CHAPTER-2
HUMAN RIGHTS OF VICTIMS OF PERSONAL VIOLENCE CRIMES IN INTERNATIONAL PERSPECTIVE

2.1. INTRODUCTION

Human rights are considered the most sacrosanct rights, necessary for the survival of a human being in a dignified way. Every human being deserves these human rights only because of being a human. Till now, only one angle was being considered as a relevant aspect of human right regime and that was imposition of ‘Negative Obligations’ upon the State. The only factor that could harm the individual human rights was considered to be the unwanted State interference in the field of individual rights and liberties. ‘Negative Obligation’ means that State should abstain itself from committing any such act that may result into violation of an individual’s human rights. These were termed as negative obligations because these obligations make it clear that anything that infringes human rights should not be done by the State.

Over the years, various ‘victims’ movements’ resulted in to the recognition of the fact that not only the State but Non-State actors could also violate the individual human rights. This recognition resulted into identification of State’s Positive Obligations. Positive obligations are the obligations of State in case a Non-State actor violates individual human rights. These Positive Obligations denotes the positive role that a State is required to play in protecting human rights from being violated by the Non-State actors.

Victims of Personal Violence Crime suffer the violation of their human rights because of a crime being committed against them by a Non-State actor. It is State’s positive obligation to provide protection in the first place and take preventative measures to avoid the commission of violation of human rights. Even if it happens, then to take necessary measures to ensure victim justice. Victims as a human being are entitled to the same humane treatment in a
dignified way as the offender in a case. Their rights also need to be given due
consideration during the Criminal Justice Process.

Referring to the justice due towards victims of crime, Justice Benjamin Cardozo
set the dictum as,

“Justice, though due to the accused, is due to the accuser also. The
concept of fairness must not be strained till it is narrowed to a filament.
We are to keep the balance true.”

This quote from the dissenting judgement in the case of Booth v. Maryland\(^2\) is
quite relevant to be cited here,

“The State has a legitimate interest in counteracting the mitigating
evidence which the defendant is entitled to put in, by reminding the
sentencer that just as the murderer should be considered as an
individual, so too the victim is an individual whose death represents a
unique loss to society and in particular to his family.”

2.2. VICTIMS’ RIGHTS: DEVELOPMENT AND
RECOGNITION OF VICTIMS’ RIGHTS:

The term ‘Victimology’ for the first time, was used by Benjamin Mendelsohn
in 1947 who classified crime victims on the basis of their culpability for the
purpose of a systematic study of crime victims.\(^4\) Victimology is not only
concerned with the causes and consequences of victimization but it covers, in
its ambit, treatment of the victim by the criminal justice system and responses
of agencies of Criminal Justice System towards victim after his ‘Primary
Victimization’.\(^5\)

Earlier studies in the field of victimology were mainly concerned with victim
blaming or centered on the role that victim played in his own victimization. This
was the period that saw the emergence of ideas of victim precipitation, victim
facilitation and victim provocation.\(^6\) Till this time studies were confined with

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1 Justice Benjamin Cardozo in Snyder v. Massachusetts, 291 U.S. 97 (1934) available at
4 Leah E. Daigle, Victimology 4, (Sage Publications Ltd; United Kingdom 2012).
5 Id at 1.
6 Id, at 2 & 3.
the role or the blame that could be attributed to the victim in his own victimization without any attention being paid towards his interests.

**U.S.A.:** It was during mid 1900’s when victim became the center of attention, not because of his contribution towards victimization but because of the recognition of his needs, interests or rights in the criminal justice system.  

Various social movements helped in raising victims’ issues such as the women’s movement, child victims’ movement and the civil rights movement etc. The objective of women’s movement was to help the female victims of crime. The main concern was the treatment meted out to these victims by the Criminal Justice System and the need of special care and services for female victims of crime. The objectives of child victims’ movement were to identify the needs of child victims and to bring into focus the effects of victimization on child victims. During 1970s secondary victims or survivors of homicide victims raised their voice. Consequently ‘Families and Friends of missing persons (1974)’ and ‘Parents of Murdered Children (1978)’ were formed.  

Civil rights movements also played an important role in raising the victims’ cause and helped in victims’ rights movements. These movements raised the issue of mistreatment of minorities by the Criminal Justice System whether they are the offenders or the victims. These movements further helped in identifying the counselling needs of victims, provided support to victims from outside the Criminal Justice System and did not need any budgetary allocation as it was being provided by volunteers. Merge of these different movements

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Victim precipitation acknowledges some victims’ role in their victimization along with the role played by the offender for causing such victimization. Though the concept is not in a negative sense for victims but sometimes may be used to blame the victim alone.

Victim facilitation is a concept in which victim plays as a catalyst and unintentionally helps the offender in the commission of crime. Concept of facilitation is devoid of victim blaming for his victimization.

Victim provocation term suggests for an active role played by the victim to incite the offender to commit the crime. Provocation concept blames victim for his victimization.

7 Id, at 6.
8 Ibid.
9 Ibid.
10 Ibid.
culminated in to victims’ rights movements that led to the demand of procedural changes in to Criminal Justice System.\textsuperscript{13}

Victims’ movements brought into sharp focus the unfulfilled needs and expectations of victims from Criminal Justice System, therefore the U.S.A government took the initiative of finding out the reasons of reluctance of crime victims to report the crime to police or to access the justice delivery system for their grievances. To find out the factors behind victims’ tendency of not bringing the matter of victimization into the knowledge of police, The President’s Commission on Law Enforcement and Administration of Justice was formed in 1966 that conducted the first National Crime Victimization Survey.\textsuperscript{14}

These Victims’ rights movements, further contributed in initiation of various programmes for crime victims. These include first crime victims’ compensation program, California (1965); first three victim assistance programs in the nation (1972); first prototype of today’s victim/witness assistance programs funded by the Federal Law Enforcement Assistance Administration (1974). In 1975, National Organization for Victim Assistance was developed. In 1980, Wisconsin passed a Victims’ Bill of Rights.\textsuperscript{15}

For providing better assistance to crime victims, President’s Task Force suggested 68 recommendations that included among others an amendment to the U.S. Constitution for inclusion of crime victims’ rights and recommendations for better treatment of crime victims by the criminal justice professionals.\textsuperscript{16} On the basis of these recommendations Victims of Crime Act 1984 was passed.

During 1990s, various specific rights to crime victims were guaranteed by the Federal as well as many State governments through victims’ rights legislations. These include presence at trial, separate waiting area, notification of important events, information regarding various rights and dignified treatment during

\textsuperscript{14} Leah E. Daigle, Victimology 6, (Sage Publications Ltd; United Kingdom 2012).
\textsuperscript{15} Ibid.
\textsuperscript{16} Id, at 8.
Criminal Justice Process. Various legislations such as Crime Victims’ Rights Act, a part of the Justice for All Act 2004 implement these rights. Section 3771 of Title 18 of the United States Code deals with Crime Victim’s Rights Act (CVRA). It provides for the following rights among others:

(1) Under his right to protection a crime victim has a right to get reasonable protection from the accused.

(2) Victim has a right for speedy procedure without any unreasonable delay.

(3) Victims have a right for fair and dignified treatment.

US has ratified ICCPR. Its various provisions deal with victim issues such as:

(i) Victims have a right to be protected from harm that imposes an obligation upon State to provide with such legislations that deter criminal behaviour. This right to protection imposes another obligation upon State to bring the culprit to justice through effective investigation that gives victim a right to fair and effective investigation.

(ii) Article 6.1 seeks to protect the ‘right to life’.

(iii) Under its Article 7, State is obliged to provide protection from inhuman treatment.

(iv) Article 17 seeks to provide protection from unjust attacks. It has been provided specifically under Article 17 (2) that, “Everyone has the right to the protection of the law against such interference or attacks.”

(v) Article 2, 3, 16 and 26 provide victims with a ‘right to be recognized by law, to be treated equally before the law, and a right of non-discrimination.

17 Ibid.
18 Crime victims’ Rights Act, available at https://www.law.cornell.edu/uscode/text/18/3771
(vi) Article 2 and 14 provide for a right to a remedy and a right to access to justice.

(vii) Article 9, 10, 14 and 15 deal with due process rights.

**CANADA:** Canada has taken measures for implementing the Basic Principles of Justice into their domestic legislation.\(^{20}\) The Victims of Crime Act in Canada deals with the Statement of Principles that ensure human rights to victims to access justice. It includes:\(^{21}\)

1. Victims should be given dignified treatment (Section-2).
2. Victims should have access to legal services (Section-8).
3. Victims should be given information regarding progress of the investigation (Section-6).
4. Victims and their family members should be provided protection from intimidation, retaliation and harassment (Section-8).

**EUROPE:** Governments in Europe have taken steps for protecting the rights of victims of crime and for ensuring their access to justice. France has taken measures to incorporate the Basic Principles of UN Declaration into its legislative framework. European Union Framework Decision on the Standing of Victims in Criminal Proceedings have provisions somewhat similar to Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).\(^{22}\)

The Council Framework Decision on the standing of victims in criminal proceedings from 2001, established basic rights for victims of crime within the EU. Time line for the Member States for incorporating requirements of the Framework Decision in their legislation was by 2006. As per the Implementation reports published in 2004 and 2009, EU legislation were found not been effective in achieving minimum standards for victims across the EU.\(^{23}\)

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\(^{20}\) Id at 6.


Therefore, in 2011, the Commission proposed a legislative package to strengthen the legal framework on victims’ rights including a proposal for a directly binding and effectively enforceable Directive on the rights, support and protection of victims of crime. The Directive was adopted on 25 October 2012 and entered into force on 15 November 2012. The EU Member States have to implement the provisions into their national laws by 16 November 2015. The Directive brings significant added value compared to the previous legal framework since it contains more concrete and comprehensive rights for victims and clearer obligations for Member States.24

New rights and obligations25:

1. Family members are widely defined and Family members of surviving victims have the right to support and protection.
2. Accessible and understandable information- Victims will also receive information about their case, including a decision to end the investigation, not to prosecute and the final judgment (including the reasons for such decisions)
3. Access to victim support - Member States must facilitate referrals from police to victim support organisations.
4. Review decision not to prosecute – Victims have the right to be informed about a decision not to proceed with prosecution of the offender and new right to have such decision reviewed.
5. Individual assessment to identify vulnerability and special protection measures – All victims will be individually assessed to determine whether they are vulnerable to secondary or repeat victimisation or intimidation during criminal proceedings.
6. Training of practitioners has become an obligation and emphasis is also put on cooperation between Member States and at national level and awareness raising about victims’ rights.

2.3. HUMAN RIGHTS OF VICTIMS OF CRIME:

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24 Ibid.
25 Ibid.
Jonathan Doak has observed in ‘Victims’ Rights, Human Rights and Criminal Justice’ (2008),

“that the very concept of ‘victims’ rights’ rings hollow unless we reconceptualise these rights as being human rights fully protected and directly applicable within both domestic and international legal orders.”  

Human rights are inherent rights for human beings. These are necessary rights for spiritual pursuits as well as for best use of human intellect and human qualities. Respect for human worth and dignity are the pillars of these rights. On the basis of equality, freedom and justice, human consciousness evolved and along with it the concept of human rights evolved. Human Rights are necessary for ‘Rule of Law’ and for protection of human dignity.

Human rights are at times termed as fundamental rights or natural rights or common rights. Fundamental rights are the rights guaranteed by the Constitution and cannot be taken back by legislature because they are fundamental for meaningful human existence. Human rights are referred as ‘natural rights’ as they belong to human beings because of their very nature or these may be called as ‘common rights’ since these are common to all men and women in the world.

Human rights are those minimal rights which every human being deserve only because of his being a human and without of any other consideration. Respect for ‘Human dignity’ has been the essence of human rights in all times. Human rights are the natural rights, to be protected, respected and recognized by civilized countries or bodies like UN, in spite of the fact that the human rights cannot be created or amended by the legislatures. The preamble to the UN Charter (1945) shows the values appreciated by it in the following manner,

28 Krishna Iyer, Justice at Cross Road, 21, (Deep and Deep Publications, New Delhi, 1992).
“We the peoples of the United Nations determined--to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and--to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained--do hereby establish an international organization to be known as the United Nations.”

The values enshrined by the UN Charter include fundamental human rights, the dignity and worth of the human person, equal rights and justice among others. To preserve and pursue these values, UN Charter through its Article 55 and 56 impose an obligation upon the member States to observe and respect human rights. These Articles Namely Article 55 and Article 56 of the UN Charter are supposed to have the binding effect for the member States. There have been different opinions regarding the binding legal effect of UN Charter Provisions. Manley O. Hudson and Hans Kelsen were of the view that the Charter does not impose a binding obligation and it only set out a programme to be achieved by the cooperation of Member States. Another school led by Professor Sir Hersch Lauterpacht, Philip Jessup and Professor Quincy Wright were of the view that Article 56 comprises a distinct element of legal duty and if any different construction of this provision is permitted to be made it will be violative of the legal and moral authority of the Charter.

Council of Europe’s Recommendation has helped in recognition of victim’s rights as a form of Human Rights.

“States should ensure the effective recognition of, and respect for, the rights of victims with regard to their human rights; they should, in particular, respect the security, dignity, private and family life of victims and recognise the negative effects of crime on victims.”

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Universal Declaration of Human Rights 1948 recognizes the right to life, liberty and security of person and equality before the law and freedom from inhuman or degrading treatment as human rights among various other rights.\textsuperscript{36}

2.4. INTERNATIONAL INSTRUMENTS OF VICTIMS’ HUMAN RIGHTS:

For the identification and recognition of victim’s Human Rights, in this research work, not only the Universal Declaration of Human Rights 1948 but following human rights’ instruments along with the jurisprudential approaches of their concerned bodies have also been taken into consideration. These include:

2.4.1. THE UNITED NATIONS TREATIES AND THEIR MONITORING BODIES (CONVENTIONAL):

- The International Covenant on Civil and Political Rights (ICCPR) 1966 along with the approach of (Case law of) UN Human Rights Committee.
- The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984 along with the approach of the Committee against Torture.
- International Convention on the Elimination of All Forms of Racial Discrimination 1965 along with the approach of CERD Committee.
- Convention on the Elimination of All Forms of Discrimination against Women 1979 along with the approach of CEDAW Committee.

2.4.2. NON-CONVENTIONAL INSTRUMENTS OF UNITED NATIONS (NOT LEGALLY BINDING BUT SIGNIFICANT DUE TO THEIR ADOPTION EITHER THROUGH CONSENSUS OR WITHOUT VOTING):

• A handbook on Justice for Victims on use and application of the Declaration of Basic Principles of Justice for Victims and Abuse of Power.  
• The Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005).

2.4.3. REGIONAL HUMAN RIGHTS TREATIES / BODIES (CASE LAW OF):

• The Inter-American System for the Protection of Human Rights:

39 Ibid.
• Inter-American Convention 1969. Along with the approach emerging out through Case law of Inter-American Court of Human Rights. (In brief IACtHR).
• The European System for the Protection of Human Rights.
• The Approach emerging out of Case law of European Court of Human Rights.
• Statement of the Victims’ Rights in the Process of Criminal Justice, issued by the European Forum for Victim’s Services in 1996.

2.5. IDENTIFICATION AND RECOGNITION OF VICTIMS’ HUMAN RIGHTS: POSITIVE APPROACH OF HUMAN RIGHTS LAW:

Traditionally international Human Rights law is considered as a set of rules that regulates State’s action only by imposing a negative obligation upon the State of not interfering, through its actions, upon the individual liberties of citizens. This approach is referred as ‘negative approach’ of Human Rights. Nowadays the scenario has changed and emphasis is being given to the ‘positive approach’ of human rights that has not only changed victim’s position in Criminal Justice System significantly but has brought forth State’s positive obligations of protecting and ensuring Victims’ Human Rights.43

The positive approach of Human Rights law has significantly changed victim’s position in Criminal Justice System. This ‘Positive Approach’ (Rights based) is different from the ‘Negative Approach” (Freedoms based) of the common law.\(^{44}\) The difference between these two approaches (human rights and civil liberties approach) were made clear in the case of X and Y v. Netherlands.\(^{45}\) Under the ‘Negative Approach’ of the common law, State is prohibited from interfering with the civil liberties of its citizens whereas under the ‘Positive Approach’, State is under a duty of not interfering with individuals’ Human Rights as well as under a ‘Positive Obligation’ of providing them protection from third party violations committed against their Human Rights. Human Rights approach imposes positive obligations upon State to take measures to protect victims’ rights.\(^{46}\)

2.5.1. DOCTRINE OF POSITIVE OBLIGATIONS:

Doctrine of Positive Obligations emanates from the decision in X and Y v. Netherlands\(^ {47}\), wherein it was held that,

> “There may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”

This was not an illustration of recognition of State’s positive obligations towards victims of crime only, rather it was an indication towards the major changes in perception of State’s obligation that was taking place at international level. Nowadays it is well accepted internationally that for proper enjoyment of core human rights by victims, States are required not only to refrain itself from


interfering with victims’ rights but to provide protection from third party interferences too.48

“The proposition that States’ obligation ‘to ensure’ human rights encompasses a duty to take measures to protect against interference of human rights by private individuals is well-accepted in international practice. In particular, there has been a realisation that effective enjoyment of internationally recognised human rights requires protection not only against impairments of these rights by State agents, but also by private individuals.”49

This shows that how the State’s duty to provide protection extends to the violation of Human Rights committed by individual actors or the offences committed by private individual against the human body. This position has further been supported by the international instruments such as the European Convention and Recommendations of Council of Europe.

It has been provided under Art. 2 of the European Convention that States, itself, must not violate individuals’ right to life (except in exceptional circumstances) and States must provide protection from third party threats by means of effective deterring and preventing measures.50

Council of Europe, Recommendation 06 (08), provides that victim’s physical and psychological integrity should be protected by the State at all procedural levels and steps should be taken to ensure protection to potential victims of crime.51

State’s positive obligations were reiterated by the Inter-American Court of Human Rights in Velasquez Rodriguez v. Honduras.52

“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction; to

49 Ibid.
identify those responsible; to impose the appropriate punishment and to ensure the victim adequate compensation.

The duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to punishment of those responsible and the obligation to indemnify the victims for damages."53

It is State’s responsibility to prevent and punish crime especially those that threaten life or physical integrity. For this purpose, State is required to take steps by means of providing adequate and appropriate legislative frameworks and ensuring practical measures for their implementation.54

Under its positive obligations, State is required to provide not only with the substantive measures but to provide with the required adequate and appropriate procedural measures to deal with the issue of proper criminal investigations, prosecutions and punishments.55

State should take preventative measures, not only against its own agencies, but against the acts of Non-State actors too.

“Where the acts of private parties...are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”56

It was held by the European Court of Human Rights in the case of Mc Bulgaria57,

“...The investigation of the applicant’s case, and in particular the approach taken by the investigators and the prosecutors in the case fell short of the requirements inherent in the State’s positive obligations viewed in the light of the relevant modern standards in comparative and international law to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse- -The court thus

53 Id at [174-5].
55 Id at113.
56 Velasquez Rodriguez v. Honduras (1989) 28 ILM 291, at [176-7].
finds that in the present case there has been a violation of the respondent State’s positive obligations under both Articles 3 (on torture and inhuman/ degrading treatment) and 8 (on protection of the law) of the European Convention on the Human Rights.”

Not only a biased attitude on part of police but the negligence in performing their duties of investigation may also amount to a breach of State’s Obligation.

“It would thus appear that negligence by the police or any criminal justice agency in the course of the investigation would constitute a breach, as would bias, prejudice or a lack of independence.”

State is under a legal duty to prevent escape of the perpetrators through its agency-police. Failure on the part of the police to prevent or allowing a perpetrator to escape from the custody violates the constitutional imperative of acting positively to prevent such escape. It was held by the Supreme Court of Appeal of South Africa in the case of Van Eader v. Minister of Safety and Security,

“The fundamental values enshrined in the Constitution include human dignity, the achievement of equality and the advancement of human rights and freedoms—everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources—- in all the circumstances of the present case I have come to the conclusion that the police owed the appellant a legal duty to act positively to prevent Mohammed’s escape—I have reached this conclusion mainly in view of the State’s Constitutional imperatives to which I have referred.”

It emerges out from the above-mentioned developments in the field of International Human Rights Law that State owes positive obligations towards victims of crime that include State’s Protective Obligations and its Procedural Obligations which are interdependent on each other. These obligations require State to provide not only the protection to the victims of Human Rights

58 Ibid.
61 ibid.
Violations but further providing procedural means to ensure such protection to victims of Human Rights Violations.62

2.5.2. RIGHT TO JUSTICE AS VICTIMS’ HUMAN RIGHT IN INTERNATIONAL INSTRUMENTS:

Article 8 of the Universal Declaration of Human Rights (1948) was the beginning for recognition of a right to a remedy.63 According to Article 8 of the Declaration, “Everyone has the right to an effective remedy by the competent National Tribunals for acts violating the fundamental rights granted to him by the constitution or by law.”

International Covenant on Civil and Political Rights (1966) prescribes for a right to remedy in its Article 2(3) as follows: “Any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

According to Shelton, ‘right to remedy’ includes ‘the range of measures’ that may be taken in response to an actual or threatened violation of human rights.’64 These measures can be categorized into two heads i.e.

(i) Right to justice i.e., general and procedural forms of redress that includes state’s obligation to prevent crime as well as responding to crime by proper investigation, prosecution and punishment.65

(ii) Right to reparation i.e., substantive remedies that provide redress to victims such as compensation. Restitution, rehabilitation and satisfaction etc.66

The initiatives taken by the United Nations played an important role in raising the concerns of victims’ needs and identifying their rights especially victims’

66 Ibid.
right to justice. United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)\(^{67}\) recognized four broad rights for victims of crime i.e., access to justice and fair treatment, restitution, compensation and assistance. This Declaration is meant for providing a guidance to the Member States in their efforts of curtailing victimization. Member States are called upon to effectively address the issue of victimization and ensure victims’ rights into their jurisdictions. First category of these rights, ‘access to justice and fair treatment’ is inclusive of various other specific rights. These rights can be enumerated as:

(i) Right to be treated with dignity throughout the Criminal Justice Process. Declaration emphasize upon this right by providing that, “Victims should be treated with compassion and respect for their dignity”.

(ii) Right to access the justice mechanism and to get prompt redress: Declaration recognize not only victims’ right to access the justice mechanism but also recognizes victims’ right to get a prompt or speedy redress for the harm suffered by them.

(iii) Right to procedural fairness: Victim should be given procedural fairness that means that they should be given fair treatment in the process of seeking redress. This procedural fairness can be satisfied by providing victim with a procedure i.e., expeditious, fair, inexpensive and accessible to victims.

(iv) Victim should be provided with a responsive system of judicial and administrative processes i.e., adoption of victim-sensitive processes. This can be ensured by providing victim with a right to information and notification, a right to present his views and concerns, a right to get assistance throughout the legal process, minimum inconvenience, a right to privacy, a right to safety and a right to speedy disposal of the case.

Victims should be provided with timely information pertaining to their rights and role during the Criminal Justice Process. They should further be notified about the timing and progress of the proceedings in their case and as to the disposition of their matter especially in cases where victim has made a request and where the concerned crime is of serious nature.

An analytical study of positive obligations of the State discussed above along with these instruments of human rights, identifies victim’s right to justice and right to remedy as an important human right and is further dependent on three rights for its wholesome realization:

- Right to protection,
- Right to access to justice and
- Right to a fair and prompt investigation.

2.5.2.1. Right To Protection:

General public expect from State to provide protection from crime. This approach derives its base from ‘social contract theory’ of Hobbes and Locke. The underlying philosophy of this theory is that it is the State that should provide protection to individuals from being victimized since the State has taken certain freedoms from individuals in exchange of certain protections from the State.68

As a protector of its citizens, the duty rests upon the State to provide protection and prevent victimization, and make provision for Justice to offenders. In a democratic set-up, this expectation of a sense of security is associated with the concept of Human Rights and fair treatment. Owing to the Social Contract, State is expected to provide better protection from victimization.69

Right to Protection may lead to two types of ‘Protections’, One that seeks protection before the commission of crime i.e., ‘Protection from primary victimization’ and another that recognize the need of protection only to those

69 Ibid.
against whom the primary victimization has already occurred i.e., ‘Protection from further or re-victimization and secondary victimization’.

‘Protection from primary Victimization’ covers under its ambit all persons who may be victim of an offence i.e., all potential victims. The second category ‘protection from further or re-victimization and secondary victimization’ covers cases of repeat crimes against a person and secondary victimization of such persons. Though for potential victims of crime, fear of crime may or may not be real, but for the victims of crime, inability to prevent further victimization or subsequent intimidation pose a real threat.\(^70\)

It is submitted that incidence of crime against a person makes him much more vulnerable for further victimization than any other potential victim of crime. Such victims of ‘further victimization ‘or re-victimization’ and ‘secondary victimization’ may need protection from such repeat victimization.

2.5.2.1.1. Protection In Case Of Victims Of Non-State Crimes:

It was held in the case of X and Y v. Netherlands (1985) that State is under a ‘positive obligation’\(^71\) to protect victims from ‘life-threatening crimes’ or ‘crimes that threaten their physical or psychological integrity’.\(^72\) This protection is not limited with the cases where the violation of right to life was caused by State actors rather it is wide enough to include the cases where the violation of right to life was not caused by the State actor but by an individual actor or non-State actor.

The breakdown of vertical or horizontal divide of State duties has resulted into an expansion of State’s duties and an inclusion of ‘protection to victims of non-state crimes’ into the Human Rights framework. Nowadays victims of non-state


\(^71\) X and Y v. Netherlands (1985) 8 EHRR 235.

crimes have a right to get protection from the state on the basis of their Human Rights violation.\textsuperscript{73}

Art. 2 and 3 of the European Convention provide for the positive obligations of the State. Under Art. 3 (along with the general duty of the State as provided under Article 1 of the Convention) it is an obligation of the State to take positive steps to provide adequate protection to the victims of crime under their respective criminal laws.\textsuperscript{74}

Article 1 of the European Convention on Human Rights provides for the Obligation of the State to respect Human Rights. It provides that,

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”

Article 2 of the European Convention deals with the ‘Right to life’. It provides as under,

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

Article 3 of the European Convention provides that,

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The jurisprudence of UN Human Rights Committee throws some light on State’s procedural obligations in cases of violation of Human Rights of victims of non-state crime or crime committed by private individuals. In Delgado Paez v. Colombia\textsuperscript{75}, where unknown perpetrators threatened a school teacher with


\textsuperscript{74} European Convention on Human Rights(1953) available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

death threats and even attacked him, Colombian authorities failed to adequately respond. It was held by the UN Human Rights Committee that

“States shall take reasonable and appropriate measures- including the conduct of an effective investigation- to protect the right to security of individuals, even if they are not detained, when there are objective circumstances warranting the adoption of these measures.”\(^76\)

Committee made it clear that either the State or even the non-State actor or a private individual may be the author of these acts causing ‘objective circumstances’.\(^77\)

UN Human Rights Committee stated that,

“the legal bases for this State’s duty is the obligation ‘to ensure’ the rights recognised in the ICCPR under Article 2, paragraph 1, and the principle of effectiveness governing the interpretation of human rights treaties.”\(^78\)

Article 2, para 1 of ICCPR provides that,

“Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\(^79\)

It was found by the CEDAW in the case of Ms. A.T. v. Hungary that state was under an obligation to take care of the physical and mental integrity of a woman by ensuring her rights through effective measures of investigation under the provisions of CEDAW but Hungry, by not providing protection to a woman that

\(^{76}\) Ibid.
\(^{77}\) Ibid.
\(^{78}\) Ibid.
was being ill-treated by her former partner, had failed in its obligation to ensure her rights.\textsuperscript{80}

\subsection*{2.5.2.1.2. International Recognition Of Victims’ Right To Protection:}

Victim’s Right to Protection is an internationally recognized standard that can be used directly under national legal systems.\textsuperscript{81}

As per Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law (2005),\textsuperscript{82} State has an obligation to,

“(a) take appropriate legislative and administrative and other appropriate measures to prevent violations,\textsuperscript{83}

Art. 1 of the European Convention deals with the general duty of the State i.e., secure to everyone within their jurisdiction the rights and freedoms defined in (the) Convention.\textsuperscript{84} Whereas its Articles 2 and 3 prescribes for State’s duty of providing protection in cases of violation of human rights committed by the Non-State actors.\textsuperscript{85}

Highlighting the ‘Right to Protection’ in Kenya it was stated by the Court in the case of R v. Commissioner of Police & 3 others\textsuperscript{86} that,

\begin{quote}
\textit{“All the same, the life of the victim and the interests of the family are protected by the Constitution and the statutes. The State through the respondents herein are responsible for security of citizens in this country. It is the duty of the State to inquire into any crime or suspected crime affecting any of its subjects. It is the duty of the State to investigate...”}
\end{quote}

\begin{flushleft}

\textsuperscript{81} Pupino case, 16\textsuperscript{th} Jun 2005, in case C-105/03 as cited by Jonathan Doak, \textit{Victims’ Rights, Human Rights and Criminal Justice, Reconceiving the Role of Third Parties} 65 (Hart Publishing, Oxford and Portland, Oregon, 2008).

\textsuperscript{82} UN DOC A/RES/60/147 available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

\textsuperscript{83} Ibid.

\textsuperscript{84} European Convention on Human Rights (1953) available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

\textsuperscript{85} Ibid.

\end{flushleft}
2.5.2.1.3. Right To Protection: Requirements

2.5.2.1.3.1. Effective Substantive Law Measures:

Substantive law should not provide too wide defences to offenders that counteracts the protection provided to victims. Law should be designed in a manner that balances victims’ rights with that of the accused’s rights. If it provides the offender with a lot of defences, it cannot protect victims’ rights effectively. This reasoning was given by the European Court of Human Rights in 1999 in a case of ‘reasonable chastisement’.

2.5.2.1.3.2. Before The Event Remedies (not only through effective criminal law provisions but through effective criminal law enforcement machinery):

Osman case reflects the development of victims’ rights. In this case though the police were informed of series of attacks, it failed to provide protection and when the case was brought before the ECtHR then UK government argued that justice had been administered by arresting, charging, convicting and sentencing the accused. Finding the measures insufficient it was declared by the ECtHR that ‘after-the-event’ remedies are not sufficient to provide protection to ‘Right to life’ under Article 2 of ECHR. State is under a positive obligation to provide special protection to ‘right to life’. As per the reasoning given by the European Court this obligation means that State is under a duty to provide, “Effective criminal law provisions to deter the commission of offences against the person backed up by the law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.”

2.5.2.1.3.3. Preventive Operational Measures (in cases of threat to right to life):

In Osman v. United Kingdom (1998), it was held that where an identified third party faces a real and immediate risk to his right to life, States should take

87 Ibid.
90 Id at [115].
reasonable preventative measures under its ‘protective obligations’, 91 but this threat to human right should be real, as was observed by the court in HLR v. France, that State can be held responsible where it is shown that there was a real risk of violation of Human Rights.92

In cases of personal violence crime (or crime against the human body), the incidence of victimization shows the existence of a real risk or threat to right to life of the victim or a real risk or threat of further or re-victimization. In such type of situations or cases, use of no protective or preventative measure would result into violations of State’s ‘protective obligations’.

In cases where there is a known risk of right to life, this obligation may include a ‘duty to take preventative operational measures’. 93 This special duty exists in cases where,

“the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judges reasonably, might have been expected to avoid that risk.” 94

This right to protection from serious harm recognized in Osman’s case95 was reaffirmed in Van Colle v. United Kingdom.96 It was observed by Lord Bingham that, in Osman case, the submission made by the State, that the concerned relevant act had to amount to gross negligence or willful disregard of the duty to protect life, on part of the authorities, was roundly rejected by the Strasbourg Court. He observed that,

“Such a rigid standard would be incompatible with the obligation of member States to secure the practical and effective protection of the right laid down in Article 2. That Article protected a right fundamental in the scheme of the Convention and it was sufficient for an applicant to show that the authorities did not do all that could reasonably be
expected of them to avoid a real and immediate risk to life of which they
had or ought to have had knowledge.”

Lord Bingham further observed that Osman test depends upon two criteria i.e.,
knowledge of the authorities and “what they ought to have known at that time”.
This second phrase was considered as a crucial part of the test. Lord Bingham
observed as,

“Stupidity, lack of imagination and inertia did not afford an excuse to a
national authority which reasonably ought, in the light of what it knew
or was told, to make further enquiries or investigations: it is then to be
treated as knowing what such further enquiries or investigations would
have elicited.”

2.5.2.1.3.4. Due Diligence Requirement To Ensure Right To Protection
(on part of the State):
State should perform its duties of providing protection with due diligence
irrespective of the intention on part of the State. In case of Jessica Lenahan (Gonzales)99
where a father killed his children after taking them from their
mother’s custody without permission, it was found by the Inter-American
Commission on Human Rights that police was under an obligation to enforce
restraining order,

“There was ‘broad international consensus’ that States “may incur
responsibility for failing to act with due diligence to prevent, investigate,
sanction and offer reparations for acts of violence against women”.

2.5.2.2. Right To Access To Justice:
2.5.2.2.1. International Recognition Of Victims’ Right To Access To
Justice:
UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse
of Power (1985), emphasize upon ‘access to justice’ and ‘fair treatment’ among

97 Id, at para 49, Application no. 7678/09.
98 Ibid.
99 Jessica Lenahan (Gonzales) et al v. United States, case 12.626, Report No. 80/11, August,
17, 2011, as cited in C.K. (a child) through Ripples International (as her guardian and next
friend) & 11 others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition
No.8 of (2012) eKLR dated 27th May 2013, available at http://theequalityeffect.org/wp-
content/uploads/2013/05/KLR-160-Girls-decision.pdf
100 Ibid.
other areas. 1985 Declaration provided that all types of victims ‘are entitled to access to the mechanism of justice and to prompt redress.’ 101

This declaration of 1985 though provides for victims’ right to access to justice but it is attached with the condition that this right of victim has to be decided subject to the domestic law. As is clear from Paragraph 4 of this Declaration,

“Victims are entitled to access to the mechanisms of justice and prompt redress, as provided for by the national legislation.”102

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), through its various principles provide for victims’ right to access to justice’. These principles are Principle 2(b), 3(c), 11(a) and 12.

Principle 2(b), requiring States to adopt appropriate measures for providing access to justice;103 Principle 3(c), recalling that State obligations to respect, ensure respect for and implement international human rights law and international humanitarian law require States to provide victims with access to justice “as described below”;104 Principle 11 (a), providing that remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victims’ right to effective access to justice “as provided for under international law”;105 and Principle 12 specifically provides for the right of a victim of a gross violation of international human rights law or of a serious violation of international humanitarian law to “equal access to an effective judicial remedy as provided for under international law”.106

102 Ibid.
103 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law, Principle 2 (b), UN General Assembly, Res.60/147, 16 December 2005, UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
104 Id, Principle 3 (c).
105 Id, Principle 11 (a).
106 Id, Principle 12.
These principles determine State’s duty to provide victim with equal and effective access to justice. UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles) lays emphasis upon equal and effective access to justice, adequate, effective and prompt reparation and the right to truth. These principles at one side reaffirm State’s obligation to investigate and on the other side provide for an equal access to an effective judicial remedy for the victims of gross violations of international human rights law and serious violations of international humanitarian law.107

These Non-Convention instruments such as UN Declaration for Victims of Crime (adopted by consensus on 29th November 1985) and Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims (adopted without vote in December 2005), do not have the legally binding force as the treaties do have, still they are significant in the sense that these were adopted by the UN General Assembly either by consensus or without vote.108

Various Human Rights instruments109 provide for ‘right to remedy’ that include a procedural ‘right to access’ investigatory procedures because without an effective mechanism of enforcement of these rights, human rights are only declaratory and ineffective.110

Article 8 of Universal Declaration of Human Rights 1948 also recognizes right to remedy as a human right. It provides that,

107 Id, Principle 2 (b), 3 (c), 11 (a) and 12.
“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.”111

Article 2(3) (a) of the International Covenant on Civil and Political Rights imposes an obligation upon the Member State to ensure that every person, whose rights or freedoms are violated, shall be provided with a right to remedy, irrespective of the consideration who was the perpetrator of such violation was. It provides that even if the violation is caused by the person acting in an official capacity, the victim shall be provided with such remedy. It does not say that the said remedy shall only be provided in case the perpetrator is acting in an official capacity. This shows that the provision has an equal application in both the cases where the perpetrator is a State actor or is a Non-State actor. The essence of this remedy lies in its effectiveness. The provision says that the victim shall have an effective remedy. Thus, an ineffective remedy is no remedy in the sense prescribed under the Covenant.112

Next clause (b) of Article 2 (3) of the International Covenant on Civil and Political Rights imposes an obligation upon the Member State to ensure that victims’ right to get an effective remedy, is determined by any competent judicial, administrative or legislative authorities or by any such authority that has been provided under the National legal system of that Member State and in case of absence of any such authority, the concerned State shall develop such possibilities where judicial remedy can be ensured. This covenant goes further in ensuring that not only the normative measures are laid down but they are

112 Article 2(3) (a) of the International Covenant on Civil and Political Rights (1976):
“Each State party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.”
practically enforced. For this objective, clause (c) of Article 2 (3) of the International Covenant on Civil and Political Rights imposes a further obligation upon the State party to look after the proper implementation of the normative measure of an effective judicial remedy. It says that not only this, that the remedy shall be granted, but once granted, it is for the authorities to see that the granted remedy is enforced and State has to ensure that such remedy is enforced by the competent authority.\textsuperscript{113}

Article 6 of International Convention on the Elimination of All Forms of Racial Discrimination (1966) provides that it is an obligation of the State parties to assure that everyone within their jurisdiction is provided with effective protection and remedies. State shall provide competent national tribunals and other State institutions for this purpose. Such protection and remedy is to be provided in case of violation of human rights and of fundamental freedoms that may result from such acts of racial discrimination that are contrary to this convention. This Article further says that State parties shall assure to everyone within their jurisdiction, a right to seek just and adequate reparation or satisfaction for any damage that they have suffered due to such acts of victimization. This reparation or satisfaction is not an alternative of the remedy but it is in addition to the remedy prescribed under the Convention.\textsuperscript{114}

It is to be noted here that representative of ECtHR supported “inclusion of guarantees for access by victims to investigative machinery.”\textsuperscript{115}

\textbf{2.5.2.2.2. Applicability Of Victims’ Right To Access To Justice In Cases Of Non-State Actors:}

\textsuperscript{113} Ibid.
\textsuperscript{114} Article 6 of International Convention on the Elimination of All Forms of Racial Discrimination (1966):
“States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.” available at www.ohchr.org/EN/Professionalinterest/Pages/CERD.aspx
As per Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), State has an obligation to,

“(c) Provide those who claim to be victims of a human right or humanitarian law violation with equal and effective access to justice—irrespective of who may ultimately be the bearer of responsibility for the violation.”

In Ergi v. Turkey, though the European Court of Human Rights was satisfied that victim was not killed by security forces, still the court held Turkey responsible for ‘not initiating an effective investigation’ as provided under Article 2 of the European Convention on Human Rights.

This right to access to justice has been the source of victims’ rights in criminal proceedings, since it has been taken into consideration by human rights treaty monitoring bodies while recognizing victims’ rights in criminal proceedings.

2.5.2.2.3. Requisites Of Effective Right To Access To Justice:

2.5.2.2.3.1. Effectiveness Of The Remedy (Adequate And Effective Constitutional And Statutory Measures):

Adequate and effective constitutional and statutory measures are a must for providing protection to victim’s rights. It was accepted by the European Court of Human Rights (ECtHR) in 1985 in the case of X v. Netherlands, where it was recognized that victims have a ‘right to access’ to criminal remedies, thus State was under an obligation to change the law for providing this access to the victim.

2.5.2.2.3.2. Effectiveness Of The System:

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116 UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
117 Ibid.
119 Ibid.
It was observed by the European Court of Human Rights that if Articles (1, 2, 3 and 13) of European Convention on Human Rights (1953) are taken together then they mean that a State’s violation of its Convention duties results into violation of victim’s right to access an effective remedy. It seeks not only for the effectiveness of remedy but for the effectiveness of the system to obtain the remedy.123

Article 13 ‘the right to a remedy’ of European Convention on Human Rights (1953), states that,

“Everyone whose rights and freedoms as set forth in this convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

Article 1 of European Convention on Human Rights (1953) prescribes ‘rights and freedoms’ to everyone within its jurisdiction. Article 2 of European Convention relates with ‘the right to life’ and Article 3 of European Convention deals with ‘the right to be free from inhuman or degrading treatment’.

In Hugo Rodriguez v Uruguay,124 it was submitted by Uruguay that exhaustion of domestic remedies is required before approaching committee but this submission was rejected by the United Nations Human Rights Committee125 taking note of the fact that non-initiation of criminal investigation amounts to an impediment in the way of applicant’s ability to take recourse of domestic remedies. As per the mandate of Article 2(3) of International Covenant on Civil and Political Rights, the essence of an idea of an effective remedy lies in the criminal investigation.126 This shows that right to an effective remedy needs initiation of an effective investigation.

2.5.2.2.3.3. Access To Justice Not To Be Unjustifiably Hindered Or Impeded By State Authorities:

125 Established under Article 28 of ICCPR.
In Mahmut Kaya v. Turkey\textsuperscript{127}, the European Court of Human Rights, while interpreting Article 13 of Inter-American Convention has made it clear that the ‘right to a remedy’ which has been held to include right to access to justice, to be effective in practice, must not be unjustifiably hindered by the acts or omissions of the State authorities.

Constitution of Kenya 2010 recognizes this right under its Articles 48\textsuperscript{128} and 50 (1)\textsuperscript{129}. Holding respondents responsible for violating petitioners’ ‘right to access of justice’, as recognized by the Constitution of Kenya 2010, it was stated by the Court in Kenya case,\textsuperscript{130}

\begin{quote}
“Article 48 and 50 of the Constitution of Kenya, 2010, obligates the State to ensure access to courts is not unreasonably or unjustifiably impeded and in particular where there is legitimate complaint, dispute or wrong that can be resolved by the courts or tribunals. Needless to say, in criminal justice system, police play a critical role and its abdication from that role would inevitably deprive claimant’s access to courts and lead to miscarriage of justice or deny justice altogether.”\textsuperscript{131}
\end{quote}

“The police in the instant petition by failing to conduct prompt, effective, proper, corrupt free and professional investigations into the petitioners complaints, and demanding payments as preconditions for assistance, whether for fuel or P3 forms or whatever the case might have been they violated petitioners right to access of justice and right to have disputes that can be resolved by the application of law decided in a fair and in public hearing before court of law in accordance with Article 50 (1) of the Constitution of Kenya, 2010.”\textsuperscript{132}

\subsection*{2.5.2.3. Right To Fair Investigation:}

As per Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005),\textsuperscript{133} State has an obligation to,

\begin{itemize}
\item \textsuperscript{127} Mahmut Kaya v. Turkey, App No. 22535/93, 28 Mar 2000, [124], available at http://www.zorlakaybetmeler.org/download.php?id=HAH/doc/266
\item \textsuperscript{128} Article 48 the Constitution of Kenya, 2010 deals with access to justice.
\item \textsuperscript{129} Article 50 the Constitution of Kenya, 2010 deals with access to justice.
\item \textsuperscript{130} C.K. (a child) through Ripples International (as her guardian and next friend) & 11others v. Commissioner of Police/ Inspector General, High Court at Mera, Petition No.8 of (2012) eKLR dated 27th May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf
\item \textsuperscript{131} Ibid.
\item \textsuperscript{132} Ibid.
\item \textsuperscript{133} UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
\end{itemize}
“(b) investigate violations effectively, promptly, thoroughly and impartially and where appropriate take action against those allegedly responsible in accordance with domestic and international law,”\textsuperscript{134}

Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) does not provide rights for victims of Non-State crime, though it makes reference to the 1985 Declaration. 1985 Declaration covered victims of both ‘Human Right abuses by State actors’ as well as ‘crimes committed by Non-State actors.’ 1985 Declaration provided that all types of victims ‘should be treated with compassion and respect for their dignity’ and ‘are entitled to access to the mechanism of justice and to prompt redress.’\textsuperscript{135}

Several conventions like Convention on the Elimination of All Forms of Discrimination Against Women\textsuperscript{136}, the Convention on the Elimination of Racial Discrimination\textsuperscript{137} and the Convention on the Rights of the Child\textsuperscript{138} provide that state has an obligation to pursue the cases of Human Rights breaches not only by making them an offence under their national criminal laws but by providing for a proper and effective investigation mechanism for the human rights violation cases.

Article 2 of CEDAW provides that State parties should condemn discrimination against women in all its forms and they should come forward to adopt a policy to eliminate discrimination against women. Such a policy should be prepared by using all appropriate means and there should not be any delay in preparation of such a policy. State parties are under obligation to take appropriate and other measures that may include sanctions where required so that discrimination

\textsuperscript{134} Ibid.
\textsuperscript{136} Articles 2(b) and 2(c) of CEDAW, available at www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf
\textsuperscript{137} Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (1966), available at www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx
against women is effectively prohibited in all its forms. State are under obligation to ensure equal protection of rights of women as that of men. States are further supposed to ensure through such competent national tribunals and other public institutions that women are accorded effective protection against any act of discrimination.\textsuperscript{139}

Article 39 of the Convention on the Rights of the Child make it obligatory for the State parties to take all appropriate measures that promote physical and psychological recovery and social reintegration of a child victim. Victimization of such child may be the result of any form of neglect, exploitation, or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment or of armed conflicts. States shall take effective measures to ensure that such recovery and reintegration takes place in a child-friendly environment that takes care of child’s health, self-respect and dignity of the child.\textsuperscript{140}

Principle 19 of “The Set of Principles on Combating Impunity” affirms that State has an obligation to effectively investigate human rights violation cases.\textsuperscript{141}

\textsuperscript{139} Article 2 (b) and 2 (c) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979):

“States parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(b) to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women and

(c) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”

available at
www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf

\textsuperscript{140} Article 39 of the Convention on the Rights of the Child adopted by General Assembly Resolution 44/25 of 20th November 1989 with effect from 2nd September 1990:

“States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

available at
www.ohchr.org/en/ProfessionalInterest/Pages/crc.aspx

\textsuperscript{141} The Set of principles for the protection and promotion of human rights through action to combat impunity, available at
http://www.derechos.org/nizkor/impu/principles.html
The need for an effective and appropriate enforcement mechanism was felt and emphasized under Article 12 of the Convention against Torture, that provides that,

“Each state party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”\(^\text{142}\)

The individual right to complain his case and his case being examined ‘promptly and impartially’, has been enshrined under Article 13 of the Convention against Torture.\(^\text{143}\)

In Aydin v. Turkey\(^\text{144}\), it was recognized by the Court that, ‘right to a remedy’ includes in its ambit ‘right to an effective investigation’ under Article 13 of European Convention on Human Rights.

The Inter-American Commission on Human Rights, in the case of Jessica Lenahan, that concerned with the killing of children by their father after taking them out from their mother’s custody without her permission, held that,

“The courts have found that State has a clear duty to investigate crime and found the failure to do so constitute a Constitutional violation of claimant’s rights.”\(^\text{145}\)

2.5.2.3.1. Applicability Of Right To Fair Investigation In Cases Of Non-State Actors:

CEDAW through its recommendation,\(^\text{146}\) as well as through its decisions\(^\text{147}\) in individual cases has made it clear that state’s responsibility is not limited to the

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\(^{142}\) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx

\(^{143}\) Id, Article 13.


State crime, rather it extends to the crimes committed by non-state actors or individual players. Its recommendation requires,

“States to investigate and punish acts of violence against women perpetrated by both State agents and private individuals.”

In McCann, State was held to be under a duty to investigate in Murder cases whether the killing was done by State agents or private parties. Jonathan Doak is of the view that it is clear from the phrase ‘inter alios’ used by the court.

It was reaffirmed by the ECtHR in Yasa v. Turkey that “State’s obligation to carry out an effective official investigation when individuals have been killed is not confined to cases where it has been established that the killing was caused by an agent of the State.”

Another case that throws some light on State’s obligation is of Ergi v. Turkey, wherein it was held that State is under an obligation to carry out an effective investigation and this obligation is not concerned with the question that who was the perpetrator of the killing? Even if the State authorities are not involved in the said killing, the State is under obligation to investigate the matter to find out the actual perpetrator. Mere knowledge on part of State authorities that a killing has taken place, gave rise to this obligation to effectively investigate the matter to ensure the actual circumstances surrounding the death.

“this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State ----in the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention (European Convention on Human Rights) to carry out an effective investigation into the circumstances surrounding the death.”

150 ECtHR, Yasa v. Turkey, Judgement of 2nd September 1998, Application No. 22495/93, para 100.
153 Ergi v. Turkey (2001) 32 EHRR 18, ibid 82.
The decisions of European Court of Human Rights make it clear that Article 2 and 3 of the Convention (specially Article 2)\textsuperscript{154}, play a vital role in ascertaining the investigatory requirement irrespective of the fact that State has played any role in the killing or not. It was made clear by the court that such requirements apply in that case also where the attack though was life-threatening, but did not result into death. It is clear from Menson and others v. United Kingdom,\textsuperscript{155} where in a racist attack, four white youths killed a black man by setting him on fire. ECtHR recognised this fact that,

“\textit{The applicants did not claim that the State had actively caused the death, or that the authorities knew, or ought to have known, that he was at risk of violence.}”\textsuperscript{156}

Still it was ruled by the ECtHR that,

“\textit{The absence of any direct State responsibility for the death of Michael Menson did not exclude the applicability of Article 2 of the ECHR.}”\textsuperscript{157}

The court said that Article 2(1) of the ECHR imposes an obligation upon the State to secure the right to life by means of effective criminal law provisions. It was observed by the Court that,

\begin{quote}
\textit{“This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment.”}\textsuperscript{158}
\end{quote}


\textsuperscript{155} Menson and others v. The United Kingdom, ECtHR, Decision of Admissibility of 6 May 2003, Application No. 47916/99 available at http://www.rettseven.info/Content/Menneskerett/Case

\textsuperscript{156} Id at 12.

\textsuperscript{157} Id at 12.

\textsuperscript{158} Id at para 1 at 12.
As is clear from the case law of European Court, under its positive obligations, it is State’s duty to prevent crime, to investigate and prosecute cases that are the results of violations of Article 2 and 3 by State as well as by Non-State actors.\textsuperscript{159}

ECtHR has expressed its view that regardless of who the perpetrator is, whether an official of the State or a private individual, State must carry out an investigation in all cases of violent killing, so as to comply with its obligations under Article 13 of the ECHR.\textsuperscript{160}

It was affirmed by Lord Bingham in the case of R v. Secretary of State for the Home Department, ex parte Amin,\textsuperscript{161} concerning the death of an offender by his cellmate, that,

“The duty to an effective and impartial investigation arose where an individual had been killed by an agent of the State or there was suspicion that the State has failed in its positive obligation to protect his life.”\textsuperscript{162}

Referring the investigation in cases of Victims of Non-State crime, it was emphasized by Lord Slynn in Amin that there exists a grey area between the deaths caused by the State and Non-State actors,

“It does not seem to me to be possible to say that there is a clear dividing line between those cases where an agent of the State kills and those cases where an agent of the State or the system is such that a killing may take place. The result of ‘an incident waiting to happen’ may just as much as an actual killing require detailed and profound investigation, though in some cases the procedure to be adopted may be justifiably different.”\textsuperscript{163}

As is clear from the decisions in McCann and Ergi, the Strasbourg jurisprudence recognise the investigatory obligations of State in cases of State as well as Non-State actors alike.\textsuperscript{164}


\textsuperscript{162} Ibid.


2.5.2.3.2. Approach Of United Nations Human Rights Committee:

Observations made by the UN Human Rights Committee, rejecting the claims of victims as to the fair hearing requirement as mentioned under Article 14, paragraph 1 of the ICCPR reflects upon the initial trend that ICCPR nowhere provides the right for individuals requiring the State to criminally prosecute another person.\(^{165}\)

Contrary to this initial trend, it was recognized by the committee in the case of Bahamonde v. Equatorial Guinea\(^{166}\) that victims do have a right of access to court for violation of first sentence of Para 1 of Article 14 of the ICCPR. Terming the denial of justice as ‘Systematic’, The Committee observed that,

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\text{“The notion of Equality before the Courts and Tribunals encompasses the very access to the courts, and that a situation in which an individual’s attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of Article 14, Para 1.”}\(^{167}\)
\]

Later developments show that still UN HR Committee considers that victims’ right to access to and participation in criminal proceedings including investigation does not come within the scope of the fair hearing requirements as provided under Article 14 paragraph 1 of ICCPR.\(^ {168}\)

This approach is not free from criticism\(^ {169}\) on the following grounds:


\(^{169}\) Id at 102-103.
(1) It is wrong to suppose that in cases of Human Rights Violations, providing victims with a fair hearing requirement in Criminal investigations gives them a right that imposes an obligation upon the State to prosecute criminally the perpetrators. By applying this provision, victims can get only a right to investigation that is

(i) Carried out by impartial bodies and
(ii) Within a reasonable period of time.  

(2) Though the UN HR Committee introduced the concept of “Systematic and Non-Systematic” violation of victims’ right to access of domestic courts but without any reasonable criteria or rationale behind it, it is not possible to distinguish between systematic and non-systematic violations.

(3) It is the logical extension of UN Human Rights Committee’s approach itself that victims have a right to approach authorities to seek investigation. This can be derived from,

“Its well established approach to the legal bases and rationales of State Obligations to investigate and prosecute these violations particularly its view that the victim’s right to an effective remedy is a legal basis of these duties of States; and the recognition in its General Comment No. 31 and case law that in the event of a serious human rights violation, bringing to justice those responsible is a component of the reparation due to the victim.”

Similar trend reflects from the United Nations instruments and the approach of their monitoring bodies where, going a step farther in doing justice towards the victim of serious human rights violations, ‘investigation’ has been considered as a component of ‘reparation’ due to the victims of crime.

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170 Id at 102.
173 Ibid Ch II, Sec. I, Sub Sec. A as cited at 103.
174 UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 16 & 18 available at: http://www.refworld.org/docid/478b26ae2.html [accessed 24 June 2017]
175 The Basic Principles and Guidelines on the Right to a Remedy and to Reparation for Victims, Principle 22(f); Guridi v. Spain, Committee against Torture, Communication No. 212/2002, views of 24th May 2005, paras 6.7; The Ituango Massacre case v. Colombia, IACtHR,
As per the Principle 22 (f) Basic Principles and guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law (2005), victim satisfaction includes,

“Judicial and administrative sanctions against persons liable for the violations.”

This principle leads towards the proposition that an impartial and thorough investigation are the essentials of victim reparation. 176

2.5.2.3.3. Approach Of IACtHR: Fair Investigation- From State’s Obligation To Victim’s Rights.

IACtHR is of the view that reparation cannot be limited with the payment of compensation only. Reparation consists of an impartial and thorough investigation, criminal prosecution and sanctions with payment of compensation. Compensation though a component of reparation but cannot be considered as the sole criteria for ensuring victim reparation. In case there is a violation of a right under ACHR, then victim reparation can be said to be satisfied if there is a thorough and impartial investigation, criminal prosecution, sanctions and compensation. All these form the essential elements of victim reparation. It has also been consistently ruled by IACtHR that,

“integral reparation for the violation of the rights enshrined in the ACHR cannot be reduced to the payment of compensation to the victim. In the view of this court, reparation with respect to this type of violation should include an impartial and thorough investigation, and if warranted, criminal prosecution and sanctions.” 177

It was held by the Inter-American Court of Human Rights, in the case of Velasquez- Rodriguez v. Honduras that Article 1(1) of the Inter-American

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Convention of Human Rights uses the phrase ‘ensure all persons’ that imposes a duty upon the State to investigate the violation of convention. State’s duty to investigate was discussed in the ‘Street Children’ case, whereas it was held by the Inter-American Court of Human Rights,

“That the State is obliged to investigate and punish any violation of the rights embodied in the convention in order to guarantee such rights.”

IACtHR has now changed its approach that considered ‘investigation’ as a matter relating with State’s obligation only to an approach that considers ‘investigation’ as a matter of victims’ rights. In relation to criminal investigation into cases of violation of Human Rights IACtHR has recognised that victim has a right

i. to resort to the administration of justice to obtain an investigation;

ii. Such an investigation must be carried out by competent, independent and impartial authority;

iii. Within a reasonable time period;

iv. If evidentiary and other objective requirements warrant so then prosecution and punishment of those responsible.

Independence of victims’ right and State’s obligations from each other while pursuing in the same direction and with the same objective, has resulted in to recognition of two rights of victims i.e.,

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(i) The right to resort to the administration of justice to obtain an investigation within a reasonable time.\textsuperscript{184}

(ii) Parallel nature of State’ Obligation: Practice of both IACtHR and the IACommHR show the changes in the perception regarding ‘investigation and prosecution’ that has widened from regarding these as merely an obligation of State to considering these as ‘victims’ rights in criminal proceedings’.

It was noted by IACtHR that existence of victim’s ‘right to resort to the administration of justice to obtain an investigation’, runs parallel to the State’s obligation to investigate

In The Caracazo v. Venezuela case that was in relation to disproportionate use of force by security forces, the IACtHR held that,

“All the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefits and that of society as a whole.”\textsuperscript{185}

2.5.2.3.4. Rationale Behind Victims’ Right To Obtain A Fair Investigation:

‘Fair hearing requirement’ as prescribed under Article 8 Paragraph 1 of the ACHR; ‘Right to Judicial Protection as provided under Article 25 of the ACHR, and ‘Victims’ Right to Truth’ are the main rationale, considered by the IACtHR, behind providing victim with a Right to resort to the Administration of Justice to obtain an investigation, and, if warranted, that those responsible are prosecuted and punished.\textsuperscript{186}

2.5.2.3.4.1. Fair Hearing Requirement:

\textsuperscript{184} Case of the “White Van” (Paniagua-Morales et al.) v. Guatemala, IACtHR, Merits, Judgment of 8\textsuperscript{th} March 1998, Series C No. 37, Merits, paras. 151-155, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_37_ing.pdf


\textsuperscript{186} The Caracazo v. Venezuela, Reparations, IACtHR, Judgment of 29\textsuperscript{th} August 2002, Series C No. 95, Para 115 available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_95_ing.pdf

It was held by IACtHR in the case of Genie Lacayo (1997) that, “accusing parties in criminal proceedings for human rights violations are beneficiaries of the fair hearing requirement.”

It was also held in the same case that criminal proceedings in cases of alleged violations of Human Rights should be conducted within ‘a reasonable period of time’.

IACtHR’s view that fair hearing requirement provides a sound footing for victim’s right to resort to the administration of justice to obtain an investigation seems reasonable because of the broad scope of Article 8, paragraph 1 of the ACHR inherent in the expression, “the determination of [everyone’s] rights and obligations of a civil, labour, fiscal or any other nature.”

2.5.2.3.4.2. Right To Judicial Protection:

IACtHR derives victims’ ‘Right to Resort to the Administration of Justice’ for the purposes of conduction of an investigation from the ‘right to judicial protection’ given under Article 25 of the ACHR.

It was in the case of Loayza Tamayo v. Peru that IACtHR gave such a wide meaning to Article 25 of the ACHR. It was stated by the Court that

“Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, inter alia, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered.

Article 25 is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.”

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188 Id para 80.


See also, Castillo Paez v. Peru, IACtHR, Reparations and Costs, Judgment of 27th November 1998, Series C No. 43, Para 106 available at https://www1.umn.edu/humanrts/iachr/C/43-ing.html
This right to obtain an investigation is not limited or does not cease only with the request being made before authorities for initiation of such proceedings. Conduction of such proceedings within a reasonable period of time is the essential of this right, as was held by the IACtHR in the case of Bulacio v. Argentina (2003).  

Though some restricted interpretation of this Article 25 paragraph 1 (limiting it to a simple, prompt and effective remedy) may also be found, but that meaning may only be given by neglecting the expression “any other effective recourse”.  

Article 25, Paragraph 1 of the ACHR makes everyone entitled for the right of simple and prompt recourse or any other effective recourse. This recourse should be simple and be prompt but it may be any other recourse provided its being effective in nature. Victim shall be entitled to such recourse from a competent court or tribunal. This recourse shall be available in cases of violation of fundamental rights recognized by the Constitution or violation of the concerned State’s laws or violation of this Convention. Even if the perpetrator of the violation is a State actor and the violation occurred during performance of his official duties, victim shall be entitled to such recourse. Again, it does not say that the recourse shall be available only in cases of violations caused by the State actors.  

A Textual and Systematic interpretation of the right to judicial protection makes it clear that there was some objective behind using the expression ‘any other effective recourse’, and it leads towards the logic that there may be certain remedies that are not ‘simple’ and ‘prompt’ but still may be effective for protecting victim’s rights.  

As per the case law of IACtHR, it

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194 Partial dissenting opinion of Judge Cecilia Medina Quiroga, in IACtHR, Case of Salvador Chiriboga v. Ecuador, Preliminary Objections and Merits, Judgment of 6 May 2008, Series C
is clear that such proceedings (because of being effective in nature), though not simple and prompt, fall under the ‘right to judicial protection’.

2.5.2.3.4.3. Right To Know The Truth:

Another legal base or rationale behind this right to resort to the administration of justice to obtain an investigation relates with victim’s right to know the truth about the past incidents. IACtHR is of the firm opinion that this truth should be obtained through criminal proceedings. This right requires that whatever steps are required to be taken to ascertain the truth behind the fact should be taken.

La Cantuta v. Peru affirms this view of IACtHR, in which the Court stated that,

“The right to justice is not limited to the formal institution of domestic proceedings, but it also involves the assurance within reasonable time of the right of alleged victims or their relatives to have every necessary step taken to know the truth and punish those responsible for the events.”

This right places judges under an obligation to control the proceedings in a manner that avoid undue delays resulting into impunity.

2.5.2.3.5. Approach Of African Courts- Right To Fair Investigation:


available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_179_ing.pdf


Kenya case\textsuperscript{201}: In this petition the issue raised for determination was whether neglect, omission, refusal and/ or failure on part of the police to conduct prompt, effective, proper and professional investigation into the petitioners’ complaints of defilement and other forms of sexual violence violates their fundamental rights and freedoms under UDHR,\textsuperscript{202} CRC\textsuperscript{203}, African Charter on the Rights and Welfare of the Child\textsuperscript{204}, African Charter on Human and People’s Rights\textsuperscript{205}, and Rights to Access to Justice\textsuperscript{206} as set out under Constitution of Kenya.

It was contended by the petitioner that according to the constitutional provision\textsuperscript{207} every person is entitled to institute court proceedings in case of denial, violation or infringement or threat of violation of a fundamental right or freedom.\textsuperscript{208}

It was held by the Court that there is a clear violation of various Articles under the Universal Declaration of Human Rights (1948), African Charter on Human and People’s Rights (1981) and United Nations Convention on the Rights of the Child (1989).

It was observed by the Court that,

\textsuperscript{201} C.K. (a child) through Ripples International (as her guardian and next friend) & 11 others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition No.8 of (2012) eKLR dated 27\textsuperscript{th} May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf

\textsuperscript{202} Articles 1 to 8 (inclusive) and 10 of the Universal Declaration of Human Rights 1948 available at www.un.org/en/documents/udhr/


\textsuperscript{206} Articles 21 (1), 21 (3), 27, 28, 29, 48, 50 (1) and 53 (1) (c) of the Constitution of Kenya 2010, available at http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

\textsuperscript{207} Article 22 (1) of the Constitution of Kenya 2010 provides, “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”, available at http://www.kenyalaw.org/lex/actview.xql?actid=Const2010

\textsuperscript{208} C.K. (a child) through Ripples International (as her guardian and next friend) & 11 others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition No.8 of (2012) eKLR dated 27\textsuperscript{th} May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf
“the reports of defilement and other forms of sexual abuse were reported to various police stations. Police unlawfully, inexcusably and unjustifiably neglected, omitted and/or otherwise failed to conduct prompt, effective, proper and professional investigations to the said complaints. That failure caused grave harm to the petitioners and also created a ‘climate of impunity’ for defilement as perpetrators were let free.”

“According to Article 21 of the Constitution of Kenya 2010, State has failed in its obligation to observe, respect, protect, promote and fulfil petitioner’s fundamental rights and freedoms.”

There was a clear infringement of petitioners’ fundamental rights and freedoms under Constitution of Kenya and under general rules of International law including treaties or conventions ratified by Kenya.

Regarding the impact of misuse of investigative powers, it was observed by the Court that this misuse encourages perpetrators of crime to commit further acts of victimization without fear of law. Court observed that,

“The respondent’s ongoing failure to ensure criminal consequence through proper and effective investigation and prosecution of these crimes has created a “climate of Impunity” for commission of sexual offences and in particular defilement. As a result of which the perpetrators know they can commit crimes against innocent children without fear of being apprehended and prosecuted. This to me makes the respondents responsible for physical and psychological harms inflicted by perpetrators, because of their laxity and their failure to take prompt and positive action to deter defilement.”

Observing that Police owed a constitutional duty of investigating offences, it was stated by the Court in Kenya case.

“Once a report or complaint is made it is the duty of the police to move with speed and promptly, commence investigation and apprehend and interrogate the perpetrators of the offence and the investigation must be conducted effectively, properly and professionally short thereof amounts to violation of fundamental rights of the complainant.”

209 Ibid.
210 Ibid.
211 Ibid.
212 Ibid.
213 Ibid.
214 Ibid.
It was held in Kenya case\textsuperscript{215} that the “Constitutional requirement\textsuperscript{216} to protect the best interest of the child requires not only the establishment of relevant laws but requires their proper enforcement by State agencies and any failure to implement laws aimed at protecting children amounts to infringement and/or violation of the Constitutional rights. As recognized by the UN Committee on rights of the child, under Article 19, the ‘State is obligated to investigate and punish those responsible for committing violence against children’\textsuperscript{217}.”

2.5.2.3.6. Right To Fair Investigation Demands:

2.5.2.3.6.1. Prompt, Thorough And Effective Investigation:

It was recognized by the European Court in the case of Aydin v. Turkey,\textsuperscript{218} that ‘right to an effective investigation’ is implied under the ‘right to a remedy’ under Article 13 of European Convention on Human Rights,

“[W]here an individual has an arguable claim that he has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”\textsuperscript{219}

In Cas Romania\textsuperscript{220}, the European Court of Human Rights held that in case of sexual assault charges an ‘ineffective investigation’ violates the Human Rights Convention. Signifying the importance of an effective investigation, the court went on to highlight the steps to be taken in an effective investigation.

“It (the investigation) should in principle be capable of leading to the establishment of the facts of the case and to the identification and

\textsuperscript{215} Ibid.
\textsuperscript{219} Id at [103].
\textsuperscript{220} Cas Romania, European Court of Human Rights 26692/ 05 2012 as cited in C.K. (a child) through Ripples International (as her guardian and next friend) & 11others v. Commissioner of Police/ Inspector General, High Court at Mera, Petition No.8 of (2012) eKLR dated 27\textsuperscript{th} May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf
punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk failing foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. In cases under Articles 2 and 3 of the Convention where the effectiveness of the official investigation has been at issue, the court has often assessed whether the authorities reacted promptly to the complaints at the relevant time. Consideration has been given to the opening of investigations, delays in taking statements and to the length of time taken for the initial investigation.”

2.5.2.3.6.2. Right To Effective Investigation Not To Be Unjustifiably Hindered By State Authorities:

In Mahmut Kaya v. Turkey, it was observed by the European Court of Human Rights that the ‘right to a remedy’ (which include ‘right to an effective investigation’) under Article 13 of European Convention on Human Rights, ‘must be effective in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.’

2.5.2.3.6.3. Results Of The Investigation Must Be Made Known To The Victims:

In Ogur v. Turkey, it was held that not providing full access to investigation files violates Article 2 of the European Convention on Human Rights since not providing information may result into an impediment in the way of accessing justice.

Some jurisdictions have gone far beyond from recognising ‘victims’ right to obtain an investigation’ to giving him a say in participation in criminal

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221 Ibid.
226 Id at [92].
proceedings by accepting his full access to case files. The leading case in this regard is of Caracazo v. Venezuela wherein it was claimed by the victims that procedural provisions prevented them from access to their case files that result into an impediment in the way of their enjoying Article 8 para 1 and Article 25 of the ACHR. The issues that were to be decided included that whether there was a violation of fair hearing requirement as provided under Article 8, paragraph 1, and right to judicial protection as provided under Article 25 of the ACHR.\footnote{The Caracazo v. Venezuela, IACtHR, Merits Judgment of 11\textsuperscript{th} November 1999, Series C No. 58, para 2 as cited by Juan Carlos Ochoa S., \textit{The Rights of victims in criminal justice proceedings for serious Human Rights violation}, 118 (Martinus Nijhoff Publishers, The Netherlands, 2013).} In this case, on the issue of reparations, it was ordered by the IACtHR, that,

\textit{“The next of kin of the victims and the surviving victims must have full access and the power to act at all stages and in all proceedings during said investigations, in accordance with domestic legislation and the provisions of the American Convention on Human Rights, and that the results of those investigations must be made known to the public.”}\footnote{The Caracazo v. Venezuela, IACtHR, Reparations and Costs, Judgment of 29\textsuperscript{th} August 2002, Series C No. 95, paras 118 and 143.1 available at http://www.corteidh.or.cr/docs/casos/articulos/Seriec_95_ing.pdf}

2.6. ESSENTIAL ELEMENTS OF THE THREE RIGHTS OF THE VICTIM IDENTIFIED AS PART OF VICTIM’S RIGHT TO JUSTICE:

Based on the analytical study of international instruments pertaining to human rights and after identification of three rights of the victim of crime, following essential elements of the three rights of the victim can be summarized:

2.6.1. ESSENTIAL ELEMENTS OF RIGHT TO PROTECTION:

In cases of victims of life-threatening crimes or crimes that threaten victims’ physical or psychological integrity, protection from re-victimization or further victimization and secondary victimization should be provided by the State under its positive obligations.\footnote{Council of Europe’s Recommendation 06 (08) at [10.1-10.2] available at https://victimsupport.eu/activeapp/wp-content/uploads/2012/09/Recommendation-Rec20068-of-the-Committee-of-Ministries_Council-of-Europe11.pdf} For the satisfactory compliance of this duty there should be:

(i) Effective Criminal laws with limited defences only: To deter further victimization there should be effective criminal laws provisions (Osman case).\(^{230}\) Substantive law should provide with limited defences only, keeping in view the balance of victims’ rights with that of accused’ rights (A v. United Kingdom case),\(^{231}\) (Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law).\(^{232}\)

(ii) These criminal law provisions should be backed up by effective law enforcement machinery (Osman case),\(^{233}\) (Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law).\(^{234}\)

(iii) Before the event remedies: To provide protection to victims of crime, remedies should be taken before the event since after the event remedies are insufficient to provide protection in cases of threat to right to life (Osman case).\(^{235}\)

(iv) State is under an obligation to take reasonable preventative operational measures (Osman case).\(^{236}\)

(v) Protection should be provided by State with due diligence, irrespective of its intention (Jessica Lenahan case).\(^{237}\)

2.6.2. ESSENTIAL ELEMENTS OF RIGHT TO ACCESS TO JUSTICE:

\(^{230}\) Osman v. United Kingdom (2000) 29 EHRR 245.


\(^{232}\) UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

\(^{233}\) Osman v. United Kingdom (2000) 29 EHRR 245.

\(^{234}\) UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx


\(^{236}\) Ibid.

This right need to be ensured by:

(i) Ensuring access to criminal remedies or investigatory procedures through effective Substantive laws (X and Y v. Netherlands), (Principle 3(c) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law).

(ii) Ensuring right to access through initiation of criminal investigation (Hugo Rodriguez v. Uruguay case), (Ergi v. Turkey) (Principle 3(c) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law).

(iii) Effective access (UN DOC A/RES /60/ 147), meaning thereby an access that is not unreasonably or unjustifiably obstructed/ hindered (Kenya case). This obstruction should neither be caused by the acts nor by the omissions on the part of State authorities (Mahmut Kaya v. Turkey), (Principle 3(c) of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law).

2.6.3. ESSENTIAL ELEMENTS OF FAIR AND EFFECTIVE INVESTIGATION:

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239 UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
242 UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
245 UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
The investigation in the cases of alleged violation of right to life should have the following components essentially:


(ii) Thoroughness and Effectiveness (Velasquez- Rodriguez v. Honduras), (Article 2 and 7 of ICCPR), (Ergi v Turkey), (Kenya case).

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248 UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
257 C.K. (a child) through Ripples International (as her guardian and next friend) & 11others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition No.8 of (2012) eKLR
Convention on Human Rights),\textsuperscript{258} (Principle 3 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation of Victims of Violations of International Human Rights and Humanitarian Law)\textsuperscript{259}, Proper and effective (provisions of CEDAW, CERD and CRC).\textsuperscript{260}

Effective has been identified as “not hindered unjustifiably by the acts or omissions of the authorities of the respondent State” (Mahmut Kaya v. Turkey).\textsuperscript{261} Thorough and effective investigation means “an investigation capable of leading to the identification and punishment of those responsible (Ayadin v. Turkey\textsuperscript{262} and Cas Romania case\textsuperscript{263}) as well as an effective access for the complainant to the investigatory procedure” (Ayadin v. Turkey).\textsuperscript{264}

Proper, Professional and Adequate (Kenya case)\textsuperscript{265} investigation comprise of the following i.e., visiting scenes of crime to collect best evidence, interviewing witnesses/ victims, taking of samples and forwarding these samples to government analysts.\textsuperscript{266} It was opined by the experts on Kenya Policing Standards, in the Kenya case, that,

“In all cases investigations were inadequate in that the police failed to visit scenes of crime to gather evidence that is vital in collaboration of a case, did not interview witnesses/ victims, samples were not taken and

\begin{itemize}
  \item \textsuperscript{258} Ayadin v. Turkey (1998) 25 EHRR 251 at[98].
  \item \textsuperscript{259} UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
  \item \textsuperscript{260} Articles 2(b) and 2(c) of CEDAW; Article 6 of the Convention on the Elimination of Racial Discrimination; Article 39 of the CRC.
  \item \textsuperscript{261} Mahmut Kaya v. Turkey, App No. 22535/93, 28 Mar 2000, [124], available at http://www.zorlakaybetmeler.org/download.php?id=HAH/doc/266
  \item \textsuperscript{262} Ayadin v. Turkey (1998) 25 EHRR 251.
  \item \textsuperscript{263} Cas Romania, European Court of Human Rights 26692/05 2012 as cited in C.K. (a child) through Ripples International (as her guardian and next friend) & 11 others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition No.8 of (2012) eKLR dated 27\textsuperscript{th} May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf
  \item \textsuperscript{264} Ayadin v. Turkey (1998) 25 EHRR 251.
  \item \textsuperscript{265} C.K. (a child) through Ripples International (as her guardian and next friend) & 11 others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition No.8 of (2012) eKLR dated 27\textsuperscript{th} May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf
  \item \textsuperscript{266} Opinion of the experts on Kenya Policing Standards, as expressed in C.K. (a child) through Ripples International (as her guardian and next friend) & 11 others v. Commissioner of Police/ Inspector General, High Court at Meru, Petition No.8 of (2012) eKLR dated 27\textsuperscript{th} May 2013, available at http://theequalityeffect.org/wp-content/uploads/2013/05/KLR-160-Girls-decision.pdf
\end{itemize}
even those produced by victims were never forwarded to the Government analysts’ for examination.”


(iv) Open to participation by victims’ families (Castillo Paez), (the ‘Street Children’ case), full access to investigation files (Ogur v. Turkey).

2.7. CONCLUSION:

Human rights dimensions have changed with the change in the perception of State’s role. Now the role has become widened ranging from State’s Negative Obligations to State’s Positive Obligations. It is State’s Positive Obligation to provide protection to victims’ human rights from being violated by Non-State actors. Identification of State’s Positive Obligations towards victims of crime resulted into shaping the future of victims’ human rights. International instruments stamped victims’ human rights. Various initiatives were taken by different international bodies to serve the cause of justice due towards the sufferer of crime. This change in perception of human rights, along with victims’ movements and initiatives taken by the international bodies through

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269 UN DOC A/RES/60/147, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx


the means of international instruments culminated into identification and recognition of following three rights of victims as a part of their right to justice i.e., victim’s right to protection, right to access to justice and right to fair investigation. These rights are comprised of some essential elements. These are as follows:

(i) In case of Right to Protection: Effective criminal laws, effective law enforcement machinery, before the event remedies, preventative operational measures and protection with due diligence have been considered as essential elements.

(ii) In case of Right to Access to Justice: Essential elements include access to criminal remedies through effective substantive laws and through initiation of criminal proceedings provided that this access is not unreasonably or unjustifiably obstructed by the acts or by the omissions of State authorities.

(iii) In case of Right to Fair Investigation: Promptness, thoroughness and effectiveness, impartiality, open to participation by victims’ families have been considered as essential elements.