CHAPTER 3

INTERNATIONAL RECOGNITION OF VICTIMS’ JUSTICE NEEDS AS VICTIMS’ HUMAN RIGHTS

3.1. INTRODUCTION:

Human rights are those precious and inalienable rights that every human being is entitled to by virtue of his being a human irrespective of any other consideration. These are the very basic rights needed by a human being for the very survival in a dignified manner. Human Rights are those fundamental and inalienable rights which are essential for human survival in a dignified way. These rights are also referred as fundamental rights or natural rights. “As fundamental or basic rights, they are the rights which cannot, rather must not, be taken away by any legislature or any Act of the government and which are often set out in a constitution. As natural rights, they are seen as belonging to men and women by their very nature.”¹

Concept of equality, freedom and justice contributed in the evolving process of human consciousness leading further towards the development in the concept of Human rights. Human rights are must for the protection of human dignity.² Highlighting the need for taking into consideration the interests of both the accused and the victim, in Booth v. Maryland³, it was observed by White, J., in his dissenting opinion,

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.⁴

Concept of justice and fairness should be such that it is applied and available to the accused and the victim both. Justice Benjamin Cardozo has rightly observed 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.”⁵

⁴ Id.
Highlighting the need to recognize victim’s rights as human rights and making them enforceable in all legal systems, Jonathan Doak asserts that “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.”

3.2. LOCATING HUMAN RIGHTS OF VICTIMS OF CRIMES:

3.2.1. CHATER OF THE UNITED NATIONS, 1945:

Preamble of the United Nations Charter (1945) that established the United Nations, appreciates human rights for all and the preamble suggests that the main objective was to reaffirm faith in fundamental human rights and in the dignity and worth of human person. It nowhere suggests that ‘human person’ does not include the victims of crime. It refers only to the ‘human person’ irrespective of his status as a victim of State crime or a non-State crime. Article 1 (3) of the United Nations Charter (1945) indicates that this Charter is not limited with resolving international problems but is wide enough to include into its ambit activities that promote and encourage respect for human rights as well as for fundamental freedoms for all without any distinction. It suggests that respect should be promoted not only for fundamental freedoms but for the promotion of human rights too. State should provide protection to individual human rights.

3.2.2. UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948:

8 U. N. Charter (1945), supra note 7 at Preamble
“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.”
9 U. N. Charter (1945) supra note 7 at Art. 1 (3) 
“to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”
Universal Declaration of Human Rights, 1948\textsuperscript{10} provides a common standard of human rights to be achieved by one and all so that universal respect and effective recognition of human rights can be easily ensured. From the reading of preamble of this declaration, it can be deduced that as a foundation of justice, it lays emphasis upon recognition of not only the ‘inherent dignity’ of all human beings but recognition of ‘equal’ and ‘inalienable’ rights of all human beings. It recognizes the fact that people have faith in fundamental human rights and in human dignity. It further makes a reference to the pledge taken by the Member-States to achieve the promotion of universal respect for human rights and its observance in practice as well as promotion of universal respect for fundamental freedoms and its observance in practice. This reference reflects upon the role of the State in ensuring protection of human rights.\textsuperscript{11} Article 3 of this Declaration recognizes that everyone has the right to life.

3.2.3. EUROPEAN CONVENTION, 1950:

Article 17 of the European Convention, 1950 that provides for ‘Prohibition of abuse of right’ is to the effect that the Convention covers the cases of violation of human rights not only by the State actors but by the non-State actors as well. It states that, “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”\textsuperscript{12}


\textsuperscript{11}Universal Declaration of Human Rights (1948), \textit{supra} note 10 at Preamble

This Article places individual actors, non-State actors and the State agencies, State actors at the same footing by providing that no one shall be allowed to interpret any of the provisions of this Convention as to adversely affect the rights and freedoms provided under this Convention. Article 53 of the European Convention provides safeguards for already existing human rights under the laws of the Concerned State or arising out of any agreement.

3.2.4. UNITED NATIONS DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, 1985:

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985\textsuperscript{13} has significantly contributed in the process of evolution of human rights of victims of crime by recognizing four specific human rights for victims of crimes. These rights are ‘right to access to justice and fair treatment’, ‘right to restitution’, ‘right to compensation’, and ‘right to assistance’. This declaration for the first time directly addressed the concerns of ‘victims of crime’ and removed the uncertainties regarding the status of human rights of victims of crime by making a specific mention of these types of victims.

3.3. POSITIVE APPROACH OF HUMAN RIGHTS LAW:

Traditional approach of human rights emphasized upon the regulation of State actions by way of imposing certain obligation upon the State actors to refrain from interfering in the individual liberties. Referred as ‘negative approach’ of human rights, this approach provided protection from limited type of violations of human rights. On the other hand, recent developments in the field of human rights emphasize upon the ‘positive approach’ of human rights that has contributed to the development of the human rights jurisprudence by bringing State’s positive obligations of protecting and ensuring victims’ human rights from being violated by the non-State actors.\textsuperscript{14} ‘Positive approach of human rights’ law is in contrast to the ‘Negative approach’ in the sense that under the negative approach, State is expected not to interfere with individual liberties whereas in the ‘positive approach’ of human rights, State is expected to provide protection in cases where not only the State or its agencies but even the


Non-State actor violates the individual human rights. European Court of Human Rights (hereinafter referred as ECtHR) reflected upon the positive approach of human rights in the case of X and Y v. Netherlands wherein it was recognized that State has certain positive obligation towards victims.

3.4. STATE’S POSITIVE OBLIGATION TO ENSURE VICTIMS’ HUMAN RIGHT TO JUSTICE:

3.4.1. UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948:

Article 5 of the Universal Declaration of Human Rights, 1948 mandates that no human shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This Article does not make any mention of the author of these acts, meaning thereby that anyone either a State actor or a non-State actor may be the perpetrator of any of these acts. Though the concept of ‘punishment’ is somewhat restricted with the State power, but same is not the case with remaining types of acts. The Article does not say that only the State should not subject anyone to torture, cruelty, inhuman or degrading treatment or punishment. It only says that no one shall be subjected to torture, cruelty, inhuman or degrading treatment or punishment. It means that in the first instance, State and its agencies should not act in such a manner that amounts to violation of human rights in any of these forms and secondly, if the perpetrator is a non-State actor, then impliedly State is under legal obligation to provide protection to human rights of the concerned individual.

3.4.2. EUROPEAN CONVENTION ON HUMAN RIGHTS 1950 AND APPROACH OF EUROPEAN COURT OF HUMAN RIGHTS:

European Convention on Human Rights, 1950 provides under its Article 1, the obligation of the State to respect Human Rights. It lays down that it is the duty of the Contracting parties to secure to everyone the rights and freedoms as defined under Section 1 of this Convention. Article 2 of this Convention deals with the ‘Right to Life’ and prescribes under Article 2 (1) that, “1. Everyone’s right to life shall be protected by law.”

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This protection clause imposes a positive obligation upon the State to provide protection to ‘right to life’ in the sense that state shall not violate one’s right to life nor shall allow others or the non-State actors to violate one’s right to life. In both the circumstances, it is obligatory for the State to protect one’s right to life from being violated. It is not in negative terms, restricting merely the acts of the State or its agencies from violating anyone’s right to life.

The theory of positive obligation finds application in the decision of ECtHR in the case of X and Y v. Netherlands. In this case, a 16-year-old rape victim, being mentally challenged, was not able to file complaint for her victimization and her father was prevented by law to file a criminal complaint on her behalf. It was alleged by the applicant (Father of the victim) that there is a violation of Article 8 of the European Convention since in the present legislative framework, it is impossible to initiate criminal proceedings against the perpetrator. Prescribing for the positive obligations of the State, the Court made its observation that,

Although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para 32). 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.

It was found that civil remedies were insufficient to address such wrongdoings and that these types of wrongdoings could only be addressed effectively by putting some deterrence through criminal law provisions. Regarding the lack of accessibility to criminal justice, It was found by the Court that in regard to such situations, there is a procedural obstacle not foreseen by the Netherlands legislature. It was held by the Court that since the victim was not provided with any practical and effective protection, there was a clear violation of Article 8 of the

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18 X and Y v. Netherlands, supra note 16.
19 Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 12 at Art. 8
20 X and Y v. Netherlands, supra note 16 at 21.
21 Airey v. Ireland (Application no. 6289/73) at 32 ECHR (9 October 1979) provides that, though the State did not interfere in the complainant’s family or private life but failed to act, it was observed by the court that object of Article 8 is to provide protection against arbitrary interference by state authorities but this include positive obligations too providing for an effective respect for private or family life. http://www.lawschool.cornell.edu/womenandjustice/upload/Airey.PDF
22 X and Y v. Netherlands, supra note 16 at 23.
23 X and Y v. Netherlands, supra note 16 at 27.
Constitution and Netherlands authorities were responsible for such deficiency in their legislation. ECtHR recognized Access to ‘Adequate and Effective criminal laws’ as a prerequisite for ensuring justice to victims of crime. Referring to the procedural obligations of State to conduct a fair investigation and prosecution in the case of violation of human rights, European Court of Human Rights held in the case of Mc Bulgaria:

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 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 Convention.

3.4.3. INTER-AMERICAN CONVENTION 1969 AND APPROACH OF INTER-AMERICAN COURT OF HUMAN RIGHTS:

Article 1 of this Convention provides for the obligation of the State. It is obligatory for the State Parties to this Convention to give due respect to the rights and freedoms recognized under this Convention without any discrimination. In case, there is a lack of any legislative provision needed for realization of such rights and freedoms, Article 2 of this Convention imposes an obligation upon the State Party to enact such legislations that are required to give effect to the provisions of this Convention. Article 3 makes entitle to every person to be recognized as a person before the law.

Article 4 of this Convention relates with the ‘Right to Life’ and provides for the role of the State in ensuring this right. This Article 4 says in specific terms that every person has a ‘right to life’ and this ‘right to life’ shall be protected by law. Taking a similar approach like ECtHR, Inter American Court of Human Rights (IACtHR) also recognized positive

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25 X and Y v. Netherlands, supra note 16 at 40.
27 Mc Bulgaria, supra note 26 at 185 & 187.
29 American Convention on Human Rights, supra note 28, Art. 4

“Right to Life: 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

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obligations of State by observing in the case of Velasquez Rodriguez v. Honduras\textsuperscript{30} that, every State is under legal obligation to adopt effective means such as identification of violator, serious investigation, appropriate punishment and 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 such 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.\textsuperscript{31}

Referring to the role that State is supposed to play, it was observed by the IACtHR that in case of acts of non-State actors, State should take preventative measures, “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.”\textsuperscript{32}

### 3.4.4. CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, 1979 AND APPROACH OF CEDAW COMMITTEE:

United Nations Human Rights treaty monitoring bodies have recognized State’s obligation to investigate and prosecute even in those cases where the perpetrator of the act was not a State actor. General Recommendation No. 19 of the Committee on the Elimination of Discrimination against women (the CEDAW Committee) makes specific mention of State’s obligation of conducting investigation and punishing the perpetrators who caused violence against women, without taking into consideration that the alleged act was committed by State actors or by some private individuals.\textsuperscript{33}

### 3.4.5. UNITED NATIONS DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, 1985:

This declaration\textsuperscript{34} provides for the obligation of State by providing that victims of crime should be given fair treatment and procedural justice within the domestic criminal justice systems by the concerned member States. Principle 4 imposes an obligation upon State to treat victims with a compassionate and respectful manner whereas Principle 5 imposes

\textsuperscript{32} Velasquez-Rodriguez Case, supra note 31 ¶ 177.  
\textsuperscript{33} JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 63.  
\textsuperscript{34} UN Declaration, 1985, supra note 13.
obligation for establishment of such judicial and administrative mechanism that are needed to ensure victim-redress. State should provide such formal or informal procedures for the purpose of victim-redress that are expeditious, fair, inexpensive and accessible. State has an obligation to provide victims with the needed information in this regard. Principle 6 of this Declaration imposes an obligation upon the State to ensure that the prescribed judicial and administrative processes are responsive towards the needs of victims of crime and further suggests some measures for making the processes more responsive and meaningful for the victims of crime.\textsuperscript{35}

\textbf{3.4.6. IMPLEMENTATION OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, 1989:}

Deliberating upon the ‘Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’\textsuperscript{36}, Economic and Social Council recommended that in order to give effect to the provisions of the Declaration, Member States should undertake following necessary steps:

i. Provisions of Declaration should be incorporated into National Criminal Justice Systems in accordance with the constitutional process and domestic practice.

ii. Measures should be established to provide protection to victims of crime from any form of intimidation arising out of the criminal proceedings and in case such intimidation occurs then establishment of measures to provide effective remedies.

iii. State should ensure that measures are in place to keep victim informed of their rights and opportunities regarding redress from the offender, from third parties or from the State. They are further informed of the progress of the Criminal Justice Process.\textsuperscript{37}

\textbf{3.4.7. CONVENTION ON THE RIGHTS OF THE CHILD, 1989:}

Article 19 of the Convention on the Rights of the Child (CRC), 1989\textsuperscript{38} makes it obligatory for the State to take all appropriate legislative measures to provide protection to child victim from all forms of violence, injury or abuse. For this purpose, effective procedures should be

\textsuperscript{35}Id.


\textsuperscript{37}Economic and Social Council Resolution 1989/57, supra note 36.

\textsuperscript{38}Convention on the Rights of the Child, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx
established not only for prevention of such acts against the child victim but for the identification, reporting and investigation into such cases and for judicial involvement.\textsuperscript{39}

3.4.8. EU COUNCIL’S 2001 FRAMEWORK DECISION ON VICTIMS’ STANDING IN CRIMINAL PROCEEDINGS:

EU council’s 2001 framework decision on victims’ standing in criminal proceedings\textsuperscript{40} provides victims with the right to provide and receive information and the right to get protection during various stages of criminal justice process. Article 2 of this instrument imposes an obligation upon the concerned Member State to ensure that victims have a “real and appropriate role in criminal proceedings” and also recognizes participatory rights of victims. Imposition of obligation upon the State make these rights enforceable.\textsuperscript{41} In this context, case of Pupino\textsuperscript{42} is relevant to be mentioned here wherein it was observed by the European Court of Justice that even before the formal adoption of the EU Framework Decision in national legislations, national courts must interpret the relevant provisions in the light of EU Framework Decisions and give that meaning to the provision that are helpful in attaining the result pursued by the EU Framework Decision 2001(as well as all framework decisions).\textsuperscript{43} In this case it was confirmed by the European Court of Justice that’

It involves an obligation on the part of the national authorities to interpret in conformity with national law. Thus, when applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34 (2) (b) EU.\textsuperscript{44}

3.4.9. 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:

\textsuperscript{39}Convention on the Rights of the Child, supra note 38.
\textsuperscript{41}Council Framework Decision, supra note 40.
\textsuperscript{42}Case C- 105/03, Criminal Proceedings against Maria Pupino, 2005 E.C.R. I-5285 ECJ.
\textsuperscript{44}Criminal Proceedings against Maria Pupino, supra note 42,¶ 4.
This instrument provides that State not only should respect but should ensure respect for international human rights law and should take measures to implement international human rights law. To fulfil their legal obligations under international law, State shall incorporate and implement such international human rights norms into their domestic legislations as are required to bring them at par with international standards. State shall take appropriate and effective measures necessary for providing victim with a fair, effective and prompt access to justice. State shall ensure that victims are accorded same level of protection as are provided under international human rights norms and shall ensure that victims are provided with adequate, effective, prompt and appropriate remedies.

State’s obligation to respect and to ensure respect is inclusive of the following:

i. Taking of such legislative and other measures that are necessary for prevention of violations,

ii. In case there is a violation, investigate the matter effectively, promptly, thoroughly and without being biased,

iii. Taking of further action against the persons responsible for such violation,

iv. Irrespective of the consideration that who caused such violation, provide victims with an “equal and effective access to justice”, and

v. Provide all victims with effective remedies.

3.4.10. THE SET OF PRINCIPLES ON COMBATING IMPUNITY, 2005:

The Set of Principles on Combating Impunity, 2005, Principle 19 of this instrument is quite significant from victims’ point of view. This principle recognizes State’s procedural obligations on one side and also simultaneously encourages States to make victims entitle for instituting and participating in criminal proceedings. It imposes obligation upon the State to

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46The Basic Principles And Guidelines, 2005), supra note 45 at Principle 1.
47The Basic Principles And Guidelines, 2005), supra note 45 at Principle 2.
48The Basic Principles And Guidelines, 2005), supra note 45 at Principle 3.
investigate the cases of human rights violations in a prompt, thorough, independent and impartial manner. This principle though acknowledges State’s role as a party in the criminal justice process but recommends for providing victims with a right to initiate private prosecutions. It further provides for giving victim a ‘legal standing’ in the criminal justice process.\textsuperscript{51}

3.4.11. INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, 2006:

International Convention for the Protection of All Persons from Enforced Disappearance, 2006\textsuperscript{52} explicitly extends State’s procedural obligations even in the sphere of acts perpetrated by non-State actors. It makes a clear mention of States’ procedural obligations even though the State was not involved in the violation of the Convention. It provides that if similar acts are performed by non-State actors, State shall have the same procedural obligations though the acts complained of are found to be committed without any support, authorisation or acquiescence of the concerned State.\textsuperscript{53}

3.4.12. COUNCIL OF EUROPE’S RECOMMENDATION, 2006:

Replacing its earlier Recommendation No. R (87) 21 on the assistance to victims and the prevention of victimization, Council of Europe’s Recommendation\textsuperscript{54} and taking into consideration, the effects of criminal victimization upon victims of crime and the role of the State to assist victims in their dealings with offenders, has recognized victim’s rights as Human Rights and has provided for the State’s obligation to ensure effective recognition of as well as respect for the human rights of victims. Victims’ security concerns, their dignity should be taken into consideration. State should take into consideration the negative effects of crime on victims.\textsuperscript{55} It further provides that no discrimination should be made while ensuring

\textsuperscript{51}Id.
\textsuperscript{52}International Convention for the Protection of All Persons from Enforced Disappearance, Article 2
\textsuperscript{53}JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 70.
\textsuperscript{55}Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 2.1, “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 recognize the negative effects of crime on victims.”
availability of measures to victims of crime. For availability of any measure and service, identification, arrest, prosecution or conviction of the offender should not be taken into consideration.

3.4.13. EU DIRECTIVE, 2012:

EU Directive, 2012 was adopted on 25th October 2012 that came into force on 15th November 2012. This directive established minimum standards in relation to the rights, support and protection of victims of crime and provided that Victims’ vulnerability from secondary victimization should be determined by providing for individual assessment of victim. For better enforcement of victims’ rights, it has been recognized as a State obligation to impart training to practitioners so that victims’ right can be better addressed. EU Directives, 2012 is primarily aimed at securing support, protection, information and participation in criminal proceedings for victims of crime. Article 1-Objective (Recitals 9-14) provides that it is for the Member State to ensure that victim is recognized as an individual with individual needs under the concerned national criminal justice system. Ensuring the principle of fair trial, Member State should ensure that victim is provided with a key role in the criminal proceedings.

Internationally recognized human rights can be enjoyed only if these are properly protected not only from the violations caused by State actors but from violations caused by private individuals too. Traditional approach of international human rights takes the human rights as a means of regulating State actions only but developments in this area indicates that the widened horizons of human rights law covers not only the cases of violation of human rights by State actors but by private individuals too. It has rightly been observed by Juan Carlos Ochoa Sanchez that,

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

56 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 2.2.
57 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 2.3.
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.  

It has been observed that there exists interdependence between the protection of substantive
human rights and providing of the procedural means to ensure such protection. This
interdependence is clearly visible from recognition of States’ protective obligations to protect
human rights to recognition of its procedural obligations to investigate into the cases of
violation and to prosecute the alleged perpetrator of the crime. Development of the notion of
procedural obligations of State have contributed and enhanced the protection of human rights
even in the sphere where the act was perpetrated by a private individual in cases of serious
human rights violations.

3.5. RECOGNITION OF VICTIMS’ RIGHT TO JUSTICE AS A
HUMAN RIGHT:
One of the significant developments in the field of human rights is the recognition of victims’
human rights (especially their right to justice) in addition to the well-established obligations
of the State to investigate and prosecute serious human rights violations. Article 8 of the
Universal Declaration of Human Rights, 1948 recognizes the ‘right to remedy’ and provides
that such remedy should be effective in nature. Effective remedy is to be ensured in case of
violation of any of the fundamental rights as envisaged under the Constitution or by any of the
law. Everyone is entitled to this ‘right to an effective remedy.’

Article 13 of European Convention, 1950 ensures effective protection of the rights
recognized under this Convention by providing further a ‘Right to an effective
remedy’. This Article provides 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.

60 Thomas Buergenthal, To Respect And To Ensure: States Obligations And Permissible Derogations, in THE
INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS
61 JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 70.
62 JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 70.
63 JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 99.
64 Universal Declaration of Human Rights (1948), supra note 10.
65 Universal Declaration of Human Rights, 1948, Art. 8,
“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 the law.”
Use of the term ‘notwithstanding’ implies that ‘right to an effective remedy’ is not dependent upon the consideration that who was the perpetrator of the crime whether a State agency or a non-State actor. Irrespective of the consideration of the fact that the act complained of is caused by a particular person, the victim is entitled to this ‘right to an effective remedy’. Further, providing of any remedy is not sufficient to fulfil the criteria of a remedy under this Article since the remedy prescribed under this Article specifically makes a mention of an ‘effective remedy’. This effectiveness is the criteria by which the prescribed remedy is to be judged. A remedy that is not effective in nature cannot be termed as a remedy as prescribed under this Article.

Article 25 of the American Convention, 1969 provides with the ‘Right to Judicial Protection’. Article 25 (1) uses the term ‘even though’ that makes it clear that such violation may be caused by anyone and irrespective of the consideration that who caused such violation, everyone shall be entitled to have his right determined by taking recourse to judicial remedy. This phrase denotes that the right is available in both the circumstances when the violation resulted from the act of a State actor or when such violation resulted from the act of a non-State actor. Furthermore, this right is available in all the cases of violation of fundamental rights whether such fundamental rights were recognized by the constitutional process, legislative process or by any of the provision of this Convention. This Article further emphasizes upon the nature of the judicial remedy by stating that such recourse to judicial protection should be ‘simple and prompt’, thus removing the hurdles that may come in the way of ensuring justice by technicalities of the procedure or due to the unreasonable delay in the criminal justice process. Such measure needs that State should provide such judicial protection that is simple and that can be ensured without leading to any unreasonable delay in the process of administration of justice. It further provides for any other effective recourse by providing that if in certain conditions a recourse though is simple and prompt but not effective than any other recourse that is effective may be undertaken. Article 25 (2) provides for

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68 American Convention on Human Rights, supra note 28 at Art. 25

“1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The State Parties undertake:
a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
b. to develop the possibilities of judicial remedy; and
c. to ensure that the competent authorities shall enforce such remedies when granted.”
obligation of the State to ensure such judicial remedy. It imposes an obligation upon the State to ensure that determination of a person’s rights, whose rights have been violated, is done by a competent judicial authority. These rights should not only be determined but should be properly enforced. ‘Proper enforcement’ tries to ensure procedural justice to victims.

In Loayza Tamayo v. Peru, it was observed by the IACtHR that Article 25 guarantees to every individual a simple and prompt access to the mechanism of justice for obtaining redress. It was observed 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.69

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 recognizes ‘right to access to justice and fair treatment’, and three other major human rights of victims of crimes. ‘Right to access to justice and fair treatment’ is not a single right but includes various other ancillary rights needed for ensuring victims’ right to access to justice and fair treatment. These are ‘Right to dignified treatment’, ‘right to access the mechanism of justice’ and ‘right to prompt redress’. When the victim approaches the criminal justice system to get justice he should be treated with compassion and should be given a dignified treatment. Secondly, there should be a prompt redress for the harm suffered by the victim of crime, meaning thereby that there should not be an unreasonable delay in providing of redress to the victim of crime.70 It further provides that State should take measures to establish and strengthen the judicial and administrative mechanisms to make the redress easily and promptly available to victims of crime.

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)71 also reflects this international trend by reaffirming procedural obligations of State to investigate and prosecute such violations and at the same

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http://www.corteidh.or.cr/docs/casos/articulos/serie_c_42_ing.pdf
See also, Castillo Paez v. Peru, Reparations, and Costs, Judgment, Inter-Am.Ct.H.R. (Ser. C) No. 43, ¶ 106 (Nov. 27, 1998)
https://www1.umn.edu/humanrts/iachr/C/43-ING.html
70 UN Declaration, 1985, supra note 13.
71 The Basic Principles And Guidelines, 2005, supra note 45.
time establishing victims’ right to “equal access to an effective judicial remedy”.

Regarding what constitutes an effective remedy, Principle 14 gives some guidance by providing that,

An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

This provision clearly establishes that the main element to be taken into consideration to find out whether victim has been provided with an adequate, effective and prompt remedy is the “legal standing” of the victim and for this purpose recourse to all available international processes can be made.

Council of Europe’s Recommendation, 2006 after taking into consideration the plight of victims in going through the criminal justice process, has called upon the State to provide protection from secondary victimization. It has further imposed an obligation upon the State to take suitable measures in case of vulnerability of victims arising out of either their personal characteristics or as a result of the circumstances of the crime committed against them.

Shelton states that, “right to remedy’ includes ‘the range of measures’ that may be taken in response to an actual or threatened violation of human rights.” Remedy includes the measures that are adopted for enforcing the rights through a court when some harm or wrongful act is committed against an individual. Jonathan Doak categorizes these measures into two categories that is, ‘right to justice’ and ‘right to reparation’. ‘Right to Justice’ includes the general and procedural forms of redress that imposes obligation upon the State to prevent crime and also to respond to the crime by way of investigation, prosecution and punishment.

‘Remedy’ is the means to achieve justice in any matter in which legal rights are involved. On the basis of above analysis, it can be safely assumed that international instruments recognise various human rights especially victims’ ‘right to remedy’ that include ‘right to justice’ to ensure procedural and informational justice to victims of crime.

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72 JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 99.
73 The Basic Principles And Guidelines, 2005, supra note 45 at Principle 14.
74 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 3.3.
75 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 3.4.
77 JONATHAN DOAK, supra note 6 at 159.
3.5.1. RECOGNITION OF PROCEDURAL JUSTICE AS VICTIMS’ HUMAN RIGHT

3.5.1.1. HUMAN RIGHT TO VICTIMS’ PARTICIPATION:

There are not many instances where international standards frequently prescribe in clear terms for the victim’s participatory rights. There are few international instruments that deal with the issue of involving the victim in the criminal justice process, but still there is growing understanding that victim should participate within criminal justice decision-making where such participation does not jeopardizes core principles of objectivity, fairness and consistency. This understanding is highlighted with the fact that in various domestic and international standards, the role of the prosecutor has undergone a considerable expansion in terms of taking the interests of victim into account.

Some decisions of ECHR reflect the recognition of participatory rights of victims of crime. These decisions show that victim has a right to participate in the criminal justice proceedings in case of violation of Article 2. In Paul and Audrey Edwards v. The United Kingdom, family members of victim did not get any representation and thus were not able to put questions to witnesses and had to wait till publication of the final report to know the circumstances of the death of their son. The Court made the observation that family members of the deceased victim should be involved to such an extent that was required to protect their legitimate interests.

Conceptual evolution in the approach of IACtHR has recognised victims’ two rights in investigation and prosecution alongside the well-established notion of States’ obligation to conduct investigation and prosecutions. These deal with right to participation and right to access the justice system. This approach recognises victims’ “right to participate in criminal proceedings” with the aim of contributing to the clarification of the facts, the identification, prosecution and punishment of the perpetrators, and seeking due reparation.

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78 JONATHAN DOAK, supra note 6 at 116
79 A. Goldstein, Defining The Role Of The Victim In Criminal Prosecution, 52 MISSISSIPPI LAW JOURNAL 515 (1982).
80 Paul and Audrey Edwards v. The United Kingdom, ECHR, Third Section, Application No. 46477/99, 14 March 2002 [73].
81 Paul and Audrey Edwards v. The United Kingdom, supra note 80.
United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985\(^{83}\) under para 6 provides that victim should be given a right to present his views and concerns as part of his right to “access to justice and fair treatment”. It recognizes victims’ “right to present his views and concerns” at the appropriate stages of the proceedings and due consideration of such views and concerns if these affects their personal interests, does not cause prejudice to the accused and are consistent with the national criminal laws.\(^{84}\)Para 6 (b) of the United Nations Declaration, 1985 that deals with victims’ right to participation uses the expression “consistent with the national criminal justice system.” Use of this phrase subjects the provision to the concerned State’s domestic legislation and thus preventing this instrument from setting any international standard.\(^{85}\) Principle 6 (b) of UN Declaration, 1985 in a non-prescriptive term suggest for consideration of victims’ views. This instrument in a vague and non-prescriptive manner supports for victims’ right to participation.\(^{86}\)

ICC’s Rules of Procedure and Evidence provides various measures for ensuring protection to victims’ rights including victims’ right to participation as a party in criminal justice process with legal representation. These rules are significant because they apply an “interests of justice” test along with an “interests of victims” test giving ample space for consideration of victims’ views.\(^{87}\) Statute of the ICC\(^{88}\) recognizes participatory rights of the victims but leaves it for the ICC Chamber to determine the stages of the criminal justice process when such a right can be claimed and extent of these rights.\(^{89}\) ICC grants participatory rights to victims to protect their own interests.\(^{90}\) Article 68(3) of the Rome Statute\(^{91}\) prescribes for a ‘right to

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\(^{83}\) UN Declaration, 1985, \textit{supra} note 13.

\(^{84}\) UN Declaration, 1985, \textit{supra} note 13 ¶ 6

\(^{85}\) JUAN CARLOS OCHOA SANCHEZ, \textit{supra} note 14 at 107.

\(^{86}\) JONATHAN DOAK, \textit{supra} note 6 at 116.

\(^{87}\) Matthew Hall, \textit{The Relationship Between Victims And Prosecutors: Defending Victims’ Rights?}, 8 CRIMINAL LAW REVIEW 2010.


Participation’. It provides that, Court, in case of victims’ personal interests getting affected, shall permit victims to present their views and concerns and such views shall be taken into consideration at the relevant stages of criminal justice process as determined by the court in such a manner that is not inconsistent with the rights of accused or with fair trial principles. In appropriate cases, such views may be presented through legal representative of victim.\textsuperscript{92}

Rules of Procedure and Evidence provide victims with a right to choose their own legal representative or in case of there being more than one victim, a common legal representative. In case of any inability to choose a common legal representative, Registrar may choose one representative on a request made by Chamber, taking into consideration the interests of victims and avoiding any conflict of interest amongst victims.\textsuperscript{93} Victims at International Criminal Court can choose their legal representatives to put forth their concerns and to save their interests. The only limitation placed upon the exercise of their right is that it should not be inconsistent with the rights of the accused.\textsuperscript{94}

Rule 90 of the Rules of Procedure and Evidence lays down the rule that victim participation in the proceedings can be ensured in three ways. They can attend the proceedings and may participate in them,\textsuperscript{95} right to questioning,\textsuperscript{96} and by making opening statement and closing statement.\textsuperscript{97} Victim has an absolute right to attend the proceedings.\textsuperscript{98} Victims’ right to participation is a discretionary right.\textsuperscript{99} Victims’ legal representative is entitled for participation in the proceedings including hearings in the case unless the Chamber expresses the view that such representation should be made only through written observations or written submissions.\textsuperscript{100} In case such legal representative wants to questions a witness, such representative is required to present an application before the Chamber for such questioning. The Chamber may require such questions to be provided in writing to the prosecutor or to the defence.\textsuperscript{101} According to Rule 91(3) (a) victim may question a witness, expert or an accused,
though the questions intended to be asked may be scrutinised by the courts. Rule 91 (3) (b) empowers court to direct production of evidence and questioning in such a manner that is not inconsistent with accused’ right to a fair, impartial and expeditious trial.¹⁰²

‘Victims’ right to participation’ has been taken under ‘victims’ right to an effective remedy’ that is a broad head and encompasses various other rights in its sphere. Article 6 of the International Convention on the Elimination of racial Discrimination, 2005 provides with Victims’ right to an effective remedy. On the basis of this Article 6, CERD Committee¹⁰³ has encouraged State Parties for ensuring that their justice system, inter alia,

Grants a proper place to victims and their families, as well as witnesses, throughout the proceedings, by enabling complainants to be heard by the judges during the examination proceedings and the court hearing, to have access to information, to confront hostile witnesses, to challenge evidence and to be informed of the progress of proceedings.¹⁰⁴

Council of Europe’s Recommendation, 2006 provides that Criminal Justice Agencies should ensure that victims are provided with the opportunity to present the relevant information to the concerned criminal justice personnel who is empowered to make such decisions in their case.¹⁰⁵ EU Directives, 2012¹⁰⁶ recognized victims’ right ‘to have reviewed the decision’ for not prosecuting the offender. To make it easy for the victims to participate in the criminal proceedings, directives provided for victims’ right to get interpretation and translation. Article 10 of EU Directive, 2012 provides it for the Member States to ensure such measures that allow victims’ a right to heard during the criminal proceedings. victim should be given a right to provide evidence. In case of child victim, due respect shall be given to his age and maturity. The concerned national law shall determine such procedural rules that provide victim a right to be heard and provide evidence.¹⁰⁷ Where a decision of not prosecuting offender is taken, victim shall be given a right to seek review of such decision. Even if under national laws, victim has a right to participate in the proceedings only after such a decision has already been taken, the concerned national law should ensure that at least in serious crimes, victims are provided with such a right

¹⁰² JONATHAN DOAK, supra note 6 at 137.
¹⁰⁴ Committee on the Elimination of Racial Discrimination, supra note 103 at ¶ 19 (9).
¹⁰⁵ Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 4.4.
to seek review of prosecutorial decisions.\textsuperscript{108}

3.5.1.2. **HUMAN RIGHT TO FAIRNESS OF THE PROCESS:**

Procedural right to “an effective access to a fair hearing” is a right guaranteed by most of the human rights instruments.\textsuperscript{109} Going through the language of the Article 10 of UDHR\textsuperscript{110} it would be safe to deduce that the Article provides for the ‘right to fair hearing’ and it recognizes ‘right to fair hearing’ in the sense that everyone is entitled to ‘right to fair hearing’, which is to be ensured in full equality, this ‘fair hearing’ is to be applied in the determination of one’s rights, in the determination of one’s obligations, and in the determination of any criminal charge against any person.\textsuperscript{111} IACtHR has contributed in the development of victims’ specific right in addition to the already recognized obligations of the State.\textsuperscript{112} This has led to the recognition of victims’ “right to resort to the administration of justice to obtain an investigation by a competent, independent and impartial authority within a reasonable time and if warranted in the light of evidentiary and other objective requirements that those responsible are prosecuted and punished.\textsuperscript{113} The very first right recognized by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985\textsuperscript{114} is victims’ “right to access to justice and fair treatment”. This right to fair treatment is reflective of procedural fairness in the sense that the prescribed procedure whether formal or informal should be expeditious, fair, inexpensive and accessible.

Principle 11 (a) of 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

\textsuperscript{108} The Directive 2012/29/EU supra note 58 at Art. 11.
\textsuperscript{110} Universal Declaration of Human Rights (1948), supra note 10.
\textsuperscript{111} Universal Declaration of Human Rights (1948), supra note 10 at Article 10 provides as under,
“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”
\textsuperscript{112} JUAN CARLOS OCHEA SANCHEZ, supra note 14 at 112.
http://www.corteidh.or.cr/docs/casos/articulos/seriec_37_ing.p\textsubscript{df}
http://www.corteidh.or.cr/docs/casos/articulos/seriec_30_ing.p\textsubscript{df}
\textsuperscript{114} UN Declaration, 1985, supra note 13.
Violations Of International Humanitarian Law (2005)\textsuperscript{115} provides that remedies for human rights violations include victims’ right to an "effective access to justice". Principle 12 further elaborates this right by making a specific mention of victims’ right to "equal access to an effective judicial remedy" but with the caveat "as provided under international law."\textsuperscript{116} This caveat has resulted into a situation where, for ascertaining the precise scope of such a right, not only the remaining provisions of this instrument but other norms of the international law has to be taken into account.\textsuperscript{117} In the first consultative meeting of this instrument (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), the representatives of ECtHR “encouraged inclusion of guarantees for access by victims to investigative machinery.”\textsuperscript{118} On similar lines another reference for inclusion of victims’ participation in Principle 25 (b) was proposed by certain NGOs participating in this Consultative Meeting.\textsuperscript{119} Despite there being above proposals for express inclusion of victims’ right to access to criminal investigation and subsequent proceedings, no specific mention was made whether this instrument includes victims’ right to access to and participation in criminal proceedings as a component of victims’ right to fairness of the process.\textsuperscript{120}

Principle 22 (f) of this instrument is relevant in this context. It provides that victim satisfaction should include, "Judicial and administrative sanctions against persons liable for the violations."

Though this principle does not confer any specific right to fairness in criminal proceedings but still it recognizes impartial and thorough investigation, criminal prosecution and sanction as essential elements of victim reparation.\textsuperscript{121}

\textsuperscript{115}The Basic Principles And Guidelines, 2005, supra note 45.
\textsuperscript{116}JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 107.
\textsuperscript{119}See Chairperson- Rapporteur, supra note 118 at 34, Annex 1, para 143.
\textsuperscript{120}JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 108.
\textsuperscript{121}The Basic Principles And Guidelines, 2005, supra note 45 at Principle 22 (f).
3.5.1.2.1. ACCESS TO THE JUSTICE MECHANISM:

Article 1, 2, 3 and 13 of European Convention on Human Rights if taken together, emphasize that not only the prescribed remedy should be effective but the system to obtain the remedy should also be effective.\(^{122}\) ECtHR, observed in the case of Ergi v. Turkey\(^{123}\), though the State (or its security forces) was not involved in the killing of victim but still it was responsible for ensuring victims’ access to justice. It was held by the Court that, Turkey was responsible for ‘not initiating an effective investigation’ as was provided under Article 2 of the European Convention on Human Rights. In Hugo Rodriguez v. Uruguay\(^{124}\), violation of Articles 7, 9, 10, 14, 15, 18, and 19 of ICCPR was in question. It was alleged that State party has failed in investigating the matter properly. United Nations Human Rights Committee rejected the submission made by the Uruguay that victim has not exhausted all the domestic remedies on the ground that Uruguay has not taken steps to initiate criminal investigation into the matter and non-initiation of criminal investigation amounts to an impediment in the way of victims’ right to access domestic remedies. Committee made its observation that, “the Committee finds that the responsibility for investigations falls under the State party’s obligation to grant an effective remedy. Having examined the specific circumstances of this case, the Committee finds that the author has not had an effective remedy.”\(^{125}\)

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 provides that the mechanism established for obtaining redress should be expeditious, fair, inexpensive and “accessible to the victims” of crime.\(^{126}\) 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)\(^{127}\), has various provisions that deal with victims’ “right to access to justice” including Principle 2 (b), 3 (c), 11 (a) and 12. Principle 2 (b) requires States to adopt such measures that provide victims’ access to justice. Principle 3 (c) provides that under its obligation to respect, ensure respect for and implement international human rights laws, State has a duty to ensure victims’ access to justice.\(^{128}\) Principle 2 (b) talks not only about

\(^{123}\)Ergi v. Turkey 32 EHRR 18 (2001).
\(^{125}\)Hugo Rodriguez v. Uruguay, supra note 124, at 12.3.
\(^{126}\)UN Declaration, 1985, supra note 13.
\(^{127}\)The Basic Principles And Guidelines, 2005, supra note 45.
\(^{128}\)JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 107.
adopter any measure to ensure victims’ access to justice but specifically mentions that the provided measure should be appropriate enough to “provide fair, effective and prompt access to justice”. Principle 11 recognizes that victims’ right to remedies include his right to an “equal and effective access to justice”. Regarding access to justice, Principle 12 provides that victim shall be entitled to get an “equal access to an effective judicial remedy”. 129

3.5.1.2.2. PROTECTION DURING CRIMINAL JUSTICE PROCESS:

Some instruments as well as case laws of human rights monitoring bodies reflect upon the recognition of victims’ right to protection during criminal justice process. In Ms. A. T. v. Hungary, it was found by the CEDAW Committee that Hungary’s failure in taking effective measures of investigation in the case as well as in “ensuring physical and mental integrity” of woman victim has resulted into violation of Victims’ rights under CEDAW. Hungary, by not providing protection to the victim from the ill-treatment caused by her former partner, has failed in ensuring victims’ physical and mental integrity and thus has failed in ensuring its positive obligations. 130

United Nations Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power, 1985 131 recognizes ‘right to safety’ that is protection from intimidation and retaliation as part of victims’ right to access to justice and fair treatment and this right is available to not only to the victim of the crime but to their family members as well as witnesses in the case. 132

In the case of X and Y v. Netherlands (1985), 133 it was held that State has an obligation to provide protection to victims from life-threatening crimes even if State agencies were not involved in the violation of right to life. In Ahmet Osman case 134, there was a question regarding violation of obligations of the State under Articles 2, 6, 8 and 13 of the European Convention. A complaint was made by the applicants that State authorities had failed in providing them protection, though from the acts complained of, from time to time to the police authorities, it could be seen that there was a serious threat to the physical safety of Ahmet Osman and to his family. Regarding the true meaning of Article 2 of the Convention 135, it was

129 The Basic Principles And Guidelines, 2005, supra note 45.
130 Ms. A.T. v. Hungary as referred by JUAN CARLOS OCHOA S., supra note 14 at 63.
131 UN Declaration, 1985, supra note 13.
132 UN Declaration, 1985, supra note 13.
133 X and Y v. Netherlands, supra note 16.
134 Osman v. The United Kingdom, (87/1997/871/1083), Strasbourg, 28 October 1998, hudoc.echr.coe.int/webservices/content/pdf/001-58257?TID=hhkgrkntio
135 Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 12 at Article 2,
observed by the Court that, “the first sentence of Article 2 Section 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”

Rejecting the arguments of UK government that it had ensured justice to victim by arresting, charging, convicting and sentencing the accused, it was observed by the ECtHR that all this were not sufficient enough. ‘Right to life’ under Article 2 of the Convention should be protected by providing with **before the event remedies** and not after the event remedies. Article 2 of European Convention on Human Rights imposes a **positive obligation** upon the State to take protective measures before the event. This positive obligation is inclusive of providing, “**effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.**” (emphasis added)

It was further observed by the European Court, that these positive obligations include, in certain well-defined circumstances, **taking of preventative operational measures** in case of risk to life from the criminal acts of others. State is obliged to take action if it is established that,

> 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, judged reasonably, might have been expected to avoid that risk.

This leads towards the premise that in case of serious offences, victims do have a **right to protection**. Though, taking into consideration the facts of this case, it was found by the Court that there was no violation of Article 2 of the Convention since there was no such circumstances on the basis of which, it could be presumed by the police that there existed a real threat or risk to life of Ahmet Osman or to his family or there was a need to take some preventive measures, but still it was observed by the Court that State has **positive obligation** to protect life. This judgment is significant because it brought out the difference between the

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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.”

136 Osman v. The United Kingdom, *supra* note 134 at 115.


138 Osman v. The United Kingdom, *supra* note 134 at 115.

139 *Id.*

140 Osman v. The United Kingdom, *supra* note 134 at 116.
common law freedoms and the human rights as envisaged under the human rights instruments.

Van Colle v. United Kingdom\textsuperscript{141} reaffirmed victims’ right to protection as recognized in the case of Ahmet Osman\textsuperscript{142} wherein submissions made by State was rejected by the Strasbourg Court. It was submitted by the State, that for the applicability of the provisions regarding ‘right to life’, it was required to show that the relevant act of the concerned authorities had amounted to gross negligence or willful disregard of the duty to protect life. Lord Bingham made his observations 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.\textsuperscript{143}

Lord Bingham emphasized upon the test laid down in Osman Case by relying upon the two phrases that were “knowledge of the authorities” and “what they ought to have known at that time”. Considering this second phrase as the important component of this test, Lord Bingham made his observation that,

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.\textsuperscript{144}

Rome Statute provides victims with various measures to take their concerns into consideration with only one limitation that the same should not be inconsistent or prejudicial with the principles of fair trial or with the rights of the accused. Under the Rome Statute, it has been provided for the courts to take all such measures that are needed to ensure safety, physical and psychological well-being and dignity of the victims. While adopting such measures, court shall pay due regard to the relevant factors such as age and gender of the victim and nature of the crime.\textsuperscript{145} If it is necessary to ensure victim-protection, court may permit for in-camera proceedings for any part of the proceedings or may permit use of electronic or other means for

\begin{footnotes}
\footnoteref{141}{Van Colle v. United Kingdom, 56 EHRR 23 (2013).}
\footnoteref{142}{Osman v. The United Kingdom, supra note 134.}
\footnoteref{143}{Van Colle v. United Kingdom, supra note 141 at 49.}
\footnoteref{144}{Id.}
\footnoteref{145}{Rome Statute of the International Criminal Court, supra note 88 at Art. 68 (1).}
\end{footnotes}
deposition, particularly in case of child victim or victim of sexual violence.\textsuperscript{146} Chamber on its own motion or on a request being made by the victim, his legal representative or prosecutor or defense and in consultation with victim and witness unit, order for protective measures to be applied but such request shall be served on both parties and they shall be given a chance to respond with.\textsuperscript{147} During the stage of investigation and prosecution, it is the duty of the prosecutor to take such measures that are needed to ensure victims’ safety concerns, provided the measures adopted are not inconsistent with the fair trial principles or with the rights of the accused.\textsuperscript{148} Prosecutor may withhold any evidence or information during the pre-trial proceedings, if the same may endanger Victim-witness safety, but without being pre-judicial to the accused or to the fair trial principles.\textsuperscript{149}

Principle 12 of 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)\textsuperscript{150}, recognizes State’s obligation to secure a right to access justice and imposes an obligation upon State to take measures to provide protection from intimidation and retaliation to victims and to their families before, during and after the Criminal Justice Process.\textsuperscript{151} Council of Europe’s recommendation (2006)\textsuperscript{152}, provides that criminal justice agencies should ensure that victims are provided with needed protection.\textsuperscript{153} It has provided that victims’ “physical and psychological integrity should be protected” especially where their presence is required for the purpose of giving testimony.\textsuperscript{154} State should take special measures to provide protection to victims from intimidation by the offender.\textsuperscript{155}

Inter-American Commission on Human Rights, giving wider interpretation to victims’ right to protection, observed that to ensure victims’ right to protection, State is required to perform its “duties with due diligence”. Any question in relation to the performance of State’s obligation of providing protection is to be judged by taking into consideration the due

\textsuperscript{146} Rome Statute of the International Criminal Court, supra note 88 at Art. 68 (2).
\textsuperscript{147} Rules of Procedure and Evidence, supra note 93 at Rule 87 (1 &2).
\textsuperscript{148} Rome Statute of the International Criminal Court, supra note 88 at Art. 68 (1).
\textsuperscript{149} Rome Statute of the International Criminal Court, supra note 88 at Art. 68 (5).
\textsuperscript{150} The Basic Principles And Guidelines, 2005, supra note 45.
\textsuperscript{151} The Basic Principles And Guidelines, 2005, supra note 45 at Principle 12.

\textsuperscript{152} Council of Europe’s Committee of Ministers, Recommendation (2006) 8, supra note 54.
\textsuperscript{153} Council of Europe’s Committee of Ministers, Recommendation (2006) 8, supra note 54 at 4.2.
\textsuperscript{154} Council of Europe’s Committee of Ministers, Recommendation (2006) 8, supra note 54 at 10.1.
\textsuperscript{155} Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 10.2.
diligence requirement irrespective of the consideration of intention on part of the State. In Jessica Lenahan (Gonzales) case, where the father killed his children after taking them from the custody of their mother without permission, Inter-American Commission on Human Rights found the violation of right to protection because of the failure of the police to enforce restraining order. It was observed that, “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”.156 (emphasis added)

EU Directive 2012157 provided with more comprehensive and concrete rights for victims of crime. These directives recognized victims’ right to protection and extended this right to support and protection to the family members of surviving victims and further included family members of deceased victim including the non-married intimate partners in the category of ‘Victim’.

3.5.1.2.3. FAIR INVESTIGATION:

According to the United Nations Declaration of 1985 victims are entitled for “access to the mechanism of justice and to prompt redress.” 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)158 in its principle 3 provides for the obligation of State. According to this principle, State has a procedural obligation to conduct effective, thorough, impartial and prompt investigation into all cases of violations and in appropriate cases, punish the alleged perpetrator.159 Principle 22 (f) that provides for, “judicial and administrative sanctions against persons liable for the violations” implies that an impartial and thorough investigation are the important components of victim reparation.160

State’s obligation to “effectively investigate” human rights violation has been recognized under Principle 19 of “The Set of Principles on Combating Impunity”,161 that says that State shall conduct prompt, thorough, independent and impartial investigation in all cases of human

158The Basic Principles And Guidelines, 2005, supra note 45.
159The Basic Principles And Guidelines, 2005, supra note 45 at Principle 3, “(b) investigate violations effectively, promptly, thoroughly and impartially and where appropriate take action against those allegedly responsible in accordance with domestic and international law.”
160JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 108.
161The Set of Principles, 2005 supra note 49.
rights violation and take reasonable measures to prosecute, try and punish the alleged perpetrators of serious crimes. General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women provides the duty of State to conduct investigation. State’s procedural obligations to conduct investigation and to punish guilty are not limited with the cases of violation caused by State actors, rather it extends to cover such cases where violation of human rights is caused by a non-State actor instead of a state actor.

Case law of ECtHR reflects upon the obligation of State to conduct a fair investigation. In Ayadin v. Turkey ECtHR recognized that ‘right to a remedy’ includes ‘right to an effective investigation’ under Article 13 of European Convention on Human rights. Yasa v. Turkey relates with the killing of an individual wherein it was claimed by the Turkish Government that State agents were not implicated in the alleged violation of human rights, still it was held by the ECtHR 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.” (emphasis added)

In Ergi v. Turkey, it was recognized by the Court that knowledge on part of State authorities are sufficient to make State responsible for an effective investigation. It was observed by the Court that,

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).
Rights) to carry out an effective investigation into the circumstances surrounding the death.

In Menson and Others v. The United Kingdom, wherein a black man was killed by setting him on fire in a racist attack. Applicants, neither claimed any active role on part of State, nor claimed that authorities knew or were aware of any such risk to the life of the victim. Still, it was ruled by the ECtHR that whether State is responsible or not for the death of the victim, State has a responsibility under Article 2 of ECHR to conduct investigation into the case. It was observed by the ECtHR that,

State’s obligation (to take steps to safeguard the lives of those within its jurisdiction under Article 2 (1) of the ECHR) requires by implication that there should be some form of effective official investigation (capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment) where there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. (emphasis added)

In Tanrikulu v. Turkey, ECtHR reaffirmed that Article 13 imposes an obligation upon state to conduct an effective investigation in any case of violent killing whether the State officials were involved or the act was committed by a non-State actor. ECtHR observed that to fulfill its obligations under Article 13 of ECHR, State should conduct effective investigation in all cases of violent killings. In Ahmet Osman case, a question was raised regarding the violation of obligations of the State under Articles 2, 6, 8 and 13 of the European Convention. According to the facts of this case, it was found by the headmaster that one teacher, Paul Paget-Lewis had developed some disturbing attachment towards Ahmet Osman leading to Further acts committed by the teacher included removal of Osman’s school files, attacking at his home, graffiti of a sexual nature in the neighborhood and change of teacher’s surname so as to resemble with Ahmet Osman. Every time, Police were informed, but no action, except of questioning, was undertaken. All this led to killing of Osman’s father by the teacher and then only he was convicted for manslaughter. Osman’s family tried to bring case against the police authorities for failing to provide them protection, that was struck by the courts in England and

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168 Ergi v. Turkey 32 EHRR 18 (2001) at 82.
170 Id at 12-13.
171 Menson and Others v. The United Kingdom, supra note 169 at ¶ 12.
173 Osman v. The United Kingdom, supra note 134.
Wales. It was held that police cannot be held responsible for negligence in the investigation
due to the immunity available to them on public policy ground.\textsuperscript{174} It was argued by the UK
government that all necessary steps were taken to ensure justice to the victim. The teacher has
been convicted. It was alleged by the applicants that dismissal of their plea by court of appeal
against police for negligence has resulted into violation of their right to access to a court
under Article 6 Section 1\textsuperscript{175} of the Convention.\textsuperscript{176} Taking into consideration all the
circumstances of the case, Commission found violation of Article 6 Section 1 of the European
Convention.\textsuperscript{177} It was observed by the ECtHR that, “they may or may not have failed to
convince the domestic court that the police were negligent in the circumstances. However,
they were entitled to have the \textbf{police account for their actions and omissions} in adversarial
proceedings.”\textsuperscript{178}

Approach of IACtHR is liberal in the sense that it defines fair investigation as an essential
component of reparation due towards victims of crime. Various decisions given by it, indicate
towards this approach of IACtHR that,

\begin{quote}
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 \textbf{impartial and
thorough investigation}, and if warranted, criminal prosecution and sanctions.\textsuperscript{179}
\end{quote}

This approach suggests that in case of violation of rights under the American Convention of
Human Rights, victim reparation can only be said to be satisfied if there has been an impartial
and thorough investigation, prosecution and sanctions along with the compensation.

The case of Velasquez-Rodriguez is quite significant to reflect upon the approach of IACtHR
regarding the duty of State to conduct fair investigation. It was observed by the Court that
State has a legal duty to first of all prevent violation of human rights and in case it occurs then
to take all reasonable measures to bring the culprit to book. It was observed by the IACtHR
that,

\begin{itemize}
\item \textsuperscript{174} Osman and Another v. Ferguson and Another, (1993) 4 All England Law Reports at page 344.
\item \textsuperscript{175} Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 12 at Article 6
Section 1.
\item \textsuperscript{176} "In the determination of his civil rights and obligations…..everyone is entitled to a…hearing..by[a]…tribunal."
\item \textsuperscript{177} Osman v. The United Kingdom, supra note 134 at ¶ 131.
\item \textsuperscript{178} Osman v. The United Kingdom, supra note 134 at ¶ 134.
\item \textsuperscript{179} The Ituango Massacre case v. Colombia, Judgment, Inter-Am.Ct.H.R. (ser. C) No. 148 ¶ 339-344 (July 1,
(ser. C) No. 160 ¶ 441 (Nov. 25, 2006).
\end{itemize}
The **State is obligated to investigate** every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.\(^{180}\)

Reflecting upon the elements that constitute a fair investigation, Court made the observation that an investigation should not be a formality. It should be conducted in a serious manner with objectivity. In the wordings of Court,

> In certain circumstances, it may be difficult to investigate acts that violate an individual’s rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and **not as a mere formality preordained to be ineffective**. An investigation must have an objective and be assumed by the state as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. **Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.**\(^{181}\)

The approach of IACtHR in the case of ‘White Van’ (Paniagua-Morales et al.) v. Guatemala and in the case of Genie Lacayo v. Nicaragua recognizes victims’ right to resort to the administration of justice for the purpose of obtaining **fair investigation** that is carried out by **competent, independent and impartial authority** within a **reasonable time period** and prosecution and punishment to the perpetrators of violation.\(^{182}\) IACtHR has taken recourse to ‘Fair hearing requirement’ under Article 8 Paragraph 1 and ‘Right to Judicial Protection’ under Article 25 of the American Convention on Human Rights along with victims’ right to truth to recognize victims’ right to resort to the administration of justice to obtain an investigation, prosecution and punishment to the guilty.\(^{183}\)

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\(^{180}\)Velasquez-Rodriguez Case, *supra* note 31 at 176.

\(^{181}\)Velasquez-Rodriguez Case, *supra* note 31 at 177.


\(^{183}\)JUAN CARLOS OCHOA SANCHEZ, *supra* note 14 at 112.


3.5.1.2.4. FAIR PROSECUTION:

In the case of Aydin v. Turkey, it was held by the ECtHR that prosecutor has a duty towards victim and if he does not take steps to question police suspects properly or any other required step such as to find supportive witnesses or to obtain medical evidence, then it may amount to prejudice victims’ rights under the European Convention of Human Rights.

If a decision is to be taken with regard to the prosecution of a case, it is necessary to fulfil the procedural requirements as prescribed under Article 2 and 3 of the European Convention. Aydin v. Turkey reflects upon this general principle that criminal investigations should be commenced with a view to ultimately prosecute the offender and it is a breach of convention (European convention) rights, if the decision of not to prosecute is taken by the prosecutor despite the fact that there is sufficient evidence for ‘prospect of conviction’ especially in cases where the alleged criminal conduct relates with the violation of Articles 2 or 3 of the European Convention.

Recognition of victims’ right to fair prosecution in domestic jurisdiction can be seen from the FB Case wherein incorporating the provisions of ECHR into domestic field, the Court found that not conducting a fair prosecution in a case amounts to violation of victims’ rights as enshrined under Article 3 of European Convention of Human Rights.

In FB case, the offender injured victim for not giving him money. On the basis of victims’ complaint, assailant was arrested and charged for causing grievous bodily harm and witness intimidation. Defense sought for assessment of mental condition of the victim. In response of which, psychiatrist gave his report that victim was not in a fit condition to perceive and recollect the events in an accurate manner. On the basis of this assessment, prosecutor took the decision of not prosecuting the assailant because victim could not be termed as a reliable witness. This led to acquittal of assailant on both the charges. When FB challenged this decision, it was observed by the High Court that,

In this case FB suffered a serious assault. The decision to terminate the prosecution on the eve of the trial, on the ground that it was not thought that FB

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185 Id.
186 Id.
187 JONATHAN DOAK, supra note 6 at 121.
188 R. (on the application of B) v. DPP, (2009) EWHC 106 (Admin); (2009)1 W.L.R. 2072 at [70].
189 Id.
could be put before a jury as a credible witness, was to add insult to injury. It was a humiliation for him and understandably caused him to feel that he was being treated as a second-class citizen. Looking at the proceedings as a whole, far from them serving the State’s positive obligation to provide protection against serious assaults through the criminal justice system, the nature and manner of their abandonment increased the victim’s sense of vulnerability and of being beyond the protection of the law. It was not reasonably defensible and I conclude that there was a violation of his rights under Article 3 [ECHR]. 190

This shows that duty to protect victims from violent crimes includes the duty to prosecute such violations.

3.5.1.2.5. FAIR TRIAL:

Article 6 of the European Convention, 1950191 provides for ‘Right to a Fair Trial’ and provides that everyone is entitled for a fair hearing within a reasonable time period.192 Even though this Article does not specifically talk about the victim of crime, still in the case of Doorson v. Netherlands193, ECtHR read victims’ fair trial rights under Article 6 of the ECHR, and observed that if circumstances so warrant, he can remain anonymous. Protecting victims’ rights, Court held as under,

> It is true that Article 6 does not explicitly require the interests of witnesses in general… to be taken into account. However, their life, liberty or security may be at stake…. Against that background, principles of fair trial also require that in appropriate cases the interests of the defense are balanced against those of witnesses or victims called upon to testify.194

Similarly, Article 8 of Inter-American Convention 1969 provides for ‘Right to a Fair Trial’ as follows;

> 1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.195 (emphasis added)

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190 Id.
192 Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 12 at Art. 6, “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”
194 Id. at 70.
This Article indicates towards a ‘right to a hearing’ to which every person is entitled. This right can be used by any person for

   i. Substantiating any criminal accusation made against him,
   ii. Determination of his rights,
   iii. Determination of his obligations,
   iv. These rights and obligations may be of civil, labour, and fiscal nature or of any other nature.

The right to fair hearing under Article 8, paragraph 1 of the ACHR is wider in its scope as compared to Article 6 of the European Convention, 1950. This right is not restricted to an accused only since it provides that this right to a fair hearing can also be used in case of determination of anyone’s rights and obligations of any other nature. It recognizes victims’ ‘right to fair hearing’ including right to obtain investigation, prosecution and trial.\(^\text{196}\) In the case of Genie Lacayo\(^\text{197}\), it was held by the IACtHR that, Article 8 follows the principle of “due process of law” or “the right to legal defence”, which provides for the right to hearing to every person.\(^\text{198}\) To establish the violation of Article 8 of ACHR, it is required to establish that procedural rights of the victim were not respected. It made the observation that,

   In order to establish violation of Article 8, it is necessary, first of all, to establish whether the accusing party’s procedural rights were respected in the trial to determine those responsible for the death of young Genie-Lacayo.\(^\text{199}\)

### 3.5.1.2.6. RIGHT TO CORRECTABILITY:

Article 8 (1) of the Inter-American Convention that provides for a right to a fair trial includes victims’ right to appeal and disposal of the same within a reasonable time period. This inference can be drawn from the decision of IACtHR in the case of Genie Lacayo v. Nicaragua wherein it was observed that,

   The application for judicial review before the Supreme Court of Justice filed by the accusing party on August 29, 1994, admitted by that Tribunal on August 31 and which, notwithstanding the various requests from the parties, has still not

\(^{196}\) JUAN CARLOS OCHOA SANCHEZ, supra note 14 at 120-121.


\(^{198}\) Genie Lacayo v. Nicaragua, supra note 197 at 74.

\(^{199}\) Genie Lacayo v. Nicaragua, supra note 197 at 75.
been disposed of. Even considering the complexity of the case, as well as the excuses, impediments and substitution of judges of the Supreme Court of Justice, the two years that have elapsed since the application for judicial review was admitted is not reasonable; this Tribunal therefore deems it to violate Article 8 (1) of the Convention.\(^{200}\)

This decision reflects upon victims’ right to appeal that too decided by the concerned authorities within a reasonable time period.

### 3.5.1.3. HUMAN RIGHT TO CONSISTENCY OR SIMILARITY OF TREATMENT AMONGST VICTIMS:

Principle of Equality can be satisfied by affording victim similar protective rights to protect their interests as given to the offender.\(^{201}\) UN (1999) working paper elaborated this status by concluding: “Looking at the rights of victims as a whole, the right to counsel seems the logical complement of the defendant’s right to counsel. There is no zero-sum game between those two rights. The victim’s right to be treated with respect seems to have little if any negative implications for the offender.”\(^{202}\)

Article 14 of the European Convention, 1950 prohibits discrimination on any ground whatsoever by providing that,

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.\(^{203}\)

This Article prohibits discrimination on any ground. The prohibited categories are not limited to the grounds only of sex, race, colour, language, religion, opinion, origin, association with any minority, property and birth but it may include any other grounds too as is implied with the use of the phrase “other status”. Article 24 of the Inter-American Convention 1969 provides for the ‘Right to Equal Protection’ as follows; “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”\(^{204}\)

\(^{200}\) Genie Lacayo v. Nicaragua, supra note 197 at 80.

\(^{201}\) JONATHAN DOAK, supra note 6 at 143.


\(^{204}\) American Convention on Human Rights, supra note 28.
This right to equal protection uses two phrases. First one provides that all are equal before the law denoting that State shall not discriminate among persons on any ground and shall give respect to their right to equality. Another one provides that State shall accord equal protection to all thus denoting that State is not only obliged to prohibit itself from violating anyone’s right to equality but when such right is denied to anyone, State shall come forward to protect his right to equality.

In terms of similarity of treatment and entitlements amongst victims, it can safely be deduced from provisions provided under international instruments and the definition of victim as provided under United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 that the victim is to be considered as a person whose human rights are to be protected and who is also entitled to few basic remedies regardless of age, sex and status.

In domestic criminal justice systems, it would not be violative of the spirit of the provision to mean as,

i. Both types of victims, whether of a crime committed by a State actor or a non-State actor, shall be accorded equal protection of law.

ii. Both, accused as well as the victim of a crime, shall be accorded equal protection of law.

iii. There shall be equality in terms of protection accorded to victims of a particular type.

205 Universal Declaration of Human Rights, 1948 (UDHR), supra note 10, at Art. 1 recognizes equal rights of all human beings when it provides that, all human beings are born free and equal in dignity and rights; Universal Declaration of Human Rights, 1948 (UDHR), supra note 10 at Art. 2, “Everyone is entitled to all the rights and freedoms set forth in this declaration, 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”;

206 UN Declaration, 1985, supra note 13 at Principle A.1 and A. 2 defines ‘victims’, “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.” “A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”
3.5.2. RECOGNITION OF INFORMATIONAL JUSTICE AS VICTIMS’ HUMAN RIGHT:

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985\(^{207}\) provides that victims should be kept informed of “their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information.”\(^{208}\) Victims should be provided with such information that they have right to seek redress through such mechanisms.\(^{209}\) The judicial and administrative processes should be responsive towards the needs of victims and this should be facilitated by providing victim with a “right to information” to get information regarding their role and scope in criminal justice process and a “right to notifications” regarding timing and progress in relation to the proceedings and disposition of their cases. This “right to information and notification” is to be given especial care in case the matter relates with a serious offence and the victim has made such a request.\(^{210}\)

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)\(^{211}\), in its principle 11 recognizes victims’ right to an “access to relevant information”.\(^{212}\)

Regarding victims’ right to information, Council of Europe’s recommendation (2006)\(^{213}\), prescribes the role of the criminal justice agencies as comprising of the following:

i. To ensure that victims are provided with appropriate information.\(^{214}\)

ii. In appropriate cases, ensuring that victims are provided with legal advice.\(^{215}\)

Council of Europe’s recommendation, 2006 has an elaborate provision regarding the victims’ right to information. Its principle 6 deals with the ‘information’. It provides that victim should be provided with relevant information from the time of his coming into contact with criminal justice agencies.\(^{216}\) It provides that, “States should ensure that victims have access to
information of relevance to their case and necessary for the protection of their interests and the exercise of their rights.”

Victim should be provided with the information in relation to the procedures to be followed with proper mention of the role that victim is supposed to perform. Victim should be informed under what circumstances and how he can obtain the protection from criminal justice agencies. Victim should further be informed whether legal advice or legal aid is available or whether victim is required to pay the cost for getting such aid or advice. Regarding information as to the legal proceedings, the recommendation provides for State to ensure that victims are provided with the relevant information and they are able to understand:

i. Outcome in their case,
ii. Progress at various stages of criminal justice process,
iii. Verdict and sentence in the case.

Further, victim should be given a chance to indicate their choice of receiving such information or not. Victims’ right to information as highlighted under the provision of UN Declaration of 1985 or under Council of Europe’s Recommendation (2006) 8 at [6] focuses upon the status and progress in his case within the criminal justice process. Regarding notification to the victims, Council of Europe’s Recommendation, 2006 provides that victim should be notified about the release of the offender in case there is a danger to the victim from such offender, but victim should be given a right to receive or not to receive any such information unless it is compulsory to be given under the criminal justice process. It provides that,

States should take the necessary measures to ensure that, at least in cases where there might be danger to the victims, when the person prosecuted or sentenced for an offence is released, a decision may be taken to notify the victims if necessary.

Under the EU Directives, 2012, in addition to recognition of new rights, already existing rights and obligations were strengthened that include victims’ right to accessible and

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218 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 6.4.
219 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 6.5.
220 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 6.5.
221 JONATHAN DOAK, supra note 6 at 183.
222 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 10.4.
223 Council of Europe’s Committee of Ministers, Recommendation (2006) 8 supra note 54 at 10.3.
understandable information by providing information pertaining to their case, any decision to end the investigation, any decision of not prosecuting the offender, in case of prosecution of the offender, information as to the charges laid against the offender and venue and time of the trial as well as judgment in the case. Recital 31 provides that victims’ right to be informed about time and place of trial should also include the information regarding time and place of hearing of the appeal from the concerned judgment. Recital 32 provides that on a request being made by the victim, victim should be provided information regarding offender’s release or escape especially in cases where there is an identified risk of harm to the victims unless there is a possibility that providing of the notification may cause an identified risk of harm to the offender. In determining the ‘identified risk of harm’ to the victims, concerned authority should take into consideration, factors such as nature of the crime and risk of retaliation by the offender.

3.5.3. RECOGNITION OF INTERACTIONAL JUSTICE AS VICTIMS’ HUMAN RIGHT

Council of Europe’s Recommendation, 2006 imposes an obligation upon the Criminal Justice Agencies to ensure that victims are provided with explanations as to the decisions taken into their cases.

EU Directives 2012 provides that victim should be provided with reasons along with the judgment in the case. It further provides that in case of child victim, the communication made with the victim, should be child-sensitive.

3.6. ROLE OF AGENCIES OF CRIMINAL JUSTICE SYSTEM IN ENSURING VICTIMS’ RIGHT TO JUSTICE:

3.6.1. UN HANDBOOK ON JUSTICE FOR VICTIMS, 1999:

Handbook on Justice for Victimshas recognized the reality of victim suffering and secondary victimization through the responses of agencies of Criminal Justice System in the aftermath of crime. The whole process of criminal justice including investigation, charging decisions, prosecution and trial may cause secondary victimization, if in the process of ensuring justice

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226 Id.
228 The Directive 2012/29/EU supra note 58.
to the offender, justice to victim is neglected or victims’ concerns are not paid the required attention.\textsuperscript{229}

Handbook has identified the areas where victim needs assistance during investigation, prosecution and trial. During investigation of an offence, victims’ safety concerns should be given priority attention and victims should be provided with direct assistance in obtaining protection orders.\textsuperscript{230} Victims should be given required information when they come into contact with criminal justice agencies. They should be provided information pertaining to the progress of the investigation, about the criminal justice process, about victims’ rights during the criminal justice process, about the offenders’ detention, bail and bond, information on how to protect evidence and how to prevent further victimization.\textsuperscript{231}

Handbook on Justice for Victims provides set of examples that may be followed in different jurisdictions but at the same time, taking into consideration various difficulties that may come in varied circumstances, this handbook does not prescribe any particular way on use and application of the UN declaration.

During prosecution and trial stages of criminal justice process, handbook has identified, based upon the victim’s needs, certain crucial areas where victims should be provided support. Victims should be provided with such measures that helps in ensuring victim participation during the criminal justice process and which prevent victim intimidation. Regarding informational aspect, handbook suggests that victim should be provided with the information regarding his role and his rights, responsibilities of criminal justice personnel, information on progress of the prosecution as well as of the trial process and plea bargaining.\textsuperscript{232}

**Victim participation in the criminal justice process:**

Handbook is suggestive of the areas where victims’ concerns should be paid priority attention. It suggests that within various jurisdictions, victims are not getting their due from the criminal justice system. Their needs, concerns and rights are not being paid the needed attention. There should be an effective mechanism to ensure victims access and their participation in the

\textsuperscript{230} Handbook, supra note 229 at 18.
\textsuperscript{231} Handbook, supra note 229 at 19.
\textsuperscript{232} Id.
criminal justice process. Measures should be adopted to sensitize practitioners to make them victim sensitive. It suggests that there should be an easy access to criminal justice system for victims of crime.

Interaction between victim and the agencies of criminal justice system:

Handbook suggests for the creation of a post of “victim-witness coordinator” that may be entrusted with the task of coordinating between victim and the various agencies of criminal justice system. This may be helpful in ensuring victims’ rights within the criminal justice system.\(^233\)

Role and responsibilities of police, prosecutors, judges and legal counsels etc.:

Handbook emphasizes upon the need of developing protocols or guidelines for the agencies of criminal justice system. It further emphasizes upon inclusion of such protocols in the training manuals and upon proper implementation of such guidelines.\(^234\)

Police: Regarding the role to be played by the police as first contact agency, the guide suggests for police playing a victim-sensitive role that treats victim not only as a source of evidence but as a human being who needs “psychological first aid’. This “psychological first aid” is not limited to providing victim with a sympathetic response for what has happened with him but includes taking due care of his safety concerns. Due attention paid towards safety concerns of victim reassures victim that he can seek justice from the system without being intimidated from his past traumatic experience. Police should also provide victim with the information as to what role do they have, as a victim of crime, in the criminal justice process.\(^235\) The role that police can play in ensuring victim justice may include the following:\(^236\):

i. Providing information to the victim regarding police procedures and investigatory process,

ii. Providing information to the victim on ways to protect evidence,

iii. Providing information to the victim as to their rights,

iv. Providing notification regarding the status of investigations,

\(^{233}\)Id at 58.

\(^{234}\)Id at 64.

\(^{235}\)Id at 57.

\(^{236}\)Id at 57-58.
v. To take care of **victims’ safety concerns** by properly investigating the suspects and by use of detention.

Police is expected to perform investigation with an objective attitude while maintaining the confidentiality of the provided information.237

Recognizing victims’ rights in the criminal justice process, it has been stated under the Policy statement of the “International association of Chiefs of Police on Victim Rights, 1983” that **all crime victims are entitled for an incontrovertible right to be free from intimidation, to be provided with a secure waiting area, to get speedy disposition of his case and to get notification regarding case status and final disposition and of offender’s release.**238

**Prosecutors:** Recognizing victims’ valid interest in prosecution of the offender, handbook suggests that it **should be kept in mind by the prosecutors that victim should be involved in the criminal justice process since he is the direct sufferer of the crime.** Proper attention paid towards victims’ concerns will result into improved cooperation by the victim in the criminal justice process. Prosecutors’ office can play a significant role in ensuring victim justice. It was emphasized that prosecutors’ office should perform its role by 239:

i. Providing victim with the **basic information and guidance through familiarization programmes**, pertaining to the criminal justice system and proceedings,

ii. Providing victim with the **relevant information regarding what role do they have** in criminal justice process as a victim of crime.

iii. Providing victim with **notification of their case status, important developments** in the progress of their case,

iv. **Helping victim in their participation** in court proceedings,

v. **Taking measures to minimize victim intimidation.**240

**Role of the judiciary:** It is for the judiciary to take care of interests of all the concerned parties in criminal proceedings. To promote judicial recognition of victims’ rights, this handbook suggests for **judges’ role in providing protection to victim, in expediting the**

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237 *Id* at 61.
238 *Id* at 59.
239 *Id* at 66-68.
240 *Id* at 66.
matters pending before them and ensuring victim participation in the criminal justice process. This handbook recommends that role of the judges should include:

i. To ensure that victims are provided with **dignified treatment** within the criminal justice process by the agencies of criminal justice system,

ii. To ensure that victims are provided with **information as to their rights** in the criminal justice process,

iii. To ensure that victims are provided with **specific information pertaining to the status of their case and offenders’ release**,.

iv. To ensure that victims are provided with **separate waiting areas so as to minimize the chances of victim-intimidation** by the offender,

v. To ensure the **services of interpreter and translator so as to make victims’ participation easy**,

vi. To ensure that victims’ who come for participation in the proceedings are provided with **due safety measures** to and from the courthouses,

vii. To ensure that victims **are not called unnecessarily** for court visits by providing an “on-call” system.

viii. Regarding victim-participation, it suggests for judges’ role in allowing **victims to participate in pre-trial release or bail hearings, scheduling of court proceedings, continuances or delays of the proceedings and plea negotiations**.

ix. To allow the **presence of the family member** of the victim or a support person in the court-room.

x. Judges should take measure to **protect victims from intimidation, threats, harassment and harm by the offender**,.

xi. In case of vulnerability of victim, take measures to **prevent direct questioning by the offender** with the victim.

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241 Id 69.
242 Id 69-70.
243 Id 70.
244 Id 71.
245 Id.
246 Id.
3.6.2.  **UN GUIDE FOR POLICY MAKERS, 1999:**

To fulfil the interactional and informational justice towards victims of crimes, United Nations Guide (1999)\(^{247}\) has provided police role as to provide victims with the explanations in relation to the police procedures and investigation, to keep them informed on ways to protect valuable evidence, to ensure their access to medical services (that may be helpful in protection of evidence), to keep them informed regarding the status of investigation and decision to close the investigations.\(^{248}\) It has been observed under the UN Guide that the present understanding that victim’s interest are well taken care of by the public prosecutor is the main hurdle in the victims’ right to get a responsive criminal justice system. This practice obstructs victims’ right to get justice in two ways. At one hand, authorities are prevented from getting all the required information in relation to the victims and on the other hand, victims are obstructed in presenting their views and concerns.

States should ensure better treatment of victims of crime. Under the Guide, it has been mentioned that State can bring ethical norms in practice and for this purpose, it should impart training to its public servants so that observance of international human rights norms can be ensured. Further, States can issue guidelines to its concerned agencies of its criminal justice system regarding the manner they should treat victims of crime.\(^{249}\)

3.7.  **CONCLUSION:**

Positive obligation of State requires that State should take care of victims’ concerns and provide with such national legislations in accordance with internationally recognized norms of victim justice, that provide protection to the rights of victims even in the cases when such violation is caused by a non-state actor. Victim participation at one hand helps in ascertainment of the guilt of the offender and on the other hand helps in ensuring victim justice and serves societal interests too. Deducing from various human rights treaties and the

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\(^{248}\)Id, at 31 ¶ 16.

approach of their monitoring bodies, it can be summarized that under international norms victims are entitled for procedural, informational and interactional justice. Jurisprudence of ECtHR and IACtHR recognize that victims have legitimate interests in the process of criminal justice and to protect their legitimate interests, they should be provided with certain rights that determine procedural, informational and interactional justice to victims of crime.