

The victim-centred approach in criminal prosecutions and the need for compensation: reflections on international approaches and the legislative and policy frameworks in Uganda and South Africa

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Abstract

Since the early 1960s, the rights of victims of crime have been a matter of grave concern. This is because victims of crime have been marginalised and situated on the periphery of the criminal justice process with little focus on a victim-centred processes directly addressing the rights of offenders. This article first explores international developments in the area of victim protection, discussing the approaches of international bodies and criminal tribunals, especially the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC), with the latter being perhaps the 'gold standard'. A review of the different approaches adopted by Uganda and South Africa follows. This includes reference to pertinent legislation and policy frameworks in both countries. The main distinguishing aspect is that South Africa's approach is based on an extensive policy framework, while Uganda's focus is rather on a legislative framework. It is important that Uganda, South Africa, and other African countries begin to work towards progressively realising victim-protection standards similar to those of the ICC. The state should take responsibility for the plight of victims of crime, and the entrenchment of rights of victims in both the Ugandan and South African Constitutions would be an important advance. The need for meaningful measures such as compensation and proper structures (for example, a fund for victims) to implement these measures is also stressed.

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INTRODUCTION

Human rights are increasingly making inroads into all branches of law, including criminal and procedural law. As early as the 1960s, questions were raised about the rights and place of victims of crime in the criminal justice system. These concerns arose because the criminal justice system failed to prioritise victim-centred processes, and rather focused on offenders and their rights. Victims continued to suffer physical, emotional, and economic harm, caused both by the crime and the grinding processes of the criminal justice system. These concerns gave birth to the science of ‘victimology’, which deals with the physical, emotional, and financial harm which people suffer as a result of illegal acts.¹ Victimology also studies the public’s political, social, and economic reactions to the plight of victims.² At the international level, these concerns have culminated in the 1985 adoption of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power by the United Nations General Assembly.³

In many African countries, the response to the needs of victims has been slow, while reforms have been piecemeal and not comprehensive. It is against this background that we review selected approaches that South Africa (particularly in the post-1994 period) and Uganda have adopted in focusing on victim-centred approaches and processes. In so doing, attention is first directed to the approaches of international criminal tribunals: the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). The latter is perhaps the ideal or ‘gold standard’. The review of policy and legislative frameworks in Uganda and South Africa is not comprehensive, and is not intended to be so. Rather, the aim of this article is to highlight trends, difficulties, and deficiencies, to discuss lessons learned, and to suggest a pragmatic way forward.

Many would argue that by African standards – and to some extent internationally – South Africa is a fledging multiparty democracy that respects the rule of law, whereas Uganda is a benevolent dictatorship with scant regard for the rule of law and criminal justice. One could therefore question the rationale of reviewing aspects of the criminal justice systems in two countries with so divergent democratic and judicial systems. The answer is that it is precisely because of this divergence that a comparative review is useful. Moreover, in many respects, both countries are transitional

¹ Karmen *Crime victims: An introduction to victimology* (2010).

² *Ibid.*

³ UN Doc GA Res 40/34 (1985).

societies. Such societies usually have a history of autocratic dictatorship and periods of conflict or foreign domination. Apartheid, racism, and discrimination are defining features of South African pre-1994 history, while colonialism and autocratic dictatorship have characterised the history of Uganda. The countries, therefore, share a history that has implications for criminal justice – an aspect that makes general comparisons and a review useful.

INTERNATIONAL APPROACHES

In early common-law jurisdictions, victims of crime who sought to bring their perpetrators to book would conduct their own investigations and then initiate the prosecution in which they sought relief from the perpetrator.⁴ With the passage of time, however, the state started drawing a distinction between offences against the social order, and offences between individuals.⁵ As a result, the distinction between criminal and civil wrongs was born. Under this differentiated system, victims of crime cannot seek compensation against the perpetrators unless they do so under a civil claim – with all the attendant costs and difficulties. Furthermore, in criminal prosecution, the victim is reduced to being a witness of the state, and his or her participation in the proceedings is therefore merely subsidiary.

The subject of the rights of victims has also received considerable attention in the criminal prosecution by international courts established by the United Nations. For example, express reference to victims is found in the statutes establishing these courts. Article 19(1) of the ICTR Statute requires the court to ensure that a trial is fair and expeditious, and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused, and with due regard for the protection of victims and witnesses. Article 21 builds on the above provision, to require the court to provide in its rules of procedure and evidence, for the protection of victims and witnesses. In terms of this provision, the protection measures shall include – but not be limited to – the conduct of proceedings in camera, in order to protect the victim's identity.

⁴ Victims Committee, Criminal Justice Section, American Bar Association *The Victim in the criminal justice system* (2006) available at: <http://meetings.abanet.org/webupload/commupload/CR300000/newsletterpub/victimsreport.pdf> (last accessed 29 March 2012).

⁵ *Ibid.*

In contrast to the ICTR, the Statute establishing the ICC has taken the issue of victims to new heights. The Statute makes provision for the participation of victims at various stages in the proceedings, beginning with the investigation stage. Article 15(3) allows for representation by victims before the Pre-Trial Chamber. The same applies to a ruling on admissibility made under article 19 of the Statute. Moreover, in conducting investigations, the prosecutor is required to respect the interests and personal circumstances of victims and witnesses.⁶ Similarly, the Trial Chamber is required to ensure that the trial is conducted with full respect for the rights of the accused, and with due regard for the protection of victims and witnesses.⁷ The court is also required to take appropriate measures to protect the safety, physical, and psychological well-being, dignity, and privacy of victims and witnesses. In this respect, the court is required to have regard to all relevant factors, including age, gender, health, and the nature of the crime – in particular, but not limited to, where the crime involves sexual or gender-based violence, or violence against children.⁸

Article 68(3) of the ICC Statute provides that where the personal interests of the victims are affected, the court shall permit their views and concerns to be presented and considered at stages in the proceedings determined to be appropriate by the court, and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Statute also makes provision for the establishment of a Victims and Witnesses Unit within the Registry. The Unit, which is required to include staff with expertise in trauma violence, is required to provide protective measures and security arrangements, counselling, and other appropriate assistance for witnesses and victims who appear before the court.⁹ Article 75 is highly significant and warrants specific mention. Compensation is one of the reparations mentioned in the article, and this is selected for discussion later in this article. Article 75 provides that

[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

⁶ Article 54(1)(b).

⁷ Article 64(3).

⁸ Article 68(1).

⁹ See art 43(6).

In summary, international courts are required to conduct proceedings in a way which will create a friendly and conducive environment for the victim, whilst ensuring that he or she is protected – especially where he or she appears as a witness in the proceedings. The laws establishing the courts have attempted to ensure that the negative impact of the trial on the victim is minimised, and in the case of the ICC, reparation (as referred to above) is provided for when deemed necessary.

VICTIMS AND THE JUSTICE SYSTEM IN UGANDA

In Uganda, the power to prosecute crime is constitutionally conferred on the Director of Public Prosecutions (DPP). Under the Constitution, the functions of the DPP include instituting criminal proceedings against any person or authority in any court with competent jurisdiction, other than a court martial.¹⁰ This is in addition to taking over and continuing any criminal proceedings instituted by any other person or authority.¹¹ Although the Magistrates Courts Act¹² allows private persons to institute criminal proceedings against any person before a magistrate's court,¹³ the practice has been for the DPP to take charge of all criminal prosecutions, and it has in many cases, without offering any reasons, discontinued prosecutions initially instituted by private persons.

The victim in Uganda is still treated as a witness in the criminal prosecution process. Apart from a few recent laws (see below), the law has not made comprehensive provisions guaranteeing the rights of the victim, and has not implemented provisions for the protection of the victim as a witness.

Recent research in Uganda has, for instance, documented the harrowing experiences of victims of sexual and gender-based violence (SGBV). This is characterised by transport difficulties with access to the police station, and once there faced with police personnel who lack the appropriate skills and attitude to deal with victims of SGBV. The experience at the office of the DPP is not notably different; some cases are dropped for lack of evidence, arising either from poor investigation or from the mishandling of evidence. Court proceedings, usually conducted in open court, also have a negative

¹⁰ Article 120(3)(b) of the Constitution.

¹¹ Article 120(3)(c).

¹² Laws of Uganda (1970) ch 16.

¹³ Article 42(3).

impact on the victim. In many cases, judges and magistrates are out of touch with the victim's issues.¹⁴ However (as mentioned earlier), recent laws have, in terms of criminal prosecutions, attempted to focus on victim-centred processes. Some of the recent laws taking this approach are discussed below.

The first category of victim-friendly laws makes provision for a victim to benefit from the prosecution, especially in the context of receiving restitution, compensation, or the return of property lost as a result of crime. Section 130 of the Trial on Indictment Act¹⁵ requires the court, upon conviction or on admission of an offence by any person charged with stealing, taking, obtaining, extorting, converting, disposing of, or knowingly receiving, any property – to return such property to the owner. Section 201 of the Magistrates' Courts Act has similar provisions. A second category of victim-friendly laws comprises those recently enacted laws that have incorporated some elements of a victim-centred approach in criminal prosecutions. Unfortunately, these laws do not apply the approach in a coherent or systematic way. This is because the application of this approach has not come as a result of a comprehensive and coherent process directed at an holistic overhaul of the criminal laws and procedures, as the following analysis will show.

In 2009, the Ugandan parliament adopted the Prevention of Trafficking in Persons Act¹⁶ to provide for the prohibition of trafficking in persons, the creation of offences, the prosecution and punishment of offenders, the prevention of the vice of trafficking in persons, the protection of victims of trafficking in persons, and other related matters.¹⁷ The Act defines 'a victim of trafficking' to include a person who is being or has been trafficked as per the definition of trafficking in persons provided under the Act.¹⁸ 'Trafficking in persons' is defined as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, fraud, of deception, of the abuse of power or of a position of vulnerability

¹⁴ ACORD (Agency for Co-operation and Research in Development) 'Protection and restitution for survivors of sexual and gender based violence in Uganda: The legal peculiarities, the possibilities and options' (September 2010) available at: <http://www.acordinternational.org/silo/files/uganda-protection-and-restitution-for-survivors-of-sexual-and-gender-based-violence.pdf> (last accessed 3 April 2012).

¹⁵ Laws of Uganda (2000) ch 23.

¹⁶ Act 7 of 2009.

¹⁷ See Long Title to the Act.

¹⁸ Section 2.

or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹⁹

Part III of the Trafficking in Persons Act is dedicated to the protection of victims of trafficking, and provides for non-discrimination support, protection, and assistance. Section 11 requires measures for protection, assistance, and support for victims to be applied in a non-discriminatory manner, and makes it an offence to act in a discriminatory manner towards a victim. Section 12 makes comprehensive provision for support, protection, and assistance of victims, and guarantees them a number of rights. These rights include being informed, in a language that the victim understands, of the different stages in any proceedings, and of her/his rights and duties;²⁰ being enabled to ensure that the views and concerns of the victim are presented and considered at the appropriate stages of the proceedings;²¹ the right to pursue a civil case for damages and not to pay filing fees for such civil suit;²² the right to health and social services, medical care, counselling, and psychological assistance, on a confidential basis and with full respect of the privacy of the victim and in a language he or she understands;²³ and the right to safe and appropriate accommodation and material assistance, where necessary and possible.²⁴ Victims are also entitled to information on the nature of protection, assistance, and support to which they are entitled, and the possibilities of assistance and support.²⁵ Special provision is made for the protection, assistance, and support of children in accordance with their special needs – especially with regard to accommodation, education, and care.²⁶ The Act also makes provision for reparation, restitution, and compensation for victims.²⁷

The Domestic Violence Act²⁸ takes the same approach as the Trafficking in Persons Act. The long title to this Act indicates that the Act was adopted, *inter alia*, to provide for the protection and relief of victims of domestic violence; to provide for the punishment of perpetrators of domestic violence;

¹⁹ *Ibid.*

²⁰ Section 12(2).

²¹ Section 12(3).

²² Sections 12(4) and (5).

²³ Section 12(6).

²⁴ Section 12 (7).

²⁵ Section 12(10).

²⁶ Section 12(9).

²⁷ See Sections 14–16.

²⁸ Act 3 of 2010.

to provide for the procedure and guidelines to be followed by the court in relation to the protection and compensation of victims of domestic violence; and to provide for the jurisdiction of court. A ‘victim’ in the Act is defined as a person in a domestic relationship who directly or indirectly suffers threatened or actual domestic violence.²⁹ The Act makes domestic violence an offence punishable with a fine or imprisonment for up to two years, or both imprisonment and a fine.³⁰ In addition to a fine or imprisonment, the Act empowers the court to order the offender in a case of domestic violence, to pay compensation to the victim. The Act, in the second schedule, makes comprehensive provisions to guide the court in determining the quantum of compensation due to a victim. The factors to be taken into account include the pain and suffering of the victim; the cost of medical treatment for the injuries suffered by the victim; any loss of earnings arising from the domestic violence; the amount or value of the property taken, destroyed or damaged; and the necessary and reasonable expenses incurred by or on behalf of the applicant, where he or she is compelled to separate or be separated from the perpetrator due to the domestic violence, including accommodation costs, transport costs, and meals.

The Prohibition of Female Genital Mutilation Act,³¹ although promulgated around the same time as the Trafficking in Persons Act and the Domestic Violence Act, does not go as far as those two statutes in according the victim protection and protecting their rights. The Act proscribes and makes female genital mutilation (FGM) an offence which attracts as much as ten years’ imprisonment and up to life imprisonment for the offence of aggravated FGM.³² Aggravated FGM is where death occurs, the offender is a parent, guardian or person with authority over the victim, the victim suffers disability, is infected with HIV as a result, or when the mutilation is done by a sex worker. The closest the Act comes to a victim-centred approach, is in authorising the court to order a convicted offender to pay the victim compensation that could be enforced under the civil procedure laws. The court is also empowered to issue a protection order for the benefit of any girl or women likely to undergo FGM.³³

²⁹ Section 2.

³⁰ Section 4(2).

³¹ Act 5 of 2010.

³² Sections 2 and 3.

³³ Section 14(1).

The 2007 Penal Code (Amendment) Act,³⁴ which sought to amend the Penal Code Act by imposing stiff punishments for the sexual abuse of children, makes the offence of defilement punishable with a sentence of up to life imprisonment, and creates the offence of ‘aggravated defilement’ which is punishable with death as the maximum penalty.³⁵ The Amendment Act introduces section 129B in the Penal Code Act, which mandates the court to order a person convicted of defilement to pay the victim compensation for any physical or psychological harm. The section gives the court guidance on factors to consider when setting the compensation. These include the extent of harm suffered by the victim of the offence, the degree of force used by the offender, and medical and other expenses incurred by the victim as a result of the offence.

The Prohibition and Prevention of Torture Act (2009), recently adopted by the Ugandan parliament, has also taken a victim-centered approach in its provisions. This Act seeks to bring into effect the obligations of Uganda as a state party to the various human rights instruments, and particularly the United Nation’s Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. In this regard, the Act seeks to provide a comprehensive definition of torture, make torture a criminal offence, provide sanctions for the offence of torture, and regulate the use of information obtained by means of torture. It further provides for individual criminal and civil responsibility for the offence of torture. The Act, in a comprehensive manner, makes provision for issues of compensation, rehabilitation, and restitution in favour of a victim of torture. When the Act is implemented, the courts will be empowered to order restitution of the victim and his or her family or dependents – to the greatest extent possible. Such restitution may include the return of any property; payment for harm or loss suffered; payment for the provision of services and restoration of rights; or reimbursement of expenses incurred as a result of victimisation. The court can also order compensation for any economically assessable damage resulting from torture, such as physical or mental harm, including pain, suffering and emotional distress; for lost opportunities, including employment, education and social benefits; material damage and loss of earnings, including loss of potential earnings; and costs required for legal or expert assistance, medicines, medical services, and psychological and social services. This is in addition to ordering rehabilitation, including medical, psychological care, or psycho-social services to the victim in case of trauma.

³⁴ Act 8 of 2007.

³⁵ Sections 3 and 4.

A very recent development worth mentioning is the adoption of the Sentencing Guidelines for Courts of Judicature,³⁶ which are intended to guide judicial officers in determining appropriate sentences in criminal matters. The Guidelines, which were adopted in April 2013, define principles that should guide judicial officers in exercising their discretion in sentencing offenders. They set out penal theories that should guide sentencing to include reconciliation and compensation. It is also indicated that sentences must, *inter alia*, be intended to restore the rights of the victim of the offence. In this regard, detailed provisions are made on the use of restorative justice and reparation. The Draft Guidelines also create room for what they describe as a ‘victim impact statement’ – which is an oral account of the harm suffered by the victim. The statement may include financial, emotional or physical impact. What remains to be seen, however, is how soon the Draft Guidelines will be adopted and actually implemented.

THE SOUTH AFRICAN APPROACH

For various reasons, before the democratic dispensation in 1994, little attention was paid to the rights of victims in the South African criminal justice process. Like many other things, this was to change, as the post-1994 transition brought about a restructuring of the criminal justice system and a new approach to the criminal justice process. This transition was accompanied by the abolition and repeal of several laws and the introduction of new ones, together with new policies and operating procedures.

Policy framework

The first post-1994 initiative to pay attention to the plight of victims of crime in South Africa, was the development of the National Crime Prevention Strategy (NCPS). The NCPS is a policy document produced in 1995 by an interdepartmental team consisting of the Departments of Correctional Services, Defence, Justice, Safety and Security, and Welfare. It is a long-term strategy resulting from government concern about the high levels of crime in South Africa. The NCPS recognised and acknowledged the inadequate support given to victims of crime. Accordingly, one of the principles underpinning the policy framework provided by the NCPS, was that ‘the focus of prevention efforts and of the criminal justice system in particular, should be on victims, rather than on the traditional pursuit of

³⁶ Constitution (Sentencing Guidelines for Courts of Judicature) Practice Directions Legal Notice 8 of 2013.

offenders'.³⁷ The NCPS further prioritised victims by providing that, firstly, 'the onus is on government to deliver a crime prevention approach which places the rights and the needs of victims at the centre of the strategy',³⁸ and secondly, that 'it is of primary importance that the NCPS represents a victim-centred approach to the problems of crime'.³⁹

The victim-centred approach adopted by the NCPS was reflected in its intended aims, which included: enhancing its effectiveness as a deterrent to crime and as a source of relief and support to victims;⁴⁰ improving the access of disempowered groups to the criminal justice process, including women, children and victims in general;⁴¹ providing a greater and more meaningful role for victims in the criminal justice process;⁴² and dealing with the damage caused by criminal acts by providing remedial interventions for victims.⁴³

However, despite its noble and ambitious intentions, the NCPS is generally and widely regarded to have failed. According to a 2008 Institute of Security Studies report, the failure is because the NCPS did not address and/or was not linked to the underlying socio-economic causes of crime, such as unemployment, poverty, inadequate social services, and lack of education.⁴⁴ Bureaucratic incompetence and corruption were also contributory factors to the failure of the NCPS.

Another important initiative which started after 1994 and focused on victims in the criminal justice system, was the development of the Service Charter for Victims of Crime in South Africa.⁴⁵ This Charter was approved by Cabinet in 2004, but only launched in 2007. The Victims Charter was the first official policy relating to the victims of crime, and the main instrument that claimed to provide rights to the victims of crime in South Africa. The seven key rights identified in this Charter were the right to be treated with

³⁷ Simpson & Rauch 'Reflections on the National Crime Prevention Strategy' in Maharaj (ed) *Between unity and diversity: Essays on nation-building in post-apartheid South Africa* (1999) 295-314.

³⁸ Paragraph 2.3.3 of the NCPS.

³⁹ Paragraph 4.10.

⁴⁰ Paragraph 8.1.1.

⁴¹ Paragraph 8.1.5.

⁴² Paragraph 8.2.

⁴³ Paragraph 8.29.

⁴⁴ Burger & Boshoff 'The state's response to crime and public security in South Africa' (2008) available at: <http://www.afriforum.co.za/wp-content/uploads/2008/12/states-response-to-crime-etc.pdf> (last accessed 22 October 2012).

⁴⁵ Victims Charter.

fairness and with respect for dignity and privacy, offer information, receive information, protection, assistance, compensation, and restitution.

Accompanying the Victims Charter is the Minimum Standards on Services for Victims of Crime (Minimum Standards). This is an information document that claims to set minimum standards on services provided to victims of crime, and to supply detailed information to enable victims of crime to exercise their rights as contained in the Victims Charter. The Minimum Standards also provide for a process to be followed once a victim reports a crime and the responsibilities of the relevant government departments.

The Victims Charter (and accompanying Minimum Standards) has not been without problems. Central to this is the lack of clarity on its status. As the Charter lacks parliamentary approval (only having been approved by Cabinet), it has been argued that the 'rights' contained in the Charter cannot be recognised as such in terms of section 234 of the Constitution.⁴⁶ There is also the problem of implementation (or lack thereof). There is no indication in the Victims Charter (or elsewhere) of any framework for its implementation. According to Jody Kallapen, former Chairperson of the South African Human Rights Commission (SAHRC), this and other related problems have led to the perception that the Charter is merely a document that 'contains a number of vague promises of improved service delivery without really detailing how to access these or what to do if they are not provided'.⁴⁷

Another relevant and more recent policy document is the National Policy Guidelines for Victim Empowerment. Launched in 2009, the Guidelines provide a framework for the implementation of the Victim Empowerment Programme, which was launched in 1999 as a result of the National Crime Prevention Strategy discussed above. The guiding principles underpinning these Guidelines are stated as empowerment, human rights, participation, self-determination, a family-centred approach, and restorative justice. The Guidelines also emphasise an holistic and coordinated approach to victim empowerment, as well as encouraging cooperation with the criminal justice process. Although the implementation of the Victim Empowerment Programme is stated in the Guidelines to be an inter-departmental responsibility (through the Justice Crime Prevention and Security Cluster,

⁴⁶ Frank *Quality services guaranteed? A review of victim policy in South Africa* (2007).

⁴⁷ Moran *Key issues in victim empowerment* (2004).

the Criminal Justice System Development Committee, and the Social Cluster), it is an initiative of the Department of Social Development – which plays the coordinating role. It is, however, not clear how this arrangement is beneficial to the victims of crime and their place in the criminal justice system.

Legislation

It is clear from the foregoing discussion that South Africa is not short on policy provisions intended to focus on victim-centred processes in the criminal-justice system. There is also no shortage of legislative provisions – an aspect which is now discussed. Before doing so, however, it is important to note that the Constitution of the Republic of South Africa 1996, is technically silent on the rights of victims of crime. Instead, it provides – in considerable detail – for the rights of ‘arrested, detained and accused persons’.⁴⁸ Although it could be argued that rights such as human dignity and security of the person are aimed at victims, there is no direct constitutional protection for such victims in the same way that arrested, detained and accused persons are protected.

Although there is no specific legislation that provides for the rights of crime victims, there are a number of legislative provisions in various statutes that have a bearing on victims of crime, and these can be said to have the effect of attempting to put them at the centre of criminal justice processes. Interestingly, even long before 1994, the Criminal Procedure Act⁴⁹ authorised a court to order a person convicted of an offence which had caused damage or loss of property (including money) belonging to another person, to award compensation for such damage or loss to that victim.⁵⁰ All other relevant legislative provisions are post-1994. They include the Domestic Violence Act,⁵¹ which, through a range of sections, obliges the police to render assistance to victims of domestic violence at the scene of the crime or during the process of taking the complaint.⁵² The provisions include the Judicial Matters Second Amendment Act,⁵³ section 6 of which amends the Criminal Procedure Act by inserting a section that provides for the right of a victim (complainant) to make representations on matters relating to the offender being placed on parole or under correctional supervision. Also

⁴⁸ Section 35.

⁴⁹ 51 of 1977.

⁵⁰ Section 300.

⁵¹ 116 of 1998.

⁵² Sections 2, 4, 7(1) and 8.

⁵³ 55 of 2003.

relevant is the Probation Services Act,⁵⁴ which provides for probation services to include the assessment, care, treatment, support, referral for and provision of mediation, in respect of the victims of crime.⁵⁵

Another statute that has a bearing on the rights of victims of crime is the Child Justice Act.⁵⁶ Although it is generally more offender-friendly, the Act seeks to 'balance the interests of children and those of society, with due regard to the rights to victims' (Preamble to the Act). After defining restorative justice as 'an approach to justice that aims to involve the child offender, the victim, the families concerned and community members [in] ... making restitution ... and promoting reconciliation',⁵⁷ the Act goes on to state that one of its objectives is to support reconciliation by means of a restorative justice response. Chapter 8 of the Act deals with 'diversion', which is seen as a tool for effective restorative justice. One of the objectives of diversion is stated under section 51(f), as 'to encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm'. Moreover, section 52(2) requires that in considering whether a matter should be diverted, the views of the victim should be taken into account. There are also several other provisions in the Act that make reference to the rights of victims under diversion and restorative justice.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act⁵⁸ is also relevant, as it is aimed, *inter alia*, at protecting victims of sexual offences from secondary victimisation 'by establishing a co-operative response between all government departments involved in implementing an effective, responsive, and sensitive criminal-justice system relating to sexual offences'.⁵⁹ In terms of section 30, a victim may apply to court for an order to have the alleged offender tested for HIV, and for the result to be disclosed to the victim.

It has to be pointed out that the South African policy and legislative framework discussed above has been inadequate in addressing the plight of the victims of crime in the context of a victim-centred approach. In the particular context of policies, for example whereas victims of crime have

⁵⁴ 116 of 1991.

⁵⁵ Section 3.

⁵⁶ 75 of 2008.

⁵⁷ Section 1.

⁵⁸ 32 of 2007.

⁵⁹ Section 2(d).

been subjects of several policy documents, many of these documents have fallen by the wayside, or merely outline measures already available to victims. The NCPS and the Victims Charter are two cases in point.

In 2004, the South African Law Reform Commission (SALRC) came up with what would have been the closest to a national policy and legislative framework on victim-centeredness. However, nothing much has come of the Commission's recommendations.⁶⁰ In its report on the review of the law relating to sentencing, the Commission found that there was a gap between the making of policy on victims of crime and its implementation.⁶¹ One of the Commission's recommendations was the establishment of a victim's compensation scheme. The Commission also recommended the establishment of an Office for the Victims of Crime. But most importantly, the Commission recommended legislation in the form of The Victims of Crime Bill which would define the principles for the treatment of victims, establish a Victims Advisory Council, establish the Office for Victims of Crime, and establish a fund to assist victims of crime. However, the Commission's recommendations were never implemented, and the proposed legislation has also not seen the light of the day. Instead, as will be seen below, seven years later the Commission came up with the idea of a Victims Empowerment Programme and conceded that the establishment of a victims compensation fund was not viable.⁶²

COMPARATIVE LESSONS

There are several lessons that Uganda and South Africa can learn from each other, and two are addressed below: the need for a policy framework and taking guidance from international instruments. First, however, there are several things both countries ought to do to put the victims of crime at the centre of their criminal justice systems. To begin with, upholding victims' rights requires that the victims be made aware of these rights, and of how to enforce them. It is therefore imperative that all officials within the criminal justice system receive adequate proper training, not only on how to protect and uphold the rights of victims, but also on how to inform and educate victims of their rights.

⁶⁰ The South African Law Reform Commission Project 82: Sentencing (A Compensation Fund for Victims of Crime) at http://www.justice.gov.za/salrc/reports/r_prj82-2011-victim-compensation.pdf (last accessed 4 March 2014). Although the report was finalised in 2004, it was only released and approved in 2011.

⁶¹ *Ibid.*

⁶² See note 70 below.

An important lesson that Uganda can learn from South Africa is with regard to a policy framework. There are no policy provisions for realising victims' rights in Uganda. There is no Ugandan equivalent of the South African Victims Charter (and accompanying Minimum Standards for Victims of Crime) and Policy Guidelines for Victim Empowerment. The recently adopted Ugandan legislative provisions, or those in the process of promulgation, are inadequate to put victims of crime at the centre of the criminal justice system. Policies and operating procedures are also required. It is submitted that the policy framework in South Africa would be stronger and more effective if all relevant policy provisions were consolidated into one over-arching and comprehensive policy, to be implemented through inter-departmental cooperation in the criminal justice system. Such cooperation would see the Departments of Justice, Safety and Security, Social Development, and Correctional Services, working together to provide support to victims of crime, and to focus on victim-centred processes.

It is interesting and encouraging to learn that both South Africa and Uganda are taking guidance from specific international instruments in protecting the rights of victims of specific crimes. The Ugandan Prohibition and Prevention of Torture Act, recently passed by the Ugandan parliament, seeks to bring into effect the obligations of Uganda as a state party to the various human rights instruments, and particularly the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. Similarly, South Africa has recently passed the Prevention and Combating of Torture of Persons Act.⁶³ The Act is intended, *inter alia*, 'to give effect to the Republic's obligations in terms of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons'.

CONCLUSION

Numerous international justice instruments have taken note of the plight of victims of crime in relation to their position in the criminal justice system. Of these, the Statute of the ICC almost certainly has the most comprehensive victim-centred approach, and is perhaps the gold standard. Although these lofty ideals would not be practical or possible for any country to wholly adopt into its criminal justice system, it is important that countries begin to

⁶³ 13 of 2013.

work towards progressively realising standards similar to those of the ICC. Indeed, both Uganda and South Africa, as discussed in this article, can learn from the international approaches mentioned above. The approaches and processes adopted by Uganda and South Africa differ significantly. Although both are African countries, this fact is not totally unexpected. The countries have notably different colonial histories, and different political, cultural, economic and socio-economic realities. Clearly one size does not fit all, and as countries struggle with the issues debated in this article, the outcomes will vary.

As mentioned above, there is no constitutional protection for the rights of victims of crime in either the Constitutions of South Africa or that of Uganda. While there is extensive protection for the rights of offenders in both constitutions (section 35 of the South African Constitution, and section 28 of the Ugandan Constitution), there is virtually no mention of the rights of victims. It is submitted that the rights of victims would be better protected if they were constitutionally enshrined in the same way as the rights of offenders. The state should also take responsibility for the plight of victims of crime for, it could be argued, both Uganda and South Africa have largely failed to control and minimise crime. Crime is also a result of prevailing socio-economic conditions such as poverty, lack of education, and unemployment – all of which are the responsibilities of the state. Moreover, by criminalising certain forms of behaviour, the state indirectly acknowledges its responsibility to protect its citizens from these acts.

It has been suggested that there should be state-funded compensation for victims, as is the case in countries such as New Zealand, the United States, and the United Kingdom.⁶⁴ A state fund for victims of crime, it has been argued, would help to realise the rights of victims within the criminal justice system.⁶⁵ Compensating victims in the criminal justice system may be more meaningful in the African context, where crime and poverty are often endemic. In South Africa, for example, the high incidence of crime, including violent crime, ensures that crime in the country is inordinately expensive to society and individuals. Furthermore, some argue that crime takes its toll on the health and lives of the poor in particular.⁶⁶ In the most

⁶⁴ Von Bonde *Redress for victims of crime in South Africa: A comparison with selected Commonwealth jurisdictions* (Doctor Legum dissertation, Nelson Mandela Metropolitan University, 2006).

⁶⁵ Democratic Alliance (2007).

⁶⁶ Louw & Shaw *Stolen opportunities: The impact of crime on South Africa's poor* (1997); SALRC (South African Law Reform Commission) 'Project 82: Sentencing: (A

extreme cases, the death of income-generating family members may have a severe impact and rapidly reduce vulnerable households to poverty.⁶⁷

The issue of compensation tracks throughout this discussion, and is especially relevant given that victims typically need to pursue compensation through civil claims. In Uganda, a series of Acts all provide for some form of compensation to the victims of crime. In South Africa, the Victims Charter and Criminal Procedure Act, are also relevant in this regard. With the issue of compensation in mind, the South African Law Reform Commission recently called (in a Report) for judicial changes, in order to allow the victims of violent crime limited financial claims against the state.⁶⁸ The Report had supposedly been kept under wraps by the justice ministry for seven years, and was released in May 2011.⁶⁹ The Commission chairperson stated, however, that the establishment of a proper victims' compensation fund was not viable, as it would cost an estimated R4,7 billion per year (based on figures dating from 1998). Instead, the Commission proposed a Victim Empowerment Programme (VEP) aimed at providing and improving services to the victims of crime.⁷⁰ This would include limited financial support for victims of crime in certain exceptional and limited circumstances, and would be informed by policy recommendations of a newly created Victims Council. The Commission recommended that the establishment of a compensation fund should not actually be abandoned, but rather developed over time as a project within the broader objective of improved services for victims of crime.⁷¹ As mentioned earlier, the SALRC Report concluded by recommending that legislation be adopted to provide for a comprehensive package when dealing with the needs of victims of crime, and should be based on the approved government policy of the NCPS. As a minimum, the creation of a permanent structure – an Office for Victims

compensation fund for victims of crime): Report' 24 (April 2004) available at: [NK"http://www.justice.gov.za/salrc/reports/r_prj82-2011-victim-compensation.pdf"](http://www.justice.gov.za/salrc/reports/r_prj82-2011-victim-compensation.pdf)http://www.justice.gov.za/salrc/reports/r_prj82-2011-victim-compensation.pdf (last accessed 22 October 2012).

⁶⁷ *Ibid.*

⁶⁸ See n 60 above.

⁶⁹ SAPA (South African Press Association) 'Call for victim's crime fund' (2011) available at: <http://www.news24.com/SouthAfrica/News/Call-for-victims-crime-fund-20110704> (last accessed 22 October 2012).

⁷⁰ SALRC 'Media statement by the South African Law Reform Commission concerning its investigation into sentencing – A compensation fund for victims of crime (Project 82)' (2011) available at: <http://www.justice.gov.za/salrc/media/2011-prj82-victim-compensation.pdf> (last accessed 22 October 2012).

⁷¹ *Ibid.*

of Crime – was suggested. This would go a long way in taking care of the needs of victims. Ideally, it would allow for the creation of branch offices to provide victims with access to victim service delivery close to their place of residence, and also of a limited fund to support the development, improvement, and provision of services to victims of crime.

It is hoped that all measures and considerations relating to compensation – especially relating to the SALRC Report just discussed – will be seriously entertained in South Africa, Uganda, and other African countries. The review in this article of some victim-centred processes and the relevant legislation, in both Uganda and South Africa, reveals that the awareness is there and some mechanisms to affect compensation are already in place. However, these mechanisms have largely been ineffective, and a more holistic approach focusing on the rights of victims needs to be considered.