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.....Chapter 15  
**PROTECTION AND REDRESS  
FOR VICTIMS OF CRIME  
AND HUMAN RIGHTS  
VIOLATIONS .....**

*Learning Objectives*

- *To sensitize the participants to the effects that crime and human rights violations may have on the victims*
- *To familiarize the participants with existing international legal rules governing protection and redress for victims of crime and human rights violations*
- *To identify steps that States must take in order to provide redress and protection for victims of crime and human rights violations*
- *To increase the participants' awareness of their potential as judges, prosecutors and lawyers in protecting victims of crime and human rights violations*

*Questions*

- *What are the needs, problems and interests, in your view, of victims of ordinary crime?*
- *What types of legal protection and/or redress exist in your country for victims of ordinary crime? Give examples, such as cases of persons abused or maltreated by common criminals?*
- *Do victims of crime face any special problems in the country in which you are exercising your professional responsibilities?*
- *If so, what are they and what is being done to remedy the situation?*
- *Are there any particularly vulnerable groups of victims in your country, such as abused women and children?*
- *If so, what is done to protect them if they denounce the perpetrator of the abuse?*
- *What measures, if any, are taken in the country in which you work to help protect other witnesses, such as informers, whose lives may be in danger following their testimony?*

## Questions (cont.d)

- *What types of legal protection and/ or redress exist in your country for, among others, the following categories of people in the event of human rights violations?*
  - *detainees who consider that they are arbitrarily detained;*
  - *detainees who are subjected to ill-treatment, and, in particular, women and children;*
  - *persons in incommunicado detention;*
  - *victims or their dependants in cases of abduction and extrajudicial killings;*
  - *offenders who have not enjoyed basic due process guarantees during their trial;*
  - *women and children who are subjected to State, community or domestic abuse, or threats of such abuse;*
  - *persons subjected to gender, racial or other kinds of discrimination;*
- *Do victims of human rights violations face any special problems in the country in which you are exercising your professional responsibilities?*
- *If so, what are they and what is being done to remedy the situation?*
- *Are there any particularly vulnerable groups in this regard in your country?*
- *If so, who are they, what are their problems, and what is being done to help them?*
- *How do you perceive your role as judges, prosecutors and/ or lawyers in ensuring effective protection and redress for victims of human rights violations?*
- *What are your views on amnesty or impunity laws, which imply that perpetrators of crimes and human rights violations will not be prosecuted for their unlawful acts?*

## Relevant Legal Instruments

### Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- Convention on the Rights of the Child, 1989

## *Relevant Legal Instruments (cont.d)*

- United Nations Convention against Transnational Organized Crime, 2000, and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention

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- Universal Declaration of Human Rights, 1948
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985
- Vienna Declaration and Programme of Action, 1993

### **Regional Instruments**

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
- European Convention on Human Rights, 1950
- European Convention on the Compensation of Victims of Violent Crimes, 1983

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- Committee of Ministers Recommendation No. R (85) 11 to the Members States of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985

## **1. Introduction**

The present chapter will deal with two basically distinct, but also clearly related issues, namely protection and redress for victims of crime, on the one hand, and protection and redress for victims of human rights violations, on the other. Generally speaking, conventional crimes are committed by people in their private capacity against national penal law, and Governments are not, in principle, responsible for the illegal conduct involved. Acts constituting human rights violations are committed by organs or persons in the name of or on behalf of the State, for instance by the Government, parliament, the courts, prosecutors, police officers and other law enforcement officials. As will be seen below, however, Governments may also, in specific cases, be responsible for the acts of private individuals. These acts may constitute violations of the fundamental rights and freedoms of persons under international human rights law and/or under domestic constitutional or ordinary legislation. Admittedly, however, this

distinction between victims of crime and human rights violations is not always clear-cut, but it serves as a convenient point of departure for the presentation of the legal problems dealt with in this chapter.

That being said, it is important to bear in mind throughout this chapter that to some extent victims of crime and human rights violations have many interests and needs in common, such as a possible need for medical attention, including help for emotional problems, compensation for financial loss and various forms of special protection and/or assistance. The principles dealt with below in relation to victims of crime and human rights violations can thus be viewed as mutually reinforcing whenever an assessment must be made of the victim's needs and the adequate response by society to those needs.

It should further be noted that it is impossible, within such a limited framework, to provide a comprehensive account and analysis of the needs of victims of crime and human rights violations, and the response to the victims, including the establishment of victims' programmes. As increased attention has been focused on victims' rights in recent years, much research has been carried out that can provide help and stimulation to legal practitioners and to social workers and other professional groups who may be called upon to assist victims of crime and human rights violations in recovering from the negative effects of unlawful acts. For suggested reading on this issue, see **Handout No. 1**.

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The *first* part of this chapter will deal with protection and redress for victims of crime. As will be seen, however, international law does not regulate in detail the question of protection and redress for victims of ordinary crime, although attempts have been made to increase the focus on the plight of victims so as to encourage Governments to provide them with adequate help and support. The chapter will review the limited rules that do exist in the hope that it may inspire further discussion of the problems facing victims of crime, the main purpose being to increase participants' awareness of the importance of paying due attention to their feelings, needs and interests at all stages of the judicial process.

It should furthermore be pointed out that conventional crimes cover not only more traditional crimes such as ill-treatment, murder, trafficking, sexual and other abuses, theft, burglary and so forth, but also various kinds of organized crime and corruption, as well as, for instance, the relatively new category of cybercrimes.<sup>1</sup> On the other hand, it will not be possible to deal in detail with the various interests that different categories of victims have or may have, and the chapter will therefore deal only, in relatively general terms, with the problems of victims of crime.

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<sup>1</sup>For an international treaty on this issue, see *Convention on Cybercrime* (ETS No. 185) signed in Budapest on 23 November 2001. The Convention is open for signature by the member States of the Council of Europe and non-member States that participated in its elaboration, and is open for accession by other non-member States. It requires 5 ratifications including at least 3 member States of the Council of Europe in order to enter into force. As of 23 June 2002, only Albania had ratified the Convention; see <http://conventions.coe.int>

The *second* part of this chapter will consider the international rules governing the legal duties of States to provide effective protection and redress to victims of human rights violations. In this regard, some relatively clear rules exist in international human rights law, which have been further clarified in the substantial case law of the international monitoring bodies. The chapter will analyse, in particular, States' general legal duty to *ensure* the effective protection of human rights, and their specific duties to *prevent* violations of human rights, to provide *effective domestic remedies* for alleged violations of a person's human rights, and to *investigate, prosecute* and *punish* such violations and provide *redress* to the victim concerned. The chapter will also discuss the question of *impunity* for human rights violations. Lastly, it will make recommendations regarding the role of the legal professions in providing protection and redress for victims of crime and human rights violations, and close with some concluding remarks.

## 2. Protection and Redress for Victims of Crime

### 2.1 Relevant legal provisions

#### 2.1.1 The universal level

While there is no universal convention dealing with the rights of victims of conventional crimes, the United Nations General Assembly adopted, in 1985, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the text of which had been approved by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.<sup>2</sup> To promote implementation, a *Guide for Practitioners Regarding the Implementation of the Declaration* was prepared,<sup>3</sup> and the United Nations Economic and Social Council, by resolution 1990/22 of 24 May 1990, invited the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to give wide distribution to the Guide.<sup>4</sup>

The Declaration defines the notion of victim of crime and abuse of power and specifies victims' rights of access to justice and fair treatment, restitution, compensation and assistance. Insofar as it deals with victims of abuse of power, it will be considered in section 3 *infra*.

<sup>2</sup>See UN doc. E/CN.15/1997/16, Use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, note by the Secretary-General, para. 1.

<sup>3</sup>UN doc. A/CONF.144/20, Annex, Guide for Practitioners Regarding the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter referred to as UN doc. A/CONF.144/20, Annex, Guide for Practitioners).

<sup>4</sup>UN doc. A/CONF.144/20.

As pointed out in the Guide for Practitioners, the basic principles contained in the Declaration “apply, without discrimination, to all countries, at every stage of development and in every system, as well as to all victims”.<sup>5</sup> They furthermore “place corresponding responsibilities on central and local government, on those charged with the administration of the criminal justice system and other agencies that come into contact with the victim, and on individual practitioners”.<sup>6</sup> Paragraph 3 of the Declaration states expressly that:

“The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.”

Lastly, it is of interest to note that, although it was not in force on 24 June 2002, the *United Nations Convention against Transnational Organized Crime*, which was adopted by the General Assembly on 15 November 2000, contains specific provisions in article 25 concerning “Assistance to and protection of victims”. Article 6 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing that Convention, contains even more detailed rules regarding “Assistance to and protection of victims of trafficking in persons”. The text of these provisions may be found in **Handout No. 2**. However, as the Convention on Transnational Organized Crime had, as of 24 June 2002, only 15 out of the 40 ratifications required before it can enter into force, it will not be further dealt with in this chapter. By the same date, the Protocol had been ratified by 12 States.

### 2.1.2 The regional level

At the regional level, the member States of the Council of Europe concluded, in 1983, the *European Convention on the Compensation of Victims of Violent Crimes*, which entered into force on 1 February 1988. As of 23 June 2002, it had secured a total of fifteen ratifications and accessions.<sup>7</sup> This treaty was drafted in response to an increased awareness that assistance to victims “must be a constant concern of crime policy, on a par with the penal treatment of offenders. Such assistance includes measures designed to alleviate psychological distress as well as to make reparation for the victim’s physical injuries.”<sup>8</sup> It was also considered necessary to compensate the victim in order “to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy”.<sup>9</sup>

One of the concerns underlying the Convention was to provide a compensation scheme that would allow States to step in and compensate the victim or his or her dependants, who rarely obtained any compensation in practice because of the

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<sup>5</sup>UN doc. A/CONF.144/20, Annex, Guide for Practitioners, p. 3, para. 1.

<sup>6</sup>Ibid., p. 3, para. 2.

<sup>7</sup>See ETS No. 116, at Treaty Office on <http://conventions.coe.int>

<sup>8</sup>See Explanatory Report on the European Convention on the Compensation of Victims of Violent Crimes, <http://conventions.coe.int/treaty/en/Reports/Html/116.htm> (Council of Europe web site), p. 1, para. 1 (hereinafter referred to as Explanatory Report). This Explanatory Report does not, however, “constitute an instrument providing an authoritative interpretation of the Convention although it might be of such a nature to facilitate the application of the provisions contained therein” p. 1, para II.

<sup>9</sup>Ibid., p. 3, para. 7.

offender's non-apprehension, disappearance or lack of means.<sup>10</sup> Another concern was to give increased protection to foreigners moving between the member States of the Council of Europe.<sup>11</sup>

The European Committee on Crime Problems of the Council of Europe is to be “kept informed regarding the application of the Convention” and the States parties are to transmit to the Secretary-General of the Council of Europe “any relevant information about its legislative or regulatory provisions concerning the matters covered by the Convention” (art. 13).

For more details of the principles laid down by this Convention, which are limited to **compensation**, see *infra*, subsections 2.2 and 2.4.3.

By virtue of **Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure**, the Committee of Ministers of the Council of Europe expanded on the need to protect victims of crime who may suffer physical, psychological, material and social harm and whose needs “should be taken into account to a greater degree, throughout all stages of the criminal justice process”.<sup>12</sup> The preamble to the Recommendation states that the operation of the criminal justice system “has sometimes tended to add to rather than to diminish the problems of the victim,” that “it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim” and that “it is also important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as a witness.”<sup>13</sup> Moreover, measures to help the victims “need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender”.<sup>14</sup> The member States of the Council of Europe were therefore asked to “review their legislation and practice” in accordance with the guidelines contained in the Recommendation and which relate to:

- ❖ the police level
- ❖ prosecution
- ❖ questioning of the victim
- ❖ court proceedings
- ❖ the enforcement stage
- ❖ the protection of privacy
- ❖ special protection of the victim
- ❖ conflict resolution schemes
- ❖ research

<sup>10</sup>Ibid., p. 1, para. 1.

<sup>11</sup>Ibid., p. 2, para. 3.

<sup>12</sup>Fifth and seventh preambular paragraphs.

<sup>13</sup>Second, third and fourth preambular paragraphs.

<sup>14</sup>Sixth preambular paragraph.

The recommendations relating to the first seven of these stages of the administration of criminal justice will be dealt with in the appropriate context below. On the other hand, this chapter will not discuss conflict resolution and the promotion of further research in that area. It should be noted, however, that mediation between offender and victim may, especially in the case of relatively minor crimes, be an interesting way of pursuing justice and dealing with anti-social behaviour. However, the advantages and disadvantages of resorting to conflict resolution schemes in the field of criminal justice is a multi-dimensional discussion that lies beyond the scope of this chapter.

## 2.2 The notion of victim

According to paragraph 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the term “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”.

This definition covers many categories of harm sustained by people as a consequence of criminal conduct, ranging from physical and psychological injury to financial or other forms of damage to their rights, irrespective of whether the injury or damage concerned was the result of positive conduct or a failure to act.

Quite importantly, according to paragraph 2 of the Declaration a person may be considered a victim “regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim”. According to the same article:

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

Lastly, as pointed out in subsection 2.1.1 above, the provisions of the Declaration, in full consistency with the principle of equality and the prohibition of discrimination under international human rights law dealt with in Chapter 13 of this Manual, are, according to paragraph 3, applicable to all, without distinction of any kind on the grounds enumerated in the paragraph or on other grounds.

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The European Convention on the Compensation of Victims of Violent Crimes contains no explicit definition of the notion of “victim” and, as made clear by the title, its framework is somewhat limited in that it obliges the State to provide compensation to victims of crime only when “compensation is not fully available from other sources”. Moreover, only the following two categories of victim may qualify for compensation:



- ❖ “those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence”, and
- ❖ “the dependents of persons who have died as a result of such crime” – article 2(1)(a) and (b).

However, a victim for the purposes of the Convention may be a person who has been injured or killed when trying to prevent an offence or when “helping the police to prevent the offence, apprehend the culprit or help the victim”.<sup>15</sup>

As made clear by article 2, the Convention does not provide a right to compensation in respect of criminal conduct in general but only in respect of violent crime, nor does it foresee other kinds of help and assistance for victimized persons. This somewhat restrictive framework seems to limit the impact that the Convention might have in terms of providing constructive support to victims of crime, support that should be available throughout the criminal justice system. However, the 1985 Recommendation of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure, while not legally binding, adopts a more holistic approach to the problems faced by victims of crime, a victim-oriented approach that covers all stages of criminal proceedings, from the police level to the enforcement stage, and takes into account the possible need for special protection for the victim.

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It is important for members of the legal professions to be aware that the impact on victims of crime is not necessarily limited to physical injury and loss of property, but may also include “loss of time in obtaining financial redress and replacing damaged goods”.<sup>16</sup> Moreover, at the psychological level, victims may be afflicted by a sense of disbelief, a reaction that may be followed by a state of shock, disorientation or even fear and anger.<sup>17</sup> Indeed, when seeking a reason for the crime, victims may experience guilt themselves for what occurred.<sup>18</sup> Although people react differently to crime and do not all suffer serious or long-lasting effects, emotional reactions can affect everybody and a failure to respond or an inadequate response to such emotions on the part of the responsible authorities may exacerbate feelings of anger and fear.<sup>19</sup> As noted in the Guide for Practitioners,

“A peaceful and orderly resolution of conflicts depends upon showing compassion and respect for the dignity of victims by meeting their expectations.”<sup>20</sup>

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<sup>15</sup>Explanatory Report, p. 6, para. 20.

<sup>16</sup>UN doc. A/ CONF.144/20, annex, Guide for Practitioners, p. 3, para. 5.

<sup>17</sup>Ibid., p. 3, para. 6.

<sup>18</sup>Ibid., loc. cit.

<sup>19</sup>Ibid., p. 4, paras. 7-8 and 11.

<sup>20</sup>Ibid., p. 4, para. 9.

## 2.3 Treatment of victims in the administration of justice

Attempts to date at the international level to improve the position of victims in the administration of justice are an admission of the fact that national justice systems have often focused on the offender and his or her relationship with the State, to the exclusion of the rights, needs and interests of victims. Although international law is still rudimentary in this field, some useful guidelines have been developed and will be dealt with below in the logical order of their relevance to the practical workings of the administration of justice.

It may be said at the outset that the primary concern should, in general, be to ensure that persons whose rights have been violated in one way or another feel that justice has been done. It is therefore important always to bear in mind that, to avoid further disillusionment on the part of victims of crime, everybody working in the criminal justice system must show respect and understanding for their concerns, needs and interests. Thoughtlessness and lack of consideration might otherwise needlessly add to victims' pain and disappointment.<sup>21</sup>

To ensure justice for persons who suffer victimization, it is also vital to establish and strengthen judicial and administrative mechanisms. As stated in paragraph 5 of the Declaration of Basic Principles, victims of crime should be enabled "to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible". According to the same provision, victims "should be informed of their rights in seeking redress through such mechanisms". As will be seen below, this duty to inform constitutes an essential part of the responsibilities of various law enforcement authorities vis-à-vis victims of crime.

### 2.3.1 Treatment of victims by the police

After a criminal offence has been committed, the victim's first contact with the justice system is usually through the police, and this contact may continue for a considerable part of the judicial process. The response of the police during this first encounter may have a decisive impact on the victim's attitude to the criminal justice system as such. Their role is therefore crucial at this early stage of the criminal process.<sup>22</sup>

The Declaration on Basic Principles provides little guidance on police conduct as such, although paragraph 4 makes the general statement that victims "should be treated with compassion and respect for their dignity", a rule that is equally valid for the police. The only explicit reference to the police is contained in paragraph 16, according to which police personnel constitute one of the groups that should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid.

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<sup>21</sup>Ibid., see p. 10, para. 31.

<sup>22</sup>Ibid., p. 10, para. 36.

However, according to paragraph 6, which should be interpreted as applying also to police investigations of crime, “the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by”, inter alia,

- ❖ “Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information” – paragraph 6(a);
- ❖ “Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system” – paragraph 6(b);
- ❖ “Providing proper assistance to victims throughout the legal process” – paragraph 6(c).

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According to the Council of Europe Recommendation on the Position of the Victim:

- ❖ “Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner” – Part IA, paragraph 1;
- ❖ “The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation” – Part IA, paragraph 2;
- ❖ “The victim should be able to obtain information on the outcome of the police investigation” – Part IA, paragraph 3;
- ❖ “In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim” – Part IA, paragraph 4.

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It follows from these provisions that a *first* important aspect of the role of the police is to show due courtesy and respect. They must also ensure that the victim feels “that the offence is being considered individually and properly”. Consequently, to prevent a sense of frustration among victims or increased anger, fear and insecurity, police officers should avoid conveying the impression that the crime is trivial or otherwise not being taken seriously.<sup>23</sup> Respect, compassion and understanding for victims should thus be the hallmark of police conduct at this stage, including a willingness to speak to the victims in language that they understand, avoiding professional jargon to the extent possible.

*Second*, the police are particularly well placed to inform victims of crime of ways in which they can obtain assistance, compensation and other kinds of help. For instance, they can refer victims to specialized assistance agencies and should preferably provide the information in both oral and written form, since the victims may at this

<sup>23</sup>Ibid., p. 11, para. 38.

stage be too upset to take on board all oral information given.<sup>24</sup> In this connection, the police may also wish to reassure victims by emphasizing that crime is not tolerated<sup>25</sup> and that they will do their best to investigate the victim's case.

A *third* important role for the police is as transmitter to victims of various kinds of essential information regarding the judicial process. The continuous sharing of information that is of relevance to victims and their needs and interests is of fundamental importance in ensuring that they feel involved in the criminal proceedings, an aspect that has long been neglected in the criminal justice system. In particular, victims need to be adequately informed about the role they might play in the proceedings.<sup>26</sup> Again, all such information should preferably be conveyed to the victim in both oral and written form. To this end, well-written guides could prove helpful.<sup>27</sup>

On the question of information, it is important to reiterate that, according to the Council of Europe Recommendation on the Position of the Victim, the victim should be able to obtain information on the outcome of the police investigation and, lastly, that “in any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim”. Both points are essential in reassuring the victim that his or her problems and needs are being given due consideration by the competent authorities. A failure to inform the victim about the result of the police investigation may undermine his or her confidence in the judicial criminal system and its capacity to deal with crime and the effects of crime. Furthermore, unless the prosecuting authorities are in possession of a detailed and adequate account of the effects of the crime on the victim or victims concerned, they may not be able adequately to assess the seriousness of the unlawful act, which, again, may cause the victim to feel neglected and lose confidence in the judicial process.

*The police must at all times show respect for, and courtesy towards, victims of crime.*

*The police should provide victims of crime with information about available help, assistance and compensation for injuries and losses they have sustained as a result of the crime.*

*The police should share other relevant information with victims of crime, including information on the role that victims may play in the criminal proceedings.*

*The police should inform victims of the outcome of their investigation and provide the prosecution with detailed information as to the effect or effects that the relevant crime had and continues to have on the victims concerned.*

*By treating victims with respect and understanding, and by sharing relevant information with them, the police help to promote confidence in the criminal justice system.*

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<sup>24</sup>Ibid., p. 11, paras. 39-41.

<sup>25</sup>Ibid., see p. 11, para. 39.

<sup>26</sup>Ibid., see p. 11, para. 41.

<sup>27</sup>Ibid., loc. cit.

### 2.3.2 Treatment of victims by the prosecution

As in the case of the police, the Declaration of Basic Principles does not deal *expressis verbis* with the manner in which the prosecuting authorities should deal with victims of crime, but the same general principles are valid. Thus, the prosecution must also treat victims with “compassion and respect for their dignity” and keep them informed about their role, the scope, timing and progress of the proceedings and the outcome of the investigations. Moreover, for the same reasons as were stated above, it must allow victims to convey their views and concerns.

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According to the Council of Europe Recommendation on the Position of Victims:

- ❖ “A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender” – Part. IB, paragraph 5;
- ❖ “The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information” – Part. IB, paragraph 6;
- ❖ “The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings” – Part IB, paragraph. 7.

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As noted in the Guide for Practitioners, the criminal justice system differs from one country to another, and so does the role played by the victim. For instance, in some countries the victim can only serve as a prosecution witness, while in others he or she can also prosecute.<sup>28</sup> However, irrespective of the judicial system in force, the question of information for victims – as shown by both the Declaration of Principles and the Recommendation on the Position of Victims – remains of fundamental importance throughout the proceedings, also when the case is in the hands of the prosecution. In addition to any information of general value that the prosecutor’s office may distribute to victims, specific material should also be provided about a victim’s case. To enable victims to play a constructive role in the investigation, and to prevent disillusionment with the criminal justice system, the information imparted by the prosecuting authorities must be relevant and adequate.<sup>29</sup>

It is particularly important “that victims should believe that their case has been fully and carefully considered, and that they have confidence in the decision that is made to prosecute or not”.<sup>30</sup> As recognized at the European level, it is also important for victims who are dissatisfied with the decision not to prosecute to have a right of review or the right to institute private proceedings. With regard to the right of review, different mechanisms have been adopted in practice such as review by superior

<sup>28</sup>Ibid., p. 14, para. 51.

<sup>29</sup>Ibid., see p. 14, para. 52.

<sup>30</sup>Ibid., p. 15, para. 54.

prosecutors, by the courts or even by an ombudsman. Another possibility is that of private prosecution.<sup>31</sup>

*The prosecuting authorities should at all times show respect for, and courtesy towards, victims of crime.*

*The prosecuting authorities should keep victims informed about their role in the investigations and about the scope, timing and progress of the proceedings.*

*The prosecuting authorities should inform the victim of the outcome of the investigation unless, at least at the European level, the victim has indicated that he or she does not wish to have this information.*

*Where the competent authority decides not to prosecute, the victim should be entitled to have the decision reviewed or should be able to bring a private prosecution.*

### 2.3.3 Questioning of victims during criminal procedures

The duty to treat victims of crime “with compassion and respect for their dignity” (Principle 4 of the Declaration of Basic Principles) is particularly relevant in the context of the questioning of victims, whether the questioning is carried out by the police, a prosecutor or a judge in court. To give evidence in court may be a particularly intimidating experience, especially if the victim has had no earlier contact with the criminal justice system.<sup>32</sup> Specific assistance for victims may be helpful “to ensure that the victim feels that he or she has been able to participate properly and that the court has the best evidence before it”.<sup>33</sup> Special assistance to victims who have to testify in court may be of particular value to victims of rape and child abuse. The use of trained counsellors, video-taped evidence or direct video links may be helpful in this respect, as may legal aid to victims so that they can have their own legal adviser. This is particularly important, inter alia, when the victim’s civil claim is heard at the same time as the criminal prosecution.<sup>34</sup>

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According to the Council of Europe Recommendation on the Position of Victims, the victim should, at all stages of the procedure, “be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them” (Part IC, para. 8).

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<sup>31</sup>Ibid., loc. cit.

<sup>32</sup>Ibid., see p. 15, para. 55.

<sup>33</sup>Ibid., loc. cit.

<sup>34</sup>Ibid.

Apart from the abovementioned categories of crime victim, persons who may need particular help and support in connection with questioning include victims of trafficking, of racially motivated criminal acts or of terrorist acts. Whenever a victim is, for instance, a foreign national and does not speak the local language, particular attention has to be paid to ensuring that he or she is treated with dignity and that all relevant information is conveyed in a language that is understood. Special assistance may also be required to support and reassure crime victims belonging to minority groups.

*Questioning by the police, a prosecutor or a judge of victims of crime must be carried out with compassion and respect for their dignity. Special assistance to victims testifying in court may be necessary to reassure the victims and ensure that they play a proper role in the proceedings.*

*Special assistance may be needed, inter alia, for victims of sex crimes, child abuse, trafficking or terrorist acts and for victims of foreign nationality, members of minority groups and persons with disabilities.*

#### 2.3.4 Victims and criminal court proceedings

Paragraph 6 of the Declaration of Principles also covers court proceedings, which means that victims should, for instance, be informed about the time and scope of the proceedings and the role they are expected to play. As noted in the previous subsection, it may be helpful to provide special assistance to victims at this stage too. Such assistance is envisaged in paragraph 6(c) of the Declaration. It is also important for victims that unnecessary delays in the disposition of the case be avoided (paragraph 6(e)).

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According to the Council of Europe Recommendation on the Position of Victims, the victim should be informed of

- ❖ “the date and place of a hearing concerning an offence which caused him suffering ;
- ❖ his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice ;
- ❖ how he can find out the outcome of the case” (Part ID, para. 9).

“It should be possible for a criminal court to order compensation by the offender to the victim” and “legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction” (Part ID, paras. 10-11).

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To inspire confidence in the justice system, the presiding judge should make sure that victims are given due notice of the trial proceedings and that their views are adequately conveyed to the court. Victims should be duly notified of any delay in or adjournment of the proceedings and should be informed about how to obtain the judgment in the case. It is essential that the presiding judge ensures that victims have been adequately informed about any rights they may have to compensation and restitution so that they may, for instance, formulate their claims properly.

*Victims of crime should be informed of the date and place of the court proceedings concerning the crime whose effects they are suffering and should also be informed of any delay or adjournment.*

*Victims of crime should be duly informed of any rights they have to obtain restitution or compensation for the crime concerned.*

*Victims of crime should be informed of how to obtain a copy of the judgment relating to the crime.*

### **2.3.5 Victims' right to protection of their private life and their safety**

According to paragraph 6(d) of the Declaration of Basic Principles, the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

“Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation”.

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On this issue the Council of Europe Recommendation on the Position of Victims states that:

“Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or the particular status or personal situation and safety of the victim make such special protection necessary, either the trial before the judgment should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate” (Part IF, para. 15).

It is further recommended that, “whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender” (Part IG, para. 16).

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While publicity may be important, inter alia, for educating both legal professionals and the public about the effects of victimization, it may also be so distressing to victims that their identity should be withheld.<sup>35</sup> Publicity may have a particularly devastating effect on victims in cases of sexual abuse, including child abuse, as well as in cases of organized crime and terrorism where disclosure of identity may place the victim's life in danger. As a rule, it is in any event advisable to obtain the victims' consent before they are identified in the mass media.<sup>36</sup>

Whenever the life and safety of victims, witnesses and their family members are in danger as a consequence of retaliation, it may not be sufficient to withhold the person's identity. The judicial authorities may have to take additional measures, such as withholding other relevant information and providing other forms of special protection. In particularly serious cases, it may also be necessary to hold the court proceedings *in camera*, although international human rights law imposes specific restrictions on any such decision (see article 14(1) of the International Covenant on Civil and Political Rights, article 8(5) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights). In extreme cases, it may even be necessary for the competent authorities to provide special police protection for the victims concerned, as well as for relatives and witnesses.

*Whenever necessary, the competent authorities should protect the privacy of victims of crime and should also protect victims, their families and witnesses on their behalf from intimidation and retaliation.*

*Special protection of the right to privacy and of the safety of persons may be particularly indicated in cases of sexual abuse as well as in cases of organized crime and terrorism.*

*As a rule, it is always preferable to obtain the consent of the victim before his or her name is given to the mass media.*

## 2.4 Restitution, compensation and assistance to victims of crime

### 2.4.1 General remarks

The questions of restitution, compensation and assistance to victims of crime will, of necessity, be addressed only in very general terms in this context, as the issues at stake are too complex for more in-depth analysis. This part is therefore limited to an outline of the general principles that should guide national judicial authorities in providing some sense of justice to crime victims, whose needs vary according to the nature of the crime committed, the place it was committed and the situation of the victims themselves.

<sup>35</sup>Ibid., p. 15, paras. 56-57.

<sup>36</sup>Ibid., p. 15, para. 57.

## 2.4.2 Restitution

According to paragraph 8 of the Declaration of Principles of Justice:

“Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.”

Paragraph 9 states that “Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.”

The term “restitution” means in this context that the offender restores to the victim the rights that were breached by the criminal act. Restitution to victims is of course only possible when the property or money stolen is still available. Restitution is not, therefore, a viable solution in the case of violent crimes such as murder, where there can be no reinstatement of rights.

In addition to the restitution of property or payment for the harm and loss suffered, the victim may also claim reimbursement of certain expenses. Such claims may require a clear listing of expenses that the victim has incurred as a result of victimization.<sup>37</sup>

*Whenever appropriate, persons responsible for criminal offences should make fair restitution to the victims of their crimes for any harm or loss suffered. Through restitution, the offender restores to the victim the rights that were breached.*

## 2.4.3 Compensation

Irrespective of whether compensation is available from the State, financial compensation from the offender for physical or psychological injuries or other harm sustained in connection with crime may be an important element for the victim in that such compensation “is seen to be a recognition of the hurt done to the victim by the offender”. When an order for such compensation is made by the court, “it is also a symbol of the State’s concern for the victim”.<sup>38</sup> This kind of recognition may have an important healing effect on the victim concerned and may also increase his or her confidence in the criminal justice system.

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<sup>37</sup>In cases where the criminal activities have caused “substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community” (paragraph 10 of the Declaration of Basic Principles). In such cases, restitution can be a powerful means of encouraging enterprises to use environmentally friendly means of production and to adopt measures to prevent or minimize the risk of ecological disaster. Another case in point is the transport of toxic substances or substances that may otherwise be harmful to the environment by means of transportation that do not comply with required safety measures. However, where multiple acts of arson by individual persons destroy large areas of forest and numerous dwellings, restitution by the offenders is illusory.

<sup>38</sup>UN doc. A/ CONF.144/20, annex, Guide for Practitioners, p. 21, para. 83.

On this question, paragraph 12 of the Declaration on Basic Principles states that, “when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.”

Lastly, paragraph 13 of the Declaration states that: “The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.”

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Under article 1 of the 1983 European Convention on the Compensation of Victims of Violent Crimes, States parties “undertake to take the necessary steps to give effect to the principles set out in Part I of this Convention”. This means that “when compensation is not fully available from other sources the State shall contribute to compensate:

- a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
- b. the dependents of persons who have died as a result of such crime” (art. 2(1)).

From this provision it follows that, for a victim to qualify for State compensation, the offences must be

- ❖ “intentional”;
- ❖ “violent”;
- ❖ “the direct cause of serious bodily injury or damage to health”.<sup>39</sup>

The reason for limiting the Convention to intentional offences is that “they are particularly serious and give rise to compensation less often than non-intentional offences, which include the huge range of road traffic offences and are in principle covered by other schemes” such as private insurance and social security.<sup>40</sup>

The injury need not be physical, and compensation may also be payable “in cases of psychological violence (for example serious threats) causing injury or death”.<sup>41</sup> The injury must, however, in all cases be “serious and directly attributable to the crime”. A causal relationship between the crime and the effects must, in other words, be proven.<sup>42</sup>

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<sup>39</sup>Explanatory Report, p. 5, para. 16.

<sup>40</sup>Ibid., p. 5, para. 17.

<sup>41</sup>Ibid., p. 5, para. 18.

<sup>42</sup>Ibid., p. 5, para. 19.

It follows that the Convention neither covers “slight injury or injury not directly caused by the offence” nor “injury to other interests, notably property”. However, poisoning, rape and arson “are to be treated as intentional violence”.<sup>43</sup>

According to article 2(2) of the Convention, compensation “shall be awarded in the above cases even if the offender cannot be prosecuted or punished”. For instance, minors or mentally ill people may not be subject to prosecution or may not be regarded as responsible for their acts, and an offender may even escape prosecution because he or she has acted by necessity as in cases of self-defence. It is of course essential that victims, in these cases too, should be able to obtain compensation from the State if it is not available from other sources.<sup>44</sup>

Article 3 further specifies that “compensation shall be paid by the State on whose territory the crime was committed [both] to nationals of the States party to this Convention [and] to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.” The purpose of including the latter group of victims was to enhance the protection of migrant workers.<sup>45</sup> The Convention, which lays down minimum provisions, does not, of course, prevent States parties from enlarging the scope of the compensation available or from providing compensation to their nationals who are victims of violent crime abroad or to all foreigners.<sup>46</sup> It should be noted in this connection that paragraph 3 of the United Nations Declaration of Basic Principles prohibits distinctions based on nationality.

It is also noteworthy that, according to the 1985 Council of Europe Recommendation on the Position of the Victim, compensation as a penal sanction “should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible” (Part IE, para. 14).

**Items compensated:** Compensation in any given case under the Council of Europe Convention shall comprise “at least the following items”:

- ❖ loss of earnings;
- ❖ medical and hospitalization expenses;
- ❖ funeral expenses;
- ❖ as regards dependants, loss of maintenance (art. 4).

These are the *minimum* requirements for which “reasonable compensation” shall be paid, provided that the loss is verified in each case.<sup>47</sup> Depending on the terms of national legislation, other items that may be compensated include:

- ❖ “pain and suffering (*pretium doloris*);
- ❖ loss of expectation of life;
- ❖ additional expenses arising from disablement caused by an offence”.<sup>48</sup>

<sup>43</sup>Ibid., loc. cit.

<sup>44</sup>Ibid., see p. 6, para. 21.

<sup>45</sup>Ibid., p. 7, para. 25.

<sup>46</sup>Ibid., p. 7, para. 27.

<sup>47</sup>Ibid., p. 7, para. 28.

<sup>48</sup>Ibid., loc. cit.

According to the Explanatory Report, “compensation of these items is to be calculated by the state paying the compensation according to the scales normally applied for social security or private insurance according to normal practice under civil law.”<sup>49</sup>

**Conditions for compensation:** The Convention imposes various conditions on the granting of compensation. First, it allows the compensation scheme to set “an upper limit above which and a minimum threshold below which such compensation shall not be granted” (art. 5). Second, “the scheme may specify a period within which any application for compensation must be made” (art. 6).

An upper limit may be necessary because funds for compensation are not unlimited and a minimum threshold is considered justified by the principle of *de minimis non curat praetor*, that is to say minor damage that can be covered by victims themselves does not interest the judge.<sup>50</sup> The Convention does not set “rigidly quantified limits” for the simple reason that both financial resources and living standards vary from country to country.<sup>51</sup>

With regard to the time-limit for lodging a claim for compensation, it is important that such claims be made as soon as possible after the commission of the crime so that:

- ❖ “the victim may be assisted if in physical and psychological distress;
- ❖ the damage may be ascertained and assessed without untoward difficulty”.<sup>52</sup>

Early professional care for crime victims may also increase the chances of a speedy recovery and thus reduce medical and other costs incurred for rehabilitation.

Third, compensation under the 1983 Convention may be reduced or refused “on account of the applicant’s financial situation” (art. 7). The idea is that, since compensation from public funds to a victim of crime “is an act of social solidarity, it may be unnecessary where the victim or his dependents are plainly comfortably off”. On the other hand, there is nothing in the Convention that prevents States from awarding compensation “regardless of the victim’s or his dependants’ financial position”.<sup>53</sup>

Lastly, compensation may also be “reduced or refused”

- ❖ “on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death” – article 8(1);
- ❖ “on account of the victim’s or the applicant’s involvement in organised crime or his membership of an organisation which engages in crimes of violence” – article 8(2);
- ❖ “if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*)” – article 8(3).

<sup>49</sup>Ibid., p. 8, para. 28.

<sup>50</sup>Ibid., p. 8, para. 29.

<sup>51</sup>Ibid., p. 8, para. 30.

<sup>52</sup>Ibid., p. 8, para. 31.

<sup>53</sup>Ibid., pp. 8-9, para. 32.

The first of these grounds relates to improper behaviour by the victim in relation to the crime or to the damage suffered, and “refers to cases where the victim triggers the crime, for example by behaving exceptionally provocatively or aggressively, or causes worse violence through criminal retaliation, as well as to cases where the victim by his behaviour contributes to the causation or aggravation of the damage (for example by unreasonably refusing medical treatment)”. Another reason for reducing or withholding compensation on this ground may be the refusal of the victim “to report the offence to the police or to co-operate with the administration of justice”.<sup>54</sup>

The second ground for reducing or even refusing compensation is where the victim “belongs to the world of organised crime (for example drug trafficking) or of organisations which commit acts of violence (for example terrorist organisations)”. The victim may in such a case “be regarded as forfeiting the sympathy or solidarity of society as a whole [and may] be refused compensation or be paid reduced compensation, even if the crime which caused the damage was not directly related to the foregoing activities”.<sup>55</sup>

Lastly, States parties may reduce or refuse compensation to victims of crime when it would be repugnant to a sense of justice or contrary to public policy (*ordre public*). In such cases, they retain some discretion in awarding compensation and can refuse it “in certain cases where it is clear that a gesture of solidarity would be contrary to public feeling or interests or would be contrary to the basic principles of the legislation of the state concerned”. For example, “a known criminal who was the victim of a crime of violence could be refused compensation even if the crime in question was unrelated to his criminal activities.”<sup>56</sup>

The abovementioned principles for reducing or refusing compensation to victims of crime are equally applicable to dependants of victims who died as a result of violent crime.<sup>57</sup>

**Other relevant issues:** The Convention also contains provisions concerning the avoidance of double compensation and the subrogation of rights, and requires States parties to take appropriate steps “to ensure that information about the scheme is available to potential applicants” (arts. 9-11).

For instance, in order to avoid double compensation under article 9 of the Convention, “compensation already received from the offender or other sources may be deducted from the amount of compensation payable from public funds. It is for the Parties to specify which sums are so deductible.”<sup>58</sup> The States may require that compensation received by the victim from the offender *after* he or she has been compensated by public funds be repaid in full or in part, depending on the sums involved.<sup>59</sup> This situation can arise, for instance, “where a victim suffering hardship receives state compensation pending decision of an action brought against an offender or agency [or where] the offender, unknown at the time of compensation from public

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<sup>54</sup>Ibid., p. 9, para. 34.

<sup>55</sup>Ibid., p. 9, para. 35.

<sup>56</sup>Ibid., p. 9, para. 36.

<sup>57</sup>Ibid., p. 9, para. 37.

<sup>58</sup>Ibid., p. 9, para. 38.

<sup>59</sup>Ibid., p. 10, para. 39.

funds, is subsequently traced and convicted, and has fully or partly made reparation to the victim”.<sup>60</sup>

For public compensation schemes to be useful, the public must know about their existence. But studies have found that, because of public ignorance, such schemes are rarely used.<sup>61</sup> To remedy this situation, article 11 of the Convention imposes a duty on States parties to see to it that information on public compensation schemes is available to potential victims of crime. According to the Explanatory Report, “the main responsibility for informing the victim of his compensation rights should lie with the authorities and agencies dealing with him immediately after the offence (the police, hospitals, the examining judge, the public prosecutor’s office, etc.). Information, specially published by the competent authorities, should be available to such agencies who should distribute this, whenever practicable, to the persons concerned.”<sup>62</sup> The mass media also have a useful role to play in publicizing financial as well as other kinds of assistance available to victims of crime.<sup>63</sup>

*Compensation to victims of crime for physical or psychological harm suffered as a consequence of crime is an important recognition of concern for the victim.*

*When such compensation is not fully available from the offender or other sources such as private insurance, the State should provide it either to the victim or to his or her dependants, as the case may be.*

*At the European level, member States of the Council of Europe may have a treaty obligation to provide compensation to victims of violent crime when such compensation is not available from other sources.*

*Such compensation may, however, be reduced or refused, inter alia in the light of the victim’s conduct in relation to the commission of the criminal act or in cases where the victim is known to be involved in organized crime such as drug trafficking or terrorism.*

#### 2.4.4 Assistance

In addition to various financial needs, victims of violent crimes may also require immediate or even long-term medical care as well as other forms of assistance. These needs are recognized in paragraph 14 of the United Nations Declaration of Basic Principles, according to which:

“Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.”

<sup>60</sup>Ibid., loc. cit.

<sup>61</sup>Ibid., p. 10, para. 42.

<sup>62</sup>Ibid., loc. cit.

<sup>63</sup>Ibid.

This provision envisages various forms of assistance not only from the State but also from the community and specialized associations. Much can be accomplished for victims of crimes by developing strong local associations or agencies with specialized personnel trained in the specific needs of crime victims.<sup>64</sup> The need for assistance can vary in terms of both the victim and the effects of victimization. Injured victims clearly require swift medical help. Such help is also essential in order to document the effects of the crime on the victim for the purpose of proving any criminal prosecution or civil claim against the offender.<sup>65</sup>

Paragraph 17 of the Declaration of Basic Principles further emphasizes that “in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted” or because of factors such as discrimination on the grounds listed in paragraph 3 of the Declaration. Certain groups of victims, such as victims of sexual crimes, may indeed need specialized treatment, including long-term emotional support by medical personnel skilled in dealing, for example, with rape victims. Victims of serious sex crimes may also need medical follow-up over an extended period owing to the HIV/AIDS problem.<sup>66</sup> In many cases, victims of terrorist attacks need not only extensive medical treatment but also both immediate and long-term psychological assistance by specially trained professionals in order to help them come to terms with the traumatic experience. Major criminal events such as terrorist acts may also require specialized equipment such as temporary housing, mortuaries, feeding stations and so forth. States should be prepared to deal with this kind of situation by developing contingency plans at the national, regional and local levels and should keep regularly updated lists of equipment and qualified personnel.<sup>67</sup>

Victims may also need various kinds of *practical* help after the commission of a crime. In cases of burglary, locks or other damaged property may have to be repaired, and victims of arson or domestic violence may need temporary accommodation.<sup>68</sup> Other victims may need social support services for some time after the crime, such as help with shopping or housekeeping and/or assistance in looking after small children.

For assistance schemes to work efficiently, information about their existence is, as emphasized throughout this chapter, essential. Paragraph 15 of the Declaration of Basic Principles provides that:

“Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.”

As noted above, the question of training for persons who deal with victims of crime is also important and, as specified in paragraph 16 of the Declaration:

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<sup>64</sup>See UN doc. A/ CONF.144/20, annex, Guide for Practitioners, p. 23, para. 92.

<sup>65</sup>Ibid., p. 25, paras. 99-100.

<sup>66</sup>Ibid., p. 25, paras. 101-102.

<sup>67</sup>Ibid., see p. 26, para. 104.

<sup>68</sup>Ibid., p. 26, para. 107.



“Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.”

It is particularly important that members of the police force and the legal professions, such as judges, prosecutors and lawyers, are trained to have a sound understanding of the traumatic impact that crime can have on human beings. They should also be fully conversant with the terms of the compensation and assistance schemes available to victims of crime so that they can ensure that such information is consistently and effectively conveyed to the victims concerned.

*Apart from financial needs, victims of crime may have a variety of needs of a material, medical, psychological and social nature.*

*Such needs for assistance will vary according the situation of the victim and the nature of the crime. To be able to provide victims of crime with prompt and efficient help, all relevant professional groups, including judges, prosecutors and lawyers, must be sensitized to the needs of victims and available assistance schemes.*

### 3. Protection and Redress for Victims of Human Rights Violations

The second part of this chapter will deal exclusively with victims of human rights violations. Contrary to the situation in respect of victims of ordinary crime, international human rights law lays down some clear legal rules regarding the responsibility of States vis-à-vis abuses of power that constitute violations of individual rights and freedoms. Moreover, these rules have been further developed in a large number of cases by the international monitoring bodies. However, only a brief survey is feasible in this context of States’ general legal duty to **ensure the effective protection of human rights** and of the most relevant specific legal obligations that this entails: the duty to **prevent** human rights violations; the duty to provide **domestic remedies**; and the duty to **investigate** alleged human rights violations, to **prosecute** those suspected of having committed them and to **punish** those found guilty. Lastly, the duty to provide **restitution or compensation** to victims of human rights violations and the problem of **impunity** for human rights violations will be examined.<sup>69</sup>

<sup>69</sup>The present chapter is based only on legal provisions interpreted by international monitoring bodies. The question of remedies for victims of human rights violations has, however, also been dealt with, inter alia, by the United Nations Commission on Human Rights; see, for example, UN doc. E/CN.4/2000/62, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni; see, in particular, the annex to this report containing draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.

Before States' various duties to protect human rights are considered, the notion of "victim" will be analysed.

### 3.1 The notion of victim

According to paragraph 18 of the United Nations Declaration of Basic Principles:

"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 do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights."

This definition is somewhat peculiar in that, first, it seems to presume that violations of international human rights standards are limited to the field of criminal law. This is not, of course, the case. Such violations can also occur under civil law, such as family law and the law of succession. Other fields of law that may be relevant include press law, administrative law, labour law, social security law and environmental law.

Second, an act or omission may be contrary to national law and still constitute a violation of international human rights law. Notwithstanding national law, a State can in principle be held responsible at the international level for an act or omission that violates internationally recognized human rights standards until it has provided an effective remedy to the victim or victims of the violation.

Third, the reference to "substantial" impairment raises some difficulties of interpretation and cannot be adequately understood in the abstract. Indeed, an act or omission on the part of a State may violate international human rights standards although the impairment for the victim concerned has not been "substantial". The victim is still a "victim" as understood by international law, but the response to the violation will vary accordingly. Instead of awarding restitution or damages, the international monitoring body may, for instance, consider the very finding of a violation in a specific case to be a sufficient recognition of the harm incurred. In many cases, however, the violations are grave and therefore require, as will be shown below, a variety of measures in order to remedy or at least reduce the negative consequences of such violations for the victims or their next-of-kin.

It follows from the foregoing that, for the purposes of the second part of this chapter, a much simpler definition of a "victim" of human rights violations will have to be adopted:

**A "victim" is a person whose nationally or internationally recognized human rights and fundamental freedoms have been violated as a consequence of governmental acts or omissions.**

It is important to point out that a “victim” can also be a family member who is suffering hardship because of a disappearance and/or arbitrary killing. The Human Rights Committee and the Inter-American and European Courts of Human Rights have all accepted that mothers of victims of a human rights violation may also be considered to be victims. The profound sadness, stress and anguish that mothers suffer as a result of such serious human rights violations constitute per se a violation of their right not to be subjected to ill-treatment, as prohibited by international legal standards such as article 7 of the International Covenant on Civil and Political Rights, article 5(2) of the American Convention on Human Rights and article 3 of the European Convention on Human Rights.<sup>70</sup>

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A particularly serious aspect of abuses of power such as human rights violations is that they are committed by – or at least with the knowledge of – persons or authorities that are expected to *protect* the individual and his or her rights instead of violating them. In other words, the sense of trust that should have existed has been seriously betrayed. The situation becomes singularly alarming when violations of the right to life and the right to security and liberty of the person occur and are even widespread, as when abduction, involuntary disappearances and torture become part of a State’s administrative practice. Victimization then often has a much deeper adverse impact on the persons affected than where they are “simply” victims of ordinary crimes. For victims of State or State-sponsored violence, it is important, for purposes of rehabilitation, to obtain recognition by the State of the wrong committed and to receive various forms of help and assistance.

*A “victim” is a person whose nationally or internationally recognized human rights and fundamental freedoms have been violated as a consequence of governmental acts or omissions.*

*Close relatives of disappeared, tortured and arbitrarily killed persons may be considered to be victims of violations of their own right not to be subjected to ill-treatment.*

*Human rights violations are a particularly serious form of abuse of power in that they are committed by – or with the knowledge of – persons or authorities whose duty it is to protect the individual and his or her rights.*

*Victims of human rights violations may require multiple forms of help and assistance to deal with the effects of victimization, including recognition by the State of the wrongs committed.*

<sup>70</sup>See Communication No. 107/1981. *Quinteros v. Uruguay* (Views adopted on 21 July 1983) in UN doc. GAOR, A/38/40, p. 224, para. 14; I-A Court HR, *Case of Villagrán Morales et al.*, judgment of November 19, 1999, Series C, No. 63, pp. 179-180, paras. 176-177; Eur. Court HR, *Case of Kurt v. Turkey*, judgment of 25 May 1998, Reports 1998-III, pp. 1187-1188, paras. 130-134.

## 3.2 The general legal duty to ensure the effective protection of human rights

This section will simply highlight some general considerations relating to States' legal duty effectively to protect human rights and fundamental freedoms. The provisions dealing specifically with questions of prevention, domestic remedies, investigations and so forth will be discussed in greater detail in the relevant subsections below.

### 3.2.1 The universal level

Under article 2(1) of the International Covenant on Civil and Political Rights, each State party “undertakes to *respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (emphasis added). In interpreting article 2, the Human Rights Committee considers it necessary “to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the *respect* of human rights, but that States parties have also undertaken to *ensure* the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.”<sup>71</sup> The obligation to ensure thus gives rise to *positive* State party obligations to secure the enjoyment of the guaranteed rights and freedoms to all persons within their jurisdiction. It follows from this basic and positive legal duty that States parties may also be required effectively to investigate, prosecute and punish violations of individual rights and freedoms.<sup>72</sup>

### 3.2.2 The regional level

At the regional level, article 1 of the African Charter on Human and Peoples' Rights may at first sight seem to use somewhat less categorical language than the International Covenant when stating that States parties “shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”. However, the reference to “other measures” suggests that this provision entails a clear obligation to take affirmative steps to comply with the obligations laid down by the Charter. This view has been confirmed by the African Commission on Human and Peoples' Rights, which has held that, under article 1 of the African Charter, States parties not only “recognise the rights, obligations and freedoms proclaimed in the Charter [but] they also commit themselves to respect them and take measures to give effect to them”.<sup>73</sup>

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<sup>71</sup>See General Comment No. 3 (Article 2 – Implementation at the national level), in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 112, para. 1; emphasis added.

<sup>72</sup>See, for example, Communication No. 821/1998, *Chongwe v. Zambia* (Views adopted on 25 October 2000), in *GAOR*, A/56/40 (vol. II), p. 143, paras. 7-8.

<sup>73</sup>ACHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, *Communication No.231/99 decision adopted during the 28<sup>th</sup> Ordinary session, 23 October – 6 November 2000*, para. 31 of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/231-99.html>

As a general rule it must be emphasized that, notwithstanding the fact that the legal obligations to “respect” and to “ensure” human rights are not included *expressis verbis* in the treaty concerned, States in any event have a legal duty to perform their treaty obligations in good faith. This basic rule of international law, also known as *pacta sunt servanda*, has been codified in article 26 of the Vienna Convention on the Law of Treaties and is, of course, equally applicable to human rights treaties as to other international treaties. By failing, for instance, to prevent or vigorously to investigate alleged human rights violations and, where need be, to follow up the investigation with a prosecution, a State undermines its treaty obligations and hence also incurs international responsibility for being in breach of the law.

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Article 1 of the American Convention on Human Rights uses terms reminiscent of those in article 2 of the International Covenant in that the States parties “undertake to **respect** the rights and freedoms recognized herein and to **ensure** to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination” (emphasis added).

These terms were interpreted by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, which concerned the disappearance and likely death of Mr. Velásquez at the hands of members of the Honduran National Office of Investigation and the Armed Forces. With regard to the obligation to “respect the rights and freedoms” recognized by the Convention, the Court emphasized that “the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State.” This also means that “the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power.”<sup>74</sup>

Moreover, the obligation to “ensure” the free and full exercise of the rights guaranteed by the Convention

“implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”<sup>75</sup>

The Court added that:

“The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”<sup>76</sup>

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<sup>74</sup>I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4, pp. 151-152, para. 165.

<sup>75</sup>Ibid., p. 152, para. 166.

<sup>76</sup>Ibid., p. 152, para. 167.

What is “decisive” in determining whether a right recognized by the Convention has been violated is, in the words of the Court, whether the violation has occurred “with the support of the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible”.<sup>77</sup>

The States parties’ legal undertakings under article 1 of the American Convention thus form a clear web of preventive, investigative, punitive and reparative duties aimed at effective protection of the rights of the human person, all of which will be further detailed below.

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Lastly, article 1 of the European Convention on Human Rights stipulates that “the High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (emphasis added). Rather than giving an independent interpretation of the term “secure” in article 1, the European Court of Human Rights has preferred to weave this term into the other substantive provisions of the Convention and its Protocols. For instance, when interpreting the right to life as guaranteed by article 2 of the Convention, the Court has held that the first sentence of article 2(1) “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”<sup>78</sup> In the words of the Court:

“This involves a primary duty on the State to *secure* the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.”<sup>79</sup>

In the case of *McCann and Others v. the United Kingdom*, the Court held that “a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life [in article 2(1)], read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in (the) Convention’, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.”<sup>80</sup>

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<sup>77</sup> *Ibid.*, p. 154, para. 173.

<sup>78</sup> *Eur. Court HR, Case of Mabmut Kaya v. Turkey, judgment of 28 March 2000*, para. 85 of the text of the judgment as published at: <http://echr.coe.int/>.

<sup>79</sup> *Ibid.*, loc. cit.; emphasis added.

<sup>80</sup> *Eur. Court HR, McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A, No. 324*, p. 49, para. 161.

In order to **secure** the right to life under article 2 of the Convention, the High Contracting Parties are thus under an obligation to resort to effective measures of prevention, investigation, suppression and punishment of violations of this right. It is noteworthy that the obligation to prevent offences against the person is not necessarily complied with by the implementation of general preventive policy measures but may, in individual cases, also imply a duty to take positive measures of an operational nature (see *infra*, subsection 3.3).

The positive obligations that may be “inherent in an effective respect of the rights concerned”<sup>81</sup> under the European Convention are not limited to article 2 and the right to life but may also have implications for the protection of other rights and freedoms such as the right to freedom from torture in article 3,<sup>82</sup> the right to respect for one’s family life in article 8,<sup>83</sup> the right to freedom of expression in article 10<sup>84</sup> and the right to freedom of peaceful assembly and to freedom of association in article 11.<sup>85</sup> The nature and extent of such obligations depend, however, on the right at issue and the facts of the case considered.

Lastly, it should be noted that the duty to **secure** the rights and freedoms laid down in the European Convention and its Protocols may also entail a legal duty for the Contracting States to take positive action to ensure respect for those rights and freedoms **between private citizens**.<sup>86</sup>

*Irrespective of the terms used in international human rights treaties, States parties are duty bound to provide effective protection for the rights and freedoms recognized therein to all persons within their jurisdiction.*

*These legal obligations comprise the duty effectively to **prevent, investigate, prosecute, punish** and **redress** human rights violations.*

*Positive obligations may be inherent in the effective protection of a human right recognized by international law.*

<sup>81</sup> Eur. Court HR, *Case of Ozgur Gundem v. Turkey*, judgment of 16 March 2000, para. 42 of the text of the judgment as published at: <http://echr.coe.int/>.

<sup>82</sup> Eur. Court HR, *Case of Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, p. 3290, para. 102.

<sup>83</sup> Eur. Court HR, *Case of Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A, No. 160, pp. 16-20, paras. 41-49.

<sup>84</sup> See, for example, Eur. Court HR, *Case of Ozgur Gundem v. Turkey*, judgment of 16 March 2000, para. 43, as published at <http://echr.coe.int/>.

<sup>85</sup> Eur. Court HR, *Case of the Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, Series A, No. 139, p. 12, para. 32.

<sup>86</sup> Eur. Court HR, *Case of X and Y v. the Netherlands*, judgment of 26 March 1985, Series A, No. 91: in this case the Government had a positive legal duty to ensure an effective right to respect for the private life of a mentally handicapped girl who had been raped but who was legally unable to institute criminal proceedings against the alleged perpetrator of the crime; this gap in domestic law constituted a violation of article 8 of the European Convention, p. 14, para. 30. See also Eur. Court HR, *A. v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VI: in this case domestic law did not provide adequate protection for a child who had been beaten by his stepfather; “the failure to provide adequate protection” constituted a violation of article 3 of the European Convention, p. 2700, para. 24.

### 3.3 The duty to prevent human rights violations

Prevention is the alpha and omega of the effective protection of the rights and freedoms of the human person, and it is thus the ultimate purpose of international human rights law as well as a key to the creation of a national and international society in which all persons can live in freedom, peace and security. Prevention, the importance of which has been emphasized by all international monitoring bodies, begins with the incorporation of international human rights obligations in the domestic legal system.<sup>87</sup> Domestic law must then be consistently and fearlessly applied by all competent authorities, for instance in full independence from the Executive, because a law, no matter how well and elegantly drafted, only has a preventive impact if potential offenders know that they will be pursued in the courts for their trespasses and crimes. Indeed, the second part of this chapter illustrates some of the essential components of prevention, namely the existence of effective domestic remedies and the prompt, vigorous and impartial investigation of alleged human rights violations.

However, in many cases effective prevention also requires social, administrative, educational and other measures such as international and cross-border cooperation,<sup>88</sup> depending on the needs, problems and circumstances of the country involved. Some examples are given below of references to prevention by the international monitoring bodies relating to arbitrary killings, disappearances and torture.

#### 3.3.1 The universal level

Although the Human Rights Committee has not elaborated its views on States parties' duty to prevent human rights violations in general, it has often emphasized the need for prevention with regard to specific issues. Thus, States parties should inform the Committee in their periodic reports about "the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture" and other forms of ill-treatment in conformity with the provisions of the International Covenant on Civil and Political Rights.<sup>89</sup> More specifically, it recommended that Uzbekistan "should institute an independent system of monitoring and checking all places of detention and penal institutions on a regular basis, with the purpose of preventing torture and other abuses of power by law enforcement officials".<sup>90</sup>

The Committee has also stated that:

"3. The protection against arbitrary deprivation of life which is explicitly required by ... article 6(1) is of paramount importance. 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. The deprivation of life by the

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<sup>87</sup>On the preventive role of legislation criminalizing ideas based on racial superiority, see the Committee on the Elimination of Racial Discrimination, in UN doc. *GAOR*, A/56/18, p. 59, para. 349.

<sup>88</sup>On the importance of international and cross-border cooperation for the purpose of preventing trafficking in women, see the Committee on the Elimination of Discrimination against Women, in UN doc. *GAOR*, A/55/38, p. 38, para. 372.

<sup>89</sup>General Comment No. 20 (Article 7), in *United Nations Compilation of General Comments*, p. 140, para. 8.

<sup>90</sup>UN doc. *GAOR*, A/56/40 (vol. I), p. 60, para. 7.



authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”<sup>91</sup>

In the Committee’s view, “States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life.”<sup>92</sup>

Lastly, when the Committee concludes that a State party has violated its obligations under the Covenant in a communication brought under the Optional Protocol to the Covenant, it consistently informs the State party concerned that it is under an obligation to prevent such violations from occurring in the future.<sup>93</sup>

### 3.3.2 The regional level

The notion of prevention was analysed in somewhat more detail by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, in which it ruled that a State party to the American Convention on Human Rights “has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.<sup>94</sup> Importantly, the Court added that:

“175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victim for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.”<sup>95</sup>

In the *Street Children* case, the Court also referred to the abovementioned statement by the Human Rights Committee regarding protection against the arbitrary deprivation of life, emphasizing “the particular gravity” of the case, which involved the abduction, torture and killing of several children and which also violated the State’s “obligation to adopt special measures of protection and assistance for the children within its jurisdiction”.<sup>96</sup>

<sup>91</sup>General Comment No. 6 (art. 6), in *United Nations Compilation of General Comments*, p. 115, para. 3.

<sup>92</sup>*Ibid.*, p. 115, para. 4.

<sup>93</sup>Communication No. 687/1996, *Rojas García v. Colombia* (Views adopted on 3 April 2001) in UN doc. *GAOR, A/56/40* (vol. II), p. 54, para. 12, and Communication No. 821/1998, *Chongwe v. Zambia* (Views adopted on 25 October 2000), p. 143, para. 7.

<sup>94</sup>*I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 155, para. 174.

<sup>95</sup>*Ibid.*, p. 155, para. 175.

<sup>96</sup>*I-A Court HR, Villagrán Morales et al. Case (the “Street Children” case), judgment of November 19, 1999, Series C, No. 63*, pp. 170-171, paras. 145-146.

The use of effective domestic remedies for purposes of prevention has also been underlined by the Inter-American Court, in particular with regard to the writ of *habeas corpus*, the aim of which “is not only to ensure respect for the right to personal liberty and physical integrity, but also to prevent the persons’s disappearance or the keeping of his whereabouts secret and, ultimately, to ensure his right to life”.<sup>97</sup>

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In the case of *Kaya v. Turkey*, which concerned the disappearance and subsequent death following torture of the victim, the European Court of Human Rights made the following finding with regard to Turkey’s obligations under article 1 of the European Convention on Human Rights, read in conjunction with the prohibition of torture in article 3:

“115. The obligation imposed on High Contracting Parties under article 1... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals ... State responsibility may therefore be engaged where the framework of law fails to provide adequate protection ... or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment which they knew or ought to have known ...

116. The Court finds that the authorities knew or ought to have known that Hasan Kaya was at risk of targeting as he was suspected of giving assistance to wounded members of the PKK. The failure to protect his life through specific measures and through the general failings in the criminal law framework placed him in danger not only of extra-judicial execution but also of ill-treatment from persons who were unaccountable for their actions. It follows that the Government is responsible for ill-treatment suffered by Hasan Kaya after his disappearance and prior to his death.”<sup>98</sup>

An important conclusion of this judgment is that the duty to prevent human rights violations comprises measures to protect people from being tortured not only by State officials but also by private persons. In simple terms, States must not put a person in a situation where he or she runs the risk of being subjected to treatment contrary to article 3 of the Convention.

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While the foregoing references and cases relating to the prevention of human rights violations mainly concern particularly serious crimes such as torture, abduction and arbitrary deprivation of life, the obligation to prevent violations is equally applicable to all basic rights and freedoms recognized by national and international law.

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<sup>97</sup> I-A Court HR, *Suárez Rosero Case*, judgment of November 12, 1997, Series C, No. 35, p. 75, para. 65.

<sup>98</sup> Eur. Court HR, *Case of Mahmut Kaya v. Turkey*, judgment of 28 March 2000, paras. 115-116 of the text of the judgment as published at <http://echr.coe.int/>

*The duty to prevent violations of human rights is inherent in the legal duty to ensure their effective protection.*

*Preventive measures may be of a legal, administrative, political, cultural, social, educational, remedial or other nature, depending on the problem and the country involved.*

*The duty to prevent human rights violations entails a duty not to place a person in circumstances where he or she is at risk of disappearing, being tortured or arbitrarily killed, even if such illegal acts are committed by private individuals.*

## 3.4 The duty to provide domestic remedies

As seen above, the legal duty to provide domestic remedies for alleged victims is inherent in the general duty to provide effective human rights protection. Practice has consistently and convincingly shown that, unless an individual has an effective right to have recourse to independent and impartial courts or administrative authorities at the national level for the purpose of remedying an alleged human rights violation, the true enjoyment of human rights will remain illusory. From the point of view of States, the existence of effective domestic remedies has the advantage of allowing them to remedy a wrong, thus avoiding international responsibility and a possible rebuke from an international monitoring body.

In this section, selected statements and decisions will provide a general idea of the importance that international monitoring bodies attach to the availability of effective remedies for violations of human rights at the national level.

### 3.4.1 The universal level

At the universal level, the right to domestic remedies was first included in article 8 of the Universal Declaration of Human Rights, which states that everyone “has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. It was also incorporated in article 2(3) of the International Covenant on Civil and Political Rights, pursuant to which each State party to the Covenant undertakes:

“(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

It follows from the clear terms of this provision that the remedies available must be *effective* and that their enforcement must be *ensured* by the competent authorities. The remedies may be, for instance, judicial or administrative, although a reading of article 2(3)(b) *in fine* suggests that the drafters of the Covenant had a preference for judicial remedies. It is noteworthy that, for the purpose of complying with the exhaustion of domestic remedies rule laid down in article 5(2)(b) of the Optional Protocol to the Covenant, the Human Rights Committee holds that an alleged victim is required to resort only to such remedies as have “a reasonable prospect” of being “effective”. Moreover, it is for the Government alleging the availability of remedies to prove their effectiveness.<sup>99</sup>

Although remedies must be available for all alleged violations of the rights guaranteed by the Covenant, the need for available, effective, independent and impartial remedies is particularly urgent for people deprived of their liberty. The Human Rights Committee has therefore emphasized the need for effective guarantees and remedies for detained persons in respect of all acts prohibited by article 7 of the Covenant, namely torture and cruel, inhuman and degrading treatment and punishment. In their periodic reports States parties should, for instance, “indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress”.<sup>100</sup> In the Committee’s view, the right to bring complaints against ill-treatment, as prohibited by article 7, “must be recognized in the domestic law” and the complaints

“must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.<sup>101</sup>

The reports of States parties “should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with”.<sup>102</sup>

The Committee was “deeply concerned at the reports of torture and excessive use of force” by law enforcement officials in Venezuela, at the State party’s “apparent delay in responding to such occurrences [and at] the absence of independent mechanisms to investigate the reports in question. The right to recourse to the courts is not a substitute for such mechanisms. The State party should establish an independent body empowered to receive and investigate all reports of excessive use of force and other abuses of authority by the police and other security forces, to be followed, where appropriate, by prosecution of those who appear to be responsible for them.”<sup>103</sup>

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<sup>99</sup>See, for example, Communication No. R.1/4, *W. Torres Ramírez v. Uruguay* (Views adopted on 23 July 1980), in UN doc. GAOR, A/35/40, pp. 122-123, para. 5.

<sup>100</sup>General Comment No. 20 (Article 7), in *United Nations Compilation of General Comments*, p. 141, para. 14.

<sup>101</sup>*Ibid.*, loc. cit.

<sup>102</sup>*Ibid.*

<sup>103</sup>UN doc. GAOR, A/56/40 (vol. I), p. 50, para. 8.

The Committee also expressed concern in the case of Trinidad and Tobago “at the lack of remedies under domestic legislation, including the Constitution, for victims of discrimination within the full ambit of articles 2.3 and 26 of the Covenant. The State party should ensure that remedies are available for the full range of discriminatory situations falling within the protection given by those articles.”<sup>104</sup>

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Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires each State party to ensure

“that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

The Committee against Torture recommended in this regard that China establish a “comprehensive system ... to review, investigate and effectively deal with complaints of maltreatment, by those in custody of every sort”.<sup>105</sup> It also recommended that Jordan “further strengthen measures to protect the right of detainees, especially their access to judges, lawyers and doctors of their choice”.<sup>106</sup> Access to the legal profession is, of course, also essential in order to enable people in detention to vindicate their rights. The Committee thus welcomed the establishment by the Panamanian Public Prosecutor’s Department “of a ‘prison mailbox’ system to facilitate the exercise by prisoners of their right to lodge complaints and petitions”.<sup>107</sup>

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Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination also imposes a duty on States parties to provide “effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate [a person’s] human rights and fundamental freedoms contrary to this Convention”. On this point, the Committee on the Elimination of Racial Discrimination recommended that Sudan “continue its efforts to establish a domestic legal order giving full effect to [articles 4, 5 and 6] of the Convention and to ensure effective and equal access to remedies through the competent national tribunals and other State institutions against any acts of racial discrimination and related tolerance”.<sup>108</sup> With regard to article 6, it also recommended that France “reinforce the effectiveness of the remedies available to victims of racial discrimination”.<sup>109</sup> The same Committee has also begun to take into account “the

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<sup>104</sup>Ibid., p. 32, para. 10.

<sup>105</sup>UN doc. GAOR, A/51/44, p. 24, para. 150(b).

<sup>106</sup>UN doc. GAOR, A/50/44, p. 24, para. 174.

<sup>107</sup>UN doc. GAOR, A/53/44, p. 22, para. 215.

<sup>108</sup>UN doc. GAOR, A/56/18, p. 41, para. 210.

<sup>109</sup>UN doc. GAOR, A/55/18, p. 27, para. 103.

gender-related dimensions of racial discrimination”. In so doing, it will give “particular consideration”, inter alia, to the “availability and accessibility of remedies and complaint mechanisms for racial discrimination”.<sup>110</sup>

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Under article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women, the States parties undertake “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. The Committee on the Elimination of Discrimination against Women urged Belarus “to create adequate remedies for women to obtain easy redress from direct or indirect discrimination especially in the area of employment [and] to improve women’s access to such remedies, including access to courts, by facilitating legal aid to women and embarking on legal literacy campaigns”.<sup>111</sup> The Committee also recommended that Cameroon “provide access to legal remedies” for women subjected to various forms of violence.<sup>112</sup>

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Lastly, it is interesting to note in this context that the question of effective remedies for human rights violations was also dealt with in Part I, paragraph 27, of the Vienna Declaration and Programme of Action, in which the participating States agreed by consensus that:

“Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.”<sup>113</sup>

### 3.4.2 The regional level

The right to a domestic remedy is, of course, also guaranteed by the regional human rights treaties. Article 7(1)(a) of the African Charter on Human and Peoples’ Rights stipulates that every individual shall have “the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”. This provision was violated, inter alia, in a case against Zambia, in which one of the victims had been denied the opportunity to appeal his deportation order. In the view of the African Commission on Human and Peoples’ Rights, this deprivation of the right to a fair

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<sup>110</sup>General Recommendation No. XXV (Gender-related dimensions of racial discrimination), in *United Nations Compilation of General Comments*, p. 195, para. 5(d).

<sup>111</sup>UN doc. GAOR, A/55/38, p. 37, para. 360.

<sup>112</sup>*Ibid.*, p. 55, para. 50.

<sup>113</sup>See UN doc. A/CONF.157/53.

hearing violated both Zambian law and international human rights law, including article 7(1)a) of the African Charter.<sup>114</sup> The right to be heard, as guaranteed by article 7(1)(a), was also violated in a case against Nigeria, in which the courts were prevented by a government decree from entertaining any complaints concerning a number of decrees regarding, *inter alia*, the proscription of newspapers. The African Commission on Human and Peoples' Rights did not accept the Government's argument that it was "in the nature of military regimes" to provide for such "ouster clauses" in order to avoid excessive litigation. According to the Commission:

"A government that governs truly in the best interest of the people ... should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law."<sup>115</sup>

The Commission therefore decided that the ouster of the courts' jurisdiction violated the right to have one's cause heard under article 7(1) of the Charter.<sup>116</sup>

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Article 25 of the American Convention on Human Rights on the right to judicial protection reads as follows:

"1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- (b) to develop the possibilities of judicial remedy; and
- (c) to ensure that the competent authorities shall enforce such remedies when granted."

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<sup>114</sup> ACHPR, *Amnesty International (on behalf of W. S. Banda and J. L. Chinula) v. Zambia*, Communication No. 212/98, decision adopted on 5 May 1999, paras. 60-61 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/212-98.html>

<sup>115</sup> ACHPR, *Media Rights Agenda and Others v. Nigeria*, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998, paras. 78 and 81 of the text of the decision as published at: [http://www1.umn.edu/humanrts/africa/comcases/105-93\\_128-94\\_130-94\\_152-96.html](http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html)

<sup>116</sup> *Ibid.*, para. 82.

The Inter-American Court has stated that the right to judicial protection, as guaranteed by article 25(1), “incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights”.<sup>117</sup> This means, in particular, that:

“Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).”<sup>118</sup>

According to this principle, moreover,

“the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather that it must be truly effective in establishing whether there has been a violation of human right and in providing redress. A remedy which provides illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.”<sup>119</sup>

In “normal circumstances” these conclusions “are generally valid with respect to all the rights recognized by the Convention”.<sup>120</sup> For specific information regarding the requirement of effective domestic remedies in public emergencies, see Chapter 16 of this Manual.

Article 25 of the American Convention has been interpreted by the Inter-American Court of Human Rights in the case of *Castillo-Páez v. Peru* concerning the abduction and subsequent disappearance of Mr. Castillo-Páez. The Court concluded “that the remedy filed by Mr. Castillo-Páez’ next-of-kin against his detention (habeas corpus) was obstructed by State agents through the adulteration of the logs of entry of detainees, which made it impossible to locate the victim”. It had therefore been proven “that the remedy of habeas corpus was ineffective for securing the release of Ernesto Rafael Castillo-Páez and, perhaps, for saving his life”.<sup>121</sup> On this important issue the Court added that:

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<sup>117</sup>I-A Court HR, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Series A, No. 9, p. 32, para. 24.

<sup>118</sup>I-A Court HR, *Godínez Cruz Case, Preliminary Objections, judgment of June 26, 1987, Series C, No. 3, p. 78, para. 93.*

<sup>119</sup>I-A Court HR, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Series A, No. 9, p. 33, para. 24.

<sup>120</sup>*Ibid.*, pp. 33-34, para. 25.

<sup>121</sup>I-A Court HR, *Castillo-Páez Case v. Peru, judgment of November 3, 1997*, OAS doc. OAS/Ser.L/V/III.39, doc. 5, 1997 *Annual Report I-A Court HR*, p. 266, paras. 81-82.



“82. ... The fact that the ineffectiveness of habeas corpus was due to forced disappearance does not exclude the violation of article 25 of the American Convention. This provision on the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.

83. Article 25 is closely linked to the general obligation contained in article 1(1) of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation. The purpose of habeas corpus is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention, and, ultimately, to ensure the right to life.”<sup>122</sup>

In this case the Court found it proven that Mr. Castillo-Páez had been detained by the members of the Peruvian police force, who hid him so that he could not be located. The ineffectiveness of the remedy of *habeas corpus* was therefore “imputable to the State” and constituted a violation of article 25 of the Convention.<sup>123</sup>

However, where the relatives of a disappeared person failed to initiate a judicial action to try to secure the freedom of the person concerned, the Court was unable to find a violation of article 25, since the requirement for its application had not been met.<sup>124</sup>

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Quite importantly, article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also spells out States parties’s duties to provide help and remedies for women subjected to violence, for instance the establishment of “fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures” (art. 7(f)). It further imposes an obligation on States parties to establish “the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies” (art. 7(g)).

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Lastly, article 13 of the European Convention on Human Rights stipulates that:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

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<sup>122</sup>Ibid., pp. 266-267, paras. 82-83.

<sup>123</sup>Ibid., p. 267, para. 84.

<sup>124</sup>I-A Court HR, *the Case of Blake v. Guatemala, judgment of January 24, 1998*, in OAS doc. OAS/Ser.L/V/III.43, doc. 11, 1998 *Annual Report I-A Court HR*, p. 100, para. 104.

This article has been interpreted on numerous occasions and violations, particularly with regard to protection of the right to life, have been found in an increasing number of cases. An analysis of the jurisprudence of the European Court of Human Rights shows that the following general principles are of relevance in the interpretation of article 13 of the European Convention:

**First**, as the Court stated in the case of *Boyle and Rice v. the United Kingdom*, “notwithstanding the terms of Article 13 read literally, the existence of an actual breach of another provision of the Convention (a ‘substantive’ provision) is not a prerequisite for the application of the Article [which] guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order.”<sup>125</sup>

**Second**, it follows that “where an individual has an *arguable* claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress.”<sup>126</sup> This means more precisely that “the grievance must be an arguable one in terms of the Convention”, and that a person cannot claim the benefit of the protection of article 13 for “any supposed grievance under the Convention ... no matter how unmeritorious his complaint may be”.<sup>127</sup>

**Third**, the Court has concluded that the authority referred to in article 13 “may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective”.<sup>128</sup>

**Fourth**, the Court has held that “although no single remedy may itself entirely satisfy the requirements of article 13, the aggregate of remedies provided for under domestic law may do so.”<sup>129</sup>

**Fifth**, although “the scope of the obligation under article 13 varies depending on the nature of the applicant’s complaints under the Convention”, the remedy required by that article “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”.<sup>130</sup>

**Sixth**, neither article 13 nor the Convention itself lays down the manner in which the Contracting States should ensure “within their internal law the effective implementation of any of the provisions of the Convention – for example, by incorporating the Convention into domestic law”. It therefore follows that the application of article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under article 1

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<sup>125</sup>*Eur. Court HR, Case of Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A, No. 131, p. 23, para. 52.*

<sup>126</sup>*Eur. Court HR, Case of Silver and Others, judgment of 25 March 1983, Series A, No. 61, p. 42, para. 113(a); emphasis added.*

<sup>127</sup>*Eur. Court HR, Case of Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A, No. 131, p. 23, para. 52.*

<sup>128</sup>*Eur. Court HR, Case of Silver and Others, judgment of 25 March 1983, Series A, No. 61, p. 42, para. 113(b), p. 42, para. 113(b).*

<sup>129</sup>*Ibid.*, p. 42, para. 113(c).

<sup>130</sup>*Eur. Court HR, Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000, para. 124 of the text published at: <http://echr.coe.int/>.*

directly to secure to everyone within its jurisdiction the rights and freedoms set out in the Convention and its Protocols.<sup>131</sup>

*Lastly*, it follows from the preceding principle that article 13 does not guarantee “a remedy allowing a Contracting State’s law as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic legal norms”.<sup>132</sup>

However, the question of remedies may be examined not only within the framework of article 13 of the Convention but also under other articles, such as articles 6 and 8. If, for instance, the Court has found a violation of article 6(1) as a consequence of lack of access to the courts, it will not, in principle, find it necessary to examine the matter also under article 13, since “the requirements of that provision are less strict than, and are ... absorbed by, those of Article 6, para. 1”.<sup>133</sup> In the case of *X and Y v. the Netherlands*, the Court likewise did not consider it necessary to examine the question of remedies under article 13, since it had already concluded that article 8 of the Convention had been violated, inter alia, by the fact that no “adequate means of obtaining a remedy” was available to one of the applicants.<sup>134</sup>

Conversely, if the requirements under other articles, such as article 2, are less strict than article 13, the Court will pursue its examination of grievances also under the latter article. For instance, it found a violation of article 13 after concluding that the lack of an effective investigation into the death of a person constituted a violation of article 2 of the Convention.<sup>135</sup> The reason was that the requirements of article 13 “are broader than the obligation to investigate” imposed by article 2.<sup>136</sup> In this case the Court stated that:

“Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure.”<sup>137</sup>

As such an effective investigation was not conducted into the circumstances of the death of the applicant’s brother, the applicant had no effective remedy in respect of his brother’s death as required by article 13, which had therefore been violated.<sup>138</sup>

<sup>131</sup> *Eur. Court HR, Case of Silver and Others, judgment of 25 March 1983, Series A, No. 61, p. 42, para. 113(d).*

<sup>132</sup> *Eur. Court HR, Case of James and Others, judgment of 21 February 1986, Series A, No. 98, p. 47, para. 85.*

<sup>133</sup> *Eur. Court HR, Case of Hentrich v. France, judgment of 22 September 1994, Series A, No. 296-A, p. 24, para. 65 and, similarly, Eur. Court HR, Case of Pudas v. Sweden, judgment of 27 October 1987, Series A, No. 125-A, p. 17, para. 43.*

<sup>134</sup> *Eur. Court HR, Case of Y and Y v. the Netherlands, judgment of 26 March 1985, Series A, No. 91, p. 15, para. 36.*

<sup>135</sup> Among several cases see, for example, *Eur. Court HR, Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000, para. 126.*

<sup>136</sup> *Ibid.*, loc. cit.

<sup>137</sup> *Ibid.*, para. 124.

<sup>138</sup> *Ibid.*, para. 126. For cases involving a violation of article 13 relating to the right to life or freedom from torture, see also *Eur. Court HR, Case of Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI, pp. 2286-2287, paras. 95-100, and Eur. Court HR, Case of Avsar v. Turkey, judgment of 10 July 2001, paras. 421-431; for the text of the decision see <http://echr.coe.int>*

*The legal duty under international law to provide effective human rights protection comprises the obligation to ensure that effective domestic remedies are available to victims of human rights violations.*

*This means that it is not sufficient for a remedy to be available under a country's constitution or other legislation. It must exist in practice and be allowed to function freely.*

*To be able to provide effective remedies, the authorities concerned, including the courts and the legal professions in general, must therefore be competent, independent and impartial.*

*States should endeavour to develop **judicial** remedies for alleged violations of human rights.*

*In order to be effective, the exercise of a remedy must not be hindered by acts or omissions of the State concerned.*

*While effective remedies must exist for all violations of human rights, their prompt and unhindered exercise is particularly important in the case of grievances suffered by persons deprived of their liberty, whose life and personal health and security must be protected at all times.*

*To deprive a detained person of his or her right to bring complaints regarding, for example, unlawful deprivation of liberty or torture or other forms of ill-treatment amounts to placing the person concerned in a legal vacuum where he or she has no possibility of redress. Such a situation is a manifest violation of a State's legal obligations under international human rights law.*

*Effective domestic remedies must also be ensured for complaints of discrimination such as alleged racial and gender-based discrimination, including acts of violence arising either in the domestic or in the public sphere.*

*It is the professional responsibility of all judges, prosecutors and lawyers to ensure that claims of human rights violations are addressed effectively and with due diligence.*

### 3.5 The duty to investigate, prosecute and punish

As previously noted, the duty to *investigate, prosecute* and *punish* human rights violations is also inherent in States' general responsibility to ensure effective human rights protection and it is a duty that has been consistently emphasized by the international monitoring bodies. As this duty is not always expressly defined in the treaties concerned, it will be analysed below principally in the light of a selection of the many comments and judgments of these bodies that invoke the obligation to investigate, prosecute and punish violations of the rights and freedoms of the individual.

### 3.5.1 The universal level

In General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Committee noted, in general, “that it is not sufficient for the implementation of article 7 to prohibit such treatment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures that they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.”<sup>139</sup>

In the *Chongwe* case, a Zambian police officer had shot “and barely missed killing” the author who was not formally deprived of his liberty. According to the Human Rights Committee, the State party “refused to carry out independent investigations, and the investigations initiated by the Zambian police [had] still not been concluded and made public, more than three years after the incident”.<sup>140</sup> Furthermore, no criminal proceedings had been initiated and the author’s claim for compensation appeared to have been rejected. The author’s right to security under article 9(1) of the Covenant had therefore been violated.<sup>141</sup>

With regard to Zambia’s obligations under article 2(3)(a) of the Covenant, the Committee concluded that:

“the State party is under the obligation to provide Mr Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future.”<sup>142</sup>

The Human Rights Committee also expressed concern “at the lack of action” by Venezuela to deal with disappearances that occurred in 1989, noting that the statement to the effect that investigations of the disappearances were “being pursued” was unsatisfactory.<sup>143</sup> “Taking into account the provisions of articles 6, 7 and 9 of the Covenant, the State party should give special priority to rapid and effective investigations designed to determine the whereabouts of the disappeared persons and those responsible for disappearances. The State party should also take all necessary measures to prevent disappearances, including adoption of the legislation described in article 45 of the Constitution.”<sup>144</sup> The Committee was also “gravely concerned at the many reports of extrajudicial executions” in Venezuela and the failure of the State party to deal with them. “The State party should conduct investigations to identify those

<sup>139</sup> *United Nations Compilation of General Comments*, p. 140, para. 8.

<sup>140</sup> Communication No. 821/1998, *R. Chongwe v. Zambia*, (Views adopted on 25 October 2000), in UN doc. *GAOR*, A/56/40 (vol. II), p. 142, para. 5.3.

<sup>141</sup> *Ibid.*, loc. cit.

<sup>142</sup> *Ibid.*, p. 143, para. 7.

<sup>143</sup> UN doc. *GAOR*, A/56/40 (vol. I), p. 49, para. 6.

<sup>144</sup> *Ibid.*, loc. cit.

responsible for extrajudicial executions and bring them to justice. It should also take the necessary measures to prevent the occurrence of such violations of article 6 of the Covenant.”<sup>145</sup>

Similarly, the Committee expressed concern about reports of extrajudicial executions of prisoners in the Dominican Republic “and of deaths at the hands of the National Police, the Armed Forces and the National Drug Control Office owing to the excessive use of force and the apparent impunity that they enjoy”. The State party should therefore

“take urgent steps to ensure respect for article 6 of the Covenant, to have those responsible for violations of the right to life guaranteed thereunder prosecuted and punished, and to make redress”.<sup>146</sup>

The Committee also noted with concern that torture was widespread in the Dominican Republic and that “no independent body exists to investigate the many complaints of torture and cruel, inhuman or degrading treatment . . . The State party should take prompt action to comply fully with article 7 of the Covenant and to have violations thereof investigated so that the culprits may be tried and punished by ordinary courts and redress provided.”<sup>147</sup>

Commenting on the Amnesty Law passed in Argentina to grant immunity for human rights violations committed during the military regime, the Committee recommended that gross violations of civil and political rights during that regime “should be prosecutable for as long as necessary, with applicability as far back in time as necessary, to bring to justice their perpetrators” (see further *infra* subsection 3.7.1).<sup>148</sup>

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The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains specifically defined State obligations relating to the penalization of acts of torture and to investigations and complaints procedures. Pursuant to article 4(1) of the Convention, States parties are required to ensure that all acts of torture, attempts to commit torture, as well as complicity or participation in torture, are offences under their criminal law. Article 4(2) stipulates that the States parties “shall make these offences punishable by appropriate penalties which take into account their grave nature”. And article 12 of the Convention states that:

“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

Lastly, as already noted *supra* in subsection 3.4.1, article 13 obliges States parties to provide victims of torture with the right to bring complaints and to have their cases “promptly and impartially” examined by the competent authorities.

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<sup>145</sup>Ibid., pp. 49-50, para. 7.

<sup>146</sup>Ibid., p. 55, para. 8.

<sup>147</sup>Ibid., pp. 55-56, para. 9.

<sup>148</sup>UN doc. GAOR, A/56/40 (vol. I), p. 39, para. 9.

In connection with its examination of the third periodic report of Belarus, the Committee against Torture expressed concern about the “pattern of failure of officials to conduct prompt, impartial and full investigations into the many allegations of torture reported to the authorities, as well as a failure to prosecute alleged perpetrators, which are not in conformity with articles 12 and 13 of the Convention”.<sup>149</sup> The Committee therefore recommended that:

- ❖ “Urgent and effective steps be taken to establish a fully independent complaints mechanism, to ensure prompt, impartial and full investigations into the many allegations of torture reported to the authorities and the prosecution and punishment, as appropriate, of the alleged perpetrators”;
- ❖ “The State party consider establishing an independent and impartial governmental and non-governmental national human rights commission with effective powers to, *inter alia*, promote human rights and investigate all complaints of human rights violations, in particular those pertaining to the implementation of the Convention.”<sup>150</sup>

Another of the many similar examples from the proceedings of the Committee against Torture relates to Guatemala, in respect of which the Committee expressed concern at “the continuing existence of impunity for offences in general and for human rights violations in particular, as a result of repeated dereliction of duty by the government bodies responsible for preventing, investigating and punishing such offences”. It also expressed concern about the “lack of an independent commission with wide powers and extensive resources to investigate the circumstances of the kidnapping of disappeared persons on a case-by-case basis and to locate their remains. Uncertainty about these circumstances causes the families of disappeared persons serious and continuous suffering.”<sup>151</sup> The Committee recommended that:

“An independent commission should be established to investigate the circumstances of the kidnapping of disappeared persons and to determine what happened to them and where their remains are located. The Government has an obligation to spare no effort to find out what really happened in such cases and thus give effect to the legitimate right of the families concerned, provide compensation for the loss or injury caused and prosecute the persons responsible.”<sup>152</sup>

Lastly, when examining the initial report of Bolivia, the Committee recommended that the Government adopt “the necessary measures to ensure effective compliance by government procurators with their duty to conduct criminal investigations into any complaint of torture and cruel, inhuman or degrading treatment in a prompt and impartial manner; during these investigations, the accused officials should be suspended from their duties.”<sup>153</sup> It was recommended that the State party

<sup>149</sup>UN doc. GAOR, A/56/44, p. 21, para. 45(e).

<sup>150</sup>Ibid., p. 21, para. 46(b) and (c).

<sup>151</sup>Ibid., p. 33, para. 73(b) and (e).

<sup>152</sup>Ibid., p. 35, para. 76(e).

<sup>153</sup>Ibid., p. 42, para. 97(d).

“set up a centralized public register of complaints of torture and ill-treatment and of the results of the investigations”.<sup>154</sup>

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Article 2(b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women requires the States parties “to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” and “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. Although these provisions are applicable to all forms of gender-based discrimination, they assume special importance in the case of all forms of violence against and abuse of women.

On this issue the Committee on the Elimination of Discrimination against Women recommends that the States parties to the Convention take

“Effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace”.<sup>155</sup>

Commenting on the situation in the Republic of Moldova, the Committee emphasized that violence against women, “including domestic violence, constitutes a violation of the human rights of women under the Convention”. It called on the Government “to ensure that such violence constitutes a crime punishable under criminal law, that it is prosecuted and punished with the required severity and speed”.<sup>156</sup> It urged Uzbekistan to ensure that women and girls who are victims of violence, including domestic violence, “have immediate means of redress and protection”.<sup>157</sup>

### 3.5.2 The regional level

The Inter-American Court of Human Rights held in the *Street Children* case that it is clear from article 1(1) of the American Convention on Human Rights “that the State is obliged to investigate and punish any violation of the rights embodied in the Convention in order to guarantee such rights”.<sup>158</sup> In the earlier *Velásquez Rodríguez* case, the Court had set forth at some length its views on States parties’ duty to investigate human rights violations, which in that case involved the abduction and subsequent disappearance of Mr. Velásquez. The Court held that:

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<sup>154</sup>Ibid., p. 43, para. 97(e).

<sup>155</sup>General Recommendation No. 19 (Violence against women) *United Nations Compilation of General Comments*, p. 221, para. 24(t)(i).

<sup>156</sup>UN doc. GAOR A/55/38, p. 59, para. 102.

<sup>157</sup>UN doc. GAOR, A/56/38, p. 21, para. 177.

<sup>158</sup>*I-A Court HR, Villagrán Morales et al. Case (The “Street Children” Case), judgment of November 19, 1999, Series C, No. 63*, pp. 194-195, para. 225.



“176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victims’ full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows *private* persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual’s rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. *Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.* This is true regardless of what agent is eventually found responsible for the violation. Where the acts of *private* parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”<sup>159</sup>

In the same case, the Court concluded that the procedures available in Honduras were “theoretically adequate” but that the evidence showed “a complete inability” of the procedures to carry out an investigation into the disappearance of Manfredo Velásquez and to fulfil the State’s duty to pay compensation and punish those responsible, as set out in article 1(1) of the Convention.<sup>160</sup> For instance, the courts did not process one single writ of *habeas corpus*, no judge had access to the places of detention where Mr. Velásquez might have been held, and the criminal complaint was dismissed.<sup>161</sup> The Court also pointed out that “the duty to investigate facts of this type continues *as long as there is uncertainty about the fate of the person who has disappeared*”.<sup>162</sup>

In the *Velásquez* case, the Court unanimously decided that Honduras had violated articles 4, 5 and 7 read in conjunction with article 1(1) of the Convention.<sup>163</sup>

Although a Government may conduct various judicial proceedings relating to the facts, it may still be in violation of its duty under article 1(1) of the American Convention to investigate crime. This was the situation in the *Street Children* case, in which the persons responsible for the abduction and killing of the children had not been punished because they had “not been identified or penalized by judicial decisions

<sup>159</sup>I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4, pp. 155-156, paras. 176-177; emphasis added.

<sup>160</sup>Ibid., p. 156, para. 178.

<sup>161</sup>Ibid., p. 156, para. 179.

<sup>162</sup>Ibid., p. 157, para. 181; emphasis added.

<sup>163</sup>Ibid., pp. 162-163.

that [had] been executed”. This consideration alone was sufficient for the Court to conclude that Guatemala had violated article 1(1) of the Convention.<sup>164</sup>

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The duty to investigate, prosecute and punish human rights violations is, of course, equally valid for the Contracting States to the European Convention on Human Rights. In numerous cases, for example, the European Court of Human Rights has emphasized the obligation to investigate in relation to the right to life. Its jurisprudence on this important issue was well summarized in the *Avsar* case, in which it held:

“393. The obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State’s general duty under article 1 of the Convention to ‘secure to everyone within (its) jurisdiction the rights and freedoms defined in (the) Convention’, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force ... The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents and bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge formal complaint or to take responsibility for the conduct of any investigatory procedures ...

394. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

395. There must also be a requirement of promptness and reasonable expedition implicit in this context ... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in

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<sup>164</sup>*I-A Court HR, Villagrán Morales et al. Case (The “Street Children” Case), judgment of November 19, 1999, Series C, No. 63, p. 195, para. 228.*

maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”<sup>165</sup>

Moreover, as pointed out by the Court in the *Avsar* case, in which unlawful killings were allegedly “carried out under the auspices of the security forces with the knowledge and acquiescence of the State authorities”, the situation raised “serious concerns about the State’s compliance with the rule of law and its respect in particular for the right to life”. It followed that, in such circumstances, the procedural obligation under article 2 of the European Convention with regard to the right to life “must be regarded as requiring a wider examination”.<sup>166</sup>

In this case, the victim had been taken from his house by seven persons, namely village guards, MM (the person who confessed) and one security guard. He was taken to the gendarmerie from where he was later removed and killed. The Court concluded that article 2 of the Convention had been violated because “the investigation by the gendarmes, public prosecutor and before the criminal court did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Serif Avsat”. There had therefore been a “breach of the State’s *procedural obligation* to protect the right to life”.<sup>167</sup> The Court concluded, moreover, that the Government was responsible for Mr. Avsat’s death, a finding that resulted in a violation of its *substantive obligation* to ensure the right to life under article 2 of the European Convention.<sup>168</sup> It is noteworthy that the village guards and the confessor were prosecuted and convicted in this case but not the seventh person, the security official. These circumstances “rendered recourse to civil remedies ... ineffective in the circumstances [and] did not provide sufficient redress for the applicant’s complaints concerning the authorities’ responsibility for his brother’s death”. He could therefore continue to claim to be a victim of a violation of article 2 on behalf of his brother.<sup>169</sup>

### 3.5.3 The role of victims during investigations and court proceedings

The role of victims or their next-of-kin is essential during investigations into, and court proceedings regarding, human rights violations, and is of course particularly important in inquiries into killings, torture and other forms of violence, including gender-based violence, whether committed by private persons or State officials. Judges, prosecutors and lawyers must therefore at all times ensure that the affected persons are heard at all appropriate times during the investigations, as well as in connection with any ensuing court proceedings. They must also be particularly sensitive and understanding in cases concerning, for instance, disappearances. The trauma felt by the family members of disappeared persons is profound. Their anguish at not knowing the fate of their beloved ones is deep and has a marked and lasting impact on their lives. The legal professions should therefore show courtesy and understanding for the

<sup>165</sup>*Eur. Court HR, Case of Avsar v. Turkey, judgment of 10 July 2001*, paras. 393-395 of the decision as published at: <http://echr.coe.int>

<sup>166</sup>*Ibid.*, para. 404.

<sup>167</sup>*Ibid.*, para. 408; emphasis added.

<sup>168</sup>*Ibid.*, para. 416.

<sup>169</sup>*Ibid.*, paras. 408 and 415.

feelings and reactions of persons facing such human tragedy and their need to know what happened to their disappeared family members.

In the *Street Children* case, the Inter-American Court of Human Rights emphasized with regard to the duty to investigate that

“it is evident from article 8 of the (American) Convention (on Human Rights) that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.”<sup>170</sup>

Failure to process private denunciations, writs of *habeas corpus* or civil and other claims, and failure to initiate investigations into alleged human rights violations and, whenever appropriate, to bring criminal or other proceedings against those responsible for them clearly make it impossible for the victims or their next-of-kin “to be heard and to have their accusations discussed by an independent and impartial tribunal”.<sup>171</sup> Such failure undermines not only the victim’s right to an effective remedy but also the confidence that individuals and the public at large should have in their justice system and in the rule of law in general.

*Inherent in the general duty to provide effective protection for human rights is the specific legal duty to **investigate, prosecute and punish** violations of the individual’s fundamental rights and freedoms.*

*The ultimate purpose of this duty is to ensure the swift restoration of the victim’s rights and freedoms*

*To fulfil their duty, States must conduct prompt and effective investigations into all alleged violations of human rights. This duty is of particular importance when the allegations concern the right to life and the right not to be subjected to torture or other forms of ill-treatment, including gender-based violence as well as violence originating in other forms of discrimination.*

*The duty to investigate is one of means and not of ends and it implies inter alia that:*

- *the investigation must be carried out by an independent body, namely by a body other than that implicated in the alleged violations;*
- *the investigation must be carried out impartially, speedily, fully and effectively so as to facilitate the identification of the person or persons responsible for the alleged human rights violations for the purpose of their subsequent prosecution and eventual punishment;*

<sup>170</sup>I-A Court HR, *Villagrán Morales et al. Case (The “Street Children” Case)*, judgment of November 19, 1999, Series C, No. 63, p. 195, para. 227.

<sup>171</sup>*Ibid.*, p. 196, para. 229.

- *the investigation must be initiated by the State once it has knowledge of the alleged facts, and it does not therefore depend on steps taken, or proof tendered, by the victim or his or her next-of-kin;*
- *formal investigations not intended to establish the truth fall foul of the duty to investigate human rights violations effectively;*
- *examples of steps necessary to ensure the effective investigation of alleged arbitrary killings are the taking of eyewitness testimony and forensic evidence and an autopsy involving an objective analysis of the clinical findings, including the cause of death;*
- *in the case of grave human rights violations, such as disappearances, the duty to investigate and prosecute lasts for as long as it takes to dispel uncertainty about what happened to the victims.*

*The victim of human rights violations or his or her next-of-kin plays an essential role in investigations and during court proceedings relating to the violation concerned. He or she should have ample opportunity to be heard and to play an active part in the criminal justice process.*

*Judges, prosecutors and lawyers must show courtesy to and understanding for victims of human rights violations and must be particularly sensitive to the trauma caused by disappearances and other serious human rights abuses.*

*The failure to investigate human rights violations promptly and effectively jeopardizes the victim's right to redress for his or her grievances and undermines the rule of law, including public confidence in the rule of law.*

## 3.6 The duty to provide redress for human rights violations

### 3.6.1 Restitution and compensation

In most cases, the international human rights treaties do not specify how a breach of a legal obligation should be remedied. In a sense, this is logical inasmuch as the States parties to a human rights treaty are free to decide how to enforce the rights and freedoms concerned. However, article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that States parties have a duty to ensure that victims of torture obtain redress and that they have “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. In the event of the death of the victim as a result of the torture, his or her dependants “shall be entitled to compensation”. As previously noted, article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women also imposes a duty on States parties to establish, inter alia, “the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies”.

As in the case of victims of ordinary crime, victims of human rights violations should, to the extent possible, have their rights restituted. In the *Blazek* case, which concerned the confiscation of property in the Czech Republic, the Human Rights Committee expressed the view that, pursuant to article 2(3)(a) of the International Covenant on Civil and Political Rights, the State party was “under an obligation to provide the authors with an effective remedy, including an opportunity to file a new claim for restitution or compensation” for an act of discrimination contrary to article 26 of the Covenant.<sup>172</sup> In this case, which concerned property, restitution may thus be possible. However, as made abundantly clear in the present chapter, this is often not the case, especially where the persons concerned have been killed or subjected to violence and the options are limited, by and large, to compensation and rehabilitation.

The examples selected below will illustrate how the regional human rights courts deal with the question of compensation. However, it should be pointed out that the obligation to indemnify is derived in these cases from an international obligation linked to a proven violation of an international human rights treaty and is thus not based in national law.<sup>173</sup> On the other hand, the judgments concerned help to clarify the kinds of damage that may be compensated, although the actual compensation will always depend on the facts of the case.

The European Court of Human Rights has regularly awarded compensation, inter alia to victims of torture and to the next-of-kin of victims of killings. Depending on the circumstances, compensation may be granted for *pecuniary damage* and also for *non-pecuniary or moral damage* which cannot be considered to be compensated by the sole findings of the international monitoring body concerned.<sup>174</sup> Such compensation may be granted not only to the victim himself or herself but also to the victim’s next-of-kin.<sup>175</sup> Compensation for *costs and expenses* may also be awarded.<sup>176</sup> However, in a case in which the next-of-kin was not dependent on his brother’s earnings prior to his death and the claims related to alleged losses incurred subsequent to his death, the Court did not “find it appropriate” to award compensation for pecuniary damages.<sup>177</sup>

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At the American level, the question of what would constitute “fair compensation” to Mr. Velásquez’s next-of-kin arose in the *Velásquez Rodríguez* case. The Inter-American Court concluded that, since the disappearance of Mr. Velásquez was not an accidental death but “the result of serious acts imputable to Honduras”, the amount of compensation could not “be based upon guidelines such as life insurance,

<sup>172</sup>Communication No. 857/1999, *Blazek et al. v. the Czech Republic* (Views adopted on 12 July 2001), in UN doc. GAOR, A/56/40 (vol. II), p. 173, para. 7.

<sup>173</sup>Cf. I-A Court HR, *Velásquez Rodríguez Case, Compensatory damages, judgment of July 21, 1989, Series C, No. 7*, p. 57, para. 54.

<sup>174</sup>See, for example, among numerous cases: Eur. Court HR, *Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000*, paras. 133-139 of the text as published as at <http://echr.coe.int> and Eur. Court HR, *Case of Price v. the United Kingdom, judgment of 19 June 2001*, para. 34 of the text as published as at <http://echr.coe.int>

<sup>175</sup>Eur. Court HR, *Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000*, paras. 133-139 of the text as published at <http://echr.coe.int>

<sup>176</sup>Ibid., paras. 140-142.

<sup>177</sup>Ibid., para. 135.

but must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death”.<sup>178</sup> However, the Court distinguished between two situations: on the one hand, the situation of a victim who was “totally and permanently disabled”, in which case “the compensation should include all he failed to receive, together with appropriate adjustments based upon his probable life expectancy”,<sup>179</sup> and, on the other, a situation in which the beneficiaries are family members who have, in principle, “an actual or future possibility of working or receiving income on their own”.<sup>180</sup> In the latter situation it would not be correct “to adhere to rigid criteria ... but rather to arrive at a prudent estimate of the damages, given the circumstances of the case”.<sup>181</sup>

On the question of indemnification of the moral damages suffered by Mr. Velásquez’s family members, the Court found that these damages were “primarily the result of the psychological impact suffered by the family”, especially as a result of “the dramatic characteristics of the involuntary disappearance of persons”.<sup>182</sup> The moral damages were demonstrated by “expert documentary evidence” and the testimony of a psychiatrist and professor of psychology. On that basis, the Court found that the disappearance of Mr. Velásquez “produced harmful psychological impacts among his immediate family which should be indemnified as moral damages”.<sup>183</sup> The Government was therefore ordered to pay compensation.

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As the status of the *universal* monitoring bodies is not strictly judicial, they have no competence, as such, to award compensation for damages. In the Views it adopts under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee is therefore limited to urging Governments responsible for human rights violations, in general terms, to pay compensation for the wrongs suffered without specifying the amount to be paid.<sup>184</sup>

### 3.6.2 Rehabilitation

In many cases, such as when a person has been the victim of torture or other forms of ill-treatment or gender-based violence, there may be a need, in addition to financial compensation, for rehabilitative measures of both a physical and psychological nature. As noted in the preceding subsection, article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly imposes a duty on States parties to provide redress for torture victims “including the means for as full rehabilitation as possible”.

<sup>178</sup>I-A Court HR, *Velásquez Rodríguez Case, Compensatory damages, judgment of July 21, 1989, Series C, No. 7*, p. 54, para. 46.

<sup>179</sup>Ibid., pp. 54-55, para. 47.

<sup>180</sup>Ibid., p. 55, para. 48.

<sup>181</sup>Ibid., loc. cit.

<sup>182</sup>Ibid., p. 55, para. 50.

<sup>183</sup>Ibid., p. 56, para. 51.

<sup>184</sup>See, for example, Communication No. 107/1981, *Quinteros v. Uruguay* (Views adopted on 21 July 1983), in UN doc. GAOR, A/38/40, p. 224, para. 16.

The Committee against Torture expressed concern, with regard to Cameroon, at the “absence of legislative provisions for the compensation and rehabilitation of victims of torture, contrary to the provisions of article 14 of the Convention”. It therefore recommended that the State party introduce “a mechanism into its legislation for the fullest possible compensation and rehabilitation of the victims of torture”.<sup>185</sup> The Committee also recommended, with regard to Brazil, that measures should be taken “to regulate and institutionalize the right of victims of torture to fair and adequate compensation payable by the State, and to establish programmes for their fullest possible physical and mental rehabilitation”.<sup>186</sup>

Rehabilitation for victims of abuse is also foreseen by article 39 of the Convention on the Rights of the Child, according to which

“States Parties shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

On the basis of this article, the Committee on the Rights of the Child recommended that the former Yugoslav Republic of Macedonia “urgently establish appropriate programmes to provide for the physical and psychological recovery and reintegration” of children who have been victims of crime.<sup>187</sup> The Committee emphasized that rehabilitative measures for children are particularly important in times of war.<sup>188</sup>

Women who have been subjected to trafficking constitute another group of victims of human rights violations who may need rehabilitation. The Human Rights Committee recommended that Venezuela should set up rehabilitation programmes for victims of trafficking.<sup>189</sup> The Committee on the Elimination of Discrimination against Women has also recommended that States take “protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence”.<sup>190</sup>

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At the regional level, the need for rehabilitative measures for women subjected to violence is recognized in article 8 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, under which the States Parties “agree to undertake progressively specific measures ... to provide women who are subjected to violence access to effective readjustment and training programmes to enable them to fully participate in public, private and social life”.

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<sup>185</sup>UN doc. *GAOR*, A/56/44, p. 29, para. 65(e), and p. 30, para. 66(a).

<sup>186</sup>*Ibid.*, p. 51, para. 120(f).

<sup>187</sup>UN doc. *CRC/C/94*, Committee on the Rights of the Child: Report on the twenty-third session (2000), paras. 286-287.

<sup>188</sup>*Ibid.*, see with regard to Sierra Leone, paras. 185-190.

<sup>189</sup>UN doc. *GAOR*, A/56/40 (vol. I), p. 52, para. 16.

<sup>190</sup>General Recommendation No. 19 (Violence against women), in *United Nations Compilation of General Comments*, p. 221, para. 24(t)(iii).



*Victims of human rights violations, or their next-of-kin, have the right to effective redress for wrongs committed.*

*Wherever possible, such redress should be in the form of restitution of rights. If restitution is not possible, fair compensation for pecuniary and/or moral damages must be awarded.*

*Redress in the form of rehabilitation should be envisaged, when necessary, for victims of violence, such as torture or other forms of ill-treatment or racial, gender-based or other forms of discrimination.*

## 3.7 The problem of impunity for human rights violations

### 3.7.1 Impunity from a legal perspective

Impunity for human rights violations is one of the most serious threats to the full enjoyment of the rights and freedoms of the individual, and constitutes a violation of a State's legal duty to ensure the effective protection of these rights and freedoms. Non-prosecution of criminal acts such as torture, abduction, disappearances and the arbitrary taking of human life have a particularly devastating impact on the victims and their next-of-kin, as well as on society as a whole. A culture of impunity also “widens a gap between those close to the power structures and others, who are vulnerable to human rights abuses. The increasing difficulties in securing justice drive people to take the law into their own hands, resulting in a further deterioration of the justice system and new outbursts of violence.”<sup>191</sup> Impunity for human rights violations can exist in any country, but it is particularly common where amnesty laws are adopted in the aftermath of military or civilian dictatorships or internal armed conflicts, such laws being an allegedly indispensable element in the process of national reconciliation.

The international monitoring bodies have consistently denounced impunity for serious human rights violations. In the *Rodríguez* case, for instance, the Human Rights Committee concluded that the 1986 Uruguayan law No. 15,848, the Limitations Act or Law of Expiry (*Ley de Caducidad de la Pretensión Punitiva del Estado*) violated article 7 read in conjunction with article 2(3) of the International Covenant on Civil and Political Rights. This law, which was adopted in 1986, ended the possibility of bringing judicial proceedings against the State for alleged human rights violations during the years of military rule. The author of the communication had been detained and tortured in 1983 during the military dictatorship but, owing to the amnesty law, was unable to sue the State for compensation. In its Views, the Committee reaffirmed its position

“that amnesties for gross violations of human rights and legislation such as No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law

<sup>191</sup>See UN doc. E/CN.4/2000/3, Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Ms. Asma Jahangir, p. 30, para. 87.

effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.”<sup>192</sup>

With regard to Argentina, the Committee expressed concern “at the atmosphere of impunity for those responsible for gross human rights violations under military rule”. Noting that many persons covered by the Argentine amnesty laws continued “to serve in the military or in public office, with some having enjoyed promotions on the ensuing years”, the Committee recommended that:

“Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary, to bring to justice their perpetrators. The Committee recommends that rigorous efforts continue to be made in this area, and that measures be taken to ensure that persons involved in gross human rights violations are removed from military or public service”.<sup>193</sup>

The Committee also expressed concern about the Croatian Amnesty Law. Although this law does not grant amnesty to those guilty of war crimes, it fails to define such crimes. The Committee therefore recommended that the State party “should ensure that in practice the Amnesty Law is not applied or utilized for granting impunity to persons accused of serious human rights violations”.<sup>194</sup>

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The Committee against Torture expressed concern about the continuing existence in Guatemala

“of impunity for offences in general and for human rights violations in particular, as a result of repeated dereliction of duty by the government bodies responsible for preventing, investigating and punishing such offences. Impunity exists for most of the violations committed during the internal armed conflict and those committed after the Peace Agreements were signed.”<sup>195</sup>

In order to improve the situation, the Committee made various recommendations to the State party involving, inter alia, the strengthening of the autonomy and independence of the judiciary and the Public Prosecutor’s Office and the prohibition of involvement of the army in public security and crime prevention.<sup>196</sup>

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<sup>192</sup>Communication No. 322/1988, *H Rodríguez v. Uruguay* (Views adopted on 19 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 10, para. 12.4.

<sup>193</sup>UN doc. GAOR, A/56/40 (vol. I), p. 39, para. 9.

<sup>194</sup>*Ibid.*, p. 67, para. 11.

<sup>195</sup>UN doc. GAOR, A/56/44, p. 33, para. 73(b).

<sup>196</sup>*Ibid.*, see pp. 34-35, paras. 74-76.

The Committee on the Elimination of Racial Discrimination noted the efforts made by Rwanda “to prevent impunity for perpetrators of genocide and other human rights violations and to bring those most responsible for such acts to justice”. The Committee remained concerned, however, that impunity prevailed in the country “notably in some cases involving unlawful acts committed by members of the security forces”. It therefore urged the State party “to make additional efforts to respond adequately to and prevent unlawful acts committed by members of the military or civilian authorities”.<sup>197</sup>

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*It is further clear from regional jurisprudence that impunity cannot be allowed for human rights violations committed by private persons.* The duty of States to investigate, prosecute, punish and redress human rights violations also extends to violations committed by private persons, at least whenever the Government concerned knew or should have known about the unlawful acts.

The Inter-American Court of Human Rights has thus made it clear that a State party to the American Convention on Human Rights “is obligated to investigate every situation involving a violation of the rights protected by the Convention” and that, when it does not do so, “the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction”. In the Court’s view,

“The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”<sup>198</sup>

The abovementioned case of *Mahmut Kaya v. Turkey* shows that the European Court of Human Rights may hold Governments responsible for human rights violations committed by private persons, at least to the extent that the authorities were aware of such acts or “ought to have been aware of the possibility” that such acts might be carried out by persons or groups of persons “acting with the knowledge or acquiescence of elements in the security forces”.<sup>199</sup>

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As may be seen from these selected cases and statements, impunity for serious violations of human rights such as arbitrary killings, abduction, disappearances, torture and other forms of inhuman treatment is strictly illegal under international human rights law. This chapter has made it clear that States have a legal duty effectively to ensure the protection of everyone’s human rights including, in particular, the right to life and liberty and to security. States that fail to comply with this duty at the domestic level may have to assume international responsibility before the international monitoring bodies.

<sup>197</sup>UN doc. GAOR, A/55/18, p. 32, paras. 141 and 144.

<sup>198</sup>I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1989, Series C, No. 4, pp. 155-156, para. 176.

<sup>199</sup>Eur. Court HR, *Case of Mahmut Kaya v. Turkey*, judgment of 28 March 2000, para. 91 of the text as published at <http://echr.coe.int>

### 3.7.2 Justice, impunity and reconciliation

As noted above, the question of impunity for perpetrators of human rights violations is frequently a subject of intense debate when a country is emerging from a period of oppression or armed conflict and wants to move into an era of peace, security and democracy. In these circumstances, victims of human rights violations, war crimes and crimes against humanity yearn for recognition of their hardship and for ultimate justice for the wrongs committed. In particular, many victims whose close family members disappeared and/or were arbitrarily deprived of their life would have strong and persistent feelings of anxiety and a need to know the truth about what happened to their loved ones. On the other hand, perpetrators of human rights violations and other wrongs generally insist on obtaining amnesty or pardon for the acts committed. But in the midst of these apparent tensions, society needs to find a *modus vivendi* in order to move forward for the good of all.

This is not the place to seek to resolve the many and often very complex issues of guilt, admission of guilt, chastisement, reparation, rehabilitation and reconciliation that arise in such situations. It may, however, be said in the light of this chapter that, as a bare minimum, amnesties and pardons cannot in any circumstances be granted for violations of the right to life and the right to liberty and security of the person, including the right to freedom from torture and other forms of ill-treatment. As will be shown in the next chapter, these are some of the rights that cannot be derogated from in any circumstances, not even in times of public emergency. The principle of justice for everyone demands that victims' rights and sufferings be recognized and remedied, that the perpetrators be punished and that the States involved act effectively to prevent similar acts from occurring in the future. A society is unlikely to be able to heal its wounds and raise itself from the ruins of oppression in a constructive way unless these minimum legal requirements that derive from human dignity are effectively met. In other words, although some form of national reconciliation will ultimately have to be reached through negotiations between the parties concerned, a lasting and prosperous reconciliation must, out of respect for the victims, be based on such elementary justice.

*Impunity for human rights violations is contrary to States' legal duty to ensure the effective protection of such rights under international law.*

*De facto failure to prosecute human rights violations as well as laws that grant impunity for such violations amount to breaches of international law.*

*The requirement that States prohibit impunity is also applicable to acts carried out by private individuals.*

*Impunity for serious human rights violations such as arbitrary killings, disappearances and torture creates particular hardship for victims and their next-of-kin and must be prevented.*

*Respect for the dignity of the human person demands that such violations be recognized, punished and redressed.*

*Sustainable national reconciliation is likely to prove unattainable in a situation where the basic interests of victims of serious human rights abuses are not acknowledged.*

## 4. The Role of Judges, Prosecutors and Lawyers in Ensuring Justice for Victims of Crime and Human Rights Violations

Whether a person is a victim of crime or human rights violations, this chapter has shown the essential role of judges, prosecutors and lawyers in responding effectively to the problems, needs and rights of the victim concerned. Members of the legal professions must not only be courteous and show understanding; they must also have a sound knowledge of human rights law and be prepared at all times to act impartially and independently in the pursuit of justice. Indeed, without an independent and impartial judiciary, as well as independent prosecutors and independent lawyers who are given the liberty to act promptly, vigorously and effectively in response to alleged human rights violations, human rights will largely remain a dead letter. It is for all States to grant the legal professions this independence and impartiality, and for the members of the legal professions to take the lead in enforcing human rights law by vigorously investigating and prosecuting acts that violate individual rights and freedoms.

## 5. Concluding Remarks

This chapter has focused in the first place on protection and redress for victims of crime and, secondly, on protection and redress for victims of human rights violations. While international law is somewhat lacking in legal provisions relating to the rights of victims of ordinary crime, the opposite is true in the case of victims of human rights violations. In this area, numerous legal provisions and a comprehensive jurisprudence provide a rich source of knowledge and inspiration for the legal professions.

States' legal duty to prevent, protect, investigate, prosecute, punish and redress human rights violations has been given ample coverage in this chapter. Although there has been a tendency to focus on the right to life and the right to freedom from torture and other forms of ill-treatment and violence, the same obligations exist with regard to the whole spectrum of human rights. As rights are interdependent, their effective protection cannot be examined in isolation. Torture victims, for instance, must be able to speak freely in order to vindicate their rights and must enjoy respect for their correspondence in order to be able to communicate with legal counsel and so forth. This intrinsic relationship among rights becomes particularly relevant to the enjoyment in crisis situations of those rights that cannot be derogated from in any circumstances and others that can, in principle, be derogated from. This will form part of our analysis in the last chapter of this Manual.

