (right to life). Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, “Framework principles for securing the human rights of victims of terrorism”, A/HRC/20/14, 4 June 2012, 20th Session, para 16. It should be noted that victims of terrorism include victims of terrorist attacks but also victims of core international

Although this categorisation has not been translated into a binding legal document, it attests to the complexity and particularities of the victimhood linked to terrorism.

Both victims of international crimes and victims of terrorism constitute specific categories of victims which should be distinguished from victims of ordinary crimes based on the type and nature of international crimes and terrorism. Besides, differences between victims of terrorism/international crimes and victims of ordinary violence can be drawn on the grounds of the particular attention paid by the media and the political system to these violations.³² For instance, the commission of international crimes has resulted in the establishment of ad hoc tribunals or fact-finding missions while specialised bodies to treat terrorist acts have been established in several countries following terrorist attacks.³³ Looking at the specific victimological characteristics and needs of these groups of victims, the applicability of common rules can be justified.³⁴ Indeed, both victim categories experience more intense harm which impacts a broader group of people than victims of other infractions. International crimes, in particular crimes against humanity and genocide, often target the community as a whole with the goal to destabilise and destroy it physically as well as its identity.³⁵ They leave victims with the question of why their group has been targeted and in need of overcoming at the same time their trauma and the one of the community.³⁶ Regarding victims of terrorism, their victimisation as representatives of the larger society, the state and/or the shared values is a proper element to this type of conduct.³⁷ Victims are attacked on the name of what they represent and not on the grounds of their personal identity, as they are in most of the cases, unknown to the perpetrator. This violence has a particular impact on the individual victims of terrorism and international crimes who find the violence inflicted on them unjustified.

Additionally, the circumstances under which the harm takes place in both situations (international crimes and terrorism) share some similarities. For instance, within the societies where international crimes occur, impunity usually prevails even before the commission of the crimes, the rule of law is destroyed, the level of civic trust is low, and there is no institutional organisation for addressing the crimes.³⁸ Regarding terrorism, when it takes place during a conflict or as part of a widespread or systematic attack directed against the civilian population the above-mentioned conditions are also applicable. But even when terrorism occurs during peacetime, the latter has an impact on society as a whole and creates a situation of terror and chaos which impacts daily life. For instance, after the terrorist attacks in Brussels, the city's everyday life was affected, while in France a state of emergency was declared which had an important impact on citizens' human

crimes committed by terrorist groups, such as victims of sexual violence. See UN Security Council Resolution 2331, S/RES/2331, 20 December 2016, para 10.

32 Hans Jörg Albrecht, and Michael Kilchling, "Victims of Terrorism Policies: Should Victims of Terrorism be Treated Differently?", *European Journal on Criminal Policy and Research* 13, no. 1-2, (2007): 27.

33 For instance, in France, in 2019, the National Anti-Terrorism Prosecutor's Office (PNAT) was created (Ministère de la Justice, "Zoom sur le nouveau Parquet national antiterroriste", *Actualités*, 30 September 2019, available at: <https://www.justice.gouv.fr/actualites/actualite/zoom-nouveau-parquet-national-antiterroriste>).

34 For international crimes, see Marc S Groenhuijsen, and Antony Pemberton, "Genocide, Crimes against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice" in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011): 13-22; For terrorism see European Parliament "How can the EU and Member States better help the victims of terrorism?", Policy Department for Citizens' Rights and Constitutional Affairs, (September 2017): 26-57.

35 Mina Rauschenbach, and Damien Scalia, "Victims and International Criminal Justice: A Vexed Question?", *International Review of the Red Cross* 90, no. 870 (June 2008): 450-451.

36 *Ibid.*

37 "How can the EU and Member States better help the victims of terrorism?", Policy Department for Citizens' Rights and Constitutional Affairs, (September 2017): 28.

38 Marc S Groenhuijsen, and Antony Pemberton, "Genocide, Crimes against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice" in Rianne Letschert and others (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011): 13-22.

rights.³⁹ Moreover, victims of international crimes and terrorism can more often experience post-traumatic stress disorder as well as re-victimisation than victims of ordinary crimes.⁴⁰ Indeed, the nature of terrorism and international crimes can lead to complex and long-term investigations and trials. Victims may be called to testify multiple times on sensitive topics before different instances. Moreover, victims of such crimes are often approached by media to share their stories and can be exposed to follow-up media reports on the specific acts which make them relive the traumatic experience.⁴¹

As a result of the type and nature of international crimes and terrorism, victims of both crimes present a specific need for recognition and acknowledgement.⁴² Put differently, victims of such crimes are attacked as “public victims” which results in the need of social acknowledgement through recognition of their victims’ statute, participation in the criminal proceedings, construction of memorials, and organisation of commemorative events.

Terrorist conduct amounting to International Crimes, Gross Violations of IHRL or Serious Violations of IHL

Besides the shared commonalities between victims of terrorism and victims of international crimes, the UN Principles and Guidelines should apply to victims of terrorism as the majority of terrorist conduct can amount to international crimes, gross violations of IHRL, or serious violations of IHL. Therefore, treating victims of terrorism differently will perpetuate discrimination among victims of the same violations. It should be noted that for terrorist conduct which does not fall under the above mentioned categories, Principle 26, stating that the Principles and Guidelines are “without prejudice to the right to a remedy and reparation for victims of all violations of international human rights and international humanitarian law”, is applicable.

First of all, terrorism can result in gross violations of human rights. Although there is not a consensus whether terrorist groups are bound by IHRL treaties, the acts that they are committing, including the last years attacks in Europe, have a serious impact on human rights.⁴³ The right to life, liberty, and security, as well as freedom from slavery and torture are among the most grave violations

39 Human Rights Watch, “Grounds for Concern: Belgium’s Counterterrorism Responses to the Paris and Brussels Attacks” (November 3, 2016) <https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterrorism-responses-paris-and-brussels-attacks> Aude Mazoue, “How the November 2015 attacks marked a turning point in French terror laws”, France24 (5 September 2021) <https://www.france24.com/en/france/20210905-how-the-november-2015-attacks-marked-a-turning-point-in-french-terror-laws>

40 See European Parliament “How can the EU and Member States better help the victims of terrorism?”, Policy Department for Citizens’ Rights and Constitutional Affairs, (September 2017): 39-40; Yael Danieli, ‘Healing Aspects of Reparations and Reparative Justice for Victims of Crimes Against Humanity’ in Jo-Anne M Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014); Christophe Herbert, Charlie Rioux and Jo-Anne M Wemmers, ‘Reparation and Recovery in the Aftermath of Widespread Violence: Traditional Justice, Restorative Justice and Mental Health’ in Jo-Anne M Wemmers (ed), *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation* (Routledge 2014); Yael Danieli, ‘Massive Trauma and the Healing Role of Reparative Justice: An Update’ in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (2nd rev edn, Brill | Nijhoff 2020).

41 For terrorism European Parliament “How can the EU and Member States better help the victims of terrorism?”, Policy Department for Citizens’ Rights and Constitutional Affairs, (September 2017): 112.

42 For terrorism European Parliament “How can the EU and Member States better help the victims of terrorism?”, Policy Department for Citizens’ Rights and Constitutional Affairs, (September 2017): 28-31.

43 Antal Berkes, *International Human Rights Law Beyond State Territorial Control* (Cambridge: Cambridge University Press, 2021); Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017); Elizabeth Stubbins Bates and others, *Terrorism and International Law: Accountability, Remedies, and Reform: A Report of the IBA Task Force on Terrorism* (Oxford University Press, 2011), p. 78.

in which terrorist acts result. According to Theo van Boven, co-author of the UN Principles and Guidelines, the gross violations of human rights and freedoms include at least:

“genocide; slavery, and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender”.⁴⁴

The fact that in the case of terrorism these violations are committed by individuals should not deprive the victims from having the same treatment with victims of gross violations of human rights committed by states. Moreover, states can be held responsible for these violations based on the IHRL treaties they have ratified. Under the existing case law, states have the obligation to prevent, investigate, and prosecute violations of the right to life committed by non-state actors.⁴⁵ This obligation includes their duty to not violate the right to life but also to protect this right from being violated by third parties, including terrorist groups.⁴⁶ When terrorist acts are taking part on their territory or against their nationals, states are accountable for failing to fulfil their obligation and responsible for providing reparation. Effective remedies should also be provided in states’ domestic law for victims of the violation of the right to life.⁴⁷

In addition, although terrorism is not included as a separate crime in the Rome Statute, various offences defined as crimes against humanity, genocide, or war crimes may include terrorist conduct. A terrorist act can constitute a crime against humanity or a war crime if the required elements are fulfilled. For instance, the International Criminal Tribunal for the former Yugoslavia found Ratko Mladić, former commander of the Main Staff of the Bosnian Serb Army (VRS) guilty for the war crime of terror against the civilian population in Sarajevo, under Article 3 of its statute (reflecting Article 51(2) of the Additional Protocol I to the Geneva Conventions of 1949).⁴⁸ Furthermore, the Special Tribunal for Lebanon defined terrorism as an international crime and confirmed that “a customary rule of international law regarding the international crime of terrorism at least in time of peace has indeed emerged”.⁴⁹ Although scholars criticised this statement, the decision cannot be ignored.⁵⁰

44 UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms Final report submitted by Mr. Theo van Boven, Special Rapporteur”, E/CN.4/Sub.2/1993/8, 2 July 1993, para 13.

45 See for instance *Velasquez Rodriguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988); *Godínez Cruz v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No 5 (20 January 1989) para 188; *Kawas Fernández v. Honduras*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 196 (3 April 2009) para 78; *Kiliç v Turkey* no 49164/99 Eur. Ct. H. R. (28 March, 2000); *Ertak v. Turkey* no 20764/92 Eur. Ct. H. R. (9 May, 2000) para 134-135; *Mahmut Kaya v. Turkey* no 22535/93 Eur. Ct. H. R. (28 March, 2000); Elizabeth Stubbins Bates and others, *Terrorism and International Law: Accountability, Remedies, and Reform: A Report of the IBA Task Force on Terrorism* (Oxford University Presse, 2011), p. 78, 82-84, 206-207.

46 Human Rights Committee, General comment no. 36, Article 6: right to life, 3 September 2019, CCPR/C/GC/36, para 21. (“Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups”) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement>

47 Elizabeth Stubbins Bates and others, *Terrorism and International Law: Accountability, Remedies, and Reform: A Report of the IBA Task Force on Terrorism* (Oxford University Presse, 2011), p. 8-10, 206, 224.

48 Press release (22 November 2017) <https://www.icty.org/en/press/icty-convicts-ratko-mladi%C4%87-for-genocide-war-crimes-and-crimes-against-humanity>; Judgment summary <https://www.icty.org/x/cases/mladic/tjug/en/171122-summary-en.pdf>

49 STL, Appeals Chamber, “Interlocutory decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging”, Case No.: STL 11 01/I, 16 February 2011

50 See for instance Ben Saul, “Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism”, *Leiden Journal of International Law* 24, No. 3 (2011): 677-700.

Except for regulating terrorism under international criminal law, in IHL “terrorism”⁵¹ and “acts or threat of violence the primary purpose of which is to spread terror among the civilian population”, are prohibited.⁵² These provisions are applied within the IHL-specific context and therefore can be perpetrated by state armed forces in international armed conflicts or by either state armed forces or organised armed groups in non-international armed conflicts.⁵³ The States responsible for those acts should pay compensation.⁵⁴

Despite the lack of an internationally binding definition of terrorism, several acts that are termed as terrorism by states and the international community constitute – when the prerequisites are fulfilled – international crimes, gross violations of human rights, and/or serious violations of IHL. Likewise, the impact that terrorist conduct has on victims seems to be closer to the harm caused by international crimes, gross violations of IHRL, and serious violations of IHL than to ordinary crimes.

The spreading of terror within a society, the feeling of unjustified targeting, and the violent attack on an individuals’ physical integrity or property are elements shared with international crimes, gross violations of IHRL, and serious violations of IHL. This leads to common victimological characteristics and shared needs between the different categories of victims. Given the overlap between terrorism, international crimes, gross violations of IHRL, and serious violations of IHL, victims of terrorism should be granted the same rights as victims of the latter.

Conclusion and Recommendations

Nowadays it is widely accepted that there is no justice without reparation. Reparation for victims is included in international legal instruments and numerous jurisdictions have abundant case law on the topic. This comprises individual and collective benefits which can take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Terrorism often results in acts which could be defined as international crimes, gross violations of IHRL, or serious violations of IHL. Although victims of the latter have a recognised right to reparation under the UN Basic Principles and Guidelines, there is no such right for victims of terrorism. The lack of a right to reparation for victims of terrorism contributes to perceptions of injustice and grievances and, in some cases, intergenerational transmission of victimhood.⁵⁵

This research demonstrates that given the characteristics that victims of terrorism share with victims of international crimes, gross violations of IHRL, and serious violations of IHL, as well as the common elements between terrorism and international crimes, gross violations of human rights and humanitarian law, victims of terrorism should enjoy the same treatment. Nonetheless, it should be noted that the basic Principles and Guidelines do not have a binding nature and cannot replace an international binding convention on the topic which should be elaborated for victims of terrorism.

51 Convention (IV) relative to the Protection of Civilian Persons in Time of War, 21 October 1950, Article 33; Additional Protocol II to the Geneva Conventions of 1949, 7 December 1978, Article 4(2)(d).

52 Additional Protocol I to the Geneva Conventions of 1949, 7 December 1978, Article 51(2); Additional Protocol II to the Geneva Conventions of 1949, 7 December 1978, Article 13(2).

53 Additional Protocol II to the Geneva Conventions of 1949, 7 December 1978.

54 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 26 January 1910, Article 3; Additional Protocol I to the Geneva Conventions of 1949, 7 December 1978, Article 91.

55 Javier Argomaniz and Orla Lynch “Introduction to the Special Issue: The Complexity of Terrorism – Victims, Perpetrators and Radicalization”, *Studies in Conflict & Terrorism* 41:7 (2018): 496-498.

The following recommendations for states stem from the research conducted in the context of the present policy brief:

- The UN Principles and Guidelines should apply to victims of terrorism. Applying the UN Basic Principles and Guidelines can result in more effective protection by recognising states' obligation to respect the right to reparation of victims of terrorism and provide for a holistic response to the harm experienced.
- States should ensure full, adequate, effective, and prompt reparation for material and moral harm suffered from terrorist acts to their nationals and victims who experienced acts of terrorism under their jurisdiction.
- States should focus on providing complex, comprehensive, and holistic reparation programmes, including a series of benefits to address the different kinds of harm experienced by the victims, for example, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Complexity contributes to maximising resources by reaching a larger number of victims, responding to a wider spectrum of harm and a variety of victims' needs.⁵⁶
- Victims' right to reparation is closely linked to their right to justice and truth. Therefore, States should continue their effort to bring perpetrators to justice and prosecute terrorists for the full extent of crimes that they have committed by focusing on cumulative charges.
- States should continue their effort for a definition of terrorism as this will contribute to defining its victims and providing more effective support.

⁵⁶ OHCHR, Rule-of-Law Tools for Post-Conflict States. Reparations programmes, (New York, Geneva: UN, 2008) 22-23.

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