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**Assessment of the development of victims' rights within the
legislative and policy framework in South Africa**

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**Assessment of the development of victims' rights within the legislative and policy
framework in South Africa**



**A research paper submitted in partial fulfilment of the requirements for the
Degree of Magister Legum in the Department of Constitutional and
Human Rights law, University of the Western Cape**

Supervisor: Dr J Gallinetti

November 2009

DECLARATION

I declare that the *Assessment of the development of victims' rights within the legislative and policy framework in South Africa* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.



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November 2009

Signed:

KEY WORDS

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ABSTRACT

An Assessment of the Development of Victims' Rights within the Legislative and Policy Framework in South Africa.

LLM Research Paper, Faculty of Law, University of the Western Cape.

This study assesses the development of victims' rights in the legislative and policy framework in South Africa. It is argued that although victims' rights are recognised more has to be done to concretise these rights.

International law is important in interpreting the Bill of Rights in the Constitution so as to broaden the scope of these rights. Key pieces of legislation recognise the rights and needs of victims and together with various policy documents introduced by government, have served to further develop victims' rights.



In order to give effect to these rights, it is argued that proper infrastructure needs to be put in place as this is still largely lacking and sadly impinges on the rights of victims. It is argued that the current legislation is inconsistent and that in order to realise victims' rights efforts need to be made to streamline the various pieces of legislation.

I conclude the research paper with the opinion that the Constitution does adequately provide for victims' rights and that legislation dealing solely with victims and their rights need not be promulgated as the Constitution, various pieces of legislation and policy documents are present but what is required is that legislation be rationalised, that there be a level of consistency to ensure that victims' rights are protected and promoted.

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INTRODUCTION

1. Context

Crime is a serious obstacle to the creation of a human rights culture in South Africa and the roots of crime are well known, these being, poverty, unemployment and a drug problem that is on the rise.¹ The notion that the Constitution is crime friendly and therefore responsible for the increase in crime is one of the myths associated with the high crime rate.² Sealey notes that the present level of crime and violence in the country leads to widespread feelings of insecurity and victimisation, which sparks the notion that the criminal justice system is a failure.³ While this may be the case, there are various instruments under international human rights law that afford rights to victims. Likewise, South African law and policy has included victims' rights in various forms through legislation and policy.



This paper will discuss certain international instruments as well as one regional instrument the African Charter on Human and Peoples Rights, which bestows rights on victims. The reason for including a discussion on these is that the Constitution of the Republic of South Africa was drafted in light of international law and the constitutional drafters relied heavily on international law.

¹ Sealey, S. (ed.). (2000). *The effect of crime and violence on the delivery of rights and the creation of a human rights culture*. Human Rights Committee of South Africa. p.1.

² Ibid.

³ Ibid.

The Constitution contains various rights that find application in respect of victims. The question is whether these rights are adequately being given effect to and how they are to be interpreted to ensure that the rights afforded to all persons are upheld and respected. South Africa does not have any legislation in place that deals specifically with victims and the rights that they are afforded. It is for this reason that the Constitution and the provisions therein are important. The ways in which these rights are interpreted and applied in order to give effect to them are of greater importance.

The Constitution provides that customary international law automatically forms part of the domestic law of the country and that the courts are under a duty to develop the common law to further the rights entrenched therein. This was one of the issues dealt with in the matter of *Carmichele v The Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC). This case also confirms that authorities such as the police services are placed under a positive duty to protect individuals from harm.

Despite no specific legislation dedicated to the rights of victims, there has been some development in the legislative framework, where certain Acts focus on victims and the remedies and services that are available to them. These Acts together with policy developments that have regard to victims needs will be discussed in chapter four.

Research question

First this paper aims to determine whether victims' rights have developed within the legislative and policy framework in South Africa and whether these developments are

adequate and enforceable or whether specific legislation needs to be promulgated. *The National Crime Prevention Strategy*, 1996, Department for Safety and Security, was devised to ensure that victims are afforded rights and that such rights are enforced.

Second the paper will assess whether the criminal justice system fails victims, by examining whether their needs are afforded adequate attention in law and policy.

Literature review

The rights afforded to victims in International Human Rights law together with their implementation will be discussed so as to determine whether South Africa complies with these standards. The instruments that will be looked at are: The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; The Universal Declaration of Human Rights; The African Charter on Human and Peoples Rights; The United Nations Convention on the Rights of the Child; International Covenant on Civil and Political Rights, and the Rome Statute, particularly the provisions pertaining to victims. Even though this statute finds application in respect of victims of gross human rights violations these provisions are important as they can be extended to victims of crime.

The mechanisms available to victims will be discussed and these are mentioned in the chapter overview. These being Acts and policy documents that not only afford victims rights, but that also recognise their needs. The 'National Crime Prevention Strategy Document' will also be discussed regarding the programmes it proposed and developed in order to provide victims with enforceable rights.

The 'Victim Empowerment Programme' is a service available to victims of crime in South Africa. This will also be discussed as it is one of the key components of the 'National Crime Prevention Strategy Document', which supports a victim-centred approach to crime.

The Victims' Charter in South Africa, which is aimed at empowering victims of crime came into effect in November 2004 and it affords victims seven rights. These rights will also be discussed with reference as to how they empower victims. This Charter is a milestone for victims as it acknowledges that victims are to be afforded rights and that these rights be enforced.

The paper will discuss the following documents namely: the ICCPR, the Rome Statute, the Sexual Offences Act, the Child Justice Act and the National Crime Prevention Strategy Document from which the Victim Empowerment Programme, the Service Charter for Victims of Crime in South Africa and the Minimum Standards of Services for Victims of Crime has stemmed. The provisions contained in the Rome Statute that are directly applicable to victims will be mentioned. The abovementioned international Covenant and treaty together with national legislation and policy documents contain provisions which bestow rights on victims and in the same breath seek to empower victims of crime.

Chapter outline

Chapter 1

This chapter introduces the issues that will be discussed in this paper. A brief overview is given of the feelings toward crime and the perceptions of the criminal justice system.

Chapter 2:

In this chapter the rights afforded to victims in International Human Rights law will be dealt with as well as their implementation, in domestic law. The instruments that will be looked at include The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights; The United Nations Convention on the Rights of the Child and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Chapter 3:

This chapter evaluates the Bill of Rights in Constitution of South Africa. The rights afforded to citizens, particularly, the rights to life and dignity; right to equality and the right to be free from all forms of violence. Case law such as *Carmichele v The Minister of Safety and Security and Another* 2001 (10) BCLR 995 [CC] will be discussed in relation to the impact that it had on victims' rights and the duty placed on the court and the state to ensure these rights. *S v Mokoena*; *S v Phaswane* 2008 (2) SACR 216 and *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (7) BCLR 637 will be discussed in light of the rights and needs of child victims and witnesses while participating in the criminal justice process. From this discussion it will become apparent whether, victims as a group must be made



provision for in the Constitution, to ensure that their rights are adequately protected, or whether their rights are in fact adequately protected by the Constitution.

Chapter 4:

This chapter will discuss the mechanisms available to victims to enforce their rights.

This chapter will assess the legislative and policy framework pertaining to victims' rights and determine whether the present status is sufficient or if there is room for further development.

The chapter will discuss the various pieces of legislation namely the: Domestic Violence Act; the Judicial Matters Second Amendment Act; the Sexual Offences Act 2007; the Child Justice Act; and the Criminal Procedure Act, particularly the section 105A dealing with plea bargaining.



The policy framework within South Africa and the way in which it developed will be assessed and emphasis will be placed on the: National Crime Prevention Strategy Document (“the NCPS”); the Victim Empowerment Programme (which stems from the National Crime Prevention Strategy); the Service Charter for Victims of Crime in South Africa (“the Victims’ Charter”); and the Minimum Standards on the Services for Victims of Crime.

The abovementioned pieces of legislation and policy documents will be discussed and it will be determined whether these documents are sufficient in protecting and promoting victims' rights within the country.

Chapter 5:

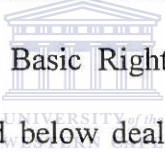
In the conclusion, the paper will be summarised and conclusions as to the findings will be stated. Recommendations as to the better protection and implementation of victims' rights and the enhancement thereof will be discussed.



CHAPTER TWO

RIGHTS AFFORDED TO VICTIMS INTERNATIONALLY

2.1 Introduction

As mentioned in the introduction victims of crime are afforded rights in international instruments. This is a great accomplishment for victims, to know that they have internationally recognised rights, however, for these rights to carry even more force national governments should actively implement these rights and where necessary, make them legally enforceable since states are obliged to do so once ratification has taken place. The rights, contained in the instruments to be discussed in this chapter, can be described as the basic rights of victims of crime (for instance the rights listed in the United Nations Declaration of the  Basic Rights of Victims of Crime and Abuse of Power). The instruments discussed below deal or pertain to specific victims, namely victims of gross human rights violations, child victims and victims in general, but the provisions and/or guidelines contained in them can be ascribed to victims of crime in general.

International human rights law played an enormous role in drafting the South African Bill of Rights (Bill of Rights) and the Constitution of the Republic of South Africa (the Constitution) makes it mandatory for our courts to consider international law when interpreting the Bill of Rights and therefore an examination of international instruments is

warranted.¹ International law includes treaty law and customary international law and encompasses both binding and non-binding international law (“soft law”).²

This chapter will discuss various international documents and one regional document that contains provisions that directly refer to victims or that can be interpreted to include victims of crime. The documents discussed below bestow rights on victims to ensure that they are treated fairly and with respect and compassion when dealing with the trauma they had experienced.³ These instruments afford victims protection throughout the criminal justice process from the moment that the crime has been reported up until its conclusion.

2.2 Universal Declaration of Human Rights (“the UDHR”)

The UDHR was adopted by the United Nations in 1948 in an attempt to give substance to the human rights and fundamental freedoms envisaged in the Charter of the United Nations.⁴

¹ Woolman, S. and Roux, T. (eds.). (2009). *Constitutional Law of South Africa (2nd ed.)*. Juta. p. 30-11.

² Woolman, S. and Roux, T., note 1, p. 30-12, in which the authors state that customary international law is the source of international law developed through state custom and practice and it is the common law of the international legal system. There are two elements to customary international law namely: use and the psychological element of acceptance of an obligation to be bound by it. In terms of the Final Constitution customary international law automatically forms part of our domestic law whereas treaties and conventions only form part of our domestic law through a separate act or adoption. The United Nations adopts resolutions that are either binding or non-binding on member states. Resolutions adopted by the Security Council are binding on states and member states undertake to carry out these resolutions while those adopted by the General Assembly are non-binding.

³ The chapter also looks at how these documents have been given effect to within the South African legal framework or whether policies have been adopted to give recognition and effect to victims’ rights which will be discussed in chapter four.

⁴ The UDHR was adopted by UN Resolution 217A(III) of 10 December 1948; see also Steiner, H.J. and Alston, P. (2008). *International Human Rights in Context – Law Politics and Morals (2nd ed.)*. Oxford University Press. p. 138 for a general discussion on the United Nations and the UDHR.

Article 3 of this Declaration provides that everyone has the right to life, liberty and security of person.⁵ It further provides that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted to persons by the Constitution or by law.⁶ This too can be interpreted to apply to individual victims of crime, as individuals too, should have their rights enforced by exercising their right to an effective remedy by competent national tribunals when their rights are violated.

2.3 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (“the ICCPR”) is a United Nations treaty based on the Universal Declaration of Human Rights. The ICCPR was created in 1966 and entered into force on 23 March 1976.⁷



As the UDHR, as discussed above, was not expected to impose binding obligations, the United Nations Commission on Human Rights began drafting a pair of binding Covenants on human rights intended to impose concrete obligations on their parties.⁸ These Covenants, being the ICCPR and the International Covenant on Economic, Social and Cultural Rights.

⁵ See also Act 108 of 1996, The Constitution of the Republic of South Africa. The Bill of Rights in the Constitution contains these rights and said rights will be discussed in chapter three of this paper.

⁶ Article 8 of the Universal Declaration of Human Rights. See also the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985 as well as the United Nations Convention on the Rights of the Child which contains the same right. These documents will be discussed in this chapter.

⁷ United Nations Organisation, “International Covenant on Civil and Political Rights” 1966 <<http://www.un.org/millennium/law/iv-4.htm>> [accessed on 4 November 2008]. South Africa signed the ICCPR on 3 October 1994 and ratified same on 10 December 1998.

⁸ Mubangizi, J.C. (2004). *Protection of Human Rights in South Africa: A Legal and Practical Guide*. Juta. p. 13.

Article 2(3) of the ICCPR⁹ provides that State Parties are to ensure that persons, whose rights have been violated in terms of the Covenant, shall have an effective remedy and that such matter be heard before a court of law.¹⁰

The Covenant provides for the rights not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; arbitrary or unlawful interference with their privacy, family or home as well as the fundamental rights such as the rights to life and security of the person, can be regarded as the basic rights that are afforded to victims and that the ancillary rights flow from these.¹¹ States are at liberty to choose the ways in which they will implement the Covenant one must note that legislative measures are not enough, an awareness of these rights must be created to ensure that these rights can be enjoyed by all citizens.¹²



⁹ Entered into force on 23 March, 1976.

¹⁰ See United Nations Organisation, "International Covenant on Civil and Political Rights 'General Comment No. 31 [80] nature of the general obligation imposed on States Parties to the Covenant: 26/05/2004 CCPR/C/21/Rev.1/Add.13. (General Comments)" <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.2.1.Rev.1.Add](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.2.1.Rev.1.Add)> [Accessed 10 March 2009].

¹¹ South African Law Commission. (2001). *Sentencing (A Compensation Scheme for Victims of Crime in South Africa)*. SALC. p. 56. See also the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and the *United Nations Convention of the Rights of the Child* with reference to the prohibition of torture, inhuman or degrading treatment or punishment. See also Article 17 of the ICCPR. See also Nowak, M. (2005). *U.N. Covenant on Civil and Political Rights CCPR Commentary*. N.P. Engel Publisher. pp. xx –29, in which the author notes that the Covenant contains 'classical human rights.' The author notes, further, that Article 2 of the Covenant deals with the personal and territorial scope of the rights contained in the Covenant. The author notes, further that the Article places duties on States Parties being the right not to discriminate and the right to provide an effective remedy has an accessory character in that a violation of Article 2 can only occur in conjunction with the concrete exercise of one of the substantive rights contained in the Covenant. A State Party will be in violation of Article 2 when it fails to enact the necessary laws to ensure that someone is discriminated against in the exercise of these rights or when it fails to provide an effective remedy. The author notes that there is a positive duty on States Parties to ensure the horizontal application on the right in that positive measures are to be undertaken to ensure protection against private interference.

¹² Office of the High Commissioner for Human Rights, General Comment No. 3: Implementation at the national level (Art 2): 29/07/81 CCPR <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/c95ed1e8ef114cbec125](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c95ed1e8ef114cbec125)> [accessed on 10 March 2009].

Article 2(3) of the Convention is phrased in such a way that it sets out the obligations that States Parties have toward individuals who are the holders of these rights.¹³

States Parties are to give effect to the rights contained in the Covenant in accordance with domestic constitutional processes but in the same breath States Parties cannot invoke aspects of constitutional and or domestic law to justify non compliance with the Convention.¹⁴ The Covenant is not to substitute the domestic criminal or civil law of the States Parties it is meant to supplement the structures within the states parties so as to ensure that the rights afforded to the citizens are protected and enjoyed.

This article, Article 2(3), also stipulates that the States Parties must ensure that individuals have accessible and effective remedies to vindicate those rights.¹⁵ Therefore States Parties, in upholding these rights, have to ensure that the Covenant is implemented domestically so as to ensure that victims have recourse in order to enforce their rights as the Covenant was adopted so as to ensure that peoples' basic civil and political rights are recognised and upheld.

¹³ United Nations Human Rights, General Comment No. 31 [80] Nature of the general legal obligation imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13. <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.1](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.1)> [accessed on 10 March 2009], further to this each State Party has an interest, a legal one, in the performance by every other state party of its obligations. The States Parties therefore act as or play watchdog roles to ensure that each and every state party to the Covenant complies with its obligations to its citizens. Should one State Party fail to comply with its obligations in terms of the Covenant, fellow states parties can require them to comply with their obligations and this is seen as legitimate community interest.

¹⁴ United Nations Human Rights, General Comment No. 31 [80] Nature of the general legal obligation imposed on States Parties to the Covenant: 26/05/2004. CCPR/C/21/Rev.1/Add.13. <[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.1](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.1)> [accessed on 10 March 2009].

¹⁵ This Article further requires States Parties to make reparation to individuals whose rights under the Covenant have been violated, it is further noted that reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, guarantees of non-repetition and changes in relevant laws and practices, and bringing to justice the perpetrators of human rights violations to name but a few.

2.4 The United Nations Convention on the Rights of the Child

The Convention is a universally agreed set of non-negotiable standards and obligations specifically aimed at children. The Convention on the Rights of the Child is the first legally binding international instrument to incorporate the full range of human rights namely: civil, cultural, economic, political and social rights. In 1989, world leaders decided that children needed a special convention because people under 18 years old often need special care and protection that adults do not.¹⁶

2.4.1 Article 3: Best interests if the child

Paramount to this Convention is Article 3, which states that all actions concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹⁷



Judith Ennew states that Article 3(1), contained in this Convention, is notable as the phrasing, “the best interests of the child” notes that all action that is to be taken and all legal developments must be in the best interests of the child and this can also be applied to victims.¹⁸ The Convention also contains a provision that states that children should be

¹⁶ See note 13.

¹⁷ Article 3.

¹⁸ Ennew, J. “Shame and physical pain: cultural relativity, children, torture and punishment” in van Beuren, G. (ed.). (1998). *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*. Ashgate Publishing. P. 8. Ennew’s chapter in this book deals primarily with Article 37 which pertains to torture other cruel, inhuman or degrading treatment and the writer notes that the Convention at hand does not define torture and that the definition of torture that can be found in various documents issued by the United Nations are not the same. She further notes that the Convention does not mention either torture or other forms of cruel and inhuman punishment with regard to punishment for infringement of the law, although it is implicit in Article 37 which deals with deprivation of liberty. See also Detrick, S. (1999). *Commentary on the Convention on the Rights of the Child*. Nijhoff. pp. 318-322 in

protected against trafficking and sexual abuse and as such article 3 is directly applicable to victims.

2.4.2 Article 19: Abuse and neglect

Article 19(1) provides that State Parties take appropriate legislative measures to protect the child from all forms of physical or mental violence, amongst others.¹⁹ Detrick states that this Article is phrased in a way in which it places an obligation on States Parties.²⁰ The author further notes that this Article focuses on intra-familial situations of child abuse or neglect but that it also finds application with regard to any persons who are caring for the child.²¹ Article 19 not only affects parent and guardians but also the personnel of private institutions responsible for the care of children.²² States parties that have ratified the Convention are under an obligation to ensure that effect legislation and or policy so as to ensure that children's rights, in this regard are protected and upheld.²³



which the author notes that the child is to be protected against abuse and neglect and that Article 19 should be read closely with Article 4. Article 4 states that States Parties have an obligation to 'take all appropriate legislative, administrative, social and educational measures' for the implementation of the designated right, in this case, Article 19.

¹⁹ See note 13, this Article makes further provision in that, such protective measures should include effective procedures for the establishment of social programmes that would provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and identification, reporting referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement. The ICCPR also contains a provision, Article 2(3), which calls for states to implement law and policy to ensure that the rights are upheld and protected.

²⁰ Detrick, S. (1999). *Commentary on the Convention on the Rights of the Child*. Nijhoff. p. 320.

²¹ Detrick, S., note 20, p. 321.

²² Detrick, S., note 20, p. 326.

²³ See Detrick, S., note 20, p. 324, in which the author notes that the States Parties are to submit periodic reports in which they are to indicate whether they have promulgated legislation which prohibits all forms of physical and mental violence, other relevant legal safeguards that are relevant to the protection of the child as set out in Article 19, whether complaint procedures have been developed and implemented and whether remedies have been identified. Most importantly States Parties are to report on the effective procedures developed for the establishment of social programmes to provide the necessary support for the child; the existence of confidential help line, advice or counselling for child victims of abuse and any other form of prevention.

2.4.3 Article 35: Sale, trafficking and abduction

Detrick notes that in terms of Article 35 of the Convention, an obligation is assumed in order to prevent the abduction of, sale of or traffic in children.²⁴ This article imposes obligations on States Parties to prevent these acts against children and that States Parties are to do so by means of ‘all appropriate national, bilateral and multilateral measures.’²⁵ In order to effectively protect children against these acts, such acts need to be criminalised and awareness should be created so to curtail the occurrence of these acts against children.²⁶ This stresses the importance of international cooperation in order to give effect to this Article.

2.4.4 Article 39: Physical and psychological recovery and social reintegration of the child

Chinken argues that the Convention requires states to take all appropriate measures to promote physical and psychological recovery and social integration after acts of torture.²⁷

Article 39 does not explicitly refer to child victims of ‘internal disturbances and natural disasters’ this Article accords special protection to a child victims of any form of neglect, exploitation, abuse or torture, and it places an obligation on States Parties to ensure that

²⁴ Detrick, S., *Commentary on the Convention on the Rights of the Child* Nijhoff, 199 at 599, in which the author notes, further, that bilateral and multilateral measures in conjunction with national measures is required to ensure that the rights of children in this regard are enforced. The author further notes that this article is closely related to Article 39 which will be discussed in this section dealing with the Convention.

²⁵ Detrick, S., note 24, pp. 602 – 603.

²⁶ Detrick, S., note 24, pp. 602 – 603.

²⁷ Chinkin, C. “Torture of the girl child.” in van Beuren, G. (ed.). (1998). *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*. Ashgate Publishing. p. 100. See also Detrick, S., note 21, in which the author notes that Article 39 of the Convention on the Rights of the Child deals with the physical recovery and social integration of the child. The writer notes that the Article is different from other international human rights provisions in that it deals explicitly with the physical and psychological recovery and social integration of child victims, more particularly child victims as made provision for in Article 37 of the Convention. The writer argues that Article 39 provides a child with a right that his or her physical and psychological recovery and social reintegration be upheld in an environment that fosters health self respect and dignity.

proper measures are implemented to uphold this right.²⁸ Detrick states that this Article provides a child with a right to the promotion of his or her physical and psychological recovery and social reintegration in an environment conducive to the health, self-respect and dignity of the child.²⁹ Detrick notes that Article 39 is closely related to Article 19 of the Convention.³⁰

States Parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child.³¹ States have to ensure that they implement domestic legislation and / or policy which recognises that the interests of the child is paramount, thereby making provision for the proper care and services that are to be rendered to children. The Convention places emphasis on the appropriate measures that are to be implemented by States Parties to ensure the enforcement of these rights.

The relevance of the provisions of the Convention (“CRC”) relating to child victims is clearly evidenced by the fact that they suffer the effects of traumatic events in ways which are different from adults.³²

²⁸ Detrick, S., note 24, p. 668.

²⁹ Detrick, S., note 24, p. 668.

³⁰ Detrick, S., note 24, p. 670.

³¹ See note 13.

³² Ennew, J., note 18, p. 57, in which she further states that at a regional and international level, human rights appears to be based primarily on adult victims and that there is a real risk that these mechanisms will be applied to children without adapting them to the needs of children. See also Chinkin, C. “Torture of the girl child” in van Beuren, G. (ed.). (1998). *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*. Ashgate Publishing, p. 84, in which the writer notes that the prohibition against torture is located within the ICCPR and that in terms thereof States are to take the necessary steps to ensure the protection of the full right. She further argues that legislative or other prohibitions are not sufficient and that states should provide adequate refuges for women and their children.

2.5 The Rome Statute

One of the primary objectives of the United Nations is securing universal respect for human rights and fundamental freedoms of individuals throughout the world.³³ Few topics are of greater importance than the fight against impunity and the struggle for peace and justice and human rights in conflict situations in today's world.³⁴ As such, the United Nations recognised the need to create a tribunal which would have international jurisdiction in order to address such atrocities. The International Criminal Court (the ICC) is a treaty based court and it is governed by the Rome Statute.

Provision is made in the Statute for a Victims and Witnesses Unit that protects victims and witnesses and provides them with counselling services as required.³⁵ The Statute also places a duty on the prosecutor to "respect the interests and personal circumstances of victims and witnesses" throughout the investigation process.³⁶ The safety of victims at the trial phase is also made provision for.³⁷ The Statute further provides for measures that are

³³ United Nations Rome Statute of the International Criminal Court
<<http://untreaty.un.org/cod/icc/general/overview.htm>> [accessed on 4 November 2008].

³⁴ United Nations Rome Statute of the International Criminal Court, note 33.

³⁵ Article 43. See also Tolbert, D. "The Registry." in Triffterer, O. (ed.). (2008). *Commentary on the Rome Statute of the International Criminal Court*. Beck, pp. 988-999, in which the author notes that this Article provides for the Victims and Witnesses Unit to consult with the Office of the Prosecutor when exercising its duties but that the other Articles in the Statute states that the Office of the Prosecutor is tasked with ensuring the safety and security of the victim during the investigation phase. The author further notes that the Statute affords the Victims and Witnesses Unit a strong mandate in respect of the provision of assistance to victims.

³⁶ Article 54. See Bergsmo, M. and Kruger, P. "Duties and powers of the prosecutor with respect to investigations." in Triffterer, O. (ed.). (2008). *Commentary on the Rome Statute of the International Criminal Court*. Beck, p. 1081 in which the authors realise that in terms of the Statute, prosecutors are to ensure that they do not violate any of the rights that are guaranteed by the Statute. The authors further note that while it is one of the aims of the prosecutor to bring the offender to justice, the prosecutor must ensure that this is done in a manner that is sensitive to the needs of witnesses and victims, so as not to re-traumatise victims, hence the requirement of respect.

³⁷ Article 64. See Bitti, G. "Functions and powers of the trial chamber." in Triffterer, O. (ed.). (2008). *Commentary on the Rome Statute of the International Criminal Court*. Beck, p. 1081, in which the author notes that the Statute makes provision for the Chambers of Court to protect victims and witnesses or an

to be put in place for the protection of the victims and witnesses and their participation in the proceedings.³⁸ Restitution (reparations) is also to be paid to victims in the sentences of convicted persons in the form of compensation and rehabilitation.³⁹ The Statute calls for a trust fund to be established in terms of which victims are compensated.⁴⁰ The trust fund is for the benefit of the victims and their families and such trust fund is aimed at providing monetary relief to victims and their families.

Although the provisions contained in this Statute pertain to victims of gross human rights violations, these rights are of merit to victims of “ordinary” crime. Once a victim, a person experiences similar misfortunes as victims of greater crimes and as such these provisions provide the basis on which states are to address the rights and needs of victims. Once states have enacted or promulgated laws to incorporate this Statute domestically states cannot differentiate between victims and these services are to be offered to all.



accused, and in doing so, may conduct any part of the proceedings in camera or allow the presentation of evidence in camera or by electronic and other special means.

³⁸ Article 68. See Donat-Cattin, D. “Protection of Victims and Witnesses.” in Triffterer, O. (ed.). (2008). *Commentary on Rome Statute of the International Criminal Court*. Beck. p. 1276, in which the author boldly states that victims rights are not fully recognised by the law, and that their life, security and privacy are not always protected before, during and after the trial. The author remarks that the participation of victims in the ICC proceedings is a necessary mechanism to implement their right to justice before the court and that this article calls for the protection of a series of individual rights such as: safety; physical and psychological well-being; privacy; and in particular dignity of the individual victim or witness.

³⁹ Article 75. See Donat-Cattin, D. “Reparations to Victims.” in Triffterer, O. (ed.). (2008). *Commentary on the Rome Statute of the International Criminal Court*. Beck. pp. 1400 – 1404, in which the author notes that the ICC process has recognised the victim’s right to reparations and that such right be enforced. The author states that the right to reparations is ‘an essential part to the inalienable right to an effective remedy’ and that the reparation requires either the cooperation of the relevant State(s) or the voluntary collaboration of the convicted person to be realised. Further to this, that rehabilitation means any form of assistance to victims as described in the United Nations Declaration on Victims’ Rights 1985.

⁴⁰ Article 79. See Jennings, M. “Trust Fund.” in Triffterer, O. (ed.). (2008). *Commentary on the Rome Statute of the International Criminal Court*. Beck. p. 1439 in which the author notes that Article 75 is also central to the regime of assistance to victims, as it provides for the making of reparation orders by the Court against convicted persons.

These provisions mentioned and that are contained in the statute will be compared to the victims' charter that will be discussed in chapter four so as to ascertain whether the victims' charter falls short of the provisions pertaining to victims as contained in the Rome Statute.⁴¹

2.6 The African Charter on Human and People's Rights

The African system for the promotion and protection of human rights is based primarily on the African Charter on Human and People's Rights. The system was designed to function within the institutional framework of the Organisation of African Unity (OAU), which has since been replaced by the African Union (AU). It is important to note that the AU emphasises the role the Charter, as article 3(g) of the Constitutive Act of the African Union provides that the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments are objectives of the Union.⁴²



The Charter provides for the traditional civil and political rights as well as promoting the economic, social and cultural rights.⁴³

The African Charter on Human and People's Rights⁴⁴ provides for the right to security of person, the respect for life and integrity of person.⁴⁵ Kaime notes that the concept of

⁴¹ The Victims' Charter will be discussed in chapter four (paragraph 4.2.3) of this paper and the rights contained therein will be evaluated.

⁴² Mubangizi, J. C. (2004). *Protection of Human Rights in South Africa: A Legal and Practical Guide*. Juta. p.13.

⁴³ Musila, G. (2006). "The right to an effective remedy under the African Charter on Human and Peoples' Rights." *AHRLJ*. Vol. 6:449.

⁴⁴ Entered into force on 21 October, 1986.

human dignity entails that all persons are entitled to humanity, respect and dignity.⁴⁶ The right to dignity can be regarded as the right from which all other individual rights flow and as such it should be protected and promoted. For a further discussion on this see chapter 3 in which the right to dignity is discussed.

The African Commission on Human and Peoples' Rights ("the African Commission) is tasked with the duty to ensure that the Charter is implemented and enforced.⁴⁷ The African Commission is increasingly playing an important role in the implementation of human rights in Africa.⁴⁸ This Commission is a mechanism that has been established to ensure that the rights afforded to all persons in the Charter are upheld. This mechanism is a good way in which to gauge the enforcement of these civil and political rights and in so doing make recommendations as to the implementation of programmes in order to ensure that these rights are upheld. Gumedze states that the African Commission is the only enforcement mechanism within the African regional human rights system and that the Commission is empowered to consider any communication from anyone as long as there

⁴⁵ Articles 4, 5 and 6.

⁴⁶ Kaime, T. (2005). "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections." *AHRLJ*. Vol. 5:224.

⁴⁷ Amadi, S. (2002). "The African Charter on Human and Peoples' Rights: Realising its potential." *ESR Review*. Vol. 3(1): 4, in which the author notes, further, that this Commission is not only tasked with receiving and processing complaints from Member States but also complaints from individuals. As such sufficient funds are required to ensure that the Commission is able to fulfil its duties. Amadi further argues that NGOs in Africa should play a proactive role together with the Commission so as to improve its effectiveness.

⁴⁸ Gumedze, S. (2003). "Bringing communications before the African Commission on Human and Peoples' Rights." *AHRLJ*. Vol. 3:118. See also Boukongou, J. D. (2006). "The appeal of the African system for protecting human rights." *AHRLJ*. Vol. 6: 272, in which the author notes that the the African Commission reports to the Assembly of the Heads of State and Government of the African Union and that the African Commission's missions are the promotion and protection of human rights. The author further notes that the Commission can settle certain cases or propose appropriate solutions to African Governments. The author states that the responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter.

has been a violation of human rights.⁴⁹ Pedersen notes that the African Commission has in its individual communications procedure adopted an approach where no connection needs to present between the victim and the complainant in a case.⁵⁰

Mabungizi states that the African Charter lays emphasis on peoples' rights.⁵¹ The African Charter advances the cause of human rights in Africa and peoples' rights in general.⁵²

The African Charter, the African Commission and the African Court contribute progressively to the emergence and consolidation of a regional protection of human rights in Africa.⁵³ The African system (the African Charter, the African Commission and the African Court) is the forum to address human rights violations in Africa and as such it is the mechanism that should uphold and enforce human rights.



2.7 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

2.7.1 History

⁴⁹ Ibid

⁵⁰ Pedersen, M. P. (2006). "Standing and the African Commission on Human and Peoples' Rights." AHRLJ. Vol. 6: 407. The author further notes that the reason for this is that it allows for Africans with limited economic and technical means to have a chance to have their cases heard.

⁵¹ Mubangizi, J.C., note 38, p.27, in which he further states that after investigating a complaint, where it has been established that there was a violation of the Charter and that a friendly settlement cannot be reached, the Commission will prepare a report and setting out the facts, its findings and recommendations which it then submits to the Assembly Heads of State and Government. The author states that there are no provisions requiring enforcement of the Commission's recommendations and that compliance would be dependant upon the Member State.

⁵² Dersso, S. A. (2006). "The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights." AHRLJ. Vol. 6:380.

⁵³ Boukongou, J. D. (2006). "The appeal of the African system for protecting human rights." AHRLJ. Vol. 6: 298.

The UN General Assembly adopted the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. The rights contained in the Declaration are recognised but because the Declaration is non-binding states are not under an obligation to promulgate necessary legislation to enforce these rights. This Declaration is a departure point in the development of human rights and providing a universal benchmark by which progress can be assessed in meeting the needs of victims of crime.

2.7.2 Rights afforded to victims

This Declaration provides for access to justice and fair treatment to victims of crime. At an international level, the 'United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'⁵⁴ has been said to call for a greater responsiveness of judicial processes to the needs of victims, and for victims to be treated with compassion and respect for their dignity.⁵⁵ Victims are to be treated more compassionately to ensure that they do not experience secondary victimisation during court processes.

In addition the Declaration provides that victims are kept informed and that they are provided with proper assistance. This is important in ensuring that victims do not play a passive role in the legal process.

⁵⁴ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly resolution 40/34 of 29 November 1985.

⁵⁵ South African Law Commission. (2001). *A Compensation Scheme for Victims of Crime in South Africa*. SALC. p. 54.

Likewise it provides that fair restitution is to be made to victims, their families or dependents, and that such restitution should include the return of property or payment for the harm or loss suffered, the reimbursement of expenses incurred as a result of the victimisation and the provision of services and restoration rights.

The Declaration also makes provision for assistance to victims, in that they should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.⁵⁶ That, victims should also be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.⁵⁷

Although this Declaration does not evidence the existence of a full and unqualified right to restitution, it does start to move the discussion towards trying to establish international norms with regard to restitution.⁵⁸ Governments are being encouraged to establish victim compensation schemes and adequate victim empowerment programmes.⁵⁹ The language describing human rights in international instruments and the language used to describe the fundamental rights of persons in the criminal process are very similar.⁶⁰ Victims (all victims even where the types of victims are differentiated) have needs and rights and therefore these provisions aid in assisting victims once they have entered the criminal

⁵⁶ Article 14. See also the United Nations Convention on the Rights of the Child which contains a similar article, Article 39 which was discussed in paragraph 2.3 of this chapter.

⁵⁷ Article 15.

⁵⁸ South African Law Commission. (2001). *Sentencing (A Compensation Scheme for Victims of Crime in South Africa)*. SALC. p. 55.

⁵⁹ South African Law Commission., note 58, p. 55.

⁶⁰ Bassiouni, M. (1993). "Human rights in context of criminal justice: Identifying international procedural protections in national constitutions." *Duke Journal of Comparative and International Law*. Vol. 3: 250.

justice process. The rights and needs of victims vary and the type of assistance that should be rendered to them is dependant upon the specific crime.

The Declaration calls for the active participation of victims in the system and as such diminishes the marginalisation that victims experience. There is a need to eliminate, if not then to minimise the secondary victimisation that victims experience. The Declaration is notable in its attempt to recognise and realise the rights of victims taking into consideration their needs.

2.8 Conclusion

Considerable advances have been made in recognising and enforcing human rights in the international plane, such as binding international treaties and Conventions and international policy documents, which serve as a guideline in advancing human rights. These treaties, Conventions and policy documents identify various victims and places obligations on member states to uphold and enforce these rights. The rights contained in the documents discussed above, are rights that are applicable to victims of crime and these rights recognise their needs and identify services that should be made available to the victims. In the next chapter, the paper will evaluate the rights afforded to persons in South Africa and from this evaluation it will become apparent as to whether South Africa complies with the international framework pertaining to victims' rights.

CHAPTER 3

RIGHTS THAT MAY BE AFFORDED TO VICTIMS IN THE SOUTH AFRICAN CONSTITUTION

3.1 Introduction

The previous chapter dealt with South Africa's international obligations generally with regard to victims and how these obligations are to be put into practice domestically. This chapter will discuss the rights afforded to all persons in the Bill of Rights in the Constitution and the impact and relevance they have on victims and how their rights are to be protected. In particular the *Carmichele v Minister of Safety and Security and Another*¹ case will be discussed to illustrate how the rights which are afforded to victims are to be applied and how they are to be interpreted so as to further the rights found in the Bill of Rights. The interests of children (when victims and when assuming the role of witnesses) were dealt with in the case of *S v Makoena and S v Phaswane*² and it was found that their interests are paramount. In doing so the court referred to various international agreements when coming to its decision. This case will be discussed later in the chapter, more particularly the role that international law and guidelines are interpreted.

¹ 2001 (10) BCLR 995 (CC).

² 2008 2 SACR 216; *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (7) BCLR 637 (CC). Both cases will be discussed in this chapter as the matter came before the High Court in which the Judge had to decide whether certain provisions of the Criminal Procedure Act was inconsistent with section 28(2) of the Constitution. The matter was then brought before the Constitutional Court where the court had to declare the orders of invalidity, made by the High Court, were to be upheld or not.

3.2 The Constitution

The Constitution aims to work toward establishing a society that is based on democratic values.³ As will be discussed later in the chapter the advancement and enforcement of these democratic values are important in ensuring that victim's rights are given effect to domestically. The rights contained in the Bill of Rights are important as it serves as the basic rights that are afforded to victims. These being the substantive rights, namely the rights to life and dignity, equality, freedom and security of the person (particularly the right to be free from all forms of violence).

3.2.1 Protection and promotion

The Bill of Rights is the cornerstone of democracy in our country.⁴ It further provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁵ A duty is thus placed on the state to ensure that the rights of all people are protected and realised. As will be discussed, further, in this chapter it will become apparent in terms of the *Carmichele* case that such a duty rests on the state as these rights ensure that victims are to be respected and protected and that the courts are tasked with the duty to ensure that these rights are upheld. When deciding a matter the courts must always be cognisant

³ Section 7(1) Act 108 of 1996; It also aims to establish the fundamentals for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.

⁴ Section (7) Act 108 of 1996.

⁵ Section (7) Act 108 of 1996. See also Cheadle, H., Davis, D. and Haysom, N. (2002). *The South African Constitutional Law: The Bill of Rights*. p. 17, in which the authors state that section 7(1) when read with section 7(2) imposes duties on the state particularly with the use of the words "respect, protect, promote and fulfil the rights". The authors, further state that section 7(2) be read with section 237 of the Constitution, which requires, that the state perform constitutional duties and or obligations diligently and without delay. These sections reinforce the positive obligations imposed upon the state. See also *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) in which the courts found that a duty of care is placed on the prosecution and the police to ensure that all persons are protected from all forms of violence. See also Botha, C., Fumah, A. and Woolman, S. "Interpretation of the Bill of Rights." in Woolman, S. and Roux, T. (eds.). (2006). *Constitutional Law of South Africa*. Juta. Chapter 32 for a general discussion on the interpretation of the Bill of Rights in which the authors state that the said section calls for 'optimum realisation' of the rights contained in the Bill of Rights.

of the Constitutional Rights of individuals and as such when making a finding the court must ensure that these constitutional rights are upheld.

3.2.2 Section 9 - The Equality clause.

Section 9 of the Bill of Rights, the 'equality clause', enshrines the principle that everyone is equal before the law in that all are equally protected and benefited. This right is of importance to victims as they are to be afforded equal protection and benefit. It can be argued that victims should be able to enforce their rights in order to ensure that the state provides them with adequate protection once they have become a part of the system, that being, once a victim has reported a crime and has to enter the criminal justice process. In this regard, victims should be notified of the role that they will play once this process has been set in motion. This aspect will be discussed in more detail in paragraphs 4.2.2. to 4.2.4 in chapter four, when discussing the Victim Empowerment Programme, Victims' Charter and the Minimum Standards of Services for Victims of Crime, when discussing the mechanisms that are available to victims of crime.⁶

In terms of section 9 the state may not unfairly discriminate (be it direct or indirect) against anyone on one or more grounds.⁷ 'Victims of crime' is not specified as a category, but it would seem to be redundant if victims as a group should be listed as a

⁶ Section 9(1) Act 108 of 1996; the section further provides that equality includes the full and equal enjoyment of all rights and freedoms, and that to promote the achievement of equality, legislative and other measures, designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.

⁷ Section 9(3) Act 108 of 1996; these being: including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. See also Devinish, G. E. (1998). *A commentary on the South African Constitution*. Butterworths. p. 48, in which the author states that fair discrimination is permissible. The author further notes that in terms of section 9(4), the horizontal application of the equality clause requires a judicious balancing of conflicting rights and interests.

category. The reason for this is that these rights are afforded to all persons and instead of listing victims of crime as a category, we should look at rationalising legislation so as to ensure that the rights of victims are recognised equally.

In the *Carmichele* case⁸, the applicant sued the Ministers of Safety and Security and Justice for damages caused to her as a result of an attack by Mr Terblanche.⁹ The High Court and the Supreme Court of Appeal held that the applicant had not established that the respondents owed her a legal duty to protect her and she was thus unsuccessful.¹⁰ The applicant then took the matter on appeal to the Constitutional Court. The importance of this is that the victim realised that her rights were infringed and approached the latter court to ensure that her Constitutional rights as contained in the Bill of Rights were recognised and not dismissed as was the case in the court of first instance. As mentioned above, section 9 states that all persons have the right to equal protection and benefit of the law and when read together with section 7 of the Constitution was held by the Constitutional Court to create positive duties on both the state and the courts. First, the courts have a positive duty to develop the common law in order to ensure that these rights

⁸ *Carmichele v The Minister of Safety and Security and Another* 2001 1 SA 489 (SAC).

⁹ In *S v Terblanche* - Carmichele's attacker was released on his own recognisance on charges of assault and attempted rape when he attacked Carmichele. In *Carmichele v The Minister of Safety and Security and Another* 2001 1 SA 489 (SAC), the applicant sued the Ministers for damages, alleging that members of the police and the prosecutor in the Terblanche case did not exercise reasonable care when executing their duties when the perpetrator applied for bail. The prosecution failed to mention the perpetrator's previous charge that was pending.

¹⁰ Carpenter, G. (2003). "The Carmichele legacy – enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety and Security v Van Duivenboden; and Van Eeden v Minister of Safety and Security*." South African Public Law. Vol. 18(1): 253, in which the authors note that in terms of Canadian law, states or rather the police services are to undertake all measures in order to protect vulnerable groups such as women and children from violent act that are mainly perpetrated against them. See generally Leinius, B. and Midgely, J. R. (2002). "The impact of the Constitution on the law of delict: *Carmichele v Minister of Safety and Security*." SALJ. Vol. 119(1): 17, for a discussion on the role which the courts play in developing the common law so as to give effect to the rights contained in the Bill of Rights. See also Cheadle, H., Davis, D. and Haysom, N., note 5, at 15, where the authors note that the Constitution seeks to protect the individual and to promote his or her development.

are upheld and thereby ensuring that all benefit from the idea of equal protection. Second, the Court held there is a positive duty on the state to ensure that the police services and the prosecution when granting or denying bail are to ensure that the perpetrators previous convictions, if any are to be made known to the court.. Albertyn and Goldblatt note that in the *Carmichele* case, the court realised that violence against women was an ‘obstacle to their enjoyment of all of their fundamental rights and freedoms.’¹¹

The Bill of Rights places positive law obligations on the state to ensure that all citizens’ rights are upheld (and enforce it) if a violation of the right takes place The Constitutional Court noted that, in relation to dignity and freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence and that South Africa has a duty under international law to prohibit gender-based discrimination and to take reasonable measures to prevent the violation of women’s and children’s rights by perpetrators of violent crime.¹² For example, The Interim Constitution and the Police Act¹³ both of which were relevant at the time of *Carmichele’s* attack, declared the prevention of crime to be one of the functions of the police.¹⁴ Police are obligated to protect citizens from any form of harm and as such to ensure that violent and/ or dangerous persons are not released on bail or their own recognisance once they have been arrested for the same or similar offence.

¹¹ Albertyn, C. and Goldblatt, B. “Equality” in Woolman, S. and Roux, T. (eds.). (2006). *Constitutional Law of South Africa*. Juta. p. 35-57.

¹² Leinius, B. and Midgely, J. R., note 10, p. 21. See generally the Palermo Protocol and The Protocol to the African Charter on Women and Children’s rights which identifies women and children as vulnerable groups and these instruments oblige Member States to implement measures so as to protect these persons and to curtail any acts of violence committed against them.

¹³ Act 7 of 1958.

¹⁴ Loc cit at note 12.

In *S v Mokoena; S v Phaswane*¹⁵ the question arose as whether certain sections of the Criminal Procedure Act 51 of 1977 was unconstitutional. The Criminal Procedure Act requires that child victims and witnesses testify under oath, through an intermediary, without compulsory assistance of a counsellor and this is done by way of the adversarial procedure.¹⁶ Judge Bertelsmann questioned whether this section complies with section 28(2) of the Constitution which states that interests of children shall be paramount under any circumstances. The court held that it would be traumatic for a child to testify for a second or further time and contended that certain sections of the Criminal Law Amendment Act 105 of 1997 may be regarded as unconstitutional.¹⁷ Skelton notes that child victims and witnesses experiences problems when assisting in the criminal justice process.¹⁸ As child victims are not provided with adequate or the rather the necessary assistance in order to ensure their well-being and to prevent being exposed to further victimisation. The matter then went before the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others*.¹⁹ The Court did not confirm the orders of invalidity made by the High Court. The Court concluded that when properly construed the invalidated provisions are not inconsistent with the Constitution and the orders of invalidity could not be confirmed.

¹⁵ 2008 2 SACR 216.

¹⁶ Skelton, A. (ed.). (2008). *Justice for Child Victims and Witnesses of Crime*. Pretoria University Legal Press. p. 6.

¹⁷ These sections being section 52(2) and 52(3)(d) and (e).

¹⁸ Skelton, A., note 18, p. 7, in which the author notes that these problems are: lack of attention to the safety of the child witness; secondary victimization during the trial process; lack of appropriately trained personnel; delays in court proceedings; exclusion of child witness due to the competency test not being applied correctly; problems experienced with the law of evidence; no support person, present, for the child; no independent legal representation for child victims, no means to ensure the safety of the victims and their families during the court proceedings; and the lack of resources to ensure that the courts are able to make orders that are in the best interests of the child and their families.

¹⁹ 2009 (7) BCLR 637 (CC). The Court had to decide whether it was appropriate for the High Court to make declaratory and supervisory orders and consider whether to confirm the orders of invalidity in respect of all the provisions that were declared invalid by the High Court.

The Court held that section 170A(1) is designed to ensure the best interests of the child complainant is of paramount importance in criminal proceedings in which the child testifies and that when properly interpreted and applied in the light of section 28(2) of the Constitution, the subsection achieves that end.²⁰

3.2.3 The right to life and the right to dignity

The rights to life and dignity vest in all persons regardless of their actions.²¹ The right to life may also be viewed positively, as placing a duty on the state to protect the lives of its citizens.²² This provision forms the basis for the development of state duties to protect life and at the very least, it must mean that the State is under a constitutional obligation to protect its citizens from life threatening attacks.²³

The right to life is recognised in most legal and constitutional systems to the extent that it is regarded as a norm of customary international law.²⁴ The right to life attaches to everyone.²⁵

²⁰ See note 19, p. 678.

²¹ Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D. (eds.). (1994). *Rights and Constitutionalism the South African Legal Order*. Juta. p. 363. See also Devinish, G. E., note 7, p.51, where the author notes that the protection of human dignity is inherent in the protection of virtually all other rights. See also *S v Makwanyane* 1995 (6) BCLR 665, for a general discussion on the right to life in light of the death penalty.

²² Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D., note 21, p. 213, in which the authors note that when read with section 7(2) of the Final Constitution it is clear that the right to life, in addition to providing a safeguard against killing or significant diminution of quality of life, imposes positive obligations on the state. Among these obligations is the duty to protect the right to life against unlawful threats, and here the state is required to punish the unlawful deprivation or diminution of life through the effective implementation of criminal law.

²³ Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D., note 21, p. 123.

²⁴ Pieterse, M. "Life." in Woolman, S. and Roux, T. (eds.). (2006). *Constitutional Law of South Africa* Juta. p. 39-1.

²⁵ Pieterse, M., note 24, p. 39-3.

In the *Carmichele* case the Constitutional Court found that the common law of delict was in need of development in order to align itself with the constitutional entrenchment of rights to life, to dignity and to freedom and security of the person.²⁶ As all other rights flow from the individual's right to dignity, by developing the common law this right is enforced and as such places a duty on the state to ensure that all persons are free from any form of violence.

3.2.4 The right to freedom from violence, the right to be free from all forms of violence from either public or private sources Section 12(1)(c)

Section 12(1)(c) defines the right to freedom from violence, the right to be free from all forms of violence from either public or private sources as being a right which operates both vertically and horizontally.²⁷ Bishop and Woolman note that this right is modelled on Article 5 of the International Convention on Elimination of All Forms of Racial Discrimination.²⁸ Though section 12(1)(c) is not confined to racist violence it provides a useful comparison for the interpretation of the right, particularly in relation to the obligations that the right imposes on the state to prevent violence from private sources.²⁹

²⁶ Leinius, B. and Midgely, J. R., note 10, p. 21.

²⁷ Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D., note 21, p. 366. See also Van der Walt, J. (2003). "Horizontal application of fundamental rights and the threshold of the law in view of the Carmichele saga" SAJHR Vol. 19 pp. 517- 540 for a general discussion on the application of the Bill of Rights between private persons.

²⁸ Bishop, M. and Woolman, S. "Freedom and security of the person" in Woolman, S. and Roux, T. (eds.). *Constitutional Law of South Africa*. Juta. p. 40-49. CERD 1966; The Article deals with the obligations of states to prohibit and eliminate all racial discrimination and promote understanding among races by guaranteeing equality before the law. The author notes that article 5(b) refers to the right to security of the person and protection by the state against violence or bodily harm, whether inflicted by government officials or by an individual, group or institution.

²⁹ Bishop, M. and Woolman, S., note 28, p. 40-49.

On the vertical level, those affected by the state's power to use force, are certain to rely on the right to be free from violence.³⁰ On the horizontal level, the right imposes an obligation on the state to prevent violent acts by individuals against others.³¹ By placing such a duty on the state, persons are assured that they will be protected against violence to their person and that should they fall victim to crime they have a fundamental right which must be upheld and protected and the victim can therefore hold the state accountable for any harm which he or she has suffered as a result of the State's failure to take the necessary precautions to ensure the safety of the person.

The Constitutional Court confirmed the positive duty imposed on the State by section 12(1)(c) in the *Carmichele* case.³² The essence of *Carmichele's* complaint was that the attack was a direct consequence of the failure of the state to oppose bail for her attacker in a previous matter and in her case as well, and that this failure constituted a breach of her right to be free from all forms of violence.³³ *Carmichele* failed to raise the constitutional issues in both the High Court and Supreme Court of Appeal. The Constitutional Court, however, found that all courts have an obligation to develop the common law in light of the spirit, purport and objects of the Bill of Rights.³⁴ Once a victim brings his or her matter or grievance before a court of law the courts always have

³⁰ Van der Walt, J., note 27, p. 517.

³¹ Ibid

³² Bishop, M. and Woolman, S., note 28, p. 40-49.

³³ The accused was released on his own recognisance despite his prior history of violence and his pending attempted rape case. See also Van der Walt, J., note 27, pp. 517 – 540 for a general discussion on the application of the Bill of Rights between private individuals.

³⁴ Leinius, B. and Midgely, J. R., note 10, p. 17, where the authors discuss the role which the courts play in developing the common law so as to give effect to the rights contained in the Bill of Rights. See also Cheadle, H., Davis, D. and Haysom, N., note 5, p. 14, where the authors note the influence of the German Federal Constitution and that the influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution and that it is within this objective normative value system that the common law must be developed.

to ensure that the rights of said victims are taken into account and the courts also have to determine in which ways these rights have been infringed and how this should be rectified.

In the *Carmichele* case the Constitutional Court affirmed that the police service is one of the primary agencies of the state responsible for the protection of the public in general.³⁵

In addition to the above the prosecution services complement the police in their protection of the public against violent crime, and women in particular, against sexual violence.³⁶ As mentioned above *Carmichele* had approached the courts in order to hold the police accountable for failing to protect her and for failure to uphold her rights. One of the significant outcomes of *Carmichele* is now that when opposing or granting bail to an accused the police must bring any previous convictions of an accused person to the



³⁵ *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC).

³⁶ van der Walt, J., note 27, p. 524; The court held, further, that prosecutors are obliged, in their performance of duties, to protect the public interest and to take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect, and that in the context of a bail hearing they have a duty to place before the court any information relevant to the exercise of discretion with regard to the granting or refusal of bail, and, if granted, any appropriate conditions thereto. See also Cheadle, H., Davis, D. and Haysom, N., note 5, p. 17, where it is noted that the *Carmichele* case was decided under the Interim Constitution which did not contain a provision similar to that of section 7 but concluded that the police and prosecution may owe a duty of care to a woman who had been raped by a person who had a record of indecent assault and who had been let free on his own recognizance by the authorities while on a charge of attempted murder of a woman. The court relied on legislation that imposes duties on the police and prosecution and found that there could be an obligation to secure a woman's freedom from sexual violence. The way in which the court approached the duty of the state supports the conclusion that the state can be obliged to take steps to protect the dignity, security and freedom of the person in terms of section 7(2). It is in this manner that the court found that there could be a duty imposed on organs of the state and this illustrates the manner in which section 7(2) can be interpreted and applied. See also Combrinck, H. "Claims and entitlements or smoke and mirrors? Victims' rights in the Sexual Offences Act." in Artz, L. and Smythe, D. (eds.). (2008). *Should We Consent*. Juta. p. 264, where the author states that the general rights as contained in the Bill of Rights in the Constitution, such as the rights to equality, dignity, privacy and (here the author places emphasis on) the right to freedom from all forms of violence, include victims in the ambit of their protection. This analysis is drawn from the fact that offenders are afforded rights within the Constitution that being section 35(3) which makes provision for the accused's right to a fair trial, clearly stating the rights that the accused /offender enjoys.

attention of the prosecutor in order to ensure that the best interests of the community and victim as well as the best interests of justice is served.

3.3 Conclusion

The fundamental rights as discussed in this chapter are notable as they afford all persons (victims of crime) with enforceable rights and as derived from the *Carmichele* case, the state is obligated to protect all persons from any form of violence and the courts are under a Constitutional duty to develop the common law so as to further the objects of the Bill of Rights. As such the Constitution does make provision for the protection of victims of crime even if victims are not listed as a category within the Constitution.

However, the challenge now remains to test this broader international perspective and constitutional protections in regard to victims' rights against South African legislative measures that have been introduced and in addition to testing the effectiveness in enforcing these. One has to look at how these rights are given effect to and the measures that are being utilised to ensure this.

In the next chapter some of these aspects will be placed under scrutiny especially those methods aimed at supporting and empowering victims in domestic legislation and policy.

CHAPTER 4

MECHANISMS AVAILABLE TO VICTIMS

4.1 Introduction

Government has realised the needs and the rights of victims and has made a conscious effort to concretise the rights afforded under international law and the Constitution by implementing various pieces of legislation, draft legislation and policy frameworks relating to victims of crime.

This chapter will discuss the development of victims' rights in various pieces of legislation for example the Sexual Offences Act 2007; Children's Act; Child Justice Act and the Domestic Violence Act. In addition various policy documents have been adopted dealing with issues relating to victim empowerment and redress the marginalisation and secondary victimisation which victims experience. South Africa does not have a piece of legislation that deals solely with victims and their rights, but victims have been made provision for in these pieces of legislation government has developed and is still developing a policy framework with regard to victim support that is to complement legislation and the common law.¹ These initiatives will be discussed below.

¹ These policy documents being the Victims' Charter; the Victim Empowerment Programme; the Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence all of which will be briefly discussed further in the chapter.

4.2 Various pieces of legislation affording rights to victims

4.2.1 Domestic Violence Act No. 116 of 1998

This Act sets out the various acts that constitute domestic violence. It further places a positive duty on the police to provide assistance to victims of domestic violence or when taking down such a complaint.²

According to the preamble of the act, the Act is to provide the victims of domestic violence “with the maximum protection from domestic abuse that the law can provide.”³

² Frank, C. (2007). *Quality services guaranteed? A review of victim policy in South Africa*. ISS. p. 17. See also Smit, J. and Nel, F. (2002) “An evaluation of the implementation of the domestic violence act: what is happening in practice?” *Acta Criminologica*. Vol. 15(3): 45, in which the author states that the promulgation of this act serves to curb the occurrence of domestic violence. The Domestic Violence Act can be interpreted as supplementing section 12(1)(c) of the Constitution of the Republic of South Africa which deals with the freedom and security of the person and states that all persons are to be free from all forms of violence from either public and private sources. The National Crime Prevention Strategy Document recognised that domestic violence is a serious problem and that it impacted negatively on the rights and empowerment of women. See also Kruger, H. B. (2004). “Addressing domestic violence: To what extent does the law provide effective measures?” *Journal for Juridical Science*. Vol. 19(1):152, in which Kruger summarises that the Constitution and international human rights conventions places an obligation on the state to protect human rights, including the rights of victims of domestic violence. See also Artz, L. and Smythe, D. (2005). “Bridges and barriers: a five year retrospective on the Domestic Violence Act.” *Acta Juridica: Advancing womens’ rights: The first decade of democracy*. p.200, for a general discussion on the implementation of the Domestic Violence Act.

³ Naidoo, K. (1998). “‘Justice at a snail’s pace’”: *The implementation of the Domestic Violence Act (Act 116 of 1998) at the Johannesburg family court.*” *Acta Criminologica*. Vol. 19(1): 77-93, in which the author notes that the Act is gender neutral as protection is afforded to both men and women and that the definition of domestic violence has been described as more comprehensive.; See also Artz, L. (2004). “Better safe than sorry magistrates’ views on the Domestic Violence Act.” *SA Crime Quarterly* No. 7, for a general discussion on the implementation of the Domestic Violence Act.

See also Artz, L. and Smythe, D, note 2, p. 2, in which the authors note that magistrates suggested that the inclusion of positive legal duties be extended to other sectors. See also J Smit, and F Nel, note 2, at 47. The National Crime Prevention Strategy Document realised that the implementation of the Domestic Violence Act should be included as a strategy in order to reduce the occurrence of this form of violence. The Domestic Violence Act is piece of legislation that places a duty on the courts and the police services to empower and assist victims of violence. The NCPS document will be discussed in paragraph 4.2.1 below. See also Joyner, K., Theunissen, L., de Villiers, L., Suliman, S., Hardcastle, T. and Seedat, S. (2007). “Emergency care provision for, and psychological distress in, survivors of domestic violence.” *SA Family Practice* Vol. 49(3): 15C, in which the authors note that survivors of this form of abuse feel that they are or have been victimised twice, first by their abusers and second, by the health care professionals where they seek help. The authors are of the opinion that the referrals to governmental and non governmental services are inadequate as it frustrates the co-operation between health care professionals and the legal and crime prevention sectors with regard to the implementation

Section 18(4) of the Domestic Violence Act compels the South African police force to fulfil its obligations in terms of the act and that failure to do so amounts to misconduct and the South African police services must take disciplinary measures against the officials who fail to fulfil their obligations.⁴ As discussed in the previous chapter, in the *Carmichele* case, the courts held that a duty rests on the state, police and prosecutors to ensure that a person's right to be free from all forms of violence is to be upheld. Section 18(4) strives to hold those officials who fail to fulfil this duty accountable.

The implementation of the Domestic Violence Act in the courts is dependant on how well and thorough the other agents of the criminal justice system manage instances of domestic violence cases.⁵ In order to implement the provisions of this Act, police officials as well as the clerk of the Domestic Violence Court are to consult with the victim of such abuse and ensure that all facts are placed before the Magistrate in order to ensure that the desired outcome is achieved, that being that the victim is protected against further harm by his or her perpetrator.

of the domestic violence act See also Doolan, K. (2005). "*Missing pieces in the puzzle: The health sector's role in implementing the DVA.*" SA Crime Quarterly. No. 12: 9, in which Doolan argues that it would be ideal to amend the Domestic Violence Act so as to include the legal obligation of health providers to assist victims. One might argue that health professionals are already under a duty to assist victims as health professionals take an oath in which they state that they will assist all persons requiring their help and or services. See also Singh, D. (2003). "*Intimate abuse – a study of repeat and multiple victimization.*" Acta Criminologica. Vol. 16(4): 46, where the writer says that the response of the police and other criminal justice officials have been "grossly" ineffective and that the police place a low priority to calls pertaining to domestic violence; See also Smit, J. and Nel, F., note 2, p. 52, where the authors note that in practice it was found that when complainants attend to the magistrates courts in order to obtain a protection order they are offered, little or no assistance, there are often long queues and complainants do not receive any or much assistance in completing the application or are not advised of the process. In some cases the complainants are not even assisted by officials on the day that they attend to court to apply for a protection order in terms of the Domestic Violence Act. Some clerics do not offer the assistance that is provided for in the Act to the complainants.

⁴ Smit, J. and Nel, F., note 2, p. 48; See also Artz, L., note 2, p.2, in which the writer states that the police's performance with regard to cases of domestic violence has improved as since the domestic violence act has come into operation as the fear and fact of being hauled before a disciplinary committee served as an incentive in this regard.

⁵ Artz, L., note 2, p. 5, where the writer states that it is important that police and victim statements are detailed and in the file as the case against the respondent may be weakened should the said statements be missing, incomplete or illegible.

Magistrates are of the opinion that the Domestic Violence Act should provide the victim of domestic violence with temporary relief.⁶ In fact all that this Act provides as temporary relief to the victim is an interim order granted in terms of which the perpetrator is to attend to court at a specified date so as to state why the order should not be finalised. The interim order ensures that the perpetrator does not commit the same acts of abuse against the victim/complainant, should the perpetrator breach the terms of the order, he or she will be held in contempt of the court. Stricter punishment for contempt of these orders should be put in place so as to ensure that the victim/complainant is not victimised further by his or her perpetrator.

The Domestic Violence Act seeks to provide victims, in terms of this Act, with protection and on paper it is extremely promising but in reality the protection it seeks to afford is idealistic. Implementation of the provisions of the Domestic Violence Act is problematic and this is evidenced by the research undertaken in this section of the paper. As discussed earlier, the Domestic Violence Act does not criminalise acts of domestic violence, it criminalises the breach of the protection order issued by a Magistrate. It would be much more effective if the act of domestic violence is criminalised as it would provide victims with immediate relief. This system is also being abused by parties in that cross protection orders are applied for and the

⁶ Artz, L. (2004). "Tough choices: Difficulties facing magistrates in applying for protection orders" (2004) No. 8 SA Crime Quarterly 29, In terms of the Domestic Violence Act, victims of domestic violence are entitled to immediate relief and magistrates are of the opinion that where there is an existing High Court order they are entitled to intervene in cases where there is violence so that the relief can be provided to the applicant until the order can be varied by the High court. This is a bold move by the magistrates, but a necessary one in ensuring that the act is implemented. One has to question how effective the 'temporary relief' is that is to be provided to such victims. The victim thus only has further recourse to the courts should the perpetrator violate the protection order, one has to question whether the protection order is worth the paper it is written on. The Domestic Violence Act provides the victim with civil as well as a criminal remedy. See also Kruger, H. B., note 2, p.159, in which Kruger notes that the Act does not criminalise domestic violence but that it criminalises the breach of the protection order. It is only once the perpetrator has once again harmed the victim that action will be taken against him or her.

Magistrate will grant same – this is the case where the perpetrator will apply for a protection order against the complainant. Proper checks and balances will have to be implemented in order to ensure that the process is not abused and to ensure that the provision of the Domestic Violence Act are given effect to.

4.2.2 The Judicial Matters Second Amendment Act No. 55 of 2003

“This Act provides for the right of a complainant (victim) to make representation relating to an offender being placed on parole, on day parole, or under correctional supervision by the Department of Justice.”⁷ This piece of legislation allows victims to play a participatory role in the proceedings, the Child Justice Act too, provides for victim participation in proceedings and the latter Act will be discussed below.



Even though the victim is allowed to participate after the offender has been convicted, the victims need for security is taken into account and the victim is able to make representations as to how the crime affected him or her and his or her feelings regarding the offender’s pending release and what it would entail for the victim. Authorities are not bound by the representations by the victim but have to take it into account while balancing the needs of the victim, offender and society.

4.2.3 The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Act”)

This Act broadens the common law definition of rape and stipulates various sexual offences.⁸

⁷ Frank, C., note, 3.

⁸ Naylor, N. “The politics of a definition.” in Artz, L. and Smythe, D. (eds.). (2008). *Shall We Consent? Rape Law Reform in South Africa*. Juta. p. 41. The Act widens the net of sexual offences

One of the objects of the Act is to provide complainants of sexual offences with the maximum and least traumatizing protection that the law can provide.⁹ Chapter 5 of the Act makes provision for the services of post-exposure prophylaxis (PEP) and HIV testing to be rendered to victims of sexual assault and that victims are to be notified of the services that are available to them but any victim of a sexual assault has to report the assault to the police services within 72 hours of its occurrence before these services will be readily available.¹⁰ These services that are made available to victims, only become available to them once they have actually laid a complaint or charge at a police station. The Sexual Offence Act affords the victim with the right to receive PEP to prevent the possible transmission of HIV, but makes no mention of counselling (psychological). Artz and Smythe argues that this right together with the right of the victim to request that the offender undergo compulsory HIV testing, lulls

thereby extending protection to victims of sexual assault that were not protected before its enactment. The importance of this is that the government/legislature is identifying various victims, and making provision for services that are to be rendered to victims of sexual assault. The services that are to be rendered to victims of this type of assault is but one namely, the administration of post exposure prophylaxis (PEP). However, the Act has been criticised for the protection it offers victims - See L Vetten, L. (2007). "New crimes and old procedures can the Sexual Offences Bill deliver on its promises?" SA Crime Quarterly. No. 22: 23, In which Vetten argues that the heading of chapter 5, services for victims of sexual offences, is misleading as there is only one service that is available to victims of sexual assault likewise see Roerhs, S. "Half-hearted HIV-related services for victims" in Artz, L. and Smythe, D. (eds.). (2008). *Should We Consent? Rape Law Reform in South Africa*. Juta. p. 185, where it is noted that in terms of the Sexual Offences Act, the victim can request that the alleged sexual offender be tested for HIV infection however the victim of a sexual offence must lodge an application with the Magistrate for a court order that the offender be tested for HIV. Roerhs notes that the compulsory HIV testing can result in secondary victimization of the rape survivor.

⁹ See preamble of the Sexual Offences Act. See also Gallinetti, J. and Kassan, D. "Children and sexual offences." in Artz, L. and Smythe, D. (eds.). (2008). *Should We Consent? Rape Law Reform in South Africa*. Juta. pp. 146, and 174, in which the authors note that section 2 of the act recognises that victims and their families need to be protected from secondary victimization, also that their needs be recognised. The Act seeks to ensure that the victims of sexual offences are adequately protected by the law by improving the procedural aspects of the law and by expanding the substantive law to reflect the nature of sexual offences committed against women and children in society. By reflecting the nature of sexual offences, better means and policies will be developed so as to ensure that victims do not experience secondary victimization. See also Maw, A., Womersley, G. and O'Sullivan, M. "The psycho-social impact of rape and its implications for expert evidence in rape trials." in Artz, L. and Smythe, D. (eds.). (2008). *Should We Consent? Rape Law Reform in South Africa*. Juta. p. 123, where the authors note that in comparison to other victims, women who have fallen victim to sexual assault experience the most trauma after the assault.

¹⁰ See note 3, The Victims' Charter, the Minimum Standards on the Services for Victims of Crime together with the Victim Empowerment Programme, as discussed in paragraphs 4.2.2 – 4.2.4 below, should be read together with this piece of legislation, so as to supplement it and in this way provide victims of this type of assault with the necessary services.

the victim into a state of false security as it somehow the victim is to believe that this diminishes the chances and risk of contracting HIV.¹¹ Therefore victims need to take a proactive stance even though they may fear secondary victimisation in order to enjoy the provisions of this Act.

Although the aims and objectives of the Sexual Offences Act are laudable, the practicality of the remedies and services available to the victims of sexual offences are not. The remedies that are made available to victims are, in fact, not remedies that are readily available to them as PEP is only administered at designated health care facilities which would be an inconvenience to most victims. Also the compulsory HIV testing that the offender is to undergo, as provided for by the Sexual Offences Act does not provide protective mechanisms that are available to the victim to ensure his or her safety. Roerhs notes that while the provision of these services are well intended, the legislature has failed to provide victims with the maximum and least traumatising protection as envisioned by the Sexual Offences Act.¹²

4.2.4 The Probation Services Act No. 116 of 1991 and Amendment No. 35 of 2002

This Act provides that probation services must provide the assessment, care, treatment, support, referral for and provision of mediation in respect of victims of

¹¹ Artz, L. and Smythe, D. (2008). *Should We Consent? Rape Law Reform in South Africa*. Juta. p. 11. See also Roerhs, S. "Half-hearted HIV related services victims" in Artz, L. and Smythe, D.(eds.) (2008). *Should we consent? Rape Law reform in South Africa* Juta, 2008 at 175 -197 in which the author notes that victims of sexual offences will require immediate access to PEP and that this treatment must be available at all health care facilities and not just at facilities designated by the Department of Health. The author argues that this aggravates and or delays the treatment process. The author also argues that compulsory HIV testing, even though it seems to be a commendable development in giving proper recognition to the rights and needs of victims, has more drawbacks than benefits. She further notes that a victim may be endangered when requesting a compulsory HIV test as there is no requirement that the offender be incarcerated when the victim makes such an application. The author notes that while the Act aims to provide victims with the maximum protection, it falls short as the remedies available to victims are not in fact remedies.

¹² Roerhs, S., note 11, p. 197.

crime.¹³ This piece of legislation also provides for restorative justice processes that are intended to benefit victims.¹⁴ This piece of legislation empowers victims in the sense that there are services available to them and it also stipulates the service provider in respect of these services. The Victims' Charter that will be discussed in this chapter makes provision for services that are to be rendered to persons once they fall victim to crime, the Child Justice Act, too contains restorative justice processes that aim to assist victims in dealing with the trauma that they have experienced.

4.2.5 The Child Justice Act No. 75 of 2008

This Act primarily deals with children who have come in conflict with the law, it primarily focuses on offenders but it is victim-centric as well. This Act recognizes the rights and needs of victims and makes provision for restorative justice processes that are to take place and in this way it ensures that victims play an active role in the criminal justice system.



The drafting process of this piece of legislation was strongly influenced by the notion of restorative justice.¹⁵

¹³ Frank, C., note 3.

¹⁴ See note 3. See also Institute of Security Studies, Batley, M. "Outline of relevant policies", in Maepa, T. (ed.). (2005). *Beyond retribution prospects for restorative justice in South Africa*. <<http://www.iss.co.za/pubs/Monographs/No111/Chap10.htm>> [accessed on 17 November 2008], in which Batley states that this is the first piece of legislation that specifically mentions restorative justice and which defines it as "the promotion of reconciliation, restitution, and responsibility of a child, the child's parents and family members, victims and communities." Batley points out, further, that the act does not limit restorative justice to the children alone but that it focuses on reconciliation rather than on attempting to right the criminal wrongs, which is the central issue of restorative justice.

¹⁵ Ehlers, L. (2006). *Child justice comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America*. Criminal Justice Initiative of the Open Society Foundation. p. 3, in which the author notes that the United Nations Convention on the Rights of the Child, The African Charter on the Rights and Welfare of the Child, and various other international instruments dealing with juvenile justice have influenced policy making with regard to juvenile justice in this country and in the drafting of this act. See also Gallinetti, J., Redpath, J., and Sloth-Nielsen, J. (2004). "Race class and restorative justice in South Africa: Achilles heel, glass ceiling or crowning glory." *SACJ*. Vol. 17:18, in which the writers state that the Child Justice Bill 49-2002 enshrines restorative justice principles. See also Skelton, A. (2005). *The Influence of the Theory and*

Skelton sums up the Child Justice Act as ‘straddling the fear of / fear for’ children divide in that it recognizes the diminished culpability of children as well as the need for a separate system that comes into operation when they are in conflict with the law.¹⁶ Further to this Skelton notes that while the Act is offender focused it accepts that children that come into conflict with the law are often themselves victims of violence and therefore the Act is victimological in nature.¹⁷

The Act also makes provision for consultations that are to take place with victims before diversion is allowed. The Act defines diversion as diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by chapters 6 and 8 of said Act.¹⁸

Practice of Restorative Justice in South Africa with special reference to Child Justice. Pretoria University Legal Press. p. 466, in which she notes that the Portfolio Committee embraced those aspects of the Child Justice Bill 49-2002 that dealt directly with restorative justice. Skelton notes, further, that the appeal of restorative justice to both the victims’ and child justice lobby may have been a pivotal fact in holding different perspectives in balance this being regulation through offence-based decision making and the reluctance to reduce imprisonment as originally intended by the Child Justice Bill. The author recognises the significance of the references to *ubuntu* and restorative justice contained in the Child Justice Bill. See also Skelton, A. and Gallinetti, J. (2008). “A long and winding road: The Child Justice Bill, civil society and advocacy.” SA Crime Quarterly. No. 25:8, in which the authors laud the participatory approach adopted by the Committee as a good example of parliamentary participation and that the ‘rigorous’ debate of the Bill resulted in a ‘fairly balanced’ piece of legislation in that it not only looks at holding offenders accountable but also takes into account their background and circumstances as well as the needs of the victims of their crimes. See also Skelton, A. (Ed). (2008). *Justice for child victims and witnesses of crime.* Pretoria University Legal Press. p. 10, where it is noted that while the Child Justice Bill is offender-focussed, it has also been described as ‘uniquely victimological.’

¹⁶ Skelton, A. (2009). “Fear for children or fear of children? Child Justice Bill breaches the divide.” *Acta Criminologica*. Vol. 22(1): iv, in which the author points out, further, that Bill makes provision for plans and solutions particular to children in conflict with the law, having regards to their specific needs and that will focus on their reintegration in the community. Also that the system will focus on holding the child accountable for his or her actions by implementing the concept of restorative justice, this aims to serve victims as the victim would meet with his or her offender and the parties would mediate the issue and see whether they can gain closure. The Act also makes provision for the child offender to make restitution to the victims. See also Gallinetti, J. (2006). “What happened to the Child Justice Bill? The process of law reform relating to child offenders.” SA Crime Quarterly. No. 17: 12 – 17, in which the author points out that the Bill does not only confer rights on the accused and convicted children but that it aims to hold them accountable for their actions to the victims, the family of the child and victims, and the community as a whole and that as a result of this the concept of restorative justice is included as an objective.

¹⁷ Skelton, A., note 13, p. 10.

¹⁸ See Child Justice Act, section 1, definitions at line 37. Diversion falls under the concept of restorative justice because the offender is not only held accountable for his or her actions but also has to make amends to his or her victim by apologising or providing the victim with a gift to show his or her remorse.

The Act further provides that one of the objects of diversion is to afford those persons affected by the harm to express their views on its impact on them (section 51 (e) of said Act). The Act also states that diversion may not be approved if the victim's views have not been considered (section 52(2)) and the victim has not been afforded the opportunity to express his or her views as to whether or not the matter should be diverted (section 53(b)(i)).

As with plea bargaining that will be discussed below, victims are afforded the opportunity to participate in the proceedings and as such they are kept informed as to the progress of the matter. This is an important provision as many victims feel that they do not play any role in the proceedings once they have reported the crime or laid a charge.



The Child Justice Act is the only piece of legislation that makes provision for the submission of victim impact statements, hereby illustrating another instance in which the Act is victim centric. Section 70 of the Act deals with the impact the offence has on the victim. The Act allows for the victim to make a sworn statement stating the way in which it affected him or her psychologically, physically, socially or any other consequences that the victim suffered.¹⁹ This section makes provision that the prosecutor consider the interests of a victim as well as the impact it had on the victim to furnish the Child Justice Court with a copy of the statement.²⁰ This illustrates the inconsistency in legislation. Legislation should be rationalised so as to ensure that victims of adult offenders are afforded the opportunity to make similar victim impact statements at sentencing during the criminal justice process.

¹⁹ Section 70(1) Act 75 of 2008.

²⁰ Section 70(2) Act 75 of 2008. Subsection (3) states that should the contents of the victim impact statement not be contested then the statement is admissible as evidence on its production.

The Child Justice Act and the Victims' Charter encourage victims to play an active role in the trial process as they provide that victims are to be updated on the progress in the matter. These Acts further provide that victims be allowed a voice by meeting with their offenders in a controlled environment to discuss the impact of the act and how to move forward.

The abovementioned documents encourage the prosecutor to actively engage the victim in the trial process. The Sexual Offences Act and the Child Justice Act together with the Victims' Charter aim to eliminate secondary victimization that victims of crime experience by implementing certain practices.

4.2.5 Plea bargaining

Steyn argues that if plea-bargaining is handled sensitively, it could also be of benefit to the victim of crime.²¹ As the victim will be involved in the discussions or made aware of the discussions pertaining to a guilty sentence albeit on a lesser charge. The victim will have an input in the matter and in such a way the victim will gain closure.

Plea bargaining is also regarded as a cost effective alternative to the lengthy and costly criminal trials.²²

²¹ Steyn, E. (2006). "Plea-bargaining in South Africa: current concerns and future prospects." SACJ. Vol. 2: 206-219, in which the author further notes that by utilizing plea-bargaining the victim will not be subjected to the trauma of secondary victimisation in court. Steyn further notes that section 105A(1)(b)(iii) of the Criminal Procedure Act provides victims of crime the opportunity to make representations to the prosecutor in 'qualified circumstances'. Steyn notes that this participation by the victim is aimed at fairness between the accused and the victim and serves the interests of justice and society and that by giving victims a say in the process it ensures transparency of the process and dispels the idea that plea-bargaining serves only the interests of the accused who had committed the crime. The aim of section 105A is to empower victims of crime and to regulate the negotiations between the state and the accused. Plea bargaining allows for an accused to plead guilty to a lesser charge thereby bypassing the long court process, however there are strict requirements that need to be satisfied before a plea bargain agreement can be entered into.

²² du Toit, S. and Snyman, E., (2001). "Chronicles Plea-bargaining in South Africa: The need for a formalized trial run." Journal for Juridical Science. Vol. 26(3): 144-57, in which the authors point out that an advantage of plea bargaining is that the backlog at the lower courts are minimised. In plea

Section 105A(1)(b)(iii) states that the prosecutor may enter into an agreement after affording the complainant or his representative, where reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding – (aa) the contents of the agreement; and (bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.²³ The section does make provision for victim participation, but what is unclear is the timing and extent of the victim's involvement in the process.

It is important to note that certain crimes that carry minimum and mandatory sentences and these cannot be negotiated.²⁴ The accused and his or her legal representative, prosecutors as well as magistrates and judges are bound to have regards to the minimum sentences prescribed by law. Punitive measures have been put in place by law and as such the State serves the best interests of the public at large and the victim by ensuring that a convicted accused is duly punished and kept incarcerated and as such the aim of incarceration is not only to act as punishment but also to rehabilitate the convicted offender. By punishing the convicted offender, the victim is assured of not being re-victimised by the same offender.

The plea-bargaining procedure and minimum and mandatory sentences are at odds with each other as the minimum and mandatory sentences stipulate a specific sentence for a specific crime and does not allow for any victim participation whereas the plea-

bargaining proceedings the accused's attorney will either plead guilty to a lesser charge or plead guilty to the main charge on a different basis but with the same aim in influencing the sentence

²³ Ibid. Section 105A(1)(b) of the Criminal Procedure Act 51 of 1977.

²⁴ Sloth-Nielsen, J. and Ehlers, L. (2005). *A Pyrrhic victory? Mandatory and minimum sentences in South Africa*. ISS. p. 1.

bargaining procedure does. Even though the plea-bargaining procedure will result in the offender pleading guilty to a lesser offence this procedure is of benefit to the victim as the prosecutor must consult with a victim when entering into a plea-bargain agreement.

4.3 Policy framework within South Africa

4.3.1 The National Crime Prevention Strategy Document

The National Crime Prevention Strategy Document (“the NCPS”) was adopted by Cabinet in March 1995.²⁵

The NCPS aims to achieve the establishment of a comprehensive policy framework which would enable government to address crime in a coordinated and focused manner which draws on the resources of all government agencies as well as civil society.²⁶

If the state is committed to addressing crime the causes of crime as well as the symptoms must be addressed.²⁷ The NCPS seeks to maximize civil society’s participation in mobilizing and sustaining crime prevention initiatives.²⁸ This is

²⁵ Polity Organisation “National Crime Prevention Strategy Summary” <www.polity.org.za/html/govdocs/policy/crime1.html> [accessed on 3 September 2004], The strategy is the result of an extensive process of research and analysis and has drawn on international experiences. Both Business against crime and Non Governmental Organizations concerned with crime prevention have made a substantial contribution to this strategy. This document is important, as it has drawn on the documents that afford rights to victims of crime and realised the need to protect and enforce said rights.

²⁶ Combrink, ., note 13, for a general discussion on the Sexual Offences Bill.

²⁷ Sarkin, J., Haeck, Y. and van de Lanotte, J. (2001). *Resolving the tension between crime and human rights: An evaluation of European and South African issues*. Maklu. p. 46.

²⁸ Polity Organisation “National Crime Prevention Strategy Summary” <www.polity.org.za/html/govdocs/policy/crime1.html> [accessed on 3 September 2004], This document aims to promote a shared understanding and common vision of how South Africans as a

important and it should be nurtured and protected and communities should be encouraged to actively participate in these initiatives thereby creating greater crime awareness and promoting and facilitating crime prevention.

The strategy (NCPS) focuses on a number of challenges such as unreliable crime data and media representations and the effect it has on the public.²⁹ Unreliable crime data and the capturing thereof hinders the way in which government addresses and serves the cause of victims. This further hinders the way in which government is to address this problem as one would not be able to determine the extent of crime and the impact that it has on victims and communities. By ensuring that crime data is captured correctly government will be able to develop and implement policies in order to address the problems effectively.



This strategy concentrates on National Programmes and on developing a conceptual framework for crime prevention at all levels, this concept is set out in the NCPS' four pillar approach to crime prevention.³⁰

nation are going to work toward solving the problem of crime, this vision should also inform and stimulate initiatives at provincial and local level.

²⁹ See note 28. Existing crime data is very unreliable and can be misleading. This, therefore, places a priority on gathering reliable crime information so as to ensure effective deployment of resources and dynamic strategic planning. The media representations of crime are very influential in determining public perceptions. The media can distort, thereby exaggerate the crime issue in the country. An effective communication strategy would be based on reliable information. This is important in properly informing public opinion in the fight against crime.

³⁰ See note 28. Although committed to the programmes contained in it, the government sees this document as representing a working strategy, which must be refined, changed and improved on the basis of feedback and experience. Education and information programmes are needed to create public awareness and acceptance of human rights. Furthermore conferences, courses and debates, to name but a few, should also take place to encourage and ensure such awareness. The NCPS' 4 pillar approach to crime prevention: The first pillar being the National programmes was aimed at making the criminal justice system more efficient and effective. The second pillar was aimed at reducing crime through environmental design, which focuses on designing systems to reduce the opportunity for crime and increase the ease of detection and identification of criminals. The third pillar focused on public values and education concern initiatives aimed at changing the way communities react to crime and violence. The first pillar would have been addressed at National level by key programmes designed to restructure the criminal justice system as a whole. The re-engineering of the criminal justice process initiative was another national programme aimed at making the criminal justice system more efficient. Another

Rationalising legislation is yet another aspect in creating a more efficient and effective criminal justice process.³¹ By rationalising legislation, crime prevention will be improved.³²

The Victim Empowerment Programme together with the Victims' Charter are programmes that were developed within the NCPS and these programmes are still in force.

4.3.2 The Victim Empowerment Programme ("the VEP")

This can be regarded as the most important national programme in the first pillar of the NCPS.³³ Recognition of the role and rights of victims are vital in addressing the effects of crime and creating crime resistant communities.³⁴ This empowerment of victims is aimed at creating a greater role for victims in the criminal justice process, as well as providing victims with protection against repeat victimization.³⁵

The main tasks of the initiative of this programme are aimed at:

- (a) Providing training to police and justice officials thereby introducing greater victim sensitivity,
- (b) implementing a victim support programme,

national programme aimed at improving the efficiency and effectiveness of the criminal justice process is the programme regarding prosecutorial policy.

³¹ See note 28, the Sexual Offences Act; the Child Justice Act are examples of government rationalising legislation.

³² See note 28, the Sexual Offences Act and the Child Justice Act are examples of legislation that differentiates between the various victims of crimes.

³³ See note 28. See also note 21 *supra* in which Batley notes that this programme was launched as part of implementing the NCPS and that this programme seeks to provide a framework for developing services to victims of crime and to create an awareness of their needs.

³⁴ See note 28. The programme is aimed at making the criminal justice process more victim-friendly by minimising the negative effects of crime on victims.

³⁵ Frank, C., note 2, p. 31, in which Frank states that the VEP represents a comprehensive effort to respond to victimisation. See also Clark, M. (2003) "*Victim-centred policing: The shepherd's solution to policing in the 21st century.*" Police Journal. Vol. 76: 316.

- (c) provide basic information to complainants and victims regarding the progress of all cases, as well as key information that would enable victims to lay complaints more easily.³⁶

It is evident that a national victim empowerment programme is needed. It has been noted that services available to victims of crime in South Africa are, in general, inadequate and limited in their accessibility.³⁷ Victim support services have been provided by community-based organizations and non-governmental organizations, but these are limited in scope and in reach.³⁸ Therefore the foundation of the government's attempts at victim support was the establishment of the Victim Empowerment Programme.³⁹

Since the initiation of the VEP, the number of available services for victims has increased, as well as the development of national projects in achieving the objectives of the VEP, namely; guidelines for voluntarism in victim empowerment; the undertaking of victim of crime surveys and; programmes which prevent and respond to violence against women, to name but a few.⁴⁰

The NCPS document together with the VEP has recognised the needs of victims and government has made a concerted effort to address the problems that victims experience, however the initiatives proposed in these documents are not being implemented as they should. The implementation of these initiatives must not only be

³⁶ Clark, M., note 35, p. 320.

³⁷ South African Law Commission. (2001). *Report on the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing*. SALC. p. 20.

³⁸ See note 28. See also note 2 *supra* in which Frank argues that while the VEP seeks to provide these services, access to these services are not guaranteed in terms of the rights as contained in the Victims' Charter. Frank notes, further, the argument that there is a lack of understanding among policy makers regarding the value of victim empowerment in relation to crime prevention and that crime will be resolved through the criminal justice process.

³⁹ See note 28 for a general discussion on the Victim Empowerment Programme.

⁴⁰ South African Law Commission. (1997). *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)*. SALC. p. 21.

fast-tracked but government must ensure that all service providers receive adequate training in order to respond to victims in a manner which will reduce if not eliminate secondary victimisation.

4.3.3 The Service Charter for Victims of Crime in South Africa (the Victims' Charter)

The Department of Justice developed the first draft of the Victims' Charter in 1998.⁴¹ This draft was based on international standards of victims' rights which was developed into a comprehensive Charter and subsequently approved by Cabinet in November 2004.

One of the most important aims the Victims' Charter is that it will educate victims about their rights and improve the accountability of service providers such as the police and hospital staff who interact with victims (first).⁴² The Victims' Charter is considered to be part of a holistic policy on victim empowerment, which will play a role in reducing incidents of secondary victimisation, a form of victimisation experienced by victims once they enter the criminal justice system.⁴³ Furthermore, the Charter aims to ensure that the justice system strikes a balance between the rights and dignity of victims on the one hand, and the rights of the accused.⁴⁴

⁴¹ South African Law Commission., note 42, p. 22.

⁴² South African Law Commission., note 42, p. 23.

⁴³ South African Law Commission., note 42, p. 23. See also Department of Justice and Constitutional Development. *Understanding the South African Victims' Charter: A Conceptual Framework. Part B: Conceptual Framework of 'Secondary Victimisation'* <http://www.justice.gov.za/VC/docs/reports/2007_VictimsProgressReport_partB.pdf> [accessed on 4 September 2009]. in which it is noted that secondary victimisation should not be confused with repeat victimisation such as domestic violence and school bullying, to name but a few, which occurs repeatedly to one person over a period of time. The paper further differentiates between two forms of secondary victimisation namely: institutional (through policies and procedures) and individual (attitudes that inform response and treatment of victims).

⁴⁴ South African Law Commission., note 42, p. 23.

The Charter affords victims of crime seven rights, these being the right to: be treated with fairness and with respect for your dignity and privacy; offer information; receive information; protection; assistance; compensation and restitution.⁴⁵ It also ensures that these ‘service providers’ are to take measures to minimise any inconvenience to victims and to adapt the process to meet the needs of the victim as will be noted in the discussion on the Minimum Standards on the Services for Victims below.

This Charter is a milestone for victims as it places the needs and rights of victims at the forefront. By ensuring that victims are central to the process, the Charter dispels the misconstrued assumption that victims are not treated well at all.⁴⁶ The Charter is based on the rights enshrined in the Constitution. It also aims to eliminate secondary victimisation by ensuring that adequate support is given to victims of crime.⁴⁷



⁴⁵ Department of Justice and Constitutional Development “Victims’ charter’ <www.doj.gov.za/2004/dojsite/policy/vc/2004vc.pdf> [accessed on 6 January 2005]. It also ensures that these ‘service providers’ are to take measures to minimise any inconvenience to victims and to adapt the process to meet the needs of the victim; that victims play a participatory role in the criminal justice process; that victims are also to be notified of all relevant services available to them and information pertaining to the progress of the case; that necessary arrangements will be made to ensure the victim’s safety if certain requirements are satisfied; that victims have the right to request assistance be it from the police and prosecution or the health sector and that they be duly assisted; that victims can claim compensation for the loss that they suffered as a result of the offence committed against them. The victim can request to be present at the sentencing hearing and at this point request the prosecutor to make an application to the court for a compensation order in terms of sections 297 and 300 of the Criminal Procedure Act 51 of 1977, in terms of the Criminal Procedure Act the prosecutor must let the victim know whether the order has been granted and how it is to be enforced. Where the order has not been granted, a civil action may, be instituted by the victim. As regards restitution, victims have the right to have their possessions or property restored to them, where they have been stolen or damaged. The court, after conviction, can order the offender to restore (return) or repair the property that he/she has unlawfully taken from the victim. See also note 2 *supra* in which Frank notes that the Charter is in line with the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power.

⁴⁶ Department of Justice and Constitutional Development, note 45.

⁴⁷ See note 2 *supra* in which Frank notes that the Charter is framed in such a way in that the onus is placed on victims to make requests for services before said services will be provided. Frank, further, raises concern as to the absence of a provision in the Charter calling for and setting out procedures to ensure the implementation of the rights contained in the Charter. See also Skelton, A., note 13, p. 10, where the authors question the status of the Victims’ Charter as additional rights may only be conferred in terms of section 234 of the Constitution if it is adopted by parliament as noted by Frank in note 2 *supra*.

4.3.4 The Minimum Standards on the Services for Victims of Crime

The abovementioned Charter is accompanied by the document entitled ‘The Minimum Standards on the Services for Victims of Crime’ (the ‘Minimum Standards’).⁴⁸ ‘The Minimum Standards’ are there to further explain the rights afforded to victims by the Victims’ Charter and to enforce these rights. The means to enforce victims’ rights should not solely be undertaken by government, victims too, should ensure that their rights are enforced by requiring adequate service delivery. In so doing, services providers become aware of the fact that victims know their rights and that they should ensure that they do their utmost to ensure that these rights are upheld.

4.3.5 The Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences.



This document was released for comment in 2005 by the National Prosecuting Authority (NPA). The NPA is of the opinion that the Victims’ Charter and the VEP is only binding on government and with this document it aims to hold accountable both government departments and non governmental organisations for services rendered to victims mentioned in the document.⁴⁹ This ensures that all persons dealing with victims so do in a manner that is compassionate taking into account the needs of victims and thereby ensuring that the rights of victims are upheld. It may seem that

⁴⁸ Department of Justice and Constitutional Development *The minimum standards on services for victims of crime* <www.doj.gov.za/2004dojsite/policy/vc/2004vcms.pdf> [accessed 28 July 2005]. This document is important as it seeks to realise the rights afforded to victims. It tries to impart information on ‘government’s commitment to improving the service delivery for victims of crime. This document explains the Victim’s rights. It further explains the steps to be taken to ensure that the rights of the victim are realised and that the various departments involved in assisting the victim will not only be obliged to monitor the case, but also to involve and inform the victim of the progress and/or any new developments.

⁴⁹ Frank, C, note 2, at 27. See also Skelton, A., note 13, pp. 19 and 50, where the authors state that the Uniform Protocol calls for service providers to respect the dignity of the victim, and where the authors note that the aim of the Uniform Protocol is to minimize and /or eliminate secondary victimisation but that the Victims’ Charter and the VEP are silent on this topic.

the rights afforded to victims look good on paper and the NPA saw the need to ensure that effect is given to these rights so as to ensure their enforcement.

4.3.6 Restorative Justice

Skelton and Batley define restorative justice as “a way of dealing with victims and offenders by focussing on the settlement of conflicts arising from crime and resolving the underlying problems which caused it.”⁵⁰

Restorative justice can be used at various stages of the criminal justice process.⁵¹

Victims have not been forgotten within the criminal justice process as the plea and sentence agreements in terms of the Criminal Procedure Act allows for consultations with the victim of crime.⁵² Restorative justice can be a part of the plea and sentencing



⁵⁰ Skelton, A. and Batley, M. (2006). *Charting progress, mapping the future: restorative justice in South Africa*. Dyason Design and Print. In which the authors note that the Truth and Reconciliation Commission report defines restorative justice as a process which (a) seeks to redefine crime (from breaking laws to violations against human beings); (b) is based on reparation (as it is aimed at the healing and restoration of all concerned); (c) encourages victims, offenders and the community to be directly involved in resolving the conflict and (d) supports a criminal justice system that aims at accountability of offenders, and the full participation of victims and offenders. Zehr, H. (1990). *Changing lenses a new focus for crime and justice*. Herald Press. In which Zehr defines restorative justice as a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to put things as right as possible. See also Hargovan, H. (2007). “Restorative approaches to justice: “Compulsory compassion” or victim empowerment?” *Acta Criminologica*. Vol. 20(3):113, in which the author states that the core value of restorative justice is to balance offender needs, victim needs and the needs of the community.

⁵¹ See Skelton, A. and Batley, M., note 50, in which the authors state that it can be used in the resolution of disputes in schools, communities or the workplace that would otherwise have been brought to the attention of the courts. Where reported to the police, it is argued that restorative justice can be implemented through victim support work. In South Africa diversion is already used as an alternative to a criminal trial in some cases, where the prosecutor decides whether to prosecute the matter or not. The Child Justice Bill advocates diversion in certain cases. See also Hargovan, H. (2007). “Restorative Justice: Yesterday, today and tomorrow – Making sense of shifting perspectives in crime control and criminal justice in South Africa.” *Acta Criminologica*. Vol. 20(1): 80, in which the author notes that the perspective of restorative justice is that not only ‘fairness and order’ play a part in societal response to crime but also matters such as restitution, victims’ rights, rehabilitation, victims-offender reconciliation, community crime prevention and volunteer based services for offenders and victims.

⁵² Act 51 of 1977.

agreements and it would be to the benefit of both the victim and the offender and it would assist in reaching an appropriate sentence.⁵³

Restorative justice policies and principles have found its way into certain pieces of legislation namely the Child Justice Act. The Act as mentioned above in paragraph 4.1.6, makes provision for diversion options, victim-offender mediation, family group conferencing, victim impact statements and importantly, this encompasses restorative justice sentences.⁵⁴ These sections in the Act allow victims to play a participatory role in the criminal justice process and they allow for the child offender to apologise for the wrong and to make amends with the victim.

4.4 Conclusion

The legislative and policy framework within South Africa with regard to victims rights draws on customary international law, international law, the Bill of Rights in the Constitution and role of the courts in developing the common law.⁵⁵

Although there is no piece of legislation that provides for victims, their rights and their needs, the legal development of the rights of victims in South Africa is enjoying sufficient scrutiny which bodes well for the future. The various pieces of legislation mentioned above refer to victims and their rights as well as services that are available

⁵³ See Skelton, A. and Batley, M., note 50. See also Hargovan, H., note 50, p. 80 in which the author argues that the effectiveness of restorative justice is reliant on a competent criminal justice system. The author further notes that the term restorative justice is applied to a variety of practices that seek to respond to crime in more effective ways than the conventional form of punishment, in that it emphasises the offender's personal accountability toward the victim, a decision making process which calls for victim participation with the goal of remedying the harm in one form or another.

⁵⁴ Section 73 Act 75 of 2008 states that where a Child Justice Court convicts a child of an offence, the matter may be referred: (a) to a family group conference; (b) for victim-offender mediation; or (c) to any other restorative justice process which is in accordance with the definition of restorative justice.

⁵⁵ See chapter two of this paper which deals with international law and see chapter three with regard to the rights contained in the Bill of Rights and how they are to be interpreted and given effect to.

to them. By including victims and referring to victims in these pieces of legislation, the rights and needs of victims are recognised and their plight is furthered. It can be argued that government is making a concerted effort to ensure that these rights are recognised and enforced.

There have been progressive developments within the legislative framework but these are still too idealistic. Government has also developed policy so as to recognise the rights of victims. Current legislation read together with the policy documents pertaining to victims' rights are a step in the right direction but more needs to be done to streamline these developments to ensure that it is actually upheld in the most effective way. The services that are to be made available to victims must in fact assist them and alleviate the suffering that they have endured at the hands of their respective offenders. Therefore all persons who are tasked with dealing with victims once they have entered the criminal justice system must be provided with training to ensure that they have regard to victims' needs.

The policy framework complements the legal framework but it is argued that for these rights to be upheld, respected and enforced, the proper infrastructure needs to be put in place. This will require considerable funding as the service providers would have to be trained to ensure that the victims of crime needs are to be met as it should.⁵⁶

⁵⁶ 2001 4 SA 938 (CC) Where the Constitutional court held that the courts have a duty to develop the common law, in this case it was found that the common law of delict required development.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

Legislation has been introduced to co-ordinate victim support services in foreign jurisdictions.¹ Victims have also been afforded rights internationally, that is in international human rights instruments as well as in international policy guidelines. As is evidenced from this paper, South Africa has conformed to these instruments and policy guidelines in some respects but not to the extent that is needed to ensure that victims' rights are protected and enforced.

Our Constitution contains rights within the Bill of Rights that has direct application to victims and as such ensures that the courts are to uphold these rights, as was evidenced by the *Carmichele* case which was discussed in chapter three of this paper. In this case the Constitutional Court held that there is a duty on the courts to develop the common law to give effect to the rights contained in the Bill of Rights and it also held that there is a duty on the state to ensure that all citizens are protected from all forms of violence.

Government has enacted legislation that is victim-centric and as such the process of rationalising legislation has begun so as to ensure that victims' rights are upheld.

Government's attempts are slow and not consistent. There is no piece of legislation in place that deals with victims solely, there are however pieces of legislation that

¹ South African Law Commission (2000) Appendix B Part 1 2

recognises the rights and needs of victims for instance, the Domestic Violence Act, the Sexual Offences Act and the Child Justice Act.

The Sexual Offences Act seeks to provide victims with rights but falls short as the rights the Act provides to victims seemingly benefits them but upon further scrutiny it creates problems in practice that may lead to further victimisation. Also, the Domestic Violence Act too, contains provisions that are to provide victims with the “maximum protection” in terms of law. However, this protection is non-existent when implementing the Act as has been discussed, by various authors, such as Artz and Combrinck.

As evidenced from this paper, the legislation in place is problematic in that victims do not enjoy the rights and remedies contained therein, as stipulated as the Acts’ aims.



The Child Justice Act is a notable piece of legislation as it encompasses restorative justice principles, and these serve the interests of the victim best as it allows for victim participation in the criminal justice system. This Act also provides for victim-offender mediation in which the offender is held accountable for his or her actions that has caused harm to the victim, and it is during this process that the offender can ‘make amends’ and the victim gain closure in the matter.

Significantly, the Act makes provision for the submission of victim impact statements at sentencing which set out the manner in which the crime has affected the victim, this

statement if uncontested, will form part of the evidence that will be presented in court.

This exercise adds weight to the participation by the victim.

The abovementioned provision as contained in the Child Justice Act illustrates the inconsistencies in our legislation. In that victim impact statements are only admissible or only find application in instances where the offender is a child and finds application nowhere else in our law. It is in this regard that it be recommended that the existing legislation be amended where necessary to be aligned with existing legislation and policy that makes provision or has regard to victims' rights and needs. The desired result would be that all pieces of existing legislation be rationalised in a way that they contain similar if not exact provisions pertaining to victims.



Government has also formulated policy that directly addresses the rights and needs of victims. In this regard the Victims' Charter as well as the Minimum Standards of Services for Victims of Crime and the National Prosecuting Authority directives have relevance, in that it establishes administrative guidelines, which secure minimum standards for the fair treatment of victims.² In addition to this, procedures and policies need to be designed to give effect to such standards.³

² Department of Justice and Constitutional Development. (2007). Victims' Charter Progress Report <http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partB.pdf> [accessed on 4 September 2009]. See also Department of Justice and Constitutional Development. (2008). Understanding the South African Victims' Charter: Contextual issues.

<http://www.justice.gov.za/VC/docs/2008Understandingvictims_context.pdf> [accessed on 4 September 2009], for a general discussion on the Victims' Charter and the Minimum Standards.

³ South African Law Commission. (2000). Appendix B. Part 1, p. 2. See also Department of Justice and Constitutional Development. (2007). Victims' Charter Progress Report <http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partA.pdf> [accessed on 4 September 2009], for a discussion on the steps that government has taken to provide training to service providers to ensure that victims are dealt with in a correct manner when they enter the criminal justice process.

The present support services for victims of crime and violence in South Africa appear to be limited, uncoordinated, reactive in nature and therefore ineffective.⁴ To ensure that such services are not futile, they should be community driven and not occur on an *ad hoc* basis.⁵ For victim services to be effective, they have to be planned in the long term and awareness campaigns relating directly to victims need to be created.

The Department of Justice and Constitutional Development and the Department of Social Development are the custodians of the victim empowerment programme and these departments have been tasked with the duty to ensure that victims' rights are disseminated and that various officials who deal with victims receive adequate and proper training to ensure that the risk of victims experiencing secondary victimisation is eliminated or reduced. There needs to be coordination between these departments to ensure that victims' rights are protected and enforced, therefore it is recommended that a permanent council or body must be established by legislation to co-ordinate the establishment of services.

The Victims' Rights Charter is an excellent mechanism that has been implemented to ensure that the rights of victims are respected but it lacks an enforcement mechanism.

The "Minimum Standards" enforces the rights in the "Victims' Charter" thereby

⁴ Department of Justice and Constitutional Development. (2007). Victims' Charter Progress Report <http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partA.pdf> [accessed on 4 September 2009], for a discussion on the steps that government has taken to provide training to service providers to ensure that victims are dealt with in a correct manner when they enter the criminal justice process.

⁵ Department of Justice and Constitutional Development. (2007). National Implementation Plan for the Service Charter for Victims of Crime. <http://www.justice.gov.za/VC/Vcdocs_implplan.htm> [accessed on 4 September 2009], in which the various stages on the implementation plan for the Victims' Charter is discussed.

strengthening it. This is all good on paper, but the success of these two policy documents depends on whether they can be effectively implemented.

The policy that is in place pertaining to victims is good but the implementation thereof is not consistent and in order for the policy to be implemented properly the co-operation is needed between the Departments of Justice and Constitutional Development and that of Social Development.

Current legislation and policy that has direct application to victims must be implemented so as to give effect to the aims of the various Acts and policy documents.

It is in this regard that this study finds that the Constitution does make provision for victims even though victims are not specified as a designated group, as the rights entrenched in the Constitution cover this aspect sufficiently and are strengthened by the legislation that has been enacted such as the Sexual Offences Act, the Child Justice Act and the Domestic Violence Act together with policy documents such as the National Crime Prevention Strategy which refers to the 'Victims' Rights Charter' and the 'Minimum Standards.' But, the important factor is that the current legislation be rationalised (aligned) to ensure consistency, in that the same standards are practices throughout the criminal justice process. To ensure effective implementation, the policy documents need to be implemented in conjunction with legislation to ensure that the rights of victims are protected and promoted.

BIBLIOGRAPHY

Books:

Artz, L. and Smythe, D. (eds.). (2008). *Should We Consent? Rape Law Reform in South Africa*. Cape Town: Juta.

Cachalia, A., Cheadle, H., Davis, D., Haysom, N., Maduna, P. and Marcus, G. (1994) *Fundamental Rights in the New Constitution: An overview of the New Constitution and a commentary on Chapter 3 on Fundamental Rights*. Cape Town: Juta.

Cheadle, H., Davis, D., and Haysom, N. (2005). *The South African Constitutional law: The Bill of Rights*. Durban: Lexis Nexis Butterworths.



Crawford, A. and Goodey, J. (2000). *Integrating a Victim Perspective within Criminal Justice*. Aldershot: Ashgate Publishing.

Currie, I. and De Waal, J. (2005). *The Bill of Rights Handbook*. Lansdowne : Juta.

Currie, I. and De Waal, J. (2003). *The New Constitutional and Administrative Law. Volume One: Constitutional Law*. Lansdowne: Juta.

Davis, R.C., Lungio, A.J. and Skogan, W.G. (1997). *Victims of Crime (2nd ed.)*. Thousand Oaks, California: Sage Publications.

Detrick, S. (1999). *Commentary on the United Nations Convention on the Rights of the Child*. The Hague: Nijhoff.

Devinish, G. E. (1998). *A Commentary on the South African Constitution*. Durban: Butterworths.

Friedmann, D. and Barak-Erez, D. (2003). *Human Rights in Private Law*. Oxford: Hart Publishing.

Harding, C., Fennel, P. and Swart, B. (1995). *Criminal Justice in Europe: A Comparative Study*. Oxford : Clarendon Press.

Karmen, A. (1985). *Crime Victims: An Introduction to Victimology*. Monterey, California: Brooks-Cole Publishing.



King, R.D. and Wincup, E. (2000). *Doing Research on Crime and Justice*. Oxford: Oxford University Press.

Maguire, M. and Ponting, J. (1988). *Victims of Crime*. Milton Keynes: Open University Press.

Mubangizi, J.C. (2004). *The Protection of Human Rights in South Africa: A Legal and Practical Guide*. Lansdowne: Juta.

Sarkin, J., Haeck, Y. and Van de Lanotte, J. (2001). *Resolving the Tension between Crime and Human Rights: An Evaluation of European and South African Issues*. Antwerpen-Apeldoorn: Maklu.

Sealey, S. (ed.). (March 2000). "The Effect of Crime and Violence on the Delivery of Rights and the Creation of a Human Rights Culture", in: *HRC Quarterly Review*. Braamfontein : Human Rights Committee of South Africa.

Skelton, A. (ed.). (2008). *Justice for Child Victims and Witnesses of Crime*. Pretoria: Pretoria University Law Press.

Skelton, A. and Batley, M. (2006). *Charting Progress, Mapping the Future: Restorative Justice in South Africa*. Pretoria: Dyason Design & Print.



Steiner H, J. and Alston, P. (2008). *International Human Rights in Context – Law Politics Morals (2nd ed.)*. Oxford: Oxford University Press.

Strang, H. and Braithwaite, J. (2001). *Restorative Justice and Civil Society*. Cambridge: Cambridge University Press.

Triffterer, O. (ed.). (2008). *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes*. Munchen, Germany: Beck.

Van Beuren, G. (ed). (1998). *Childhood Abused: Protecting Children against Torture, Cruel, Inhuman and Degrading Treatment and Punishment*. Dartmouth: Ashgate.

Van der Spuy, E., Parmentier, S. and Dissel, A. (2007). *Restorative Justice: Politics, Policies and Prospects*. Cape Town : Juta.

Van Ness, D. and Heetderks-Strong, K. (1997). *Restoring Justice*. Cincinnati, OH: Anderson Publishing Co.

Van Wyk, D., Dugard, J., De Villiers, B. and Davis, D. (1994). *Rights and Constitutionalism the South African Legal Order*. Cape Town: Juta.

Woolman, S. and Roux, T. (2004). *Constitutional Law of South Africa (2nd ed.)*. Kenwyn: Juta.

Zehr, H. (1990). *Changing Lenses. A New Focus for Crime and Justice*. Scottsdale: Herald Press.



Journal Articles:

Artz, L. and Smythe, D. (2005). "Bridges and barriers: A five year retrospective on the Domestic Violence Act." *Acta Juridica: Advancing Women's Rights; The First Decade of Democracy*. 200-226.

Bassiouni, M. (1993). "Human rights in the context of criminal justice: Identifying international procedural protections in national constitutions." *Duke Journal of Comparative and International Law*. Vol. 3: 250-293.

Botha, N. (2001). "The role of international law in the development of the South African common law." *The South African Yearbook of International Law*. Vol. 26: 253-260.

Boukongou, J. D. (2006). "The appeal of the African system for protecting human rights." *African Human Rights Law Journal*. Vol. 6: 268-298.

Carpenter, G. (2003). "The Carmichele legacy – enhanced curial protection of the right to physical safety: a note on *Carmichele v Minister of Safety and Security; Minister of Safety and Security v Van Duivenboden*; and *Van Eeden v Minister of Safety and Security*." *South African Public Law*. Vol. 18(1): 252-266.

Cowling, M. (2007). "Criminal Procedure." *South African Journal of Criminal Justice*. Vol. 3: 381-409.



Dersso, S. A. (2006). "The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights." *African Human Rights Law Journal*. Vol. 6: 358-387.

Du Toit, S. and Snyman, E. (2001). "Chronicles: Plea bargaining the need for a formalized trial run." *Journal for Juridical Science*. Vol. 26(3):144-157.

Gallinetti, J., Redpath, J. and Sloth-Nielsen, J. (2004). "Race, class and restorative justice in South Africa: Achilles heel, glass ceiling or crowning glory." *South African Criminal Law Journal*. Vol. 17: 17-40.

Gumedze, S. (2003). "Bringing communications before the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal*. Vol. 3: 118-148.

Hargovan, H. (2007). "Restorative Justice: Yesterday, today and tomorrow – making sense of the shifting perspectives in crime control and criminal justice in South Africa." *Acta Criminologica*. Vol. 20(1): 79-90.

Husa, E. R. (2006). "Maximum includes financial – even in cases of domestic violence." *South African Journal of Criminal Justice*. Vol. 19(1): 23-36.

Kaime, T. (2005). "The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: some reflections." *African Human Rights Law Journal*.

Vol. 5: 221-238.



Kruger, H. B. (2004). "Addressing domestic violence: to what extent does the law provide effective measures?" *Journal for Juridical Science*. Vol. 29(1): 152-173.

Leinius, B. and Midgley, J. R. (2002). "The impact of the constitution on the law of delict: *Carmichele v Minister of Safety and Security*." *The South African Law Journal* Vol. 119(1): 17-27.

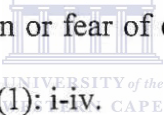
Naidoo, K. (2006). "Justice at a snail's pace": The implementation of the Domestic Violence Act (Act 116 of 1998) at the Johannesburg family court." *Acta Criminologica*. Vol. 19(1): 77-93.

Neethling, J. (2005). "Die Carmichele –sage kom tot 'n gelukkige einde." *Tysdskrif vir die Suid-Afrikaanse Reg*. Vol. 2: 402-409.

Pedersen, M.P. (2006). "Standing and the African Commission on Human and Peoples' Rights." *African Human Rights Law Journal*. Vol. 6: 407-422.

Pieterse, M. (2002). "The right to be free from public or private violence after Carmichele." *The South African Law Journal*. Vol. 65(2): 27-39.

Singh, D. (2003). "Intimate abuse – a study of repeat and multiple victimization." *Acta Criminologica*. Vol. 16(4): 34-51.

Skelton, A. (2009). "Fear for children or fear of children? Child Justice Bill breaches the divide." *Acta Criminologica*. Vol. 22(1): i-iv.  UNIVERSITY of the CAPE

Smit, J. and Nel, F. (2002). "An evaluation of the implementation of the Domestic Violence Act: What is happening in practice?" *Acta Criminologica*. Vol. 15(3): 45-55.

Steyn, E. (2006). "Plea bargaining in South Africa: current concerns and future prospects." *South African Criminal Law Journal*. Vol. 2: 206-219.

Van der Walt, J. (2003). "Horizontal application of fundamental rights and the threshold of the law in view of the Carmichele saga." *South African Journal of Human Rights*. Vol. 19(4): 517-540.

Other:

Amadi, S. (2003). "The African Charter on Human and Peoples' Rights: Realising its Potential." *ESR Review*. Vol. 3(1): 4-5.

Artz, L. (2004). "Better safe than sorry: Magistrates' views on the Domestic Violence Act." *SA Crime Quarterly*. No. 7:1-8.

Artz, L. (2004). "Tough choices: Difficulties facing Magistrates in applying for protection orders." *SA Crime Quarterly*. No. 8:25-30.

Combrink, H. (2006). "Well worth the wait? The Sexual Offences Bill in 2006." *SA Crime Quarterly*. No. 17:1-6.



Doolan, K. (2005). "Missing pieces in the puzzle: The health sector's role in implementing the DVA." *SA Crime Quarterly*. No. 12:9-12.

Frank, C. (2007). *Quality services guaranteed? A review of victim policy in South Africa*. ISS Monograph Series No. 137. Pretoria: Institute for Security Studies.

Gallinetti, J. (2006). "What happened to the Child Justice Bill? The process of law reform relating to child offenders." *SA Crime Quarterly*. No. 17:12-17

Joyner, K., Theunissen, L., De Villiers, L., Suliman, S., Hardcastle, T. and Seedat, S. (2007). "Emergency care provision for, and psychological distress in, survivors of domestic violence." *SA Family Practice*. Vol. 49(3): 15a-15d.

Skelton, A. and Gallinetti, J. (2008). "A long and winding road: The Child Justice Bill, civil society and advocacy." *SA Crime Quarterly*. No. 25:3-9.

Vetten, L. (2007). "New crimes and old procedures: Can the Sexual Offences Bill deliver on its promises." *SA Crime Quarterly*. No. 22: 21-25.

National Law

The Final Constitution Act 108 of 1996.

The Criminal Procedure Act 51 of 1977.

The Domestic Violence Act 116 of 1998.

The Judicial Matters Second Amendment Act 55 of 2003.



The Sexual Offences Act 2007.

The Probation Services Act 116 of 1991 and Amendment 35 of 2002.

The Child Justice Act 75 of 2008.

Case Law

Carmichele v The Minister of Safety and Security and Another 2001 (10) BCLR 995 (CC).

Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others 2009 (7) BCLR 637 (CC); CCT36/08.

S v Makoena; S v Phaswane 2008 (2) SACR 216.

Policy

The National Crime Prevention Strategy, 1996, Department for Safety and Security.

Victim Empowerment Programme, 1999, Department of Social Development.

Service Charter for Victims of Crime in South Africa, 2004, Department of Justice and Constitutional Development.

The Minimum Standards on the Services for Victims of Crime, 2004, Department of Justice and Constitutional Development.



The Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences, 2005, National Prosecuting Authority.

South African Law Commission. (1997). *Sentencing: restorative justice (compensation for victims of crime and victim empowerment)*. Pretoria : SALC.

South African Law Commission. (2001). *Sentencing (a compensation scheme for victims of crime in South Africa)*. Pretoria : SALC.

South African Law Commission. (2001). *Report on the application of the bill of rights to criminal procedure, criminal law, the law of evidence and sentencing*. Pretoria: SALC.

International Law and Conventions

International Covenant of Civil and Political Rights.

The Rome Statute.

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

United Nations Convention on the Rights of the Child.

Universal Declaration of Human Rights.

The African Charter on Human and Peoples Rights.



Online Resources

<http://www.crisa.org.za/volume1/rights.htm>

<http://www.doj.gov.za/2004dojsite/policy/vc/2004vc.pdf>

<http://www.doj.gov.za/2004dojsite/policy/vc/2004vcms.pdf>

http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partA.pdf

http://www.justice.gov.za/VC/Vcdocs_implplan.htm

http://www.justice.gov.za/VC/docs/2008Understandingvictims_context.pdf

http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partB.pdf>

<http://www.iss.co.za/Pubs/Monographs/No101/Contents.html>>

<http://www.iss.co.za/pubs/Monographs/No88/Contents.html>

http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partA.pdf

http://www.justice.gov.za/VC/Vcdocs_implplan.htm

http://www.justice.gov.za/VC/docs/2008Understandingvictims_context.pdf



http://www.justice.gov.za/VC/docs/2007_VictimsProgressReport_partB.pdf

<http://www.npa.gov.za/uploadedFiles/UPVM%20document.pdf>