The Victim and the Criminal Trial: A survey of recent trends in regional and international tribunals

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I INTRODUCTION

During the course of the last thirty years, the public perception of crime victims has changed dramatically. While the criminal justice system was once widely depicted as a contest between the accused and the State, it is now widely accepted that "justice" cannot be effectively meted out until criminal processes pay due recognition to the rights that at all stages of the criminal process. Across a wide variety of national jurisdictions, the range of protections and services available to victims of crime have undergone wholesale reform, which has resulted in a plethora of statutory and non-statutory protections. Depending on jurisdiction and mode of criminal process, the nature of these reforms has varied considerably, but generally they have resulted in increased special measures for victims at all stages of the criminal process, such as means to protect victims whilst testifying in court, mechanisms to increase access to information, as well as provisions designed to secure a more direct role for the victim in decision-making processes. In many jurisdictions, most notably the USA and Canada, debates continue on the practicability of victims' charters, bills of rights and victim-centred constitutional amendments.[1]

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[1] Since 1980, all fifty states have adopted over 1,000 pieces of legislation to protect victims of crime, and foremost amongst them are "bills of rights" for victims, and thirty-three states have passed amendments to their constitutions which address victims' rights in one form or another. Negotiations are currently ongoing in the US to agree the final text of an amendment to the U.S. Constitution recognising the fundamental rights of crime victims to be treated with dignity, fairness and respect. See further http://www.nova.org. In the United Kingdom, the government has to date introduced two versions of the *Victims' Charter*, which set out standards which victims should be able to expect from the authorities from the moment of entering the criminal process. The Government has recently issued fresh proposals regarding a new edition of the Victims' Charter, and has also raised the possibility of the appointment of a Victims' Ombudsman, as well

The implications of "victim emancipation" are widespread. It questions the very use of adversarial frameworks of justice, and extent to which attention to the rights of offenders ought to be protected. More recent debates contend that the victim / offender debate is not necessarily a zero sum game, and a number of areas can be highlighted where the interests of both victims and offenders coincide. However, at the end of the day, there will still be areas where some differentiation is necessary.

This article aims to examine how this issue has been addressed developments on the international and transnational criminal justice platforms. It will begin by surveying recent standard-setting trends, and will analyse the formulation of victims' rights as a form of human rights. The main focus of the article will be to appraise recent jurisprudential trends in a number of regional and international tribunals, examining how such institutions have sought to define the interface between the rights of victims and defendants. It will focus primarily on the European Court of Human Rights, which has been the pro-active in the field. However, since such institutions appear to be increasingly willing to draw on standards and jurisprudence of other international fora, the picture given would be incomplete were the article to focus solely on the European Court. In conclusion, it is argued that while the notion of a minimum threshold of due process should continue to apply, it is argued that there is nonetheless substantial lee-way for the development of comprehensive standards in national, transnational and international criminal justice.

II VICTIMS' RIGHTS AS HUMAN RIGHTS

At first glance, the relationship between human rights and victimology may appear an awkward one. Whereas human rights discourse has traditionally been perceived as liberal or left-wing and even apathetic towards victims of non-state crime, victimology has paradoxically been perceived as being a conservative or right-wing force, entrenched in

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conferring further statutory rights on victims. See Home Office, *A Review of the Victims' Charter* (2001: London, HMSO).

ideas of retributivism and vengeance. While a few activists in both camps may well fit in with these stereotypes, for the large part these perceptions are incorrect.

In recent times it has become evident that the rights of victims of crime have developed in tandem: both through the parallel development of domestic and international criminal law frameworks alongside human rights discourse. This is in contrast with the initial post-war explosion of international human rights' instruments, which did not contain any specific measures relating to crime victims. A number of reasons can be suggested for this. First, at this time the criminal trial was widely viewed in both international and domestic law as a contest between the State and the alleged perpetrator.[2] The crime victim was viewed as merely another witness to the State's case against the accused, with little or no consideration given to his or her interests, and there was little academic or policy interest in the concept of victimology.[3] Secondly, whereas victims of abuse of power are in a direct vertical relationship with the State, victims of non-state crime are also in a horizontal relationship with another individual, which raises the problematic question of how the rights of crime victims can be said to fit into the traditionally vertical human rights equation. It is only in much more recent times that the jurisprudence of the international tribunals has attempted to address this question.

With the discipline of victimology having grounded itself as a strong academic force, a number of studies and crime surveys suggested that the victim felt excluded and ill-treated by the system which he or she had hoped would bring justice.[4] In order to

[2] See further Christie, N., "Conflicts as Property" 23 *Br J Criminology* 289 (1977), where a historical process is described whereby the State "appropriated" the victim / offender conflict from the hands of the individuals directly affected by the crime.

[3] The academic study of the crime victim did not emerge until the 1940s, when Hans Von Hentig published *The Criminal and his Victim* (1948: New Haven, CT, Yale University Press). Here, a new direction was proposed for the criminal justice system, where the victim would play a much more active role. Only a handful of works were published in the early years, and these tended to concern themselves with victim precipitation and victim typologies. Substantial interest in the discipline did not take a foothold until the 1970s.

[4] See, for example, Sparks *et al*, *Surveying Witnesses* (1977: Chichester, John Wiley), Maguire, "Victims' Needs and Victim Services: Indications from Research" (1985) 10 *Victimology* 539, Chambers and Millar, *Investigating Sexual Assault* (1983: Edinburgh, HMSO), British Crime Survey 1983, Shapland *et al* (1985), Shapland and Cohen, "Facilities for Victims: The Role of the Police and the Courts" [1987] *Crim LR* 28; Simon, "Improving Services for Victims in Magistrates' and Crown Courts – a Checklist for Good Practice" (1988) 151 *JP* 150

represent these concerns, a loose association of groups and individuals arose from a range of different backgrounds to contribute to increased discussion about role of the victim in the criminal justice system. These included feminists,[5] childrens' rights campaigners,[6] as well as specific victim-interest groups.[7] Each of these groups was voicing active concerns about how each particular class of people were "victims" in one sense or another under the contemporary legal and political framework. The impact of such work upon government policy effected a series of widespread reforms during the 1980s in many criminal justice systems, as governments sought to respond to these concerns through the gradual implementation of varied victim-centred reforms. By the early 1990s, such reforms were widespread throughout the western world,[8] which in turn gave rise to the promulgation of victim-sensitive international standards and jurisprudential trends. It would appear that this trend is set to continue given current concerns surrounding international terrorism.[9]

The interaction of different factors catapulted the victim unto the international stage at a time when both victimology and human rights law were mutually expanding and also converging. The shifting paradigms in human rights can be partly attributed to the

[5] Note, for example, the work of Erin Pizzey who established the first Rape Crisis Centre in the UK. The work of single-issue groups tended to focus primarily on the treatment of that particular victim or his / her family as well as the need to punish the offender and exclude him / her from society (Sarat, A "Vengeance, Victims and the Identitites of Law", (1997) 6(2) *Social and Legal Studies* 163).

[6] During the late 1970s and 1980s, child protection had dramatically re-emerged in the public consciousness. In the UK between 1973 until 1999, there were been over 70 public or private inquiries into the deaths of abuse of children at the hands of parents, foster parents, residential care workers or others, see further Lyon, C, "The Definition of and Legal and Management Responses to the Problem of Child Abuse in England and Wales in Freeman, M (ed), *Overcoming Child Abuse: A Window on a World Problem* (2000: Aldershot, Ashgate). The abuse of children was highlighted in a number of cases, most notably in Cleveland (1986), and cases in which alleged satanic child abuse were uncovered in Orkney, Rochdale and Nottingham. Further cases indicated that social service staff themselves had been involved in this abuse in a number of children's homes in North Wales and Tyneside (1996). More recently, child pornography and particularly the exploitation of children on the internet has led to a massive media exposure of the problem, which has helped consolidate public attitudes and awareness on issues such as child abuse, and in relation to broader victimisation issues.

[7] For example, groups campaigning for the registration of sex offenders, Incest Survivor Groups, relatives of murdered and missing children, relatives of victims of drunk driving, and those concerned with combating racism, homophobia and discrimination generally.

[8] The nature of such reforms varied considerably, but all were designed to improve the satisfaction levels of victims going through the criminal process. They included the establishment of victim compensation schemes; protective measures such as the use of CCTV for the evidence of vulnerable witnesses in court; restrictions on cross-examination of sexual complainants and the piloting of restorative justice schemes.

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breakdown of the public / private divide, which has forced human rights discourse to move beyond its traditional barriers, taking into account the ongoing changes to loci of power and the corresponding increase in opportunities afforded to individuals to utitlise formal complaints mechanisms. Likewise, victimology has undergone something of change. It has moved away from the typologies and stereo-typing of earlier way, towards a more integrated and holistic discourse taking into the numerous relationships in the criminal justice system between victims, offenders and the state, as well as the underlying importance of international human rights standards.[10]

The effect of this convergence is that the inter-discplinary opportunities for cross-fertilisation of ideas and approaches has vastly increased. Today, there is a fundamental and widespread recognition that the plight of crime victims has much in common with the plight of victims of state crime, or abuse of power. For example, with regard to the experiences of both "types" of victim, there are a number of striking similarities: they both suffer a similar emotional plights and psychological responses, such as self-blame and outrage; the impact of the offence on their lives may be similar, and both feel the need for some form of redress from the offender.[11] Furthermore, victims, whether they are victims of crime or victims of abuse of power perpetuated by the state, are often subject to the same feelings of alienation and exclusion during any subsequent legal proceedings, often resulting in secondary victimisation in the courtroom. Physically, financially and psychologically, crime victims and victims of abuse of power have therefore much in common,[12] which is being increasingly recognised in the drafting of international instruments.

III. THE PROMULGATION OF VICTIM-SENSITIVE STANDARDS

This parallel approach, reflected in many international instruments, has, in part, been due to the gradual reconstruction of crime as less of a legalistic offence against the state and

[10] See, for example, the works of Nagel, "The Notion of Victimology and Criminology" (1963) 3 *Excerpta Criminologica* 46 and Schafer, *The Victim and His Criminal* (1968:5).
[11] Elias (1986:194)
[12] Elias (1986:226)

more of a social offence against individuals and communities.[13] Such thinking was reflected in the first significant set of standards dealing explicitly with crime victims, the UN *Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power,*[14] which was adopted by the UN General Assembly in 1985. Its very name serves to illustrate the re-defining of victimhood as a concept which affected those who had been victimised by the state as well as by private individuals.[15] The Declaration defined crime prevention as a victims' rights issue, and sought to guarantee access to justice and fair treatment, a right to information, assistance, and access to informal dispute resolution methods.[16]

Many other international instruments require the interests of victims to be taken into account in a variety of different ways. These include the *Basic Principles for the Treatment of Prisoners,*[17] *UN Convention against Transnational Organised Crime* and the *Standard Minimum Rules for Non-Custodial Measures,*[18] and perhaps most notably the *Vienna Declaration on Crime and Justice,*[19] which commits the member states:[20]

> "to introduce, where appropriate, national, regional and international action plans in support of victims of crime, such as mechanisms for mediation and restorative justice, and we establish 2002 as a target date for States to review their relevant practices, to develop further victim support services and awareness campaigns on the rights of victims and to consider the establishment of funds for victims, in addition to developing and implementing witness protection policies."

Paragraph 28 of the Declaration further commits the member states to implementing restorative justice policies that are "respectful of the rights, needs and interests of victims,

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[13] res justice??

[14] UN Doc A/40/53 (1985). GA Res 40/43. The Declaration was originally prepared by the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders held in Milan in 1985.

[15] Roach, K (1999:284)

[16] For example, the Declaration provides that the use of such mechanisms should ensure that the "outcome is at least as beneficial for the victims as would have been the case if the formal system had been used" (UN, 1985: A.7)

[17] UN Doc A/45/49 (1990). GA Res 45/111. Principle 10 states "With the participation and the help of the community and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the prisoner into society…"

[18] UN Doc A/45/49 (1990). GA Res 45/110. Rule 8(1) states "The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate".

[19] *Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century*. (A/CONF.187/4).

offenders, communities and all other parties". Shortly after this Declaration, the General Assembly adopted a resolution on the *Draft Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*. This resolution calls on the UN to distribute a draft set of Basic Principles prepared by the Working Party on Restorative Justice to governments and other interested organisations, and to convene an expert group to review those comments and suggests, and propose modifications or alternatives to the commission. [21]

Aside from UN instruments themselves, the Organisation was also responsible for formulating victim-sensitive rules in the *Rules of Evidence and Procedure for the tribunals for the former Yugoslavia and Rwanda*,[22] and more recently, and the Rome Statute for the International Criminal Court. Since the very *raison d'être* of such institutions is to offer remedies and redress to the victims of human rights abuses, it would seem somewhat absurd if the procedural and evidential rules secured the suspect a fair trial without affording similar protections to alleged victims, for whom the experience of having to re-live traumatic events in a witness box under cross-examination is often downright frightening, and may be exacerbated given the fact that many of the alleged perpetrators may still be in positions of authority. Nonetheless, the evidential and procedural rules of such tribunals may hold valuable lesions for domestic courts because, unlike regional permanent human rights institutions such as the European Court of Human Rights and the Inter-American Court of Human Rights, these tribunals are directly concerned with the individual perpetrators of crimes, as opposed to the failure of states to abide by human rights norms.

The Statute for the International Tribunal for the Former Yugoslavia acknowledges a relationship between the accused's right to a fair hearing alongside the need to protect victims and witnesses. While Article 20(l) of the Statute lays down a requirement that the

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[20] At para 27.

[21] Further measures for crime victims came in 1998, when a Proposal for the Foundation of an International Fund for Support to Victims of Transnational Crime was put before the General Assembly. This resolution was presented by the Commission on Crime Prevention and Criminal Justice to elaborate on the Economic and Social Council Resolution 1998/11 of 28 July 1998.

[22] The Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia apply, *mutatis mutandis*,

trial be fair and expeditious, it also outlines that this should be done in such a way that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and "due regard for the protection of victims and witnesses". The accused's right to a "fair and public hearing" is set out in Article 21(2), although it would seem that this is to be read in conjunction with Article 22, which requires the Tribunal to "provide in its rules of procedure and evidence for the protection of victims and witnesses." It lists as examples the conduct of *in camera* proceedings and the use of other measures to protect the victim's identity.

In relation to the Rules of Procedure and Evidence themselves, Rule 34 provides for the establishment of a Victim and Witnesses Unit. The functions of this Unit, under the Rule, are twofold: to recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and provide counselling and support for them, particularly in cases of rape and sexual assault. The Rule also attempts to minimise the inevitable stress and fear felt by many sexual complainants by providing that due consideration be given, in the appointment of staff, to the employment of qualified women.[23]

As with the tribunals for Rwanda and the Former Yugoslavia, the Rome Statute of the International Criminal Court[24] would seem to confirm the welcome fact that the interests of victims and witnesses are being in the process of being fully integrated into the international criminal justice agenda. For example, Article 38(2) of the Statute provides that the Trial Chamber shall ensure that the trial is fair and expeditious with full respect to the rights of the accused, whilst having "due regard" for the protection of victims and

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to the Rwanda Tribunal (Art. 14 of the Statute of the International Tribunal for Rwanda).

[23] The appointment of women to the staff of the Tribunal was particularly important as rapes were extremely common in the Yugoslav conflict –see further Ni Aolainn, Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War" (1997) 60 *Albany Law Review* 883; Catherine McKinnon (Finn, fn43); M Pratt and L E Fletcher, *Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia* (1994) 9 Berkeley Women's Law Journal 77. The Rules are not limited to cases of rape, but refer generally to crimes of sexual assault. Special provisions are made relating to the required standard of proof, and matters relating to the credibility of the witness, which may be raised by the defence (rule 96). No corroboration of the victim's testimony is required in matters of sexual assault (Rule 91(1)), and the victim's previous sexual conduct is irrelevant and inadmissible (Rule 96(iv)). Furthermore, if a defence of consent is raised, the Tribunal may take note of factors that vitiate consent, including physical violence and moral or psychological constraints (Rule 96(ii)).

witnesses.

Following international trends, the Council of Europe has also been active in successfully integrating a victim agenda into criminal justice standards. Recommendation 85(11)[25] contained a variety of provisions relating to information, practical assistance and compensation,[26] and this was followed by Recommendation (97)13,[27] which provided for a range of measures for intimidated witnesses, including the opportunity to give evidence via alternative methods which protect them from "the intimidation of face-to-face confrontation" and the consideration by the court of the impact any intimidation may have on the evidence of a witness. Paragraph 25 pays particular attention to the plight of vulnerable witnesses, and states that wherever possible, vulnerable witnesses should be examined at the earliest stage of the criminal process and, where appropriate, provision should be made for pre-trial statements to be recorded by video in order to avoid the trauma which may accompany live face-to-face confrontation at the trial proper. [28] If such witnesses do have to testify, further provision is made for them in Paragraph 28, which provides:

> "At the court hearing, examination of the witness should be closely supervised by the judge. Where cross-examination, especially in cases concerning allegations of sexual offences, might have an unduly traumatic effect on the witness, the judge should consider taking appropriate steps to control the manner of questioning."

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[24] 17 July 1998, U.N. Doc. A/CONF.183/9th.

[25] Recommendation No. (85)11 on the *Position of the Victim in the Framework of Criminal Law and Procedure* (1985). This followed on the heels of the European Convention on the Compensation of Victims of Violent Crime, which had been opened for signature in 1983, and provided that crime victims (or their dependants if the victim has died) who suffered serious injury or impairment of health directly attributable to an intentional crime of violence should be entitled to state compensation.

[26] See, for example, paragraph A which provides that Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner; The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation; The victim should be able to obtain information on the outcome of the police investigation; 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.

[27] Recommendation No. (97) 13 on the *Intimidation of Witnesses and Rights of the Defence*.

[28] In relation to face-to-face confrontation between the accused and the victim, and the rights issues arising thereof, see Doak, J "Confrontation in the Courtroom: Shielding Vulnerable Witnesses from the Adversarial Showdown" (2000) 16(3) *J Civ Lib* 216.

This paragraph was distinctive from many other forms of human rights standards to date, which had habitually tended to be more concerned with operational standards in the criminal justice system than with evidential control during the trial itself. It was also different in so far as it alluded to the notion that a "fair trial" was not only limited to the accused, but that victim-witnesses were also deserving of some degree of special protection in criminal proceedings. It would seem that this notion represented something of a political precedent which is bound to impact on the future development of the Court's jurisprudence.[29]

The impact of the victim agenda has also affected policy in the European Union. The Third Pillar of the European Union, *Police and Judicial Co-operation in Criminal* Matters, seems set to expand both in relation to its scope and enforceability as political harmonisation continues. In March 2001, the Justice and Home Affairs Council adopted one of the most recent *Framework Decision on the Standing of Victims in Criminal Proceedings*,[30] which clearly endorses the idea that victim's rights should be viewed as a central pillar of criminal justice policy. Article 5 provides that "victims' needs should be considered and addressed in a comprehensive, co-ordinated manner, avoiding partial or inconsistent solutions which may give rise to secondary victimization." Further provisions are made for the provision of information, protection from intimidation and compensation. In a similar vein, the European Parliament recently adopted a resolution concerning a Commission communication on *Crime Victims in the European Union: Reflections on Standards and Action*.[31] This document contains 17 proposals grouped under five main headings: prevention of victimization; assistance to victims; standing of victims in the criminal procedure; compensation issues; and general issues (information, language, training), and calls on all member states to implement fair and effective legislation in these areas.

[29] See *infra.*
[30] OJ 22/03/01, L 82/1. The document was an initiative of the Portuguese, during their Presidency of the European Union in 2000. It followed a request from European Council, which at its meeting in Tampere 1999 called for the drawing up of minimum standards on the protection of crime victims in the EU
[31] COM (1999) 359.

The earlier standards which emanated from the UN and Europe tended to be primarily concerned with access to information and compensation for criminal injury, and as such were mostly service-based, as opposed to rights-based, in their nature.[32] They were primarily concerned with practices and structures, as opposed to statutory protections concerning the giving of evidence or input into decision-making. These can be contrasted with more recent standards for example, those adopted by the UN in relation to the ICTFY and the ICC, which are much more comprehensive in their form.[33]

IV. SPECIFIC AREAS OF PROTECTION

The remainder of this article seeks to examine how the jurisprudence of international tribunals has sought to take account of the merging trends in criminal justice and human rights. It will concentrate primarily on the nature of the developing case law of the European Court of Human Rights. Not only is the Convention used widely in domestic adjudication, but it is the only regional tribunal to have developed a strong body of jurisprudence,. Also, as the oldest of all the instruments referred to in this article, it is noteworthy in so far as the case law clearly illustrates that older instrument can be advanced and developed by a pro-active judiciary in order to take account of changing international trends. Nonetheless, reference will be made where appropriate to the jurisprudence of other international tribunals, which may contain valuable lessons for the European Court and domestic systems on international best practice. In all, there are three specific areas of protection can be identified where the Court has been active in integrating victims' interests into its jurisprudence, these being the effectiveness of the criminal investigation; witness anonymity and procedural issues arising within the trial itself. This section will then proceed to discuss what the future may hold for victims, and will note the potential for the further development of victim's rights, most notably in the fields of victim compensation and sentencing.

[32]See further Williams, "The Victim's Charter: Citizens as Consumers of Criminal Justice Services" (1999) 38 *Howard J* 384; Zaubermen, R. "Victims as Consumers of the Criminal Justice System?" in A.Crawford and J.Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (2000: Aldershot, Ashgate), pp37-54.

[33] For example,….

(a) Criminal Investigation

Article 2 of the European Convention on Human Rights enshrines the right to life. Widely regarded as one of the superior rights contained within the Convention, it is strictly non-derogable. The vast majority of cases brought under the article concern the use of lethal force by the state against its citizens, although the scope of the article is not confined the protection of life itself, but also of the right to life.[34] As such, states must not only to refrain from taking life,[35] but also to take steps to protect life against threats from third parties. Whilst the Court has made clear that states need not take extraordinary measures to protect the right to life of individuals,[36] a number of decisions have made it very clear that the State ought to take preventative operational measures to protect individuals whose life is at risk from criminal acts of another individual. In *Osman* v *United Kingdom*,[37] the applicants complained that the police had failed to take reasonable preventative measures with respect to the second applicant's former teacher who ultimately killed the first applicant's husband (the second applicant's father) and wounded the second applicant. Although the Court found no breach of Article 2 on the facts, it adopted a number of important principles relating to victims of crime. These included the extension of the state's obligation under Article 2 in circumstances where authorities failed to do all that could reasonably be expected of them to avoid a "real and immediate" risk to life, which they knew about or ought to have known about.[38] The State was therefore under an obligation to take measures that reasonably might have been expected to minimise or avoid this risk and secure the article 2 rights of particular persons who are known to be at risk.[39]

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[34] See Ni Aolain, F, *The Politics of Force* (2000: Belfast, Blackstaff), at 187.

[35] Except in circumstances outlined in Article 2(2). The proviso does not, however, define instances where the state is permitted to intentionally kills an individual, but rather describes the situations in which it is permitted to use force, which incidentally may involve the taking of life. See, e.g. *Ergi v Turkey* (App No 23818/94, judgment of the court, 28 July 1998).

[36] *X v Ireland* (1970), 13 *Yearbook of the European Convention on Human Rights* 792;

[37] Decision of the Court, 28th October 1998.

[38] See paras 90 – 92. It was, however, found that the blanket immunity in UK law which restricted an individual to bring a claim in negligence against the police was unjustifiable, and this was held to constitute a breach of the right of access to a court under Article 6

[39] See, for example, *Kilic v Turkey*. Here, a journalist who had received death threats sought protection from the local Governor before his murder. The Court upheld a complaint that the Turkish authorities had

Likewise, the Court has also held that the state has a duty to take positive steps to protect article 3 rights through the protection of an effective criminal law. In *A v UK*,[40] a 9-year-old boy was beaten on the buttocks with a cane by his stepfather, which caused significant bruising. The stepfather's acquittal on the grounds of reasonable chastisement was held to breach the boy's Article 3 right to freedom from inhuman or degrading treatment or punishment. The Court went on to state that it was not enough for a member state to make provision of a relevant criminal charge for criminal acts, but that the Convention also requires that the criminal law itself is effective in preventing such acts.

The scope of article 2 has been widened still further by a series of recent cases, which make clear that the scope of positive obligations on the state is not limited to ensuring that rights under article 2 are not breached by other private individuals. In *McCann and others v United Kingdom*, which concerned the killing of three IRA members in Gibraltar in 1988. It was held that the duty on the state was not confined to protecting the right life, but also required the establishment of procedures to investigate unlawful killings by the state. It can be assumed that this would extend to the investigation of killings by non-state actors as well:

> "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 (Art. 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." [41]

In more recent cases the Court has gone still further, specifically pointing to elements of the investigation which should be in place in order to ensure that rights under articles 2 and 3 are comprehensively protected. The investigation into the death of an alleged

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failed to take reasonable measures available to them to prevent a real and immediate risk to life (para. 77)

[40] (1999) 27 EHRR 611.

[41] At para. 161. Likewise, in *Cakici v Turkey*, Decision of the Court, 8 July 1999 (App No 23657/94), the obligations under Article 2 were held to extend to situations where it was unclear that agents of the state were responsible for the death of the victim, an alleged member of the PKK, who was killed in suspicious circumstances in 1995. See also the recent case of *Jordan and others v UK*, Decision of the Court, 4 May 2001 (App 00024746/94), where the Court held that there had been a violation of article 2 in the failure to conduct a proper investigation into the circumstances of killings in Northern Ireland.

PKK member by Turkish authorities was held to be wholly inadequate by the Court in *Mahmut Kaya v Turkey*.[42] It was argued by the applicant, the brother of the deceased, that there was evidence to suggest state collusion in the killing and that the investigation into his death was fundamentally flawed. It appeared that no attempts were made to secure statements from the soldiers at the scene of the crime; no attempts were made to secure evidence that an exchange of shots took place; no forensic tests were carried out; and the autopsy report was deficient in a number of respects as to the precise cause of death. The Court held that such incidents "undermined the effectiveness of the criminal law" (para 98), and highlighted the need for effective criminal law provisions to be in place "to deter the commission of offences… backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches" (at para 85).

The Court has recently developed this line of jurisprudence even further. In a number of cases it has examined the combined effect of article 13, the right to a remedy, along with articles 2 and 3. In *Aydin v Turkey*,[43] the Court stated:[44]

> "where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an "effective remedy" entails, 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 and including effective access for the complainant to the investigatory procedure."

The precise constituents of what exactly constitutes a "thorough and effective" investigation was recently examined by the Court in four joined cases taken against the United Kingdom by relatives of those killed by the security forces during the Northern Ireland conflict: *Kelly and others v UK*;[45] *Jordan v UK*;[46] *Shanaghan v UK*;[47] and

[42] REF… The case is especially interesting as the complainant parties actually undertook their own private fact-finding process due to the flawed nature of the state inquest.
[43] (1998) 25 EHRR 251.
[44] *Ibid*, at para. 98.
[45] (app no 30054/96). The case concerned an SAS ambush on the IRA at Loughgall, County Armagh in 1987, when eight members of an IRA unit were killed on active service.
[46] (app no 24746/94). Hugh Jordan was the father of Pearse Jordan, an alleged IRA member who was shot in Belfast in 1992 by the RUC.
[47] (app no 37715/97). The case concerned allegations of collusion between the security forces and loyalist paramilitaries. Patrick Shanaghan, who the police believed to be in the IRA, was shot dead by a loyalist gunman in August 1991, following an incident which allegedly involved his police file falling out of an

McKerr v UK.[48] In a strong indictment of Northern Ireland inquest and investigation procedures, the Court upheld the vast majority of the complaints which concerned severe shortcomings in a wide range of the investigatory procedures.

While the Court emphasised that it was not prepared to investigate directly itself whether the perpetrators of the acts used unlawful or disproportionate force, it nonetheless highlighted the absolute necessity for procedural compliance with article 2. The Court ruled in all four cases that the UK had violated Article 2 of the Convention because it had not properly investigated the deaths in question: the investigations were deemed to be ineffective, lacking in transparency and impartiality. The specific issues raised by the complainants were varied, and most were subsequently upheld by the Court. Among the major criticisms to emerge from the judgments was the lack of independence in the police investigation;[49] a lack of public scrutiny of the investigation and very limited access for relatives;[50] security force witnesses were non-compellable to the inquests;[51] the lack of legal aid for relatives;[52] the lack of promptness and subsequent verdicts in the inquests;[53] the lack of prompt or effective investigation where there was evidence to suggest collusion;[54] and the lack of public reasons given by the DPP for his failure to prosecute.[55] Although the failure to prosecute in itself was not criticised by the Court, but it would seem that on the basis of the abovementioned dictum of the Court in *Aydin*, that a failure

army vehicle.

[48] (app 28883/95). Gervaise McKerr was killed in his car along with two other men in 1982 in an alleged shoot-to-kill incident involving RUC officers. Reportedly some 109 rounds were fired into the car.

[49] See *McKerr* para 128, where the court noted the hierarchical link between those officers being investigated and those who were carrying out the investigation. See also *Jordan*, para 120; *Kelly and* others, para 114.

[50] See *Jordan* para 134; *Kelly and* others, para 115, *McKerr* para 147; Note the Court statement in *Shanaghan* at para 105: "As regards the lack of public scrutiny of the police investigations, the Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues … and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures."

[51] *Jordan* para 127; *McKerr* para 144; *Kelly and others*, para 121.

[52] See Jordan, paras 137-138; McKerr para 146.

[53] See Jordan para 120; McKerr para 148; *Kelly and others*, paras 128 and 130.

[54] See Shanaghan (para 91)

[55] The Court stated in Shanaghan, at para 107. "… Where no reasons are given in a controversial incident involving a killing, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision."

to prosecute persons against whom there was sufficient evidence that they had committed a crime would constitute an infringement of article 2.[56] The Court also rejected an argument put forward by the state that the possibility of sufficient redress remained open to the families through civil actions for wrongful death. Following its previous decision in *Kaya*, it concluded that since the State had failed in its obligations of accountability, it would never be possible for the families of the victims to prove that the killings concerned were brought about by the State contrary to Article 2.

While the vast majority of the case law in this field relates to "state" killings by security forces, the majority of the jurisprudence is also undoubtedly relevant to victims of non-state crime.[57] In summary therefore, as a result of the recent case law, the State is under an obligation to prevent crime, undertake a thorough investigation and, if warranted, should press charges. Further, victims or their families should be permitted access to the investigatory procedures; and should be given reasons for any decisions made in respect of a decision not to prosecute. Indeed, article 2 may not only be limited to cases where there has been an actual loss of life: there would seem to be no reason why an individual could not rely on the provision in cases where life was endangered, even where no actual loss of life has occurred. The adequacy of the protection afforded by the criminal law would appear to constitute a key element of article 2 requirements, and failures of the

[56] The issue may have particular relevance to recent developments in Northern Ireland: the concerning the Omagh bomb. The relatives of the 29 people killed in the attack in August 1998 have expressed considerable frustration over the lack of progress in the at police investigation, and have commenced civil actions against a number of individuals for wrongful death (Irish Times, 31 January 2002). It would appear that one of the main reasons for the fact that no successful prosecutions have been brought in Northern Ireland to date is that the police are anxious to protect the anonymity of informers. This highlights the delegate balance which the Court has to strike between upholding the rights to an effective investigation and charging suspects on the one hand, whilst in bearing in mind that this may risk endangering the article 2 rights of others if a criminal prosecution where to proceed, along with jeopardizing the receipt of further information. See further the case of *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1.

[57] For example, in the *Jordan et al* decision, while the dicta of the Court relating to the DPP's failure to give public reasons for his decisions and the limited access to the inquest for the relatives of the deceased would apply to both "types" of victim; other dicta are specific to inquests relating to state killings, for example, the hierarchical link between the investigating officers and those who were actually being investigated. It is worth noting that a number of questions nonetheless remain unanswered after *Jordan et al*, these being questions of degree – for example, there is no definition of what exactly constitutes a hierarchical relationship, the question of *how* independent ought such an investigation actually ought to be remains, as does a question over the degree of prima facie evidence required to substantiate evidence of collusion.

state to fully implement it and effect it will mean that they are likely to fall foul of Articles 2 or 3 ECHR.

The expanding scope of the Convention to cover such cases of "indirect responsibility" would seem to be in line a broader trend in international human rights law generally, as the Inter-American Court of Human Rights declared in *Valasquez Rodriguez v Honduras*:[58]

> "The State 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.
>
> The 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 punishment of those responsible and the obligation to indemnify the victims for damages."[59]

The Court continued, suggesting that a heavy onus falls on the contracting state to disprove any breach of the right to life:

> "Where the acts of private parties ... are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane".[60]

The collapse of the vertical / horizontal divide has opened the door for victims of non-state crime to have their interests protected under articles 2 and 3 of the Convention. While it is therefore clear that international human rights instruments place states under an obligation to protect rights in both the vertical and horizontal senses, although what is not yet clear are the boundaries of this duty. Evidently the state cannot be held responsible for every infringement of the criminal law. The Court indicated in *HLR v*

[58] *Valasquez Rodriguez v Honduras*, Inter-American Court of Human Rights, Series C, No 4, Judgement of 29 July 1988, (1989) 28 ILM 291.
[59] I*bid*., at paras. 174-175.
[60] *Ibid*., 176-77

France[61] that the obligation exists only where it is shown that "the risk [of breach] is real and that the authorities ... are not able to obviate the risk by providing appropriate protection",[62] although it would seem probable that a broad margin of appreciation may exist to allow member states some lee-way in determining how to protect the rights of individuals against the infringements of private persons.[63] Clearly fresh minimal requirements have been laid down by the Court of late; but it remains to be seen how far the Court will be prepared to develop the notion of indirect responsibility for breaches of articles 2 and 3.

(b) Anonymity

Witness intimidation has become a major issue for criminal justice agencies in recent years. While there is little empirical evidence to illustrate how widespread or serious the problem is, many jurisdictions have to address the issue in a variety of ways in order to maintain public confidence in the criminal process. The admission into evidence of written statements in place of oral testimony, and the use of special measures such as screens or television links, or the clearing the public gallery may be used to shield a witness from the view of the public and / or the accused.

A much more contentious method of dealing with the problem has been conferring the power on courts to grant anonymity to prosecution witnesses who claim they have been intimidated or are fearful about the consequences of testifying. Traditionally, in common law jurisdictions, it has been widely accepted that judges or magistrates do not have a discretionary power to grant anonymity to witnesses,[64] the principle of orality is regarded as a fundamental tenet of the adversary system.[65] However, it is submitted that such a view is derived directly from the now oft criticised orthodox perception of the criminal trial as a contest between the state and the accused, which has failed to take into account

[61] (1997) 26 EHRR 29.
[62] At para 40.
[63] See *Z and others v United Kingdom* (Judgment of the Court, 10 May 2001, Application No. 29392/95)
[64] See *Re Socialist Worker Printers and Publishers Ltd, ex p Attorney General* [1975] QB 637.
[65] *Scott v Scott* [1913] AC 417. In the USA, the "right to confrontation" is regarded as sacrosanct and is enshrined as the Sixth Amendment of the Consitution. See, for example, *California -v- Green* 399 US 149 at 157 (1970)., where the Court held that the "literal right to 'confront' the witness at the time of trial" formed "the core of the values furthered by the Confrontation Clause."

the wider interests of other parties to the trial and indeed society at large. Consequently, many common law jurisdictions do now make provision for the screening of the witness' identity either from the public,[66] the accused, or both. The common law position can be contrasted with that of a number of civil law jurisdictions, most notably the Netherlands,[67] where due to the inquisitorial nature of proceedings, there has traditionally been much less of an issue with regard to courts receiving the evidence of anonymous witnesses where their lives may be placed in danger as a result of giving testimony. Many number of human rights commentators and NGOs have subsequently expressed fears that that anonymity orders endanger the fair administration of justice, the due process rights of the accused, as well as the age-old legal maxim that *justice must not only be done, but must be seen to be done*.[68]

This is a classic scenario of a conflict between the interests and rights of parties to proceedings. It is not in the accused's interests to have a witness testify against him if his counsel cannot effectively challenge the reliability of the witness's testimony: this would appear to contravene the right of the accused to challenge effectively evidence adduced against him. Yet, if a witness fears for his safety or life, it would seem that international norms, as discussed *supra*, now require that the state should take whatever proactive steps are necessary in order to protect such witnesses. The liability of the state for ensuring the safety of witnesses is also echoed in a number of soft law standards, most notably Article 13 of the Convention Against Torture which states:

> "Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain

[66] See, for example, s442(3) Canadian Criminal Code, Evidence (Witness Anonymity) Act (Queensland) 2000, and in relation to the UK, see ss44-47 Youth Justice and Criminal Evidence Act 1999, and note the guidelines given by the Court of Appeal on the "rare and exceptional circumstances" where the identity of the accuser could be witheld from the accused in *R v Taylor* [1994] TLR 484.

[67] See s264 Witness Protection Act. For further details on the position of the victim in the Dutch criminal process, see L Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001), Chapter 7.

[68] See, for example, Costigan, R and Thomas, P, "Anonymous Witnesses" (2000) 51(2) Northern Ireland Legal Quarterly 326; Amnesty International, "Fairness to Defendants at the International Criminal Court: Proposals to Strengthen the Draft Statute and its Protection of Defendant's Rights" (1996) Volume 1, Number 2 *International Criminal Court Briefing Series*.

46 Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, p. 98.

> 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 European Court has not ruled against the use of anonymity orders, and the jurisprudence suggests that providing there are counter balancing measures in place which allow the evidence to be challenged by the accused or his lawyers, then it will not normally contravene Article 6 of the Convention.[69] In *Kostovski v The Netherlands*,[70] the counter measures in place were found to be wholly inadequate. Here, the anonymous evidence was presented at the criminal trial in hearsay form, with the defence only permitted to submit written questions to the magistrate's hearing, and the only the magistrate was available at the trial proper for questioning. The Court found no breach of Article 6 in either *Baegen v Netherlands*[71] or *Doorson v Netherlands*,[72] where anonymous witnesses were used in both cases, but more stringent counter measures were clearly available. In *Doorson*, for example, the Court pointed out that defence counsel was permitted to attend the magistrates' hearing and put questions to the anonymous witnesses through the magistrates. Consequently, the Court held that such procedures did not contravene Article 6, although significantly the Court also highlighted the fact that the conviction in this case was not based solely or to a decisive extent on the anonymous evidence.[73]

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[69] See, for example, *Unterpringer v Austria* (1986) 13 EHRR 175 at para 31; *Kostovski v Netherlands* (1989) 12 EHRR 434 at para 41.
[70] (1989) 12 EHRR 434.
[71] 27 October 1995, Series A, No. 327-B.
[72] 26 March 1996, RJC, 1996-II, No6.
[73] It is also worth noting that the need for such steps is not limited to protect the identities "victim-witnesses", but it would seem that similar protections would have to be put in place for other witnesses in criminal proceedings, including the alleged perpetrator(s). See also the decision in *R v Lord Saville of Newdigate, ex p* A [1999] 4 All ER 860, which highlights the particular difficulties courts and tribunals can face where witness anonymity is raised as an issue for state witnesses in the context of public inquiries. Here, the Court of Appeal held that the Bloody Sunday Tribunal had acted unlawfully in refusing anonymity requests from soldier-witnesses at the Bloody Sunday tribunal. The Court required cogent justification for the interference with a fundamental right such as the right to life, and was further willing to take into account the weight given to specific factors. The decision, however, was widely condemned by the families of the victims of Bloody Sunday and their representatives, on the basis that the Court reached its conclusions not on the basis of objective scrutiny, but rather on the basis of reports prepared by the military. See further Costigan, R and Thomas, P, "Anonymous Witnesses" (2000) 51(2) *Northern Ireland Legal Quarterly* 326, at 335-342.

In summary, the use of anonymous witnesses should not contravene the European Convention providing such measures are strictly necessary,[74] and that any conviction is not based either solely or to a decisive extent on the evidence of an anonymous witness.[75] Both these issues surfaced recently before the Court in the case of *Visser v Netherlands.*[76] The applicant complained that he had not been afforded a fair trial since he had been denied the right to test the evidence against him under Article 6(3)(d). Neither he nor his counsel had been given the opportunity to see the anonymous witness, and had thus been unable to observe his demeanour under cross-examination. However, more than five years had passed since the witness first gave a statement to the police, while the applicant's co-accused, whom the witness was purported to fear, had been released from prison in 1988, and the Court found that he had given to cause for anyone to believe that they might be targeted by him. Furthermore, the Court found that the conviction was based primarily on the evidence of the anonymous witness, thus contravening the principles set out in *Van Mechelen*.

The potential for conflict on this particular issue has also been highlighted by the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTFY), *Prosecutor v Tadic,*[77]and the subsequent academic debate. The Rules of the ICTFY contain a number of very specific protections in relation to arrangements that may be made to protect the identity of witnesses. Rule 75 provides that a Judge or a Chamber may, of its own motion or at the request of either party or of the witness him / herself, order appropriate measures for the privacy and protection of certain witnesses, providing such measures do not

[74] See *Van Mechelen and others v The Netherlands* (1997) 25 EHRR 647, a drug-related case involving an anonymous police officers. Their evidence had been recorded by a judge who knew their identities, and who had made a written report concerning their credibility and reliability. At trial the defence was given full access to cross-examine the officers, although they were seated in a separate room connected by a sound link to the court. The European Court held that the accused had not had a fair trial, since they were unaware of the identity of the witnesses, were deprived of the opportunity of observing their demeanour, and the judge's report as to their credibility was not sufficient to overcome the problems of not being able to observe their demeanour themselves. It was also highlighted by the court that efforts should have been made to ascertain whether there had been an actual threat made, and further emphasised that while police officers were also entitled to Article 2 protections, their professional duties mean that their position is different to that of a disinterested witness since they owe a general duty of obedience to the state's executive, and usually have links with the prosecution.
[75] *Doorson* , 26 March 1996, RJC, 1996-II, No6.
[76] (app no 26668/95)
[77] (1996) 35 ILM 32.

impugn the rights of the accused.[78] Furthermore, Rule 69 provides that the identities of witnesses who may be at risk should not be disclosed to the accused until such time as the witness can be brought under the protection of the Tribunal (subject to Rule 75); and Rule 79 provides that in "exceptional circumstances" the prosecution and the defence are permitted to submit evidence by way of deposition, for witnesses who are unable or unwilling to testify subsequently in open court.[79]

In *Tadic*, the Prosecutor's office had filed a motion seeking protective measures for a number of witnesses, including confidentiality and anonymity. The defence rejected the requests for anonymity on grounds that this would infringe the right of the accused to know the identity of his or her accuser. The Prosecutor's motion sought several different types of protective measures. The two principal categories of measures were those designed to: (i) keep certain witnesses' names and identifying data confidential vis-à-vis the public, but allow their release to the Defence; and (ii) keep other witnesses anonymous so that neither the defence nor the public could learn their identity. With respect to the first category of measures, which the Trial Chamber classed as "confidentiality measures", the Chamber noted that while the preference would normally be for a public hearing, this requirement had to be "balanced with other mandated interests, such as the duty to protect victims and witnesses", and concluded that the measures proposed in the motion would not violate the accused's right to a public hearing as enshrined in Article 21(2) of the Tribunal's Statute.

More problematic for the Chamber was the Prosecutor's request for anonymity for certain witnesses. Whilst working from the premise that all evidence ought to be produced in the

[78] A Chamber may thus hold a *voir dire* hearing in order to determine which measures may be necessary in this regard. Examples may include expunging names and identifying information from the Chamber's public records; non-disclosure of certain information to the public; use of image / voice altering devices or CCTV, and the assignment of a pseudonym. See Shaw, M "The International Criminal Court – Some Procedural and Evidential Issues" (1998) 3(1) *Journal of Armed Conflict Law* 65 at 88.

[79] Depositions may be taken by means of video-conference if appropriate (rule 71). In order to protect the "equality of arms" and the rights of the accused, this procedure also allows for taking depositions allows for cross-examination of the witness.

presence of the accused at a public hearing with a view to adversarial argument, it nevertheless went on to advocate an interest-balancing approach in stating:[80]

> "... the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a 'fair trial'. A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses."

The Chamber proceeded to note that the right of cross-examination could only be restricted in exceptional circumstances, but nevertheless concluded that the situation of armed conflict in the former Yugoslavia constituted "exceptional circumstances *par excellence*", which would warrant departure from the normal procedural guarantees.

In order to determine whether anonymity should be granted in a particular instance, the Chamber identified five criteria that were "relevant to the balancing of all interests":-

(1) the existence of a real fear for the safety of the witness or the witness's family;
(2) the testimony must be sufficiently relevant and important to the Prosecutor's case to make it unfair to compel him to proceed without it;
(3) there must be no *prima facie* evidence that the witness is untrustworthy;
(4) there is no effective protection programme for the witness or the witness's family; and
(5) the measures taken should be strictly necessary.

In assessing each of these factors, the Court found that the specific requests of the Prosecutor met these criteria, and the Chamber granted the request for anonymity for certain witnesses and ordered more limited protective measures for others. The Chamber also held that witness anonymity did not violate the right of the accused to examine, or have examined, witnesses against him, although at the same time acknowledging that the Chamber had restricted the rights of the defence.

[80] Paras 54-55.

In dissent, Judge Stephen took issue with the majority opinion with respect to anonymity, whilst agreeing with the majority's decision on other protective measures. He pointed to the language of Article 20(1), which demands "full respect"' for the rights of the accused and requires only "due regard" for the protection of victims and witnesses. He argued that only the "public hearing" limb of Article 21(2) was subject to Article 22 and not its "fair hearing" limb, and concluded that the use of anonymous witnesses could not be reconciled with the requirement of a fair hearing for the accused provided for in the Statute and the Rules of Procedure and Evidence. The view of Judge Stephen was expressly agreed with by a Chamber of three different judges in *Prosecutor v Blaštic,*[81] although the Chamber did not rule out the use of anonymous witnesses in the trial *per se*. It approved of the five guidelines laid down in *Tadic*, but appeared to support a more restrictive interpretation of them, particularly in relation to what might constitute "exceptional circumstances".[82]

A number of commentators, most notably, Monroe Leigh, have agreed with the dissenting judgment of Judge Stephen in *Tadic*.[83] It is argued however that the majority opinion was the better one, which sought to balance the safety and well-being of victims and witnesses alongside the accused's right to a fair hearing. Judge Stephen's view has been criticised particularly by Momeni, who accuses him of overlooking "the crucial role

[81] *Blaštic case*, 5 November 1996, IT-95-14-T.

[82] In this case, the Chamber found such "exceptional circumstances" because the accused had been a senior officer in the HVO army, and had been charged with culpability for serious war crimes committed by personnel under his command. Furthermore, the Chamber highlighted the fact that the Prosecutor was encountering many difficulties since the majority of the witnesses lived or were required to move through territory under the control of the HVO. The Chamber underlined the fact that special protective measures would not, at pre-trial stage, prejudice the rights of the accused so long as they were granted for a definite period of time. While the Prosecution was therefore permitted to temporarily withhold from the Defence the names and other information relating to witnesses and victims, the Chamber ordered that this information be disclosed to the Defence in sufficient time before the trial proper.

[83] See the debate between Christine Chinkin and Monroe Leigh in vols 90 / 91 of the *American Journal of International Law*. Whereas Chinkin supported the majority ruling on the basis that "the requriements of a fair trial cannot be made in the abstract", and on the basis that the rights contained in Article 21 were subject to those contained in Article 22, Leigh rejects this analysis and argues that the minimum standards for the accused are not textually qualified by Article 22. He also submits that "international law has not yet accepted the position that the accused's right to a fair trial is subject to discount and 'balancing' in order to provide anonymity to victims and witnesses. See also Geoffery Robertson, *Crimes Against Humanity* (1999: London, Penguin), pp 290-292.

that eyewitnesses would play in the prosecution of the indicted…most of whom still live in volatile areas and have a reasonable fear of retaliation".[84]

Momeni's criticism would appear to be valid. Rape is a unique crime in that it is a very personal violation carrying long-term detrimental effects upon the survivor's life.[85] Many women who were raped in the Former Yugoslavia came from Muslim communities where sexual matters are not discussed openly, and certainly not in front of a public courtroom full of males. In such areas, virginity is often perceived as a pre-requisite for marriage, thus leaving many rape victims feeling excluded and rejected within their own communities.[86] Non-disclosure of victims' names and addresses protects victims from the glare of the public as well as from the risk of reprisal attacks on return to their own community, while at the same time encouraging them to report offences that might otherwise never come to light.[87]

The Tribunal is not an ordinary criminal justice institution: there is no witness protection programme in place for those who testify. Indeed, since victims of such crimes have a duty to give evidence to the Tribunal, there is a wider public interest to be served in ensuring that those charged with crimes against humanity in the former Yugoslavia are tried by the international community to uphold international peace and security. Thus the rights of the accused to a fair hearing need to be balanced alongside the private interests of the individual victim-witness, as well as the broader public interest in ensuring that all crime is effectively punished.

It is submitted that the anonymity of certain witnesses, in the exceptional circumstances such as those which existed within the former Yugoslavia, would be justifiable under

[84] Momeni, M "Balancing the Procedural Rights of the Accused Against a Mandate to Protect Vs and Witnesses: An examination of the anonymity rules of the International Criminal Tribunal for the Former Yugoslavia" (1997) 41 *Howard Law Journal* 155-179 at 157-158.
[85] See further J Becker *et al*, "The Effects of Sexual Assault on Rape and Attempted Rape Victims" (1982) 7 *Victimology* 106; P.A. Resnick, "The Psychological Impact of Rape", (1993) 8 J. *Interpersonal Violence* 223-55; A. W. Burgess & L.L. Holmstrom, "Rape Trauma Syndrome", (1974) 131 *Amer. J. Pschychiatry* 981.
[86] See Amicus Curiae Brief on Protective Measures for Victims and Witnesses, submitted to the Tribunal by Professor Christine Chinkin. This is reproduced in *Criminal Law Forum* (1996) (7)(1) pp179-212.
[87] Temkin, J *Rape and the Legal Process* (1987: London, Sweet & Maxwell).

international human rights law, which contains no absolute requirement that the accused must know the identity of his accuser.[88] Undoubtedly it would seem to exist as a fundamental right in most "normal" criminal trials, but there are, and must, be exceptions to this principle. A fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused. As Spencer argues:

> "The law is bound to recognise at least some exceptional cases where the courts can hear the evidence of absent witnesses, because if it did not, criminal justice would be paralysed in the face of some most dangerous criminals."[89]

The Rome Statute has unfortunately fudged the issue of witness anonymity. While Article 68 states that the ICC must take "appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", Article 69(2) provides that such measures "shall not be prejudicial to or inconsistent with the rights of the accused." Geoffery Robertson contends that this formula "should ensure that the correct dissenting opinion of Sir Ninian Stephen in the *Tadic* case is adopted by the ICC", yet it could equally be argued that the formula is left open and would not prevent the ICC from following the majority decision in *Tadic*, since the right to know the identity of one's accuser is not an absolute right in international human rights law.

On the basis of recent trends, it would thus appear that the right of an accused to know the identity of his or her accuser will not normally be regarded as an absolutely necessary element within the criminal trial. As the European Court has observed on a number of occasions, breaches of the right to a fair trial are less likely to be found on the basis of evidential or procedural rules, but the Court will instead look at the trial process as a

[88] It should be noted, however, that the Tribunal did not consider itself to be bound by international human rights jurisprudence. *Tadic*, para 28

[89] Spencer, J "Orality and the Evidence of Absent Witnesses" [1994] Crim LR 628 at 636. On the law on the admissibility of anonymous evidence in the UK, see the English Court of Appeal decision in *Taylor* [1994] TLR 484. Emphasising that the accused's right to see and know the identity of his accusers should only be denied in "rare and exceptional cases", the Court accepted that the right was not absolute. Evans LJ outlined five considerations which may justify such an order: real grounds for fearing the consequences of naming a witness; the evidence is so important that it would be unfair to deprive the prosecution of it; the prosecution has fully investigated the witness' credibility; no undue prejudice would be caused by the order and the Court can balance the need for anonymity against any unfairness caused to the defendant.

whole in order to ascertain whether the fundamental aspects of fairness have been observed.[90]

(c) Trial Issues

Closely linked to witness anonymity is the issue of privacy. Just as in many cases, for one reason or another, it would pose a danger to life or safety of witnesses to release their names, it is submitted that certain aspects of the witness's life ought to be withheld from the public in order to protect their right to privacy. The protection of individual privacy (or the lack of it), is just one element of a broader problem which causes considerable anxiety for victims attending court. Cross-examination itself can be a traumatic and frightening ordeal . In trials for rape or sexual assault, complainants are frequently subjected to a degrading and detailed cross-examination on intimate details of their private lives in order to destroy the character of the complainant. Details of clothing, underwear, menstrual cycles, and previous sexual encounters have frequently been dredged up before the court,[91] and in most cases, complainants will have little option other than to respond to the questions put to them.[92]

While no test on the matter has yet come before the European Court, it would seem that complainants who are subjected to this form of treatment may potentially find refuge either under Article 3, if they feel the state has failed to prevent them from being treated in a degrading manner, and / or under article 8 if they feel the state has failed to protect their right to privacy.

Article 3 states that "no one shall be subjected to inhuman or degrading treatment or punishment". While all the case law to date seems to have centred around allegations of some form of physical abuse or maltreatment, there seems to be no reason to preclude psychological

[90] *Barbera, Messegue and Jabardo v Spain* (1988) 11 EHRR 360.
[91] A number of studies have highlighted the undignified nature of such cross-examinations. See, for example Adler, Z., *Rape on Trial* (1982: London, Routledge & Kegan Paul.); Lees, S *Carnal Knowledge: Rape on Trial* (1996: Harmondsworth, Penguin Books Ltd); Victim Support, *Women, Rape and the Criminal Justice System* (1996: London, Victim Support).
[92] Unless, that is, the judge chooses to intervene, which would appear to offer little hope to a rape victim undergoing cross-examination in the UK courts. See Ellison, L "Cross-examination of rape complainants" [1998] Crim LR 606.

abuse from the scope of this Article. As with article 2, the scope of the provision is not limited to redressing incidences of alleged torture / degrading treatment carried out by the state, but also applies in situations where states have not taken adequate steps to prevent the interference from occurring, whether the torture or degarding treatment was directly caused by the state party itself,[93] or by a third party.[94] If, for example, a rape complainant felt that, as a result of being harassed psychologically in the witness box, he or she experienced some form of post-traumatic stress, it is conceivable that a complaint could be brought against the state for a breach of article 3, since the state's failure to provide protection mechanisms for the complainant at the trial could be directly attributed to the treatment which he or she suffered in the witness stand. On a number of rare occasions, the nature of this ordeal has been greatly exacerbated through rape defendants representing themselves and subjecting their victims to hostile and prolonged cross-examinations.[95] A number of jurisdictions have now taken statutory measures to prevent this, by providing for mandatory representation or some form of "judicial filtering" either for the entire trial or for the time when the complainant is giving evidence.[96] While there has been no case directly on point, the jurisprudence to date would seem to indicate that such requirements would be very unlikely to violate the rights of the accused under Article 6 as the case law indicates there is no absolute right to access or a lawyer of one's own choice.[97]

It has long been recognised that victims' dignity and privacy risk being violated in the course of the criminal trial. Principle 4 of the UN Declaration on Victims underlines the fact that "victims should be treated with compassion and respect for their dignity", and

[93] See *Cyprus v Turkey* (1976) 4 EHRR 482, where the Commission found Turkey to be breach of Article 3 for rapes committed by its soldiers. It held that Turkey had not done enough to prevent such attacks and that the disciplinary measures which followed after the attacks were insufficient.

[94] See, for example, *Soering v United Kingdom* (1989) 11 EHRR 439, where the Court considered that the extradition of the applicant to the USA to face trial for murder and possibly the death penalty could amount to a violation of Article 3, and D v United Kingdom (1997) 24 EHRR 423, where the Court considered the deportation of the applicant who had AIDS to a country who did not have facilities to treat his condition a breach of Article 3 requirements.

[95] For example, in the UK there was a widespread media outcry following the horrific ordeals of two rape victims who were subjected to prolonged and intimate cross-examinations by their respective alleged attackers, Milton Brown and Ralston Edwards. See, e.g., *The Times*, 7 May 1998, "Judges told to end trial ordeal of rape victims", *The Times*, April 5, 2000, "Law change after 'horrifying' cases"; *Daily Mail*, 9 June 2000 "Power to put a stop to 'torture' on the stand".

[96] For example, this was one of the many reforms introduced to improve the lot of vulnerable witnesses in England and Wales under ss34-37.

[97] See *Philis v Greence* (1991) 13 EHRR 741 and *Croissant v Germany* (1992) 16 EHRR 135. There would seem to be no absolute right for an accused to access a lawyer of his own choosing.

Principle 6(d) provides that the judicial system should take "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".

In relation to Article 8, which protects the right to privacy and family life, the European Court has also held that the state has a positive obligation to take measures to protect the right to privacy, in both a verticle and horizontal sense, as the Court outlined in *X and Y v Netherlands*. *Y*, a minor, was sexually abused while in residential care. Due to the fact she had been declared mentally ill, she was unable to file a complaint under Dutch law, and her father also failed to meet the statutory criteria which would have permitted him to file a complaint as her parent. The Court rejected the State's defence that an appropriate remedy would have been available to the complainant through a civil action, and held that the state was under a positive duty to provide legal mechanisms to protect the privacy of the applicant's daughter:

> "The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life."[98]

Although arising through a very different context, *Z v Finland*,[99] provides an illustration of a case where the rights and interests of the innocent party had to be weighed not against the right of a defendant to a fair trial, but against the public interest in a criminal prosecution. The case concerned the disclosure of confidential medical records, which is common place in rape trials and constitutes a grave intrusion of privacy. The applicant had been married to a man who was being tried on several counts of manslaughter on the grounds that he had knowingly engaged in sexual acts with others knowing that he was HIV positive. When her former husband refused to give evidence himself, the authorities seized the applicant's medical records and ordered her medical advisor to give evidence

[98] (1985) 8 EHRR 235, at para 23.
[99] (1997) 25 EHRR 371.

at the trial to establish the date when the applicant knew he was HIV positive. The accused was convicted, but the court ordered that the judgment remain confidential for a ten year period to protect the identity of the applicant. In a cruel and somewhat ironic twist, the Finnish Court of Appeal upheld the ten year confidentiality order, but unintentionally disclosed the applicant's name and medical condition in the appeal judgment, which it had faxed to the press.

Before the Court, the Finnish authorities accepted that Article 8 had been breached, but contended that the measures were "necessary in a democratic society" to prevent crime and to protect the rights of others. The Court agreed that the public interest in the investigation and prosecution of crime and the public interest in the publicity of court proceedings can outweigh medical confidentiality, but only in limited circumstances and where safeguards exist to protect the rights of patients. The Court found no violation of Article 8 in relation to the seizure of the applicant's medical files and the order compelling her advisors to give evidence, but did find a violation in relation to the ten year confidentiality order, which the Court felt was too short, and through the (albeit unintentional) disclosure of the applicant's name in the Court of Appeal judgment. However, had the balancing exercise been with the accused's fair trial rights under Article 6 as opposed to the public interest in prosecution, a more delicate rights-balancing exercise may have had to have been undertaken by the Court.

Attaching substantive rights to complainants and other third parties in this manner will mean that, in certain cases, these rights will have to be balanced against the rights of the accused, whose fair trial rights are contained in Article 6 of the Convention. The wording of the Article itself states that it will only apply to the accused "in the determination of a criminal charge against him…", which means that a victim / witness will not be entitled to bring an action under the provision in their own right, but it is nevertheless clear from *Doorson* that the Court must nevertheless undertake an interest-balancing exercise when determining whether the accused's rights have been breached:

> " It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention... Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify."[100]

Contrary to popular opinion, this does not imply a dilution of the protections afforded to the accused. In *Van Mechelen -v- Netherlands,*[101] it was held that any measures restricting the rights of the defence should be strictly necessary, and if a less restrictive measure can suffice, then it is that measure which should be applied.[102] The idea that defence rights are somehow subject to the rights of the victim is clearly wrong, but so too is the notion that the victim is not worthy of basic minimum standards of protection within the criminal process.

The Rome Statute of the International Criminal Court has also emphasised the importance of balancing the rights of the defence and the interest of third parties. Article 43 of the ILC draft statute requires the trial chamber to "take all necessary measures available to it, to protect the accused, victims and witnesses, and may to that end conduct closed proceedings or allow the presentation of evidence by electronic or other special means," and Article 38(4) provides that such proceedings may be held *in camera* for the purpose of protecting confidential or sensitive information which is to be given in evidence.

Indeed, the use of such "special means" are becoming increasingly available in criminal trials in many jurisdictions involving child witnesses, rape complainants and witnesses who are fearful about the consequences of testifying. In *X v UK*,[103] the Court found no breach of Article 6 where screens were employed by the court to shield witnesses from

[100] *Ibid*., at para 70.
[101] (1998) 25 EHRR 657.
[102] *Ibid*., at para 59.
[103] Appin. 20657/92, 15 EHRR CD 113.

public view in a case concerning a terrorist murder in Northern Ireland. Although they could not be seen by the defendant or public, the witnesses were in full view of the judge and both prosecution and defence counsel, they could be heard by everyone and their evidence did not involve the identification of the applicant, which was the main issue in the trial.[104] Indeed, the provision of such protection is not limited to the European Convention. Provision for such measures can also be found in the Rome Statute, which affirms that evidence may be given through "electronic or other special means", particularly in cases of sexual violence against children, where it is presumed that the child will give evidence in such a way unless the Court directs otherwise.[105]

V. SCOPE FOR FUTURE DEVELOPMENTS

While there have been a number of very progressive developments in recent years, it is hoped that the jurisprudence of the Convention can be developed yet further, and two areas in which such progress may occur are in the fields of victim compensation and sentencing. In relation to victim compensation, international soft law standards contain a plethora of norms which aim to ensure that victims and their families should be able to obtain redress in the form of restitution or compensation.[106] In particular, the European Convention on the Compensation of Victims of Violent Crimes requires signatories to ensure compensation for "those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence… or the dependants of persons who have died as a result of such crime". Provision was also made for victim

[104] See also [insert ref to bloody Sunday], discussed at fn.., supra.
[105] Art 68(2). In making its decision, the court must have "regard to all the circumstances, particularly the views of the victim or witness".
[106] See, for example, Article 8 of the Universal Declaration of Human Rights, Article 2(3)(a) of the ICCPR, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the revised draft Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law. The UN Commission on Human Rights reaffirmed in Resolution 1997/29, adopted on 11 April 1997, that "pursuant to internationally proclaimed human rights and humanitarian law principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation and rehabilitation".

compensation under the Rules of Evidence and Procedure for the Former Yugoslavia to facilitate compensation for victims through nationals courts,[107] and under Article 75 of the Rome Statute also states that the ICC shall establish principles relating to reparations victims.

Shelton - The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1 contains broad guarantees for those who suffer pecuniary losses, physical or mental harm, and "substantial impairment of their fundamental rights" through acts or omissions, including abuse of power. Victims are entitled to redress and to be informed of their right to seek redress. The Declaration specifically provides that victims of public officials or other agents who, acting in an official or quasi-official capacity, violate national criminal law, should receive restitution from the state whose officials or agents are responsible for the harm inflicted.

However, under the ECHR, there also is no requirement for a member state to compensate for criminal injuries caused by another individual. The Court has held that neither Articles 3 nor 8 will apply. Article 6 would not be an option since the victim is not regarded as a party to the criminal trial, although one option might be for him or her to rely on Article 6(1) in their own right and claim they have been precluded from access to a court, although the fact that a civil remedy for damages would normally be available in domestic law, this too would be unlikely to constitute a valid avenue. However, since Article 6 is not only restricted to criminal proceedings but, as Wadham and Arkinstall point out, this applies to all cases which involve the determination of "civil rights and obligations", so where the member state has established a criminal injuries compensation scheme, it would seem that the usual fair trial guarantees would apply to these proceedings.[108]

[107] Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), Rule 106.
[108] Wadham, J and Arkinstall, J ,"The Human Rights Act and the Rights of victims of crime" (2000) *New Law Journal* 1023, 1083. See also *Rolf Gustafson v Sweden* (Decision of the Court, 1 July 1997, App No 23196/94), at para 37, where it was noted that a criminal injuries compensation scheme had created a "civil right" for the purposes of Article 6.

Another specific area where victims' rights may be further developed in the context of the criminal trial is in the sentencing process. For procedural and substantive reasons, criminal courts have traditionally shirked from allowing the victim any input into decision-making in sentencing proceedings. Principle 6(b) of the UN Declaration on Victims states that the judicial process should allow "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 this would seem to be an accurate reflection of the widespread reforms in the field of sentencing in many domestic jurisdictions over the last 10-15 years. As such, some form of "victim impact statement" is frequently becoming a feature of many trials,[109] especially in the USA and Canada.[110] In Europe, the level of debate is growing, and is becoming a more fruitful area for academic and media discussion alike, particularly in the UK and Ireland.[111] There has been one occasion to date, where, in *McCourt v UK*,[112] the issue of victim participation in sentencing did arise before the European Commission on Human Rights. Here, the mother of a murder victim complained that she had been denied a right to be involved in the sentencing process contrary to Article 8 ECHR. Rejecting her complaint as being manifestly ill-founded, the Commission stated that the UK sentencing framework did not reveal any lack of respect for or any interference with her right to

[109] A victim impact statement is a statement read by, or on behalf of, crime victims at the sentencing stage of criminal proceedings.

[110] See further Kelly, D.P., "Victims" (1987) 34 *Wayne Law Review* 69-86; Erez, E. "Victim participation in sentencing: rhetoric and reality" (1990) 18 *Journal of Criminal Justice* 19-31; Hall, D.J., "Victim voices in the criminal court: the need for restraint" (1991) 28 *American Criminal Law Review* 233; Paige Dugger, A "Victim Impact Evidence in Capital Sentencing" (1996) 23 *American Journal of Criminal Law* 375; Stevens, M "Victim Impact Statements considered in Sentencing: Constitutional Concerns" 2 Cal Crim L Rev 3.

[111] See, for example, *South Wales Echo*, October 12, 2001, "Impact on dead man's family will decide fine", *Daily Mail* (London), April 3, 2001, "Victims will have a say on jail terms"; *The Times*, February 17, 2001, "Straw plans extra aid for victims of crime"; *The Times*, June 19, 2000, "Courts to consider impact on victims"; *The Times* , June 13, 2000, "Victim statements: one step away from a slippery slope"; *The Guardian*, May 27, 2000, "Victim statement scheme expanded"; *The Independent*, May 23, 2000; *The Times*, "Victim impact statements must conform with guidelines in cases"; *The Northern Echo*, "Victims are given a voice at last", *The Scotsman*, "Victims' case raised at bulger trial review"; *The Irish Times*, February 15, 1999; *Agence France Presse*, June 04, 1998; *The Irish Times*, January 31, 1998, "Judge orders victim impact reports before sentencing"; *Agence France Presse*, April 18, 1997; Deutsche Presse-Agentur, March 29, 1997. Among the best academic commentaries are Edwards, I "Victim participation in sentencing" (2001) 40(1) *Howard Journal* 39; Ashworth, A "Victim Impact Statements and Sentencing" [1993] *Crim LR* 498; Wasik, M "Reparation: sentencing and the victim" [1999] *Crim LR* 470.

[112] Decision of the Commission, 2 December 1992 (Application No. 20433/92). Note, however, that the Court did highlight the fact that victims' opinions were taken note of in the UK when the Parole Board

respect for family life,[113] although did note that the victims' interests had been already taken note of when the Parole Board came to decide on whether to grant early release.

The decision was not surprising since the Court and Commission have traditionally refrained from intervening in cases concerned with sentencing. However, the more recent decision of *T and V v. UK*[114] would seem to mark a shift in thinking, when the Court permitted the parents of Jamie Bulger to be represented at the hearing and make representations to the Court. While it is unlikely in the near future that the Court will acknowledge some form of right for the victim to be involved in the sentencing process, as member states enact legislation to this effect there is every chance that in the medium to long term, some form of recognisable right may emerge for victims in the sentencing process under Article 8.

VI. CONCLUSIONS

The developments which have occurred on the international platform in the past 10-20 years for the victim have been substantial. As a result, the crime victim need not fear so much the prospect of reporting crime and subsequently throwing himself into the criminal process. Rights to information, and closer liaison with investigating agents, coupled with much improved procedures in the courtroom have significantly eased the strain which was once associated with reporting crime and adding one's name to the official "victims' list". Yet given the rapid progression of such measures and standards to date, it can be legitimately speculated that such protections will be significantly enhanced within the next 10-20 years. Rather than these developments marking the culmination of a process, it would seem that we are still very much in its early days.

It is also hoped that the European Court can continue to set the pace in developing the scope of rights. The emergence of the proactive duties on the state to prevent horizontal

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decides on whether to grant early release.

[113] The Commission also rejected her complaint that denial of bereavement damages by the State also contravened Article 8. It was stated that since the victim is not an official party in a criminal case, it seems that he or she could not claim a right to criminal compensation under Article 6, and the civil avenue would generally remain open as an option to injured parties in such cases.

[114] [2000] Crim LR 187.

breaches under articles 2, 3, 6 and 8 illustrate a distinct collapse between the vertical and horizontal divide which has, for so long left human rights discourse open to the charge that some victims are more important than others. In line with this trend, it is probable that we can expect a more proactive approach in areas such as sentencing, victim compensation, substantive criminal law and evidential rules – areas in which the Court has been traditionally reluctant to intervene.

It should be borne in mind, however, that even with widespread and comprehensive human rights standards in place, and even if these are binding upon the member states which subscribe to the relevant treaties, to some extent such protections will only ever be of limited effect. This is mainly due to two reasons. First, because there will always be a general level dissatisfaction since those affected by crime never chose to be victims in the first place. As such, they have no option but to participate in the adversarial criminal process, which is the only means of obtaining any degree of justice in most common law jurisdictions. The second reason applies mostly to common law systems, and concerns the adversarial nature of proceedings themselves. The "gladiatorial combat" between prosecution and defence in the trial arena, and means that victims who come to court to give evidence will always face some form of secondary victimization, and it is submitted that the system requires much more fundamental reforms to be executed at a foundational level if the interests of victims and witnesses are to be comprehensively protected in the criminal process. [115]

Any liberal theory of criminal justice would seem to require that the rights of all individuals within the legal process are protected, which has been affirmed through the international victim-orientated reforms described above. In the English case of *R v DJX*,

[115] For further information on the protections for vulnerable witnesses in the United Kingdom, see ss23-30 Youth Justice and Criminal Evidence Act 1999. For further commentary see Birch, D "A Better Deal for Vulnerable Witnesses?" [2000] *Crim LR* 223; Hoyano, L "Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses [2000] *Crim LR* 250 and McEwan, J "In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999 (2000) 4(1) *E & P* 1. As regards intimidated witnesses, see s23 Criminal Justice Act 1988, which provides for the admissibility of a written statement where a witness does not wish to give evidence through fear.

SCY and GCZ,[116] Lord Lane CJ recognised the importance of interest-balancing in decision-making:

> "The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done…What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions where the balance of fairness lies."[117]

The relatively recent redefinition of "victims' rights" as "human rights" marks a tremendous leap forward, both for victimology and human rights discourse.[118] The task of effectively enforcing these rights is still yet to be accomplished. Such rights must be enforceable through formal legal mechanisms, not merely aspired to through states signing up to soft law standards and increasing services. An effective recourse to the domestic and international legal protection of victims' rights is vital for the framing of holistic criminal justice policy both at national and international level.

[116] (1990) 91 Cr App R 36

[117] At p40, as cited by Chinkin, C "Amicus Curiae Brief on Protective Measures for Victims and Witnesses" (1996) 7(1) *Criminal Law Forum* 179 at 192.

[118] See Elias, *The Politics of Victimization* (1986: New York, Oxford University Press), at p267. He argues in favour of the closer convergence between the two disciplines as follows: "We can examine existing overlaps between victimology and human rights inquiries, such as the rights of crime victims in victimology and the crimes against humanity in human rights. We can expand these concepts to provide crime victims with more rights, and victims of oppression with greater protections. The two fields can gain individually and mutually through their interactions."