



## **Mixed Results**

### **US Policy and International Standards on the Rights and Interests of Victims of Crime**

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## US Policy and International Standards on the Rights and Interests of Victims of Crime

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## I. Summary

I applaud the way our nation embraced the survivors of the September 11 attacks. But the cab driver who got shot in Baltimore on September 11, 2001, or the [family of the] waitress in Sioux City, Iowa, who was raped and killed on that same day, are entitled to be supported just like the survivors of September 11. Right now in the United States, they aren't.<sup>1</sup>

Many people have strong interests in the functioning of the criminal justice system: victims of crime, witnesses, those accused of committing crimes, and society at large, which requires the fair and effective administration of justice. In recent decades, both internationally and inside the United States, there has been a growing demand that greater attention be paid to the interests and rights of victims of crime as well as to ensuring their access to justice.

Unfortunately, the public debate on this topic too often casts the rights and interests of victims and defendants as a zero-sum game in which safeguards for defendants' rights—such as the presumption of innocence and the right to a fair trial—come at the expense of victims, and improvements in the treatment of victims impinge on defendants' rights. While there can be tensions between the legitimate interests of victims and defendants, a criminal justice system based on human rights standards can safeguard the rights of both while advancing justice and the rule of law.

Several international human rights instruments—including treaties binding on the US as well as detailed best practice guidelines—provide standards for upholding victims' rights and interests. These standards are discussed in detail in this document; we summarize them in the paragraph below.

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<sup>1</sup> Human Rights Watch telephone interview with victims' rights advocate Renny Cushing, founder and executive director, Murder Victims' Families for Human Rights, Cambridge, Massachusetts, August 28, 2007. Mr. Cushing's father, Robert Cushing, was murdered in 1988.

First and foremost, all victims of crime should have their status recognized by the state. Such recognition should be forthcoming whether or not alleged perpetrators are identified or arrested. Human rights standards demand that victims be treated with compassion and with respect for their human dignity throughout the criminal justice process, and that no group or category of victims should suffer from discrimination. Victims of crime should be able to have access to and participate in the criminal justice system through procedures that provide them with information, notice, and an opportunity to be heard without prejudice to the rights of the accused. Human rights standards recognize that victims should be protected and assisted in all appropriate instances, and they should have access to specialized help in dealing with emotional trauma and other hardships caused by their victimization.<sup>2</sup>

This report reviews current US law and practice against international human rights standards. It draws on interviews with victims of crime, victims' rights advocates, and attorneys, as well as an assessment of international standards and US domestic law. While US jurisdictions, both federal and state, have made significant progress in recent decades, much more can be done to ensure that victims' rights and legitimate interests are upheld.

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<sup>2</sup> United Nations (UN) Office on Drugs and Crime, *Victims and Witnesses: Criminal Justice Assessment Toolkit* (New York: United Nations, 2006), p. 1.

## II. International Standards on the Rights and Interests of Victims of Crime

Many international human rights instruments address or touch on victims' rights, including legal instruments such as the International Covenant on Civil and Political Rights (ICCPR),<sup>3</sup> legally binding on the US federal and state governments, as well as the Convention on the Elimination of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC). Other international instruments provide guidance on how best to protect and promote victims' rights and meet their needs in domestic legal systems, most notably the 1985 United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the "Basic Principles for Victims") adopted by the UN General Assembly, which details international consensus on best practices in relation to victims of crime.<sup>4</sup> In the analysis that follows, this report largely draws on the Basic Principles for Victims, the most comprehensive international treatment of the subject currently available.

The UN General Assembly and the UN Economic and Social Council have also passed several resolutions that articulate the importance of the rights of women and children who are victims of crime.<sup>5</sup>

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<sup>3</sup> International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976. The United States became party to the treaty on September 8, 1992. Ratifications and Reservations for the ICCPR can be viewed at <http://www.unhcr.ch/pdf/report.pdf> (accessed August 18, 2008).

<sup>4</sup> UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, November 29, 1985, para. 1 (hereinafter "Basic Principles for Victims"). The Declaration was adopted as a part of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, August 26 – September 6, 1985.

<sup>5</sup> UN Economic and Social Council, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Resolution 2005/20, July 22, 2005; UN General Assembly, Declaration on the Elimination of Violence against Women, Resolution 48/104, December 20, 1993; UN General Assembly, Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, Resolution 52/86, February 2, 1998. This latter resolution gives detailed procedural recommendations in para. 7:

"Member States are urged to review, evaluate and revise their criminal procedure, as appropriate, in order to ensure that:

- (a) The police have, with judicial authorization where required by national law, adequate powers to enter premises and conduct arrests in cases of violence against women, including confiscation of weapons;
- (b) The primary responsibility for initiating prosecutions lies with prosecution authorities and does not rest with women subjected to violence;
- (c) Women subjected to violence have an opportunity to testify in court proceedings equal to that of other witnesses and that measures are available to facilitate such testimony and to protect their privacy;
- (d) Rules and principles of defence do not discriminate against women and such defences as honour or provocation do not allow perpetrators of violence against women to escape all criminal responsibility;
- (e) Perpetrators who commit acts of violence against women while voluntarily under the influence of alcohol or drugs are not absolved of all criminal or other responsibility;
- (f) Evidence of prior acts of violence, abuse, stalking

## Treaty Provisions

Several provisions in the ICCPR, which the US has ratified and thereby bound itself to,<sup>6</sup> are relevant to victims of crime. They include:

- Rights to be protected from harm, which impose obligations on the government to have effective criminal laws that prohibit certain behavior, act as a deterrent to committing offenses, and ensure that those who do commit crimes are brought to justice through effective investigation and, where appropriate, prosecution. For example, Article 6.1 of the treaty requires that the right to life be protected by law; Article 7 imposes an obligation to protect individuals from inhuman treatment, including domestic violence; and Article 17 imposes obligations to protect the person, home, and family from unjust attack;
- Rights to be recognized by and treated equally before the law and a right of non-discrimination (Articles 2, 3, 16, and 26);
- Rights to a remedy and to access to justice, including a fair and public hearing in non-criminal claims (Articles 2 and 14); and
- Due process rights that are integral to the criminal system (Articles 9, 10, 14 and 15).

The US has also signed, but not ratified, CEDAW and the CRC. As a signatory, while it is not legally bound to implement the specific provisions of those treaties, the US must not act to defeat their object and purpose.<sup>7</sup>

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and exploitation by the perpetrator is considered during court proceedings, in accordance with the principles of national criminal law; (g) Courts, subject to the constitution of their State, have the authority to issue protection and restraining orders in cases of violence against women, including removal of the perpetrator from the domicile, prohibiting further contact with the victim and other affected parties, inside and outside the domicile, and to impose penalties for breaches of these orders; (h) Measures can be taken when necessary to ensure the safety of victims and their families and to protect them from intimidation and retaliation; (i) Safety risks are taken into account in decisions concerning non-custodial or quasi-custodial sentences, the granting of bail, conditional release, parole or probation.”

<sup>6</sup> The United States stated in connection with its ratification of the ICCPR that the treaty is not “self-executing.” Nevertheless, the laws of the US and its states as well as their implementation must be consistent with the ICCPR. This follows directly from article 6, sec. 2 of the US Constitution, which states that “all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land.” As a matter of international law, reservations to treaties may not contradict the object and purpose of the treaty at issue. Vienna Convention on the Law of Treaties, adopted May 22, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, signed by the US on April 24, 1970, art.19(3). The UN Human Rights Committee, responsible for interpreting and monitoring compliance with the ICCPR, has stated that reservations or interpretive declarations should not “seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.” UN Human Rights Committee, General Comment 24 on Reservations to the ICCPR, para. 19, U.N. Doc. CCPR/c/21/Rev. 1/Add. 6 (1994).

CEDAW requires that there are measures, including in the criminal justice system, to ensure that women are protected from discrimination, exploitation, and harm.<sup>8</sup> The CRC also requires that particular measures be in place to protect children from various forms of harm caused by criminal acts, and to ensure access to rehabilitative services where necessary.<sup>9</sup>

## Guiding Instruments

The UN's Basic Principles for Victims was "designed to assist governments and the international community in their efforts to secure justice and assistance for victims of crime and victims of abuse of power."<sup>10</sup> There have been a large number of follow-up conferences and activities that governments have organized on the basis of the Basic Principles for Victims.

For example, the UN Economic and Social Council has monitored the implementation of the Basic Principles for Victims by adopting its own resolutions recommending steps for governments and the United Nations to take in ensuring rights for victims of crime.<sup>11</sup> Stemming from the Economic and Social Council's series of resolutions, which have included calls for continued research and technical assistance, the United Nations secretary general and the United Nations Crime Prevention and Criminal Justice Programme have produced a guide for policymakers on implementing the Basic Principles for Victims,<sup>12</sup> a handbook for victims on use and

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<sup>7</sup> Vienna Convention on the Law of Treaties, Article 18, concluded May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980. Although the United States has signed but not ratified the Vienna Convention on the Law of Treaties, it regards this convention as "the authoritative guide to current treaty law and practice." Assistant Legal Advisor for Treaty Affairs at the US Department of State and US Secretary of State, "Report to the President," *Department of State Bulletin*, vol. 65, October 18, 1971, p. 685; Theodor Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination," *American Journal of International Law*, vol. 79 (1985), p.283. The US government has also accepted that it is bound by customary international law not to defeat a treaty's object and purpose. "Albright Says U.S. Bound by Nuke Pact; Sends Letters to Nations Despite Senate Vote," *Washington Times*, November 2, 1999 (describing the Clinton administration's acceptance of obligations under the Comprehensive Test Ban Treaty despite the Senate's failure to ratify).

<sup>8</sup> See in particular Articles 2, 6 and 15.

<sup>9</sup> See in particular Articles 6, 11, 12, 16, 19, 34, 35, 36, 37 and 39.

<sup>10</sup> Basic Principles for Victims, para. 3.

<sup>11</sup> UN Economic and Social Council, Resolution 1986/10, May 21, 1986; UN Economic and Social Council, Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 2000/15, July 27, 2000; UN Economic and Social Council, Plan of Action for the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution 1998/21, July 28, 1998.

<sup>12</sup> UN Office for Drug Control and Crime Prevention, *Guide for Policymakers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: United Nations, 1999).



application of the Basic Principles for Victims,<sup>13</sup> and a toolkit for professionals on assessing police, prosecutorial, and judicial policies and practices relating to victims and witnesses.<sup>14</sup> At least two countries, France and Canada, have implemented the Basic Principles for Victims in domestic legislation.<sup>15</sup>

Governments in Europe have also taken steps to ensure that minimum standards are drawn up to protect the rights of victims of crime and guarantee their access to justice. On March 15, 2001, the European Council, a body of the European Union, issued the European Union Framework Decision on the Standing of Victims in Criminal Proceedings, which is legally binding on the member states of the European Union.<sup>16</sup> The Framework Decision includes provisions similar to most of the Basic Principles for Victims.<sup>17</sup>

Some commentators on the Basic Principles for Victims have noted that “twenty years after its adoption ... the principles contained in this Declaration have been poorly implemented in national legislation and policies.”<sup>18</sup> Nevertheless, there is significant evidence that governments throughout the world, including the United States, have gone a long way to protect the rights of crime victims in their domestic legislation and practices.

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<sup>13</sup> UN Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims on the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (New York: United Nations, 1999) (hereinafter “Handbook for Victims”).

<sup>14</sup> UN Office on Drugs and Crime, *Victims and Witnesses: Criminal Justice Assessment Toolkit* (New York: United Nations, 2006).

<sup>15</sup> Carolyn Reese, “The Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in France,” *The Victimologist*, vol. 4, no. 1 (May 2000) (citing four laws adopted on July 22, 1992, which reformed the French Penal Code); Canadian Resource Centre for the Victims of Crime, “Rights,” <http://www.crcvc.ca/en/rights.php> (accessed August 26, 2008).

<sup>16</sup> Council of the European Union, “Framework Decision on the Standing of Victims in Criminal Proceedings,” 2001/220/JHA, March 15, 2001, <http://legislationline.org/legislation.php?lid=5696&tid=155> (accessed August 26, 2008).

<sup>17</sup> Jan Van Dijk, “Victims’ rights in International Criminal Law,” paper presented at the International Conference on Actions for Crime Victims, Rome, January 19-21, 2006, <http://www.tilburguniversity.nl/intervict/news/06-01-19-paper.pdf> (accessed August 26, 2008).

<sup>18</sup> M.S. Groenhuijsen, International Victimology Institute, “Implementing and Complying with the UN Basic Principles of Justice for Victims of Crime and Abuse of Power,” January 2006, <http://www.narcis.info/research/RecordID/OND1314809/Language/en/> (accessed August 28, 2008).

### III. International Consensus on Crime Victims' Rights and Interests

Upon the recommendation of the UN Economic and Social Council in 1993, the UN secretary general surveyed governments, of which 44 responded,<sup>19</sup> and produced a report on governmental use of and adherence to the Basic Principles for Victims.<sup>20</sup> The United States did not respond to the survey. The main findings of the secretary general can be summarized in the following chart:

Right of a Crime Victim to	Government ("State") Responses
Claim a remedy	Thirty-eight states made it mandatory for victims to be able to claim a remedy in all cases. In four states it was mandatory only in specific cases, and in two states this was subject to the discretion of the government. In 32 states, victims did not have to pay to obtain redress. In nine additional states this policy was adhered to "usually."
Restitution <sup>21</sup>	In all responding states, criminal offenders were bound to provide fair restitution to victims. For almost all states restitution included the return of property, payment for harm or loss suffered, and reimbursement of expenses incurred as a result of victimization.
Information	Half of the states responded that victims were informed of their right to claim a remedy on a mandatory basis. Two-thirds of the states reported that victims were informed of their role in judicial or administrative proceedings, and were informed of the timing and schedule of the process as well as the final disposition, particularly when victims had requested such information or when a serious violent crime was involved.

<sup>19</sup> The governments that responded are: Argentina, Australia, Barbados, Belgium, Canada, Chile, China, Colombia, Cuba, Cyprus, Denmark, Finland, France, Germany, Ghana, Greece, Haiti, Holy See, Japan, Jordan, Republic of Korea, Lebanon, Luxembourg, Mauritius, Mexico, Morocco, Myanmar, Netherlands, New Zealand, Oman, Peru, Philippines, Qatar, Romania, Russian Federation, San Marino, Singapore, South Africa, Spain, Sweden, Switzerland, Tonga, Ukraine, and Vanuatu.

<sup>20</sup> UN Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Report of the Secretary General on Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, E/CN.15/1996/16/Add.3, April 10, 1996, <http://www.uncjin.org/Documents/5comm/16e.htm> (accessed August 26, 2008).

<sup>21</sup> See Chapter V: "US Adherence to International Standards on the Rights and Interests of Crime Victims" below for a discussion of the definition of restitution.

Participation	Thirty-three states always allowed the victims' views to be presented at appropriate stages of the criminal proceedings where their personal interests were affected. More than 80 percent of the responding states noted that victims were able to present their concerns either in person or through an attorney or prosecutor.
Expeditious Procedures	Twenty-eight states indicated that redress occurred in less than one year. In 10 states, the average was two to three years. In three states—Australia, Ghana, and Haiti—obtaining redress might take three years or more.
Privacy and Safety	Sixty percent of responding states reported that measures were always or usually taken to protect the privacy of victims, as well as of their families and witnesses on their behalf, and to protect them from intimidation and retaliation. More than half of the responding states said that they endeavored to ensure the safety of victims and their families and witnesses.
Compensation <sup>22</sup> and other forms of Assistance	For victims who did not get financial restitution from the offender, one-third of states filled this gap by providing financial compensation to the victim. In addition, victims received material assistance in 23 states, medical assistance in 33 states, psychological assistance in 21 states and social assistance in 33 states. In almost all states, assistance was provided to the victims to enable them to present their concerns throughout the legal process. The use of victims' aid associations as a mechanism for providing assistance was reported by 11 governments.

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<sup>22</sup> See Chapter V: "US Adherence to International Standards on the Rights and Interests of Crime Victims" below for a discussion of the definition of compensation.

## IV. Crime Victims' Rights in US Domestic Law

In the 18<sup>th</sup> century, the British legal scholar William Blackstone wrote that “[i]n all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community.”<sup>23</sup> This recognition that both victims and the state are harmed by crime meant that historically in Britain and the United States, victims were able to bring prosecutions themselves, as private prosecutors. In fact, the burden was often entirely on the victim, who had to pay to retain an attorney to have the indictment written and the offender brought to trial.<sup>24</sup> The victim had near-total control over the proceedings, but also had the entire burden of pursuing justice.

Today the state, through its police and prosecutors, shoulders more of the burden of pursuing justice, but it has been increasingly recognized in the United States that victims' rights and interests must be upheld as a part of that process. Since its early growth in the 1970s, the crime victims' movement in the United States has successfully pushed for protection of victims' rights in state and federal legislation as well as through constitutional amendments and court decisions. As of 2007, all 50 states have statutes protecting victims' rights, and 33 states have amended their constitutions to enhance and protect victims' rights.<sup>25</sup> US courts have also begun to enforce victims' rights. For example, in 1991, the US Supreme Court upheld the constitutionality of allowing admission of victim impact evidence during capital

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<sup>23</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 4 (1769), p. 5.

<sup>24</sup> William F. McDonald, “Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim,” *American Criminal Law Review*, vol. 13 (1976), p. 652.

<sup>25</sup> According to the US National Conference of State Legislatures, “Every state provides some legal rights to victims in their state codes; however, recognition by citizens and legislators of the importance of elevating the rights and needs of victims has led 33 states to amend their constitutions to include rights for victims. The victims' rights constitutional amendments are intended to ensure that the rights and protections afforded to victims of crime are on par with those of the criminal defendant. Most state amendments articulate the right of victims to be informed, present and heard at important criminal justice proceedings, as well as the right to be treated with fairness and respect. Others also give the victim the right to restitution from the offender or include the right to reasonable protection from the accused. Although historically victims are relied upon to report the crime, testify and facilitate prosecution, constitutional victims' rights amendments have been put in place to recognize the importance of victim rights and services in that process without denying defendants any fundamental constitutional rights to a fair trial and fair treatment throughout. Whether state constitutional victims' rights amendments or statutory victims' bill of rights, both vehicles illustrate state commitments to providing victims with an appropriate role and much-needed procedural rights in the criminal justice process.” National Conference of State Legislatures, “Victims' Rights Laws in the States,” March 14, 2007, <http://www.ncsl.org/programs/cj/guidebillofrights.htm> (accessed August 27, 2008).

sentencing.<sup>26</sup> Many other state and federal courts have upheld the rights of crime victims in decisions throughout the country.<sup>27</sup>

Legislation and court decisions, however, have provided at best inconsistent protection for victims' rights. First, some state laws have not clarified whether victims of crime can take action to enforce their rights, and if they do take action, what remedies they have. Second, it is often costly for victims to retain counsel in order to seek remedies for rights violations.<sup>28</sup> Third, victims and legal professionals may not be aware of victims' rights laws or the means by which they can be enforced.

Enforcement has also been a problem. As one advocate told Human Rights Watch:

All 50 states have passed victims' rights laws. But there's not enough enforcement. For example, in Illinois it's required that all victims' rights are posted in every courthouse in the state. But they are not. Some judges are saying "I don't want to upset the defendants" and so they're refusing to comply. So, there are a lot of things that are written in principle in constitutions across the states that are not being done.<sup>29</sup>

At the federal level, between 1980 and 2004, Congress adopted at least seven different pieces of victims' rights legislation, culminating in the adoption of the Crime Victims' Rights Act (CVRA) in October 2004. Similar to many state laws, the

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<sup>26</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991). Human rights law recognizes the inherent dignity and the equal and inalienable rights of all people, including those who have committed terrible crimes. It prohibits torture and other cruel, inhuman or degrading punishments. Human Rights Watch believes these rights cannot be reconciled with the death penalty, a form of punishment unique in its cruelty and finality, and a punishment inevitably and universally plagued with arbitrariness, prejudice, and error. For these reasons, Human Rights Watch advocates abolition of the death penalty.

<sup>27</sup> For example, one author, reflecting on the state constitutional amendments providing for broad crime victims' rights, writes: "[w]ith only one exception [Rhode Island], state courts have interpreted these broad victims' rights to have substantive meaning." Douglas E. Beloof, "The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review," *Brigham Young University Law Review*, vol. 1, no. 2 (2005), p.264 (internal citations omitted).

<sup>28</sup> *Ibid.*

<sup>29</sup> Human Rights Watch telephone interview with Jennifer Bishop Jenkins, victims' rights advocate, Chicago, Illinois, August 28, 2007. Jenkins' sister, Nancy Bishop Langert (who was pregnant at the time), was shot to death along with her husband, Richard Langert, in suburban Chicago in 1990. Jenkins is a member of Murder Victims' Families for Human Rights, and she maintains a website regarding crime victims' rights in Illinois: <http://www.illinoisvictims.org/> (accessed August 27, 2008).

CVRA provides victims of federal offenses (and victims in the District of Columbia) with rights to:

- (1) be reasonably protected from the accused.
- (2) reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) not be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- (5) reasonably confer with the attorney for the government in the case.
- (6) full and timely restitution as provided by law.
- (7) proceedings free from unreasonable delay.
- (8) be treated with fairness and with respect for the victim's dignity and privacy.<sup>30</sup>

Under the CVRA, federal government officials are to make their best efforts to see that crime victims are notified of and accorded these rights.<sup>31</sup> In addition, victims may assert these rights by filing a motion in the court in which the alleged offender is tried, or in the jurisdiction where the crime occurred even if there is no prosecution pending.<sup>32</sup> If the motion is denied, the victim may seek review by the court of appeals through a petition for writ of mandamus.<sup>33</sup> The CVRA requires mandatory appellate review of any decisions taken on such a motion.<sup>34</sup> Finally, a court's decision to deny any of these rights may be asserted as an error by the prosecution in the case.<sup>35</sup> Only

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<sup>30</sup> 18 U.S.C. sec. 3771 (a), Crime Victims' Rights Act (2004).

<sup>31</sup> *Ibid.*, subsec. (b).

<sup>32</sup> *Ibid.*, subsec. (d)(3)(a).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, subsec. (d)(4).

in limited circumstances may a victim move for a new trial on the basis of the denial of these rights.<sup>36</sup>

Some victims view this federal law as an important complement to state victims' rights laws. Others are advocating for an amendment to the Bill of Rights in the US Constitution, which would be applicable to the states (unlike the CVRA). Still others see the CVRA as an important tool for victims' rights, especially since in April 2008 it was implemented in the Federal Rules of Criminal Procedure, which is the rulebook used by all judges in federal criminal cases.<sup>37</sup> While advocates may disagree about whether additional statutes or constitutional amendments need to be passed, all agree that more attention needs to be paid to enforcing the victims' rights laws that already exist so that violations of victims' rights are prevented and, when violations occur, victims have a remedy.

For example, some advocates highlighted for Human Rights Watch the importance of training and ensuring compliance at the state law enforcement agency level. One advocate said, "State agencies can take 'baby steps' toward compliance: simply train each office and point out which victims' rights fall within that office's functions."<sup>38</sup> Another told Human Rights Watch:

Unlike many European countries, in the United States we have no national police department, no national prosecutors—we have literally thousands of law enforcement agencies across the country and each one is responsible for a portion of the victims' rights mandate. The hope is that a carrot of compliance with victims' rights will be effectively combined with the stick of actually being able to take violations to court.... Ensuring victims' rights can be as simple as assuring defendants' rights. For example, judges could simply ask prosecutors whether certain rights [of victims] have been complied

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<sup>36</sup> *Ibid.*, subsecs. (d)(5), (6).

<sup>37</sup> Chief Justice John G. Roberts, Jr., United States Supreme Court, "Amendments to the Federal Rules of Criminal Procedure adopted by the Supreme Court of the United States, pursuant to sec. 2072 of Title 28, United States Code," April 23, 2008, <http://www.supremecourtus.gov/orders/courtorders/frcro8p.pdf> (accessed June 30, 2008).

<sup>38</sup> Human Rights Watch telephone interview with Meg Garvin, Portland, Oregon, October 2, 2007. Meg Garvin is the executive director of the National Crime Victim Law Institute housed at Lewis and Clark Law School.

with. There are many fixes that are remarkably simple and inexpensive.<sup>39</sup>

Emphasizing the need to allow courts to remedy violations of victims' rights in the United States, one federal judge said:

I think we've passed a number of statutes that promise victims various important rights. But the challenge for the foreseeable future is going to be how we operationalize those rights in a criminal justice system that has frankly grown used to ignoring crime victims. Doing this will require a cadre of public interest attorneys willing to pursue these cases in the face of very little financial support for such work.<sup>40</sup>

The following section details the provisions contained in international law and other standards that apply to victims of crime and analyzes the degree to which the United States is upholding them.

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<sup>39</sup> Human Rights Watch telephone interview with Doug Beloof, Portland, Oregon, October 2, 2007. Doug Beloof is a professor of law at Lewis and Clark Law School and is a leading legal scholar and advocate on victims' rights in the United States.

<sup>40</sup> Human Rights Watch telephone interview with Hon. Paul Cassell, Salt Lake City, Utah, September 25, 2007. Judge Cassell resigned from the United States District Court for the District of Utah, effective November 5, 2007, in order to focus more on his work related to implementation and enforcement of crime victims' rights. Geoffrey Fatah, "Youngest Federal Judge Resigns," *Deseret Morning News*, Salt Lake City, Utah, September 22, 2007. Cassell is a leading legal scholar and advocate on victims' rights in the United States.



## V. US Adherence to International Standards on the Rights and Interests of Crime Victims

### Definition of a Crime Victim

Under the Basic Principles for Victims, “victims of crime” are defined as:

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States....<sup>41</sup>

The term “victim” includes “where appropriate, the immediate family or dependants of the direct victim.”<sup>42</sup> By contrast, under most US state laws, family members are afforded victim status only if the direct victim of the crime is a minor, incapacitated, or deceased.<sup>43</sup>

In addition, in practice some state laws may fail to be as inclusive as the Basic Principles for Victims’ definition because the designation of victim status is left up to individual prosecutors or police officers, or the status is only recognized once a suspect is arrested and charged. For example, Delaware’s statutory definition of a victim is the person or entity “identified as the victim of a crime *in a police report*” (emphasis added).<sup>44</sup> In Utah, the victim is “any natural person against whom the

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<sup>41</sup> Basic Principles for Victims, para. 1.

<sup>42</sup> *Ibid.*, paras. 2 and 3.

<sup>43</sup> See for example, Alaska Statutes, sec. 12.55.185(19); Arizona Constitution, art. II, sec. 2.1(C); Colorado Revised Statutes, sec. 18-1.3-602(4)(a)(V); Florida Constitution, Art. I, sec. 16; Georgia Code Annotated, sec. 17-17-3(11); Illinois Compiled Statutes 120/3 sec. 725 (a); Indiana Code, sec. 35-40-12-1; Maine Revised Statutes Annotated, title 17-A, sec. 1171; Michigan Compiled Laws, sec. 780.752, subsec. 2(1)(l) ; Mississippi Code Annotated, sec. 99-36-3; New Hampshire Revised Statutes Annotated, sec. 21-M:8-k; Ohio Revised Code Annotated, sec. 2930.02; South Dakota Codified Laws, sec. 23A-28C-4; Vermont Statutes Annotated, title 13, sec. 5301(4). There are also temporal limitations on the definitions in state laws that make some state definitions narrower than the Basic Principles for Victims. For example, Iowa allows family members victim status only if the victim was “rendered incompetent as a result of the offense,” which would not include family members of mentally disabled persons who were incompetent prior to the offense. Iowa Code, sec. 915.10(3).

<sup>44</sup> Delaware Code, title 11, sec. 9410(5). Similarly, Ohio Revised Code Annotated, sec. 2930.01(H) defines “victim” as “a person who is identified as the victim of a crime or specified delinquent act in a police report or in a complaint, indictment, or

charged crime or conduct is alleged to have been perpetrated or attempted by the defendant or minor....”<sup>45</sup> In some states, there are more restrictive definitions when the crime has allegedly been perpetrated by a person below the age of 18. For example, in Oregon, “‘victim’ means any person determined by the district attorney or juvenile department to have suffered direct financial, psychological or physical harm as a result of an act that has brought the youth or youth offender before the juvenile court.”<sup>46</sup>

Even in states without these restrictive definitions, victims who disagree with the prosecution’s decision to seek the most severe punishment available—often the death penalty—have sometimes not been communicated with or afforded basic information about the progress of the investigation or prosecution of their cases. One advocate said:

Prosecutors get to, for the most part, decide who the victim is.... Certain crime victims’ family members, and I can name cases, have been excluded from the courtroom and from the inside circle of prosecutors’ offices because the prosecutor would pick and choose who would get to be [considered as victims’] family members based on whether or not they supported the harshest penalties possible.<sup>47</sup>

Also contrary to the Basic Principles for Victims, in certain states incarcerated individuals, persons accused of crimes, and some police officers have been denied victim status or the ability to enjoy all the same rights afforded to other types of victims.<sup>48</sup> The federal Victims of Crime Act restricts the use of funds under the act to

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information that charges the commission of a crime and that provides the basis for the criminal prosecution or delinquency proceeding and subsequent proceedings.”

<sup>45</sup> Utah Code Annotated, sec. 77-38-2(9)(a).

<sup>46</sup> Oregon Revised Statutes, sec. 419A.004(31).

<sup>47</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>48</sup> Police officers harmed in the course of their duties are not considered victims under Ohio’s victims’ rights statute. *In re Walling*, 91 Ohio Misc. 2d 181, 698 N.E.2d 154, 1997 Ohio Misc. LEXIS 335 (Ct. Cl. 1997). In Arizona, the definition of “victim” excludes any person who is “in custody for an offense or is the accused.” Arizona Constitution art. 2, section 2.1(C). Incarcerated victims are not granted the right to be heard and must instead submit evidence in writing. Arizona Rules of Criminal Procedure 39 (2007). In Alabama, a person may be considered a victim “except if the person is in custody for an offense or is the accused.” Alabama Code, sec. 15-23-60(19). In Michigan, “an individual who is incarcerated is not eligible to

prohibit offering rehabilitative or “support services to incarcerated individuals, even when the service pertains to the victimization of that individual.”<sup>49</sup> In addition, some states accord rights to victims of only certain categories of crime.<sup>50</sup>

According to the Basic Principles for Victims, a person may be considered a victim irrespective of whether the perpetrator is identified. While this is technically also true in the United States, as discussed below, some victims’ rights advocates raise concerns that the systems in place to support victims become effective only after a suspect is identified.<sup>51</sup>

Also under international standards, victim status should be determined “regardless of the familial relationship between the perpetrator and the victim.”<sup>52</sup> The United States tends to adhere to this standard; however, some victims’ rights advocates explain that systems set up to assist victims can break down when the victim and offender have family relationships. Victims’ assistance programs can sometimes

disregard[] the prevalence of murders in which the deceased victim and the offender knew one another, rendering the surviving family’s allegiances less distinct than the system presumes. Nowhere is this

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exercise the privileges and rights established for victims under this article except that he or she may submit a written statement to the court for consideration at sentencing.” Michigan Compiled Laws, sec. 780.752, subsec. 2(1)(l).

<sup>49</sup> US Department of Justice, Office of Justice Programs (OJP), “Final Program Guidelines for Victims of Crime Act Victim Assistance Grant Program,” October 1, 1996, <http://www.ojp.usdoj.gov/ovc/welcovc/scad/guides/vaguide.htm> (accessed August 27, 2008).

<sup>50</sup> New Mexico Statutes Annotated, sec. 31-26-3(F) (Victim rights are provided to any victim against whom a “specified criminal offense” is committed. Victim also means a family member or a victim’s representative when the individual against whom a criminal offense was committed is a minor, is incompetent or a homicide victim. The specified criminal offenses for this purpose include: negligent arson resulting in death or bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary and involuntary manslaughter, kidnapping, criminal sexual penetration, criminal contact with a minor, armed robbery, homicide by a vehicle, great bodily injury by vehicle, abandonment or abuse of a child, stalking or aggravated stalking, aggravated assault against a household member, assault against a household member with intent to commit a violent felony, battery against a household member, or aggravated battery against a household member.) ; Louisiana Revised Statutes, sec. 46:1842(9) (“‘Victim’ means a person against whom any of the following offenses have been committed: (a) any homicide, or any felony offense defined or enumerated in R.S. 14:2(B); (b) any sexual offense; (c) the offenses of vehicular negligent injuring and first degree vehicular negligent injuring; (d) Any offense against the person as defined in the Criminal Code committed against a family or household member as defined in R.S. 46:2132(4) or dating partner as defined in R.S. 46:2151(B).”).

<sup>51</sup> See Chapter V: “US Adherence to International Standards on the Rights and Interests of Crime Victims, Provision of Restitution and Compensation.”

<sup>52</sup> Basic Principles for Victims, para. 2.

more vivid than in cases of intrafamilial murder, where the relatives of the victim and the relatives of the offender are one and the same.<sup>53</sup>

A sub-component of this definitional problem arises in the context of crime victims who are children. For example, definitions of crime victims under state and federal law have failed to adequately address the problems arising from child abuse. One victims' rights advocate explained:

The challenge in defining victims is ensuring that the persons harmed are the persons with the rights. This is relatively easy when the victim is an adult with mental capacity. But there remain challenges with minor victims. If a parent is protective and nurturing, it is one thing to have them involved in the process. But in cases of child abuse, it is not uncommon for parents to join in unity against the child victim. That definitional problem has not been tackled.<sup>54</sup>

Finally, victim status can be temporal and blurred. For example, sometimes individuals who perpetrate crimes against others were themselves once victims of crime. Spouses who are victims of domestic violence and then commit crimes against their abusers, or children who are abused by parents and then commit violent crimes against them,<sup>55</sup> are just two examples. An individual's prior victimization never justifies subsequent criminal acts, but it is important to note the complexities of victim status. Similarly, definitional problems arise when persons who are engaging in criminal acts are simultaneously victims of crime; examples include "a teenage girl who is drinking but is also a victim of sexual assault, or a prostitute who is violently sexually assaulted and beaten."<sup>56</sup>

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<sup>53</sup> Murder Victims' Families for Reconciliation, "Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty," August 2002, p. 13.

<sup>54</sup> Human Rights Watch interview with Professor Doug Beloof, October 2, 2007.

<sup>55</sup> Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, October 2005, <http://www.hrw.org/reports/2005/us1005/>, p. 85.

<sup>56</sup> Human Rights Watch interview with Professor Doug Beloof, October 2, 2007.

## Access to Prompt Redress

According to the Basic Principles for Victims, victims “are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation.”<sup>57</sup> The purpose of redress is for the state and the offender to offset some of the harm done to the victim (to make the victim as whole as possible) and to provide a “socially constructive way for the offender to be held accountable, while offering the greatest possible scope for rehabilitation.”<sup>58</sup> It includes redress provided by the offender to the victim (commonly referred to as “restitution”); but it also embraces compensation by the state, including in cases in which an alleged offender is never identified or prosecuted.

Many courts worldwide order restitution as a part of sentencing.<sup>59</sup> It means payment by an offender to the victim for out-of-pocket losses caused by the offender’s wrongful acts.<sup>60</sup> Since international standards on victims of crime embrace restorative justice principles, restitution may also include some of the activities an offender may engage in during alternative or restorative justice processes, such as admission of responsibility and apology to the victim.<sup>61</sup>

Compensation refers to payments or assistance offered by the state according to state law in addition to or in lieu of restitution paid by the offender.<sup>62</sup> Victims often need to follow specific steps required by law in order to obtain compensation, such as filing their claims within a set time frame. In cases in which an offender is not convicted or cannot pay restitution, the state can fill the gap by paying

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<sup>57</sup> Basic Principles for Victims, para. 4.

<sup>58</sup> *Handbook for Victims*, p. 47.

<sup>59</sup> UN Economic and Social Council, Commission on Crime Prevention and Criminal Justice, Report of the Secretary General on Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, E/CN.15/1996/16/Add.3, April 10, 1996, <http://www.uncjin.org/Documents/5comm/16e.htm> (accessed August 26, 2008). Paragraph 8 of the Basic Principles for Victims states, “Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents.”

<sup>60</sup> Restitution can include payment of the following types of out-of-pocket losses directly relating to the crime: medical expenses, therapy or counseling costs, prescription charges, lost wages, expenses related to participation in criminal justice proceedings, lost or damaged property, insurance deductibles, or crime scene clean-up.

<sup>61</sup> *Handbook for Victims*, p. 43.

<sup>62</sup> Basic Principles for Victims, para. 12 (when restitution “is not fully available from the offender or other sources, States should endeavor to provide financial compensation....”).

compensation to the victim.<sup>63</sup> Compensation can include access to social, health, or other public insurance systems. As with restitution, because international standards embrace restorative or alternative justice processes, compensation may involve providing state funding for public art installations, victim impact panels presented to the community, or other forms of commemoration of victims' experiences.<sup>64</sup>

The redress provisions of the Basic Principles for Victims make clear that victims are entitled to claim some form of restitution and compensation for the harm they have suffered. However, that does not necessarily mean that they are entitled to see an offender tried by a court. National authorities, such as criminal prosecutors, may decide not to prosecute a particular crime without infringing on a victim's entitlement to redress, as long as that decision is not made in a discriminatory manner.<sup>65</sup> In the United States, as well as elsewhere in the world, this reality can cause conflicts between victims and prosecutors. As one prosecutor told Human Rights Watch:

While the victim's input is very important, it may not decide the outcome of the case. The prosecutor will explain to the victim that he or she can only bring to trial a case that can be proved beyond a reasonable doubt. So sometimes, if for example a victim can't pick out someone from a line-up, a prosecutor may not be able to make a charge.<sup>66</sup>

One victims' rights advocate explained her views on the role of victims in prosecutorial decision-making:

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<sup>63</sup> See Chapter V: "US Adherence to International Standards on the Rights and Interests of Crime Victims, Provision of Restitution and Compensation."

<sup>64</sup> *Handbook for Victims*, p. 43.

<sup>65</sup> With regard to gross violations of international human rights law and serious violations of international humanitarian law, there is a more rigorous definition of an effective remedy for victims. For these types of extremely serious violations, states have "a duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible, and if found guilty, the duty to punish him or her." Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc A/RES/60/147 (Dec. 16, 2005), sec. III, para. 4.

<sup>66</sup> Human Rights Watch telephone interview with Maria Bee, chief of victim services and former assistant district attorney, San Francisco District Attorney's Office, San Francisco, California, September 14, 2007.

Our system is quite correct to keep the victims as much a part of it as possible in order to respect their feelings and their journey, but you can't make them the prosecutors. The dispassionate blindfolded woman that holds the scales of justice is supposed to be blind. You can't have a dispassionate objective system that is based on the passion and grief of victims seeking vengeance.<sup>67</sup>

However, according to international standards, in specific instances redress may embrace more than simple restitution and compensation. For certain crimes, a judicial remedy may be necessary. The Human Rights Committee, which supervises compliance with the ICCPR, to which the US is bound, has recognized that “purely disciplinary and administrative remedies” cannot be deemed to constitute effective remedies when a victim has suffered “a particularly serious violation[] of human rights, notably in the event of an alleged violation of the right to life.”<sup>68</sup> The Basic Principles for Victims also emphasize the importance of “informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice.”<sup>69</sup>

In addition, Article 2 of the ICCPR provides that the rights recognized by the treaty must be respected “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Therefore, if victims of a particular race or gender are provided access to state compensation programs but others are not, that would violate the treaty's prohibition on discrimination. In fact, if any of the standards on victims' rights and interests discussed in this report are not observed on an equal basis, Article 2 would be implicated. In addition, Article 2 provides that persons who suffer violation of their rights under the ICCPR are entitled to an “effective remedy,” and that any person:

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<sup>67</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>68</sup> *Bautista v. Colombia*, communication No. 563/1993, para. 8.2, CCPR/C/55/D/563/1993 (1995).

<sup>69</sup> Basic Principles for Victims, para. 7.

claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities ... [and] the competent authorities shall enforce such remedies when granted.<sup>70</sup>

## Access to Information

During criminal proceedings or trials, human rights standards recognize that victims may prefer to be centrally involved (to the extent that this does not prejudice the rights of the accused) or to remain as anonymous and uninvolved as possible. The Basic Principles for Victims establish that victims should have a choice about their access to information and participation, stating that victims should be:

- Informed of the role, scope, timing, and progress of proceedings and dispositions, especially in the case of serious crimes and when victims have asked for such information;
- Allowed to present their views and concerns at appropriate stages of the proceedings and without prejudice to the accused; and
- Provided with assistance throughout the legal process.<sup>71</sup>

There is consensus in international standards and domestic law on the importance of providing victims with information about developments in the criminal case. This may be because victims themselves view access to information as one of the most powerful needs they have:

You cannot imagine how important it is for most victims to know what is going on with their case. Information is more important than almost anything. Victims will say this is so even if they have worked through restorative justice with an offender who has apologized for murdering their loved one and they have forgiven them. Even in those cases, the one thing that victims seem to need is information: “Why did you do it?”

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<sup>70</sup> ICCPR, Article 2.3.

<sup>71</sup> Basic Principles for Victims, paras. 6(a)-(c). These principles are echoed in some countries’ victims’ rights legislation. For example, the Northern Ireland Human Rights Commission has worked on similar principles as a part of its involvement in the proposed Bill of Rights for Northern Ireland. Northern Ireland Human Rights Commission, “Human Rights and Victims of Violence,” July 2, 2003.



What happened? What were the details? What were her last words?”  
That’s what victims seem to need more than anything else is  
information. And that is so often what they don’t get.<sup>72</sup>

In accordance with the Basic Principles for Victims, the vast majority of jurisdictions in the United States give victims notice of court proceedings, sentencing hearings, final dispositions, and pardon or parole hearings. Fewer provide notice of arraignments, plea negotiations, schedule changes, or post-conviction proceedings or appeals.<sup>73</sup> Some advocates are concerned about the lack of information provided to victims about these latter stages in the criminal process:

We’re doing better and better in guaranteeing that victims have notice about formal stages in the trial, but we’re doing less well in providing information to victims about how the case is proceeding outside of the court. Victims should be informed about plea negotiations, and victims should have the chance to consult with the prosecutor about what the court should know before a bail decision is made. Victims often have legitimate safety concerns that should be heard during bail, plea, and sentencing hearings, but we are not doing a good job of ensuring that they are heard.<sup>74</sup>

Although most laws in the US make notice mandatory, the Basic Principles for Victims make clear that victims should not be informed of developments in a case if they do not want that information. Some victims’ rights advocates strongly believe that mandatory notice should remain the practice in the US, irrespective of what the Basic Principles for Victims state.<sup>75</sup> Other victims’ rights advocates told Human Rights Watch that they understand why victims must specifically request information and updates:

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<sup>72</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>73</sup> National Conference of State Legislatures, “Victims’ Rights Laws in the States, Table 4: Victim Notice of Rights of Events in Criminal Proceedings,” 2004, <http://www.ncsl.org/print/cj/guidetable04.pdf> (accessed August 27, 2008).

<sup>74</sup> Human Rights Watch interview with Hon. Paul Cassell, September 25, 2007.

<sup>75</sup> Human Rights Watch interview with a victims’ rights advocate who chose to remain anonymous, Portland, Oregon, June 3, 2008.

There is actually good psychological evidence for the fact that some victims are re-traumatized just by hearing about the ongoing proceeding. Everybody deals with their grief in a different way, but some people have chosen to deal with their grief and trauma simply by blotting it out and not wanting to hear about it. And for those people, there was enough thinking in the writing of these policies that policymakers said “Well, the only way to give them choice is to ask them to request whether they want notification or not.”<sup>76</sup>

Yet victims’ rights advocates emphasize that in giving victims choice over access to information, they should all be informed of their right to ask for information, and unfortunately this does not consistently happen in the United States. One advocate said:

What has happened is that people have been massively re-traumatized because they aren’t told of the need to ask for information. When they find out later that something was happening with their case and they weren’t notified, then they are told “well, you have to ask to be notified” and they say, “well, you never told us we had to ask to be notified.” There are people’s lives who are in re-traumatization because of this. I have seen very sad examples.<sup>77</sup>

As noted above, all states in the US keep victims informed of various stages in the criminal proceedings, but there is less clarity about giving victims an opportunity to “opt out” of information. However, as one prosecutors’ office in San Francisco explained, “as a practical matter, a [prosecutor] wouldn’t force that information on a victim if it wasn’t wanted.”<sup>78</sup> Another victims’ rights advocate explained to a Human Rights Watch researcher that in some states, the decision must be made early in the process, which is often the moment when victims are most acutely suffering from trauma:

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<sup>76</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>77</sup> Ibid.

<sup>78</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

Some states, for example Oregon, require victims to opt in to notification at the beginning of the process, which is often right in the middle of the victim's trauma. These states treat a failure to opt in as a waiver of all subsequent notice rights, but that's problematic because victims cannot make a knowing and voluntary waiver in the middle of trauma.<sup>79</sup>

Despite these failings, in other ways the United States has gone far beyond international standards in giving victims information about offenders. In many jurisdictions victims are informed about parole hearings and when an offender is released from prison. Many victims in the United States receive information through a computer system called "Victims' Information and Notification Everyday" (VINE). Thirty-one states and one or more large counties in an additional 12 states plus the District of Columbia use VINE to provide crime victims and the general public with information about an offender's location through a toll-free number or a website.<sup>80</sup> Through VINE:

Victims can inquire whether an offender is held in jail as well as the facility's location; users can register to be notified immediately of a change in the offender's status, such as release, transfer, or escape; when a notification is triggered, VINE automatically calls the number or numbers the victim has provided; calls continue for a designated period of time, or until the victim enters a four-digit PIN.<sup>81</sup>

Some victims' rights advocates explain that resource constraints prevent some jurisdictions from providing this kind of information to victims. In addition, problems remain even in jurisdictions that have implemented VINE. For example, victims of crimes that pre-date the institution of the computer system are not able to be

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<sup>79</sup> Human Rights Watch interview with Meg Garvin, October 2, 2007.

<sup>80</sup> At the time of writing, there were 27 states providing statewide notification through VINE: Alaska, Arkansas, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming. Appriss, Inc., VINE: The National Victim Notification Network, <http://www.appriss.com/VINE.html> (accessed August 27, 2008). An additional four states were "in the process" of making VINE available statewide. Email communication to Human Rights Watch from Rick Jones, manager, Creative Services and Public Relations, Appriss, Inc., Louisville, Kentucky, November 8, 2007.

<sup>81</sup> Appriss, Inc., "VINE Fact Sheet," <http://www.appriss.com/sitedocs/VINECutSheet.pdf> (accessed August 27, 2008).

retroactively included. Therefore, if a parole hearing comes up 20 years after the crime, but the offense occurred prior to VINE, victims may not receive information about the hearing.

## Ability to Participate

The Basic Principles for Victims require that victims should be able to present their “views and concerns” at appropriate stages of the criminal proceedings “without prejudice to the accused.”<sup>82</sup> The precise timetables and procedures under which this occurs are up to each jurisdiction. These issues are controversial because of concerns that victim participation can result in inequality of treatment and punishment among criminal offenders since “if victims are allowed to present claims or to address the court, it is asserted that only some victims would do so and that the defendants in these cases may be subjected to harsher punishment.”<sup>83</sup> Others have argued that opportunities for victim participation should occur in each and every stage in the process—charging decisions, bail, plea bargaining, trial, sentencing, appeal, parole, and probation.<sup>84</sup> Still others emphasize that victims should be notified of and participate in legislation that might retroactively change the outcomes in their cases,<sup>85</sup> although there is no such requirement under applicable international human rights laws.

In the United States, most states provide for victims’ participation during sentencing, although Delaware only allows victims to present impact statements if they have “cooperated with the court and with Investigative Services officers,” Texas only allows statements to be made after the sentence is pronounced, and Virginia only allows for a victim to testify if the prosecutor agrees.<sup>86</sup> The majority of states provide for victims’ participation at all “critical” or “crucial” states of proceedings; these states allow victims to confer with prosecutors, including during plea negotiations,

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<sup>82</sup> Basic Principles for Victims, para. 6.

<sup>83</sup> *Handbook for Victims*, p. 36.

<sup>84</sup> Human Rights Watch interviews with Hon. Paul Cassell, September 25, 2007, and Professor Doug Beloof, October 2, 2007; Douglas Beloof & Paul Cassell, “The Crime Victim’s Right to Attend the Trial: The Reascendant National Consensus,” *Lewis and Clark Law Review*, vol. 9 (2005), p. 481.

<sup>85</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>86</sup> Delaware Code Annotated, Title 11, sec. 4331(g), Texas Code of Criminal Procedure Annotated article 42.03, Virginia Code Annotated, sec. 19.2-295.3.

and they allow victims to be present at parole hearings. Far fewer states allow victims to be present at any stage at which the defendant is allowed to appear; allow victims to sit at the prosecutor's table; or allow victims to have an advocate or family member present with them.<sup>87</sup>

Even if they are not required to participate as a principal witness in criminal proceedings, there are many reasons why victims or their family members may seek to participate in criminal prosecutions. In some cases, it is simply to ensure that justice is done. In others, relatives of direct victims seek to demonstrate the love and respect they have for the individual who was injured or killed. In still other cases, victims may wish to ensure that others are not victimized by the same offender in the future. Or victims may seek to participate because they oppose the type of punishment—such as the death penalty—that the accused may face. This was the case for one family member of a person killed in the 1995 Oklahoma City bombing in the United States. In that case, the victim's family member wanted to testify about her own opposition to the death penalty at the sentencing of convicted bomber Timothy McVeigh, but she was not allowed to do so.<sup>88</sup>

In a similar case in Arizona, Duane Lynn, whose wife had been murdered, wished to testify to the jury in order to express his preference for a life sentence (as opposed to the death penalty). The state prosecutor opposed the victim's petition to the court to make such a statement. The Supreme Court of Arizona ruled in favor of the prosecution and against Mr. Lynn's desire to participate. It held that the US Constitution only allowed for statements from victims relating to the harm they have suffered, and that

statements regarding sentencing exceed those bounds and violate the Eighth Amendment, and therefore are prohibited. Victims' recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant to

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<sup>87</sup> National Conference of State Legislatures, "Victims' Rights Laws in the States, Table 5: Victim Participation," 2004, <http://www.ncsl.org/print/cj/guidetable05.pdf> (accessed August 27, 2008).

<sup>88</sup> Marsha Knight, "A Proposed Constitutional Amendment to Protect Victims of Crime," statement at hearings on S.J. Res. 6, 105<sup>th</sup> Congress (1997), pp. 70-71.

the harm caused by the defendant's criminal acts or to the defendant's blameworthiness or culpability.<sup>89</sup>

In other jurisdictions the practice is different. For example one prosecutor in California said, “Victims have a right to speak at the sentencing. That is their right.”<sup>90</sup>

Some authors have interpreted the provisions in the Basic Principles for Victims relating to participation to require states to provide legal counsel for victims, separate from the state prosecutor in the case. Italy and India appear to provide separate counsel for victims, although eligibility is based on a strict means test, which makes it “relevant for only a minority of victims in practice.”<sup>91</sup> Many other jurisdictions, including the United States, do not consider it necessary for victims to receive legal assistance other than that provided by police and prosecutorial professionals. However, some victims’ advocates in the United States commend states that have put in place an independent victims’ rights ombudsman (a public official with power to assist victims who are seeking rights protection) who is separate from the prosecutor or defense attorneys in the case. In addition, some states in the United States are experimenting with defense attorneys playing a role with victims of crime, as a means of reducing the adversarial nature (which is perceived by some as harmful) of the criminal justice system.<sup>92</sup>

## Participation through the Presentation of Evidence

While victims may have different levels of interest and capacity to participate in criminal trials, one area in which they have less autonomy is in the presentation of evidence. For many crime victims, presentation of evidence of the harm they have suffered, including any forensic evidence relating to the identity of the offender, is an important part of their participation in criminal proceedings. Of course, analysis and presentation of this evidence (for example forensic evidence relating to the identity

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<sup>89</sup> *Lynn v. Reinstein*, 68 P.3d 412, 417 (Arizona 2003).

<sup>90</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>91</sup> Jan Van Dijk, “Victims’ Rights in International Criminal Law” (referring to the experience in Italy); see also *Handbook for Victims*, p. 38 (referring to the experience in India).

<sup>92</sup> Email communication from Jennifer Bishop Jenkins to Human Rights Watch, November 3, 2007.

of a perpetrator of a rape, discussed below), can be equally important to protect the rights of the accused.

Some victims may prefer not to give testimony or other evidence, but this preference is not protected under human rights standards or US law. In fact, under international standards, the accused has a right “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him.”<sup>93</sup> The Sixth Amendment to the US Constitution similarly provides that the accused must be “confronted with the witnesses against him; [and] have compulsory process for obtaining witnesses in his favor....”

One prosecutor described the balance her office tries to strike when dealing with a victim who does not want to participate:

Typically we need the victim to testify in court ... a lot of times it's very difficult to prosecute without the victim coming forward. We hope that the victim will cooperate and come in to work with us. Prosecutors do have the option of issuing a subpoena and issuing a body attachment to make sure that they do, but that should be a last resort because it is re-traumatizing to the victim.<sup>94</sup>

While no states have granted victims a right to refuse to give evidence to the prosecution, nine states (Alabama, Alaska, Arizona, Idaho, Louisiana, Oregon, Pennsylvania, Tennessee, and Wyoming) have granted victims a right to refuse an interview with the defense. Out of sensitivity to victims' concerns over safety and privacy, “several jurisdictions [outside the United States] allow the taking of evidence with video or closed-circuit television;”<sup>95</sup> yet these forms of testimony are not generally accepted in the United States as they are perceived as prejudicing the constitutional rights of the accused to confront the witnesses against him or her.

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<sup>93</sup> ICCPR, Article 14.3(e).

<sup>94</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>95</sup> *Handbook for Victims*, p. 36.

While some victims may be reluctant to present evidence, many others see this as a very important part of their participation in criminal proceedings. With advances in forensic technology, evidence from crime scenes has become an increasingly reliable way for investigators to identify potential suspects and exclude others. In particular, DNA testing of biological evidence (for example, blood, semen, skin cells) is one of the most accurate ways to both eliminate suspects and identify perpetrators.<sup>96</sup> Unfortunately, states' failures to preserve or process evidence have frustrated law enforcement's ability to hold offenders accountable.

One issue at the heart of the problem is that state crime lab personnel have sometimes destroyed crime scene evidence before testing it. In July of 2007, the *Denver Post* conducted an investigation of evidence purges in 10 states.<sup>97</sup> The *Post* discovered that law enforcement authorities destroyed biological evidence in nearly 6,000 rape and murder cases during the past decade.<sup>98</sup> For example, in 2002, the Los Angeles police and sheriff departments threw away at least 3,000 rape kits to clear space in a crowded evidence locker.<sup>99</sup>

The destruction of untested rape kits is an illustrative and important example of how flawed evidentiary policies can thwart justice for victims of sexual violence,<sup>100</sup> and violates international standards. The destruction of such rape kit evidence in particular contravenes the "Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice," which urges in Article 3 that state police forces "develop investigative

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<sup>96</sup> Donald E. Riley, "DNA Testing: An Introduction for Non-Scientists," *Scientific Testimony: An Online Journal*, April 6, 2005, <http://www.scientific.org/tutorials/articles/riley/riley.html> (accessed August 27, 2008).

<sup>97</sup> Miles Mofeit and Susan Greene, "Trashing the Truth (Evidence Project)," *Denver Post*, July 21-24, 2007, <http://www.denverpost.com/evidence>, accessed August 18, 2008.

<sup>98</sup> Miles Mofeit and Susan Greene, "Room for Error in Evidence Vaults," *Denver Post*, July 23, 2007, [http://www.denverpost.com/evidence/ci\\_6439646](http://www.denverpost.com/evidence/ci_6439646) (accessed August 27, 2008).

<sup>99</sup> *Ibid.*

<sup>100</sup> Sexual violence is a significant problem in the United States. In 2005 there were 191,670 recorded victims age 12 and older of rape, attempted rape, or sexual assault. Shannan M. Catalano, Bureau of Justice Statistics (BJS), "Criminal Victimization, 2005," September 2006, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf> (accessed August 27, 2008). These statistics almost certainly underestimate the extent of the crimes, including rapes of male victims. Self-report victimization surveys have found that 23 percent of women were sexually abused before the age of 18. David Finkelhor, "Sexually Abused Children in a National Survey of Parents: Methodological Issues," *Child Abuse and Neglect: The International Journal*, vol. 21 (1997), pp. 1-9.



techniques that do not degrade women subjected to violence ... *while maintaining standards for the collection of the best evidence*" (emphasis added).<sup>101</sup>

In the United States there are no national, uniform regulations that mandate how police agencies preserve evidence, which leaves agencies with broad discretion. Twenty-two states have statutes that compel police agencies to preserve evidence.<sup>102</sup> However, flaws in some state preservation statutes result in the continued destruction of evidence. For example, in most states, there are no penalties for those responsible for destroying evidence, a consequence that might deter improper evidence disposal.<sup>103</sup>

## Provision of Restitution and Compensation

The Basic Principles for Victims make clear that victims of crime should receive restitution and compensation. According to the Basic Principles for Victims, restitution should include "the return of property or payment for the harm or loss suffered, [and] reimbursement of expenses incurred as a result of the victimization."<sup>104</sup> When offenders cannot provide restitution, under international standards, states should endeavor to provide compensation, especially to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes and to their families, especially dependents of persons who have died.<sup>105</sup>

In the United States, offenders are typically ordered by the court to pay restitution to their victims. Many offenders do not have the funds to pay these costs upon conviction and if they are incarcerated, it may be nearly impossible for the

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<sup>101</sup> UN General Assembly, Crime Prevention and Criminal Justice Measures to Eliminate Violence Against Women, General Assembly Resolution 52/86, annex, December 12, 1997. Although this General Assembly resolution is clearly directed at addressing the problems faced by female victims of sexual violence, it can be considered authoritative guidance to state law enforcement and medical professionals dealing with any victims of sexual violence, male or female.

<sup>102</sup> The states are: Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Texas, Virginia, Washington, and Wisconsin.

<sup>103</sup> The Innocence Project, "Fact Sheet: Preservation of Evidence," <http://www.innocenceproject.org/Content/253.php#> (accessed August 18, 2008).

<sup>104</sup> Basic Principles for Victims, paras. 8 and 12.

<sup>105</sup> *Ibid.*, para. 12(a) and (b).

garnishing of wages paid in prison (an average of \$0.56 per hour for state prisoners in 1991)<sup>106</sup> to reach the amount of the restitution ordered by the court. As one prosecutor noted, “sometimes, if the offender receives a very long sentence, victims can receive full restitution through prison wages.”<sup>107</sup> All but two states—New Hampshire and North Dakota—allow victims to enforce restitution orders through a civil judgment.<sup>108</sup>

State systems of crime victim compensation in the United States are intended to supplement or act in lieu of restitution that cannot or will not be provided directly by offenders. In most states, this is organized through state compensation funds. As of 2004, all 50 states and the District of Columbia compensated victims for medical expenses, mental health costs (except Utah), lost wages, and funerals. A majority of states compensated victims for travel expenses and for attorney fees and rehabilitation costs, while only a minority of states covered moving costs and crime scene clean-up in victims’ homes or other property. Maximum award limits ranged between \$4,000 and \$150,000, with \$26,000 as the mean limit on compensation to victims among the 50 states and the District of Columbia.<sup>109</sup>

Some victims’ rights advocates told Human Rights Watch that they find these state systems sorely lacking: “The kinds of compensation funds that exist in the states and at the national level are very minimal. They don’t even cover the cost of the funeral. Getting compensation for time off work is almost impossible.”<sup>110</sup> Another advocate raised the problem of statutes of limitations: “Most states have a statute of limitations of three years for access to the victims’ compensation fund. [Relatives of]

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<sup>106</sup> Allen Beck, et al., BJS, “Survey of State Prison Inmates, 1991,” March 1993, fig. 61, p. 27, <http://www.ojp.usdoj.gov/bjs/pub/pdf/sospig1.pdf> (accessed August 27, 2008).

<sup>107</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>108</sup> The National Conference of State Legislatures reported in 2004 that Kansas, Maryland, Nevada, New Hampshire, North Dakota, Vermont, and Wyoming did not have statutory provisions enabling victims to enforce their restitution orders as civil judgments. National Conference of State Legislatures, “Victims’ Rights Laws in the States, Table 9: Restitution,” 2004, <http://www.ncsl.org/print/cj/guidetable09.pdf> (accessed August 27, 2008). Since that time, Kansas, Maryland, Nevada, Vermont, and Wyoming all provide for such enforcement in their laws. We found no provisions allowing for this in North Dakota law, and in New Hampshire, the law affirmatively prevents it. See New Hampshire Rev. Statutes Annotated, sec. 651:63.

<sup>109</sup> National Conference of State Legislatures, “Victims’ Rights Laws in the States, Table 8: Victim Compensation,” 2004, <http://www.ncsl.org/print/cj/guidetable08.pdf> (accessed August 27, 2008).

<sup>110</sup> Human Rights Watch interview with victims’ rights advocate Jennifer Bishop Jenkins, August 28, 2007.

victims of homicide may have ongoing mental health issues that don't present themselves until five years after the crime."<sup>111</sup>

Compensation problems are particularly acute in the area of health care, especially given that many US residents who are not victims of crime struggle to cover the expense of health care. One victims' rights advocate explained, "At its worst, victims say to themselves, 'why does the homicide perpetrator sit in prison and get health care, whereas victims do not?'"<sup>112</sup> Another advocate gave the following example:

I know one family where a girl was shot in the head—she's permanently disabled. The mom was already working two jobs, but had to give up one job because her daughter can't dress herself or feed herself. She's 21 years old and she's going to be in diapers the rest of her life and have to be fed and dressed and showered and there was no compensation for ongoing nursing care. They were already on welfare, so they get some medical aid, but the mother had to quit one of her jobs, she's not getting compensation for that and they didn't even get enough help to be able to cover the initial medical care, much less the ongoing.<sup>113</sup>

In some jurisdictions in the United States, victims' services, which are most often provided through a team of victim advocates, do not commence until after a suspect is arrested or charged with the crime. A federal judge explained to Human Rights Watch, "Most crime victims' rights are triggered by the filing of a formal charging document; if that is never filed, victims are on their own."<sup>114</sup> Another victims' rights advocate said:

Victim services, I believe, should be tied to the crime, not to [arrest or prosecution of] the offender. Because if you tie any services—whether it be counseling and support, or "here's an 800 number where you can

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<sup>111</sup> Human Rights Watch interview with victims' rights advocate Renny Cushing, August 28, 2007.

<sup>112</sup> Ibid.

<sup>113</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>114</sup> Human Rights Watch interview with Hon. Paul Cassell, September 25, 2007.

get funeral help,” or “here’s information about your legal rights,” or whatever—none of that is given to victims; victim services do not arrive into the life of the victim until there’s an offender who has been caught and is being prosecuted. And if the offender’s not caught ... you can imagine how often the offender is never caught and put on trial. In fact, in Cook County, Illinois, victim services claims that 80 percent of the time there’s no trial. That means either no offender is ever caught or there’s a plea bargain, which is very common. Victim services will quite often not be forthcoming. So the highest standard is the one that ties victims’ rights and victims’ services to the crime and not the offender.<sup>115</sup>

In contrast to the problems in Illinois identified above, in San Francisco, victims’ advocates get in touch with victims and provide compensation and assistance within 48 hours of the time the case is opened, and irrespective of whether a suspect is arrested or put on trial.<sup>116</sup>

## **Expeditious and Fair Procedures**

According to the Basic Principles for Victims, victims should be able to obtain redress through procedures that are “expeditious, fair, inexpensive and accessible.”<sup>117</sup> Expeditious criminal trials may at times be in the interests of victims (who may want a prompt resolution) as well as defendants (who, under Article 9 of the ICCPR, are entitled to “trial within a reasonable time or to release”). Nevertheless, defendants have pointed out that their rights to “have adequate time and facilities for the preparation of [their] defence” may militate against very rapid criminal procedures.<sup>118</sup>

Each victim’s experience is unique and reactions to the speed of trial differ. For example, one commentator, who is herself a victim of violent crime, writes:

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<sup>115</sup> Human Rights Watch interview with Jennifer Bishop Jenkins, August 28, 2007.

<sup>116</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>117</sup> Basic Principles for Victims, para. 5.

<sup>118</sup> ICCPR, Article 14(b).

Trauma might lead victims to want to speed up the process—to get it over with—in the hope that somehow this will make the anguish go away. Conversely, victims may want to slow down the process in order to gain some distance and relief from pressure. For some victims, notice about hearings may rekindle trauma. For others, notice may provide feelings of predictability and control that offset the feeling of helplessness many experience.<sup>119</sup>

One prosecutor explained that in her experience, she hears most from victims who are unhappy with delays in criminal trials: “The victim will come to us and say ‘I want closure, and now here’s another continuance [delay in the case]? Can’t you do something, prosecutor?’ And, often the prosecutor can’t do anything and has to explain the process to the victim.”<sup>120</sup>

In the United States, 25 states have enacted statutes recognizing a right of victims to a speedy trial.<sup>121</sup> In Europe, the Court of Human Rights has condemned some governments for their failure to prosecute cases within a reasonable time.<sup>122</sup>

Apart from the speed of trial, international standards recognize that victims should be “treated with compassion and respect for their dignity” throughout criminal proceedings.<sup>123</sup> Compassionate treatment may require assistance from mental health and other professionals. In addition, “police, justice, health, social service and other personnel should receive training to sensitize them to the needs of victims.”<sup>124</sup>

There are numerous international guidelines and codes of conduct that instruct public officials on achieving high standards of professional conduct when interacting

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<sup>119</sup> Lynne Henderson, “Revisiting Victims’ Rights,” *Utah Law Review*, vol. 2 (1999), pp. 401-02.

<sup>120</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>121</sup> These states are Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Carolina, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

<sup>122</sup> Carolyn Reese, “The Implementation of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in France,” *The Victimologist*, vol. 4, no. 1, p.1 (May 2000).

<sup>123</sup> Basic Principles for Victims, para. 4.

<sup>124</sup> *Ibid.*, para. 15.

with crime victims, including the following instruments developed by the United Nations: the Code of Conduct for Law Enforcement Officials;<sup>125</sup> the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>126</sup> and the International Code of Conduct for Public Officials.<sup>127</sup> Jurisdictions in the United States each take their own approach to these issues, with varying results. In California, prosecutorial staff members receive training on the needs of victims, and victims' services personnel work to get victims psychological assistance.<sup>128</sup>

The Basic Principles for Victims also require that governments take measures during criminal proceedings 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.<sup>129</sup>

The ICCPR similarly provides that:

The Press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the Parties so requires.<sup>130</sup>

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<sup>125</sup> UN General Assembly, Code of Conduct for Law Enforcement Officials, General Assembly Resolution 34/169, annex, December 17, 1979.

<sup>126</sup> UN General Assembly, Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 37/194, annex, December 18, 1982.

<sup>127</sup> UN General Assembly, International Code of Conduct for Public Officials, General Assembly Resolution 51/59, annex, December 12, 1996.

<sup>128</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>129</sup> Basic Principles for Victims, para. 6(d).

<sup>130</sup> ICCPR, Article 14.

Victims may have serious concerns about their safety and privacy. In accordance with international standards, criminal justice professionals should implement policies that protect victims from further harm, intimidation, or harassment. Harm, intimidation, or harassment can come from many sides, including from the accused and from individuals acting on behalf of the accused, and the dangers may be heightened when the accused is a family member of the victim.<sup>131</sup>

In the United States, most of these issues are governed by state and federal statutes. Of the 50 states and the District of Columbia, 37 protect victims' right to keep home addresses and personal information confidential, and 39 protect victims' right to protection from harm or threats of harm.<sup>132</sup> However, there are limits to the protection victims receive when safety is not an issue. A prosecutor in California told Human Rights Watch:

For example, in California the defendant is not allowed to know the victim's address or personal information. As prosecutors, we would never give out that information to a defendant, but we are required by law to give discovery to defense attorneys. The law allows minors under age 13 who are victims of sexual offenses or a violent felony to testify via closed circuit if they are likely to suffer serious emotional distress, and in sex crimes victims don't have to use their full names. But a lot of other information is a matter of public record.<sup>133</sup>

## Protection for other Rights of Victims

Victims of violent crime in the United States are disproportionately young, black, and poor. For example, in 2005, persons aged 16-24 were victims of violent crime at a rate that was 2.5 times that of persons aged 35-49. African Americans were crime victims at a rate that was 1.35 times that of whites; and persons in households earning less than \$14,999 per year were victims at a rate that was 2.1 times higher

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<sup>131</sup> *Handbook for Victims*, p. 35.

<sup>132</sup> National Conference of State Legislatures, "Victims' Rights Laws in the States, Table 6: Production and Confidentiality," 2004, <http://www.ncsl.org/print/cj/guidetable6.pdf> (accessed August 27, 2008).

<sup>133</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

than persons earning \$75,000 or more.<sup>134</sup> Therefore, victims' rights are not only important on their own terms, but are worthy of special attention since marginalized portions of American society may have more difficulty enforcing these rights, or enjoying them on an equal basis with other segments of the population.<sup>135</sup>

As a starting point, the right to equal access to the mechanisms of justice for all victims must inform criminal procedures:

The structure of the justice system should take into account the obstacles which many victims encounter in seeking such access, owing to factors such as culture, race, language, resources, education, age or citizenship.<sup>136</sup>

Non-discrimination is also an essential human right that must be part and parcel of the enjoyment and enforcement of crime victims' rights. Female victims should have the same ability to participate in the justice system as males. And there should be no distinction between victims of different races, nationalities, or linguistic abilities. Citizenship status should not play a role in a victim's ability to claim a remedy.

Beyond accessing a remedy, there are other points in the proceedings at which additional important human rights concerns must be addressed. For example, child victims of crime should be subject to criminal procedures that are tailored to their best interests and that respect their rights to be informed, heard, and treated with dignity and compassion. Child victims of crime also have rights to be protected from discrimination and hardship during the justice process, and to have their rights to privacy, safety, and reparation respected.<sup>137</sup> Despite these standards, and despite a detailed federal law on the need to provide special assistance, including the

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<sup>134</sup> Shannan M. Catalano, BJS, "Criminal Victimization, 2005," September 2006, p. 6, <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf> (accessed August 27, 2008).

<sup>135</sup> Office of the President of the United States (Reagan), "Final Report of the President's Task Force on Victims of Crime," 1982, December 1982, <http://www.ovc.gov/publications/presdntstskforcrprt/welcome.html> (accessed August 27, 2008); Douglas E. Beloof, Paul G. Cassell, and Steven J. Twist, *Victims In Criminal Procedure* (North Carolina: Carolina Academic Press, 2006), pp. 17-19.

<sup>136</sup> *Handbook for Victims*, p. 34.

<sup>137</sup> UN Economic and Social Council, Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Resolution 2005/20, annex, July 22, 2005 (each of these rights is enumerated and described in this resolution).



appointment of a guardian *ad litem* for child victims of crime,<sup>138</sup> “absolutely no money has been appropriated to actually hire and pay for the appointment of a guardian *ad litem* in federal courts for child victims.”<sup>139</sup>

In addition, studies in the United States have shown that African-American victims are often denied equal rights to participate in criminal proceedings, even in the most serious cases.<sup>140</sup> Recent moves by state and local officials to enforce federal immigration law appear to have suppressed immigrants’ willingness to come forward when they are victims of crime.<sup>141</sup> Finally, one prosecutor gives the following perspective on possible discrimination against victims of different races, citizenship status, or economic backgrounds:

By virtue of the complexity of their lives, neutral policies can have a discriminatory effect especially when it comes to language, citizenship status, and economic issues: A victim may not respond to calls from the DA’s office, because she is afraid that she will get deported. Recognizing that reality, we’ve put a lot of measures in place, like Spanish-speaking and Mandarin-speaking advocates. We have a contract with one of the cab companies, and we can have a cab come and pick someone up who can’t afford to travel to the office.... We also try to explain to victims’ employers, explaining that the victim’s presence is required. We do the same thing with creditors. But the truth is that sometimes employers don’t care and they can still make things uncomfortable for the employee at work. We have neutral

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<sup>138</sup> 18 U.S.C. sec. 3509(h).

<sup>139</sup> Human Rights Watch interview with Hon. Paul Cassell, September 25, 2007. Experts on guardians *ad litem* at the American Bar Association and professionals at victim clinics that work with guardians *ad litem* were unaware of any funds being appropriated for guardians *ad litem* under 18 U.S.C. Section 3509(h). These experts and professionals were canvassed by Meg Garvin, executive director of the National Crime Victim Law Institute, in August 2008 at the request of Human Rights Watch.

<sup>140</sup> Randall Kennedy, *Race, Crime, and the Law* (New York: Random House, 1997), pp. 12-28.

<sup>141</sup> Jasmine Kripalani, "Hispanics Unlikely to Report Crime, Police Say," *Memphis Commercial Appeal*, August 7, 2000; Doris Sue Wong, "Gaps Seen in Help for Abused Immigrants," *Boston Globe*, June 23, 1999; Human Rights Watch, "Letter to US Senate and House of Representatives regarding the 'Clear Law Enforcement for Criminal Alien Removal Act of 2003' (CLEAR) and the 'Homeland Security Enhancement Act of 2003' (HSEA)," April 21, 2004, [http://hrw.org/english/docs/2004/04/21/usdom8473\\_txt.htm](http://hrw.org/english/docs/2004/04/21/usdom8473_txt.htm).

policies on all of these issues, but there can still be a disparate impact.<sup>142</sup>

While several aspects of other human rights treaties such as the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination (CERD) are relevant to the issue of non-discrimination, the Basic Principles for Victims provide a helpful summary:

The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.<sup>143</sup>

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<sup>142</sup> Human Rights Watch interview with Maria Bee, September 14, 2007.

<sup>143</sup> Basic Principles for Victims, para. 3. Similarly, the Guidelines on the Role of Prosecutors, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.144/28/Rev. 1 at 189 (1990), provide that “prosecutors shall ... carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination.”

## VI. Recommendations

*All US states and localities, the District of Columbia, and the federal government should use the Basic Principles for Victims to inform their laws and policies protecting the rights of crime victims. In particular, all jurisdictions should:*

- Ensure that the definition of “victim” in state and federal laws embraces all victims of crime, and does not arbitrarily limit the category in any way.
- Ensure that victim status is accorded to all victims of crime and their family members, irrespective of the degree to which the victim cooperates with the prosecution’s pursuit of a particular punishment in the case.
- Commence victims’ services once a crime victim has been identified, without regard to whether an individual is arrested or tried for the crime.
- Ensure that the special needs of women and children who are victims of crime are given adequate attention in definitions of victims and in victims’ services.
- Give victims adequate notice of their right to receive information about all stages in criminal proceedings and the right to opt out of that information. Ensure that such decisions are not required to be made during periods of trauma for the victim, and that victims may change their minds at any time.
- Compensate victims for the medical and mental health care costs associated with the criminal offense that they or their family members have experienced.
- Lift statutes of limitations on compensation when victims can show new harms arising from their victimization (for example, mental health problems that may surface years after the crime).
- Maintain and enforce standards for the collection and preservation of evidence, particularly rape kit evidence.
- Use the vast array of handbooks and training materials produced by the United Nations and related agencies to inform policies toward crime victims.
- Educate law enforcement personnel and state agencies on the rights of crime victims and their role in ensuring that these rights are respected.

*The President of the United States should:*

With the consent of the US Senate, ratify the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

## **VII. Acknowledgments**

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