

# **RIGHTS OF GROSS HUMAN RIGHTS VIOLATION VICTIMS (INTERNATIONAL AND NATIONAL LAW PERSPECTIVE)**

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## **Abstract**

Rights of gross human rights violation victims have been much regulated in a number of constitutional regulations. However, conceptual shortfalls in substantial formulations are still present in the positive law. The substantial aspect shortfalls have the potential to have detrimental implication to the protection of gross human right violation victim's rights considering the procedural aspects will refer to the material law. This condition certainly become a challenge which is expected to motivate all related parties to improve and bring their best contribution in the effort to protect, improve human rights, and enforce law and justice to the victim.

## **Introduction**

The development of criminology theories in criminal law and the practice of criminal court system in a number of decades have gone through a big transformation, especially in its relation to the attentions of experts, academicians, and practitioners towards the position of the victim in criminal court processes. A higher degree of attention towards the position of the victim in criminal court is shown by the adoption of a various legal regulation in the international and national level which regulates the protection and assurance of the victim's rights. In Indonesia, the attention towards the position of the victim in the criminal court system became clear with the adoption of the Act 13 of 2006 on the protection of witnesses and victims. In the act, there are three matters which are being regulated. The first is the formulation of rights and the forms of protection given to victims and witnesses. The second concern is the institutional aspects of Lembaga Perlindungan Saksi dan Korban (Witnesses and Victims Protection Institution). The third is the conditions on the granting of protection and aids regarding

mechanism aspects and procedures of the Witnesses and Victims Protection Institution.

This publication will discuss briefly the protection and rights of victims of gross human rights violations which is written in the international human rights law and the practical context of the regulation and implementation in national law. To formulate this publication, the term gross human rights violation refers to the definition written in Act 26 of 2000 on the Human Rights Court. The Human Rights Court Act determines that there are two actions, genocide and crime against humanity, as gross human rights violation. In the context of law enforcement, complexity will arise in conceptual and technical forms. This publication is meant to answer and find opportunities of solutions that might be found based on experience and theoretical and practical knowledge.

### **International and National Human Rights Law**

The main reference in international human rights law of the definition of victims is the Declaration of Basic Principle of Justice for Victim and Abuse of Power, adopted by General Assembly Resolution 40/ 34 of 29 November 1985 which this publication will refer as victim declaration. Other major reference is in the International Criminal Court (ICC) Rules of Procedure and Evidence which formulation strengthens the concept of victims in the context of gross human rights violations. Regarding gross human rights violations in national law, definition of victims refers to Government Regulation 2 of 2002 on the Procedure of Human Rights Violation Victims and Witnesses Protection and Act 13 of 2006 on Witness and Victim Protection. The four references of the definition in international and national is presented in the following table.

#### ***Definition of Victim Comparison Table***<sup>1</sup>

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<sup>1</sup> Syahrial & Melly, *Pemberian Bantuan dalam Undang-undang tentang Perlindungan Saksi dan Korban*, ICW-ICJR & Koalisi Perlindungan Saksi, 2007 page 11-13.

<b>Witness and Victim Protection Act</b>	<b>Government Regulation 2 of 2002</b>	<b>Declaration of Basic Principles of Justice for Victims<sup>2</sup></b>	<b>International Criminal Court<sup>3</sup></b>
Victim is a person suffering mental, physical and/or economical loss due to a criminal action. (Note: Government Regulation 44 of 2008 has the same definition of victim with Witness and Victim Protection Act)	Victim is an individual or group suffering gross human right violations which require physical and mental protection from threats, terror, and violence from any party.	Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.	(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Basic components formulated in the definition of victims contain two important matters: first, victim subject which include individual or groups, and second, loss and suffering due to a violation of law. After the birth of Witness and Victims Protection Act, the definition of victim shifts to individualize the victim. Compared to Government Regulation 2 of 2002, Witnesses and Victims Protection Act and Government Regulation 44 of 2008 on the Compensation,

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<sup>2</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by General Assembly resolution 40/ 34 of November 1985), "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

<sup>3</sup> Rules of Procedure and Evidence: Rule 85 Definition Of Victims For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

Restitution, and Aids to Witnesses and Victims do not state the collective condition of victims when most human rights violation victims are groups/collective individuals.

The norm formulated in the act is constructed in the individual definition and do not cover groups as stated in the definition in Government Regulation 2 of 2002 or the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by General Assembly resolution 40/ 34 of November 1985) and Rule 85 of the International Criminal Court. In the context of the duty and authority of the protection institution this juristic formulation problem becomes a task that should be handled seriously to give better service on protecting the victim. The limited scope of victim subject will certainly bring implications especially for the development of protection and aid regulations which the institution will deliver to the victim.

### **Rights of Gross Human Rights Violation Victims**

In the victim declaration, a number of main rights of victims must be assured and protected by the state. They are: first, the victims right of the availability of justice mechanism and achieve immediate compensation (in the form of compensation and restitution); second, right of information on their rights in pursuing compensation and receive information on the progress of legal processes for compensation; third, right to express their views and opinions; fourth, rights to receive aid in the process of punishment; fifth, right of protection from disturbance, intimidation, and retaliation from the convict, personal freedom protection and safety protection of person and family; and sixth, right of speedy and simple justice process/mechanism without any delay.

Meanwhile, in the Rome Statute and Rules of Procedure and Evidence as the main international legal instruments for human rights which is closely related to gross human rights violation give special attention on the position of victims in the tribunal process. This matter is regulated in a number of articles on the rights of victims during the tribunal processes. They are first, victims' right of protection during the trial (Article 57 regulates the pre trial protection and Article 68 regulates the rights of victims during the trial process such as

victims; participation, protection mechanism in the proving stages to give statements in camera and giving evidence in electronic media); second, right of protection in the context of financial and other facilities for the victims and their families (Article 79 regulates the establishment of a Trust Fund to ensure the rights of violation victims and their families).

Aside from the two documents mentioned above, the international human rights law recognizes the van Boven principles and Joinet principles as two main references formulated through deep study conducted by Special Rapporteurs of the UN Human Rights Sub Commission and independent experts. Based on a number of international law norms, every violation of the human rights will raise the right of recovery. Recovery meant by Van Boven is every type of redress in material and non material form for victims of human rights violation therefore compensation, restitution, and rehabilitation include specific aspects of recovery. Boven proposed six basic principles which the state that will formulate a policy on the fulfillment of victims' rights must obey. The first is that recovery can be pursued individually or collectively. The second is that the state is obligated to apply special steps that enable the recovery steps to be conducted effectively and fully. Recovery must be in balance with the weight of the violation and damage it caused which includes restitution, compensation, rehabilitation, fulfillment, and guarantee that similar event will not occur. The third principle is that every state must announce through a public mechanism or private institution within and outside the state about the availability of recovery procedures. The fourth principle is that the limiting regulations may not apply in the duration of no effective settlement of the human rights and humanitarian law violation. The Fifth principle is that every country must enable the speedy availability of all information regarding the requirements of recovery. The sixth principle is that decisions regarding recovery of gross human rights and humanitarian law violation victims should be implemented meticulously and quickly.<sup>4</sup>

Meanwhile, the bottom line of the Joinet principle is an effort of protection and promotion of human rights through steps to eliminate impunity

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<sup>4</sup> Theo Van Boven, *Mereka yang Menjadi Korban, Hak Korban atas Restitusi, Kompensasi, dan Rehabilitasi*. Pengantar Buku ; Ifdhal Kasim page xxi-xxii, ELSAM, 2002.

by adopting universal human rights basic principles to be implemented to the efforts in the working mechanism of domestic law. The study explained the principles in four important points: right of information, right of justice, right of reparation, and right of no recurrence guarantee. One of the rights of justice principle which is very important to discuss is the regulation on the principles of limitation which is justified by the desire to fight impunity regarding amnesty regulation in gross human rights violation.

The principle clearly states that amnesty cannot be granted to the perpetrator of the violation before the victims achieve justice through effective trial. Amnesty may not have any legal effects on the trial process submitted by the victim regarding reparation.<sup>5</sup>

The criminal court system can develop efforts of reparation for victims of human rights violation which is grouped into two main groups: monetary remedies and non monetary remedies.<sup>6</sup> Monetary remedies are reparation which uses material values in the form of money or physical products to repair damage/loss caused by human rights violation. Non-Monetary remedies are victims' effort of repairs which is more based on the recovery of damage/loss caused by the violation by specific steps which cannot be valued with a specific material value such as apology of perpetrator/state, rehabilitation, non recurrence guarantee, truth telling, punishment for violator, or declaratory judgments.

In the national law ground, since Witnesses and Victims Protection Act and Government Regulation 44 of 2008 are put into effect, victims protection regarding victims of gross human rights violation refer to the two regulations. Other constitutional regulations are still in effect as long as they do not conflict the two regulations.<sup>7</sup> The regulations do not differentiate specifically rights of victims from the rights of witnesses. This means that the act has accommodated right of justice for victims because the protection of victims are delivered since the investigation is being conducted. In the Witnesses and

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<sup>5</sup> Kontras, *Menolak Impunitas, Serangkaian Prinsip Perlindungan dan Pemajuan Hak Asasi Manusia. Prinsip-Prinsip Hak Korban*. Kontras, 2005. page 128.

<sup>6</sup> Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University, 1999.

<sup>7</sup> Act 26 of 2000, Government Regulation 2 of 2002 on the Procedure of Protection of Witnesses and Victims of Gross Human Right Violation and Government Regulation 3 of 2002 on Compensation, Restitution, and Rehabilitation of Victims of Gross Human Rights Violation.

Victims Protection Act, victims of gross human rights violations have two exclusive rights granted by the act which are rights of compensation and aid aside from the rights to ask for restitution to the violator.<sup>8</sup> In the view of the writer, the formulation of definition of compensation stated in Government Regulation 44 of 2008 has a fundamental conceptual mistake. The formulation of compensation in the Government Regulation is compensation given by the state because the violator is incapable of giving full compensation.

With the formulation, new compensation which will be conducted depends on the presence of the violator and/or the capability of the violator in giving compensation. This is certainly not consistent with the concepts and principles of human rights law which gives the obligation towards states to give protection and assurance to the victims maximally by taking correct steps, meticulous steps, and give satisfaction to the victims of gross human rights violation. This certainly becomes a very important note for the author and all discussion members.

Article 5, 6, and 7 of Witness and Victims Protection Act become the reference for rights, forms of protection, and forms of aids guaranteed by the constitution. In article 5, there are thirteen rights of witnesses and/or victims which should be noted in protecting by the protection institution. In that article, the Witness and Victims Protection Act stated that the main protection needed is protection of personal, family, and belonging safety and that they should be free from threats regarding their testimony in the trial process. More information of the witnesses' or victims' rights given by the protection institution is concluded in table 1. Aside of what is stated in Article 5, the victims have the right for compensation and restitution as regulated in Article 7 of the Witness and Victims Protection Act. According to Article 6 of the Witness and Victims Protection Act, the victims of human rights violation have

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<sup>8</sup> Detailed discussion on the compensation and restitution can be seen at Wahyu Wagiman & Zainal Abidin, *Praktik Kompensasi dan Restitusi di Indonesia, sebuah Kajian Awal*, ICW-ICJR, dan Koalisi Perlindungan Saksi, 2007. Explanation on aid can be seen at dilihat, Syahril MW& Melly, *Pemberian Bantuan dalam Undang-undang tentang Perlindungan Saksi dan Korban*, ICW-ICJR & Koalisi Perlindungan Saksi, 2007 and *Naskah Akademis dan RPP Pemberian Kompensasi dan Restitusi serta Bantuan bagi Saksi dan Korban Usul Inisiatif Masyarakat*, ICW – ICJR- Koalisi Perlindungan Saksi, 2008.

the rights for medical aid and psychosocial rehabilitation<sup>9</sup>.

***The Rights of Witnesses and Victims as stated in Article 5 of the Law  
concerning Witness and Victim Protection***

<b>Articles concerning the rights guaranteed by the Law of Witness and Victims Protection</b>	<b>Explanation on the Law of Witness and Victims Protection</b>
Letter a Enjoy the protection over the security of personal, family, and possessions, also the freedom from any threads related with the testimony which will be given, being given, or already given.	This type of protection is the prominent protection needed by the witness and victims. If necessary, Witness and Victim needs to be located in a non-disclosure area to assure the safety of the witness and victim
Letter b Involved in the process of choosing and determining the form of protection and security assistance	Well explained
Letter c Giving information without any pressure	Well explained
Letter d Acquiring a translator	This right is given to the witness and victim with no fluent capability of speaking Indonesian in order to smooth the process of trial
Letter e Free from any deceiving questions	Well explained
Letter f Obtaining information regarding the case development; until the end of the protection period	It is often that a witness and victim only have a role in giving testimony in the court, but witness and victim does not know the development of the particular case. Therefore, the development of the case should be informed to the witness and victims
Letter g Obtain information regarding the decision of the court	This information is necessary to be known by the witness and victims as an award of their willingness in the trial process

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<sup>9</sup> Explanation on the witnesses' and victims' rights in Witnesses and Victims Protection Act can be seen in Syahril & Melly, Pemberian Bantuan dalam Undang-undang tentang Perlindungan Saksi dan Korban, ICW-ICJR & Koalisi Perlindungan Saksi, 2007



Letter h Know if the accused is freed	The witness's and victim's fear of receiving revenge from the accused is reasonable enough and they have the right to be informed if an accused for a jail sentence will be set free.
Letter l Gaining new identity	In several cases, especially when it involve an organized crime, the Witness and Victim could be threatened even though the accused is already being punished. In certain cases, Witness and Victims may be given a new identity.
Letter j Acquire new settlement	If the security of the Witness and Victim is felt concerned about, giving a new settlement to the Witness and Victim must be considered so that the Witness and Victim could continue their living without fear. The definition of "new settlement" is certain place which is temporary and considered safe.
Letter k Receive reimbursement for transport accordingly to its need	The Witness and Victim that could not afford to finance themselves in order to attend the location need a financial assistance by the government.
Letter l Obtain Legal Advice	The definition of "legal advice" is the legal advice needed by the Witness and Victim when it deems necessary.
Letter m Receive temporary daily financial assistance	The definition of "temporary daily financial assistance" is daily cost which is appropriate with the current situation at that time, for example the cost for daily meal.

### **LPSK Role in Protecting Witness and Victim of Human Right Violation<sup>10</sup>**

The above explanation regarding the rights of victims, produce several categories or stages that will be the duty and authority of LPSK, which is:

*First*, the form of physical protection given by the LPSK is: Protection over personal security, family, and possessions (Article 5 Phrase (1) a); Protection

<sup>10</sup> The explanation in this part is extracted from the sub-chapter concerning duty and function of LPSK according to the Law of Witness and Victim Protection, Syahrial & Melly, *Pemberian Bantuan dalam Undang-undang Perlindungan Saksi dan Korban*, ICW-ICJR & Coalition of Witness Protection, 2007.

from any threats (Article 5 Phrase (1) a); Obtain new identity (Article 5 Phrase (1) i); and Acquiring new settlement (Article 5 Phrase (1) j).

*Second*, the form of witness/victim's participation in the LPSK protection program is: witness and/or victim have the right to participate in the process of choosing and determining the form of protection and security assistance (Article 5 Phrase (1) b).

*Third*, the form of assurance related to the court's administration in every stage of legal process is: Witness and/or victims may give testimony without any pressure in every stage of legal processing (Article 5 Phrase (1) c); Witness and/or victim will be accompanied by translator in the existence of a language barrier (Article 5 Phrase (1) d); Witness and/or victim should be free from any deceiving question (Article 5 Phrase (1) e); Witness and/or victim should receive information regarding the development of the case until the end of the protection period (Article 5 Phrase (1) h); Witness and/or victim will be informed if the accused is set free (Article 5 Phrase (1) h); Witness and/or victim have the right to be accompanied by legal council to receive legal advices (Article 5 Phrase (1) l).

*Fourth*, the form of financial assistance and medics/psycho-social service is: transportation cost (Article 5 Phrase (1) k); Temporary living cost (Article 5 Phrase (1) m); Medical assistance (Article 6 a); and psycho-social rehabilitation assistance (article 6 b).

*Fifth*, the form of reparation for the victim of gross violation of human right that might be proposed by the LPSK is: Compensation proposal for the victim (Article 7 Phrase (1) a) and restitution proposal for the victim (Article 7 Phrase (1) b).

*Sixth*, the form of action and services given by the LPSK described the duty and function of LPSK as stated in the Law concerning LPSK, in particularly Article 1 Number 3 and Article 12.

#### Article 1 Number 3

The Institution of Witness and Victim Protection (LPSK) is an institution which duty and authorities is to give protection and other rights to the witness and/or victim as regulated in this Law.

#### Article 12

LPSK is responsible to handle the granting of protection and assistance for the witness and victim according to the duty and authority as stated in this Law.

In Article 10, LPSK also have a mandate from the Law concerning Witness and Victim Protection to ensure the protection for the witness and victim about the assurance by the Law, whereas the witness and victim may not be prosecuted in private or criminal court regarding to the information given or their testimony.

#### Article 10

- (1) Witness, Victim, and Informant could not be prosecuted in private or criminal court for the information, testimony that will be, being, or already given.
- (2) A witness which is also an accused in the same case could not be free from the criminal law suit if he is convincing and legally proven guilty, but his testimony could become a consideration for the judge to give a dispensation for the criminal sentences.
- (3) The provision stated in Phrase (1) would not be in effect for the witness, victim, and informant that give information without any good-will.

Article 10 also gives a duty for LPSK to assure the dispensation of sentences for the accused that is also become the witness of LPSK. Even though the dispensation of sentences is an absolute authority of the judge, Article 10 Phrase (2) clearly relates the duty and function of LPSK in the trial process to assure the dispensation for a witness which is also an accused that is joining the LPSK protection program.<sup>11</sup>

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<sup>11</sup> Article 10 Phrase (2) of the Law concerning Witness and Victim Protection is basically similar with the mechanism of plea bargaining (the definition of plea bargaining is *the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject t court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.* See Black's Law Dictionary). According to this Article, LPSK should assure the existence of criminal sentence dispensation for the accused which is also a witness. Meaning that LPSK must take the necessary step to negotiate with the other law enforcer especially the Judge.

## Categories of Action and Service Provided by the LPSK

Categories of Action and Services		Form of Protection and also the Referred Articles	
1	Physically protection	A	Protection over personal security, family, and possessions (Article 5 Phrase (1) a)
		B	Protection from any threats (Article 5 Phrase (1) a)
		C	Obtaining new identity (Article 5 Phrase (1) i)
		D	Acquiring new settlement (Article 5 Phrase (1) j).
2	Assurance of the witness/victim's participation in the LPSK protection program		Witness and/or victim have the right to join the process of choosing and determining the form of protection and security assistance (Article 5 Phrase (1) b)
3	Court Administration	A	Witness and/or victim give information without pressure in every stage of legal processing (Article 5 Phrase (1)c)
		B	Witness and/or victim will be accompanied by translator in the existence of a language barrier (Article 5 Phrase (1)d)
		C	Witness and/or victim is free from any deceiving question (Article 5 Phrase (1)e)
		D	Witness and/or victim should receive information regarding the development of the case until the end of the protection period (Article 5 Phrase (1) f)
		E	Witness and/or victim will be informed if the accused is set free (Article 5 Phrase (1)h)
		F	Witness and/or victim have the right to be accompanied by legal council to receive legal advices (1) l)
4	Financial assistance and medical/psych o-social services	A	Transportation cost (Article 5 Phrase (1) k)
		B	Temporary living cost (Article 5 Phrase (1)m)
		C	Medical assistance (Article 6 a)
		D	Psycho-social rehabilitation assistance (Article 6 b)
5	Form of reparation	A	Compensation proposal for the victim (Article 7 Phrase (1) a)
		B	Restitution proposal for the victim (Article 7 Phrase (1) b)

### Conclusion

It could be concluded from the explanation above that the

conceptual weaknesses from the substance of the constitutional regulation regarding the victim of gross violation of human right is still exist in our positive law. The substantial aspects could result in a bad implication towards the protection of the gross violation of human right victim's rights, whereas the procedural aspect is almost clearly referring to the material law. This condition would become a challenge that could stimulate every party to fix and give their best contribution in protecting, human right development, also law enforcement and justice for the victim

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