CHAPTER - 3
A common understanding regarding the necessity of restitution of victims of crime has developed. The states have developed the concept of *jus cogens*\(^1\) in their efforts to achieve reforms in the existing law and international legal order.\(^2\) The *jus cogens* have been and are being developed but they lack in implementation due to lack of political will on the part of Member States. Although international law is not a very strong law in comparison with the state law but if implemented with political zeal and enthusiasm while following the principles of international law, there will be certainty in fair treatment and justice to victims of crime in their respective states. One such basic principle is that of *pacta sunt servanda*\(^3\) which is based on good faith. At the international level, a lot has been done and a lot needs to be done for giving fair justice to the victims of crime in their domestic jurisdictions. The global awakening regarding compensating the victims can be studied under the following heads:

3.1. Universal Declaration of Human Rights, 1948

3.2 The European Convention for Protection of Human Rights and Fundamental Freedoms, 1950

3.3 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

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\(^1\) *Jus cogens* means ‘compelling law’. This ‘higher law’ must be followed by all countries. Accessed from [www.definitions.uslegal.com/jus-cogens/](http://www.definitions.uslegal.com/jus-cogens/) on 15-07-2008

\(^2\) Under Article 53 of the Vienna Convention on the Law of Treaties 1969, any treaty that conflicts with a peremptory norm is void. Vienna Convention on the Law of Treaties, 1969: Article-53: A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norms of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

\(^3\) With reference to international agreement, ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith. This entitles states to require that obligation be respected and to rely upon the obligation being respected. This implies that a party to the treaty cannot invoke provisions of its domestic law as justification for a failure to perform.’ Accessed from [www.en.wikipedia.org/wiki/Pacta_Sunt_Servanda](http://www.en.wikipedia.org/wiki/Pacta_Sunt_Servanda) on 15-07-2008
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3.4 Convention against Torture and other Cruel and Inhuman or Degrading Treatment or Punishment, 1987
3.5 The Rome Statute of International Criminal Court, 1998
3.6 Optional Protocol to the Convention on Elimination of all Forms of Discrimination against Women, 1999
3.7 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violation of International Humanitarian Law, 2005
3.8 Miscellaneous
   3.8.1 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949
   3.8.2 International Convention on the Elimination of All Forms of Racial Discrimination, 1965
   3.8.3 Convention on the Elimination of All Forms of Discrimination against Women, 1979
   3.8.4 European Convention on the Compensation to Victims of Violent Crimes, 1983
   3.8.5 Recommendation No. Rec (85) 11 of the Committee of Ministers to Member States on the Position of the Victim in the Framework of Criminal law and Procedure, 1985
   3.8.6 Convention on the Rights of the Child, 1989
   3.8.8 Model Treaty on the Transfer of Proceedings in Criminal Matters, 1990
   3.8.9 Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, 1990

3.8.12 Council of Europe Convention on Action against Trafficking in Human Beings, 2005

3.8.13 Guidelines of the Committee of Ministers of Council of Europe on Protection of Victims of Terrorist Acts, 2005


3.8.15 Recommendations No. Rec (8) of the Committee of Ministers to Member States on Assistance to Crime Victims, 2006

3.8.16 European Union for Victims of Crime 2009 [Launch of the Manifesto for Europe, 2008]


3.1 Universal Declaration Of Human Rights, 1948

With the horrors and impact of two world wars offending the conscience of man, representatives of the assembled nations at San Francisco adopted the UN Charter on 26th June, 1945. Soon thereafter on 24th October 1945 the world at large witnessed the establishment of United Nations Organization. 4 The Charter of the United Nations, which is a declaration of faith reads, “Fundamental rights in the dignity and worth of human person, in the equal rights of men and women and of nations, large and small.” It does not further define the contents of human rights. The framers of the Charter left this task to the Organization itself and it was decided for this purpose that an International Bill of Human Rights should be drawn up. 5 This Bill comprises:

(a) Universal Declaration of Human Rights, 1948

(b) International Covenant on Civil and Political Rights 1966

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(c) International Covenant on Economic, Social and Cultural Rights 1966
(d) Optional Protocol to the International Covenant on Civil and Political Rights 1966
(e) Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty, 1989

The Universal Declaration of Human Rights was adopted by the General Assembly of United Nations in Paris on 10th December, 1948. This document provides basic human rights and fundamental freedoms to which all the people in the world are entitled to and also ensures a life with dignity. The document clearly sets out the international standards of compensation for the victims of gross violations of human rights.

**Article 8** talks about the effective remedy to those whose legal rights have been violated. Not only this, this effective remedy has been recognized as a matter of right. A victim, whose legal rights are violated, must be compensated. Provisions must be made to restitute him so as to mitigate his loss.

**Article 22** throws light on duty of the State to ensure social security to the individual and if the State fails in its duty to protect its subject, it must make adequate compensation to the victim. It is the moral as well as the legal obligation of the State to facilitate the individual to realise his freedoms by lawful means.

Hence, when the State undertakes the responsibility to protect the life of its citizens, it becomes the obligation of the State not only to prosecute and punish the offenders for violation of human rights but also to help and support victims of crime i.e. those whose human rights are violated. Punishment to offenders and help to victims should be a parallel obligation of the State to realise the provisions of the Declaration.

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6 G.A. Resolution 217 A (III) of 10th December 1948
7 Article 8: Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted to him by Constitution or by law.
8 Article 22: Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
3.2 The European Convention For Protection Of Human Rights And Fundamental Freedoms, 1950

The Council of Europe (Conseil de l’Europe), founded in 1949, is an international organisation with particular emphasis on legal standards and protection of human rights, democratic development and the rule of law and cultural co-operation in Europe. This organisation works for European integration. At the heart of the Council of Europe, lies the European Convention for Protection of Human Rights and Fundamental Freedoms also called European Convention on Human Rights and European Court of Human Rights through which the convention is enforced. It is to this court that Europeans can bring cases if they believe that a member country has violated their fundamental rights. The Convention on Human Rights was adopted under the Council of Europe in 1950 to protect human rights and fundamental freedoms. The European Court of Human Rights has been established under this Convention of 1950 to monitor the compliance of Convention by the Member States. Application against signatory parties can be brought before this court by states or individuals for violation of human rights. The decision of the court is not legally binding but it has the power of awarding damages. The establishment of this Court is a novel feature as it provides for an active role to the individual at international level. The Preamble of the Convention aims at securing universal and effective recognition and observance of Rights declared in Universal Declaration of Human Rights, 1948 and inter-alia requires the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. The Convention is divided into five Sections and also contains several Protocols.

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10 Rome, 4.XI.1950
12 Article-1
13 Section-I (Article 2-18) Main Rights and Freedoms
Section-II (Article 19) Setting up of European Commission and Court
Section-III (Article 20-37) European Commission
Section-IV (Article 38-56) European Court
Section-V (Article 57-66) Implementation of the Convention
Article 13 provides for the right for an effective remedy before national authorities for violations of rights under the Convention. It says:

“Everyone whose rights and freedoms 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.”

Hence the concept of compensation has been given weightage by way of remedying the person whose rights are violated. This remedy need to be effective so that balance can be maintained while punishing the offender and compensating the victim.

3.3 Declaration Of Basic Principles Of Justice For Victims Of Crime And Abuse Of Power, 1985

The adoption of this Declaration\textsuperscript{14} by the General Assembly of the United Nations recognises the need to set norms and minimum standards in the international law for the protection of victims of crime. Part-A\textsuperscript{15} of the Declaration talks about victims of crime whereas Part-B\textsuperscript{16} describes victims of abuse of power. Part-A recognises four major components of the rights of victims of crime.

(a) Access to justice and fair treatment\textsuperscript{17}
(b) Restitution\textsuperscript{18}
(c) Compensation\textsuperscript{19}
(d) Assistance\textsuperscript{20}

(a) Access to justice and fair treatment

Under this, the declaration provides for treatment of victims with compassion and respect for their dignity,\textsuperscript{21} establishment of judicial and administrative mechanisms,\textsuperscript{22} informing victims of the proceedings, allowing their views in the proceedings, providing assistance to them, minimising inconvenience to them, avoiding delays in

\textsuperscript{14} G.A. Resolution 40/34 of 29 November, 1985
\textsuperscript{15} Clause 1-17
\textsuperscript{16} Clause 18-21
\textsuperscript{17} Clause 4-7
\textsuperscript{18} Clause 8-11
\textsuperscript{19} Clause 12-13
\textsuperscript{20} Clause 14-17
\textsuperscript{21} Clause 4
\textsuperscript{22} Clause 5
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disposition of cases,\textsuperscript{23} resolving disputes through informal mechanisms such as mediation, arbitration and customary justice.\textsuperscript{24}

(b) Restitution
Under this, the Declaration provides for making fair restitution to victims, their families or dependants.\textsuperscript{25} It also imposes an obligation on the governments to review their laws and practices to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.\textsuperscript{26} It also provides for restitution in cases of substantial harm to the environment.\textsuperscript{27} In case public officials violate the criminal laws, restitution is to be made by the State.\textsuperscript{28}

(c) Compensation
Under this, the Declaration provides that in case compensation is not fully available from the offender or other sources, the State should provide financial compensation to the victim or his dependants.\textsuperscript{29} For this matter, establishment, strengthening and expansion of national funds for compensation should be encouraged.\textsuperscript{30}

(d) Assistance
Under this, the Declaration provides that victims should receive the necessary material and assistance through governmental, voluntary, community based and indigenous means.\textsuperscript{31} Victims should also be informed of the availability of relevant assistance services\textsuperscript{32} and while providing assistance to them, attention should be given to those who have special needs because of the nature of harm inflicted upon them.\textsuperscript{33} Various agencies like police, justice, health, social service etc should be given training to ensure proper and prompt aid.\textsuperscript{34}

\textsuperscript{23} Clause 6
\textsuperscript{24} Clause 7
\textsuperscript{25} Clause 8
\textsuperscript{26} Clause 9
\textsuperscript{27} Clause 10
\textsuperscript{28} Clause 11
\textsuperscript{29} Clause 12
\textsuperscript{30} Clause 13
\textsuperscript{31} Clause 14
\textsuperscript{32} Clause 15
\textsuperscript{33} Clause 16
\textsuperscript{34} Clause 17

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The Declaration defines victims of crime as ‘victims’ mean 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.\textsuperscript{35} The Declaration defines victims of abuse of power as ‘victims’ mean 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 do not yet constitute violation of national criminal laws but of internationally recognised relating to human rights.\textsuperscript{36}

The significance of this Declaration lies in the expansion of the concept of victim and pressure on nations to take measures in the aforesaid four components namely-justice, restitution, compensation and social assistance for victims of crime and abuse of power. The Declaration is a step further by including not merely punishing of the offender but also by including the compassionate behaviour of the State by including compensatory provisions for the victim. It was the result of the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan, Italy in August and September 1985. In this Congress the claims of victims of crime and of illegal abuses of power were expanded. The United Nations further expanded the definition of victim by including medical treatment,\textsuperscript{37} rehabilitation\textsuperscript{38} and other forms of justice for victims.\textsuperscript{39} The unanimous approval at the Congress and the subsequent adoption by the United Nations General Assembly in November 1985 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power imparted a new status to the subject of victimology. This Declaration has been described as a kind of ‘Magna Carta’ of the Rights of the Victims worldwide.\textsuperscript{40}

\textsuperscript{35} Clause 1  
\textsuperscript{36} Clause 18  
\textsuperscript{37} Clause 14 and 19  
\textsuperscript{38} Clause 8-11  
\textsuperscript{39} Clause 7  
3.4 Convention Against Torture And Other Cruel And Inhuman Or Degrading Treatment Or Punishment, 1987

This international instrument on human rights aims to prevent torture around the world. The Convention was adopted by United Nations General Assembly on 10th December 1984\(^1\) and came into force on 26th June 1987. In honour of the Convention, 26th June is recognised as the International Day in support of torture victims. The structure of the Convention is divided into three parts\(^2\) containing thirty three articles. The Convention requires States to take effective steps to prevent torture keeping in view the United Nations Charter and the Universal Declaration of Human Rights. The document also forbids States to return people to their home land if there are reasons to believe that they will be tortured. Part-I defines torture and requires parties to take effective measures to prevent acts of torture within their borders. Part-II establishes a Committee against Torture and empowers it to investigate the complaints of torture in impartial manner. This part governs the steps taken by the parties to implement it. Part-III deals with ratification, entry into force and amendment of the convention and also provides for arbitration mechanism at the option of the parties having disputes. By virtue of Article-13\(^3\) States must provide the right to the person to have his case impartially investigated and protection of the complainant and witnesses. For the protection of the victims, the report should include:\(^4\)

- The mechanisms for their protection against any kind of ill treatment.

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\(^1\) G.A. Resolution 39/46 of 10th December 1984
\(^2\) Part I (Articles 1-16)
Part II (Articles 17-24)
Part III (Articles 25-33)
\(^3\) Article 13: Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.
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- Information on the access of any complainant to independent and impartial judicial remedy, including information on any discriminatory barriers to the equal status of all re-traumatisation of victims.
- Information on any officers within police forces and prosecutorial or other relevant offices specifically trained to handle cases of alleged torture or cruel or inhuman and degrading treatment or violence against women or ethnic, religious or other minorities.
- Information on the effectiveness of any such measures.

Article-14 deals with compensation and rehabilitation of victims of torture. The report should contain information on:

- The procedure for obtaining compensation for victims of torture and their families and whether these procedures are codified or in any way formalised.
- Whether the State is legally responsible for the offender’s conduct and therefore, obliged to compensate the victim.
- Statistical data or, at least, examples of decisions by the competent authorities ordering compensation and indication as to whether such decisions were implemented, including any information about the nature of the torture, the status and identification of the victim and the amount of compensation or other redress provided;
  - The rehabilitation programmes that exist in the country for victims of torture;
  - Information on any measures other than compensation to restore respect for the dignity of the victim, his/her right to security and the protection of his/her

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45 Article 14:
1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

health, to prevent repetitions and to assist in the victim’s rehabilitation and reintegretion into the community.

Hence this instrument serves as a guide for the states to take the requisite steps for preventing torture and also to provide adequate compensation to the victim.

3.5 The Rome Statute Of International Criminal Court, 1998

The plight of victims of international crimes is really worse. The adoption of the Rome Statute of International Criminal Court also known as Rome Statute is a great step forward in international law in relation to conferring a right on the victims to file claims and secure reparation from the perpetrators of international crimes. The Rome Statute is the first instrument under international regime which allows victims to file claims against, and be awarded reparations by individual perpetrators of a crime. Under this statute, reparation is seen as an essential part of the inalienable right to an effective remedy and as a relevant part of the process of justice. According to the Preamble the State Parties to this Statute are:

 Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time;

 Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity;

 Recognizing that such grave crimes threaten the peace, security and well-being of the world;

 Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation;

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Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes;

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes;

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;

Emphasising in this connection that nothing in this Statute shall be taken as authorising any State Party to intervene in an armed conflict or in the internal affairs of any State;

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole;

Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions;

Resolved to guarantee lasting respect and for the enforcement of international justice.

An elaborate procedure has been provided in the Statute and the Rules of Procedure and Evidence have also been provided for the materialisation of reparation. Under the Statute one of the important tasks of the court is to provide appropriate form of reparation.\textsuperscript{50}

Under Article 75 of the statute, such a framework has been provided within which reparation can be awarded to the victim enforceable in the national courts. Article 75 states:

Reparation To Victims:

1. The court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the court may, either upon request or on its own motion in exceptional\textsuperscript{50 Article 75(1)}
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circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the court may order that the award for reparations be made through the Trust Fund provided for in Article 79.

3. Before making an order under this article, the court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested states.

4. In exercising its power under this article, the court may, after a person is convicted of a crime within the jurisdiction of the court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Under Article 79 Trust Fund for victims has been established. Article 79 states:

Trust Fund:

1. A Trust Fund shall be established by the decision of the Assembly of State Parties for the benefit of victims of crime within the jurisdiction of the court, and of the families of such victims.

2. The court may order money and other property collected through fines or forfeiture to be transferred by order of the court to the Trust Fund.

3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of State Parties.

The aim of Trust Fund for Victims is to constructively achieve reparation by creating, managing and utilising fund for the victims. It provides for collection of amount not only from the accused but from other sources also such as states, voluntary contribution etc.
The term victim has been defined in Rule 2 of the Rules of Procedure and Evidence.51

**Rule 2: Victim:** A person against whom a crime over which the Special Court has jurisdiction has allegedly or has been found to have been committed.

Protection of victims has been dealt with under Rule 69 which states:

**Rule 69: Protection of Victims and Witnesses:**
(A) In exceptional circumstances, either of the parties may apply to a Judge of the Trial Chamber or the Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Judge or Chamber decides otherwise.
(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Witnesses and Victims Section.
(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time before a witness is to be called to allow adequate time for preparation of the prosecution and the defence.

Compensation to victims of crime has been enumerated in Rule 105 of the Rules. It states:

**Rule 105: Compensation to Victims:**
(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

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51 www.sc-sl.org/LinkClick.aspx?fileticket=zXPrwoukovM%3D&tabid=176 accessed on 19-04-2009

The Rules were amended on:
- 7 March 2003
- 1 August 2003
- 30 October 2003
- 14 March 2004
- 29 May 2004
- 14 May 2005
- 13 May 2006
- 24 November 2006
- 14 May 2007
- 19 November 2007
- 27 May 2008
(B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under Sub-Rule (B) the judgement of the Special Court shall be final and binding as to the criminal responsibility of the convicted person for such injury.

The International Criminal Court statute empowers the tribunal to grant reparation and implement its order effectively at domestic level through the instrumentality of co-operation and assistance. “The essential principle contained in the actual notion of an illegal act is that reparation must, as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.” Hence reparation has been recognised under international law since long as an instrument of remedial justice. Neither the Statute nor the Rules provide a definition of the damages or limits thereof to which direct or indirect victims might be entitled. It is for the International Criminal Court judges to determine the amount of such reparations based upon expert opinion and after having heard all the parties.

United Nations Compensation Commission which was created after the Gulf War to enable Iraq to compensate victims who were natural persons, state owned companies and multinationals, as well as the States, established certain scales of reparation such as a person whose spouse, child or parent has been killed, was entitled to compensation up to the maximum limit of $15000 or $30000 for the family. Similarly, maximum limit of $15000 was fixed for serious injury and $5000, if the effect of wound were only temporary. For sexual assault or torture maximum limit of $5000 per incident was fixed. The Statute of International Criminal Court empowers the judges to develop principles relating to reparation.54

52 Chorzow Factory case PCIJ Series A, No. 17, 1928 at 47
53 Victims’ Guide To The International Criminal Court accessed from www.rsf.org/IMG/pdf/doc-2255.pdf on 02-03-2010
54 Article 75(1)
The reparation under International Criminal Court should not remain an empty pledge. Rather it should prove to be an effective institution in serving the larger interests of victims.

3.6 Optional Protocol To The Convention On Elimination Of All Forms Of Discrimination Against Women, 1999

The Convention on the Elimination of all Forms of Discrimination against Women was adopted on 18th December 1979 and guaranteed the right of all women to be free from discrimination and sets out obligations for States to ensure legal as well as practical enjoyment of that right. During the drafting of the Convention in 1976, a complaint procedure was suggested but some delegates argued that complaints procedures were needed for serious international crimes. In the World Conference on Human Rights in Vienna in June 1993, a need for new procedures to strengthen the implementation of women’s rights was felt and a Commission on Status of Women was called on to quickly examine the possibility of introducing the right of petition through the preparation of an Optional Protocol to the Convention. The fourth World Conference on Women held at Beijing in September 1995 called on United Nations member States to support the elaboration of the Optional Protocol. Finally the General Assembly adopted the Optional Protocol to the Convention on 6th October 1999. The Optional Protocol includes:

- The Communication Procedure; by way of which women have the right to complain to the committee about violations of the Convention.
- The Inquiry Procedure; which enables the Committee to conduct inquires into abuses of women’s human rights in those States which are party to the Optional Protocol.

The Preamble ensures full and equal enjoyment by women of all human rights and to take effective action to prevent violations of these rights and freedoms.

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55 G.A. Resolution 34/180 of 18th December 1979
56 Article 2 (c): To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.
57 G.A. Resolution 54/4(A/RES/54/4)
Article 5\textsuperscript{a} deals with receipt of complaint to the Committee and requires the Committee to contact the concerned State to take measures to protect the victim from irreparable harm.

It implies that before coming to the final decision, thorough inquiry and investigation should be conducted as during which there is a possibility of hindrance in fair inquiry. Victims must be protected not only before the decision but also after the final decision. Harm to the victim may result in loss of faith in the government. Therefore victim must be protected from further victimisation. This includes protection of his life, liberty, property and also full mental and financial support to mitigate his sufferings. Just punishing the offender will not suffice unless the person assisting the authorities in sending the culprit behind the bars is also compensated. Hence the Optional Protocol adds to the existing enforcement mechanisms for the human rights of the women. The Protocol enables the Committee to request the States to take specific measures to remedy violations of the Convention.

The basic aim of the Convention is to embody the principle of equality of men and women in all matters. Similarly in the matter of compensating the victim of offence no discrimination should be made and the victim should be adequately compensated without any discrimination. The Convention defines\textsuperscript{b} ‘discrimination against women’ as ‘....any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’ The compensation granted must be in consonance with the offence of the offender irrespective of the fact that the offender is a woman.

3.7 Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Gross Violation Of International Human
Rights Law And Serious Violation Of International Humanitarian Law, 2005

The Basic Principles and Guidelines\textsuperscript{60} provide that remedies for gross violation of international human rights law and serious violations of international humanitarian law include the victim’s right to:

(a) Equal and effective access to justice
(b) Adequate, effective and prompt reparation for harm suffered
(c) Access to relevant information concerning violations and reparation mechanisms

This resolution was the culmination of several United Nations studies\textsuperscript{61} that had tried to clarify the right to reparation and potential processes for achieving that right. According to the Preamble victims should be treated with compassion and respect for their dignity, have their right to access to justice and redress mechanisms fully respected, and that the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged, together with the expeditious development of appropriate rights and remedies for victims. Principle 3 talks about the scope of the obligation by stating:

The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

\textsuperscript{60} G.A. Resolution 60/147 of 19\textsuperscript{th} April 2005 accessed from www.ohchr.org/english/law/remedy.htm on 21-03-2009
\textsuperscript{61} For example:
(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation.

**Principle 8** defines Victim as:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

**Principle 9** further elaborates stating that:

A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim. The Principles and Guideline also focus on treatment of victims. Principle 11 highlights the victims’ right to remedies:

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

(a) Equal and effective access to justice;

(b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

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62 Principle 10: Treatment of Victims: Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatisation in the course of legal and administrative procedures designed to provide justice and reparation.
Principle 12 imposes obligations on the States to secure the right to access justice and fair and impartial proceedings and for which the States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimise the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

Under Principle 13 States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

Under Principle 14 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. Reparation should be proportional to the gravity of the violations and the harm suffered. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim. The Principles and Guidelines also provide for establishing national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations. With respect to

63 Principle 15
64 Principle 16
claims by victims, States have been asked to enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements. Principle 18 expects that victims should be provided with full and effective reparation, as laid out in principles 19 to 22, which include the following forms:

- Restitution
- Compensation
- Rehabilitation
- Satisfaction

Principle 19: Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.

Principle 20: Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
(a) Physical or mental harm;
(b) Lost opportunities, including employment, education and social benefits;
(c) Material damages and loss of earnings, including loss of earning potential;
(d) Moral damage;
(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Principle 21: Rehabilitation should include medical and psychological care as well as legal and social services.

Principle 17

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65 Principle 17
Principle 22: Satisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
(f) Judicial and administrative sanctions against persons liable for the violations;
(g) Commemorations and tributes to the victims;
(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimisation and on the causes and conditions pertaining to the gross violations of international human rights law and
serious violations of international humanitarian law and to learn the truth in regard to these violations. 66

3.8 Miscellaneous

3.8.1 Convention For The Suppression Of The Traffic In Persons And Of The Exploitation Of The Prostitution Of Others, 1949

The Convention67 proclaims suppression of traffic in women and children as prostitution is incompatible with the dignity of human person and endangers the welfare of the whole community. Article-1668 of the Convention provides for rehabilitation and social adjustment of victims of prostitution.

The Convention does not clearly talk about any compensatory provision to such victims but points towards social adjustment which does include financial assistance. Women and children, being weaker sex, compensation should be more so as to retain the dignity of an individual, which, infact, will help in raising their level in the social strata of life.

3.8.2 International Convention On The Elimination Of All Forms Of Racial Discrimination, 1965

This Convention was adopted and opened for signature and ratification69 in 1965. The Convention aims at eliminating racial discrimination which is a great obstacle to friendly and peaceful relations among nations and which is capable of disturbing peace and security among people.

According to Article 6 State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any act of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage

66 Principle 24
67 G.A. Resolution 317(IV) of 2nd December 1949
68 Article 16: The Parties to the present Convention agree to take or to encourage, through their public, and private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention.
69 G.A. Resolution 2106 A (XX) of 21st December 1965
suffered as a result of such discrimination. Hence the Convention tries to remove racial barriers in the development and progress of society providing scope for compensating the victim at the same time.

3.8.3 Convention On The Elimination Of All Forms Of Discrimination Against Women, 1979

The Convention\(^7\) provides the State Parties to eliminate discrimination against women. Although there are number of provisions providing various rights to women but there is only one Article which talks about ensuring effective remedies against any act of discrimination:

**Article 2:** State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if yet not incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;

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

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

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in accordance with this conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

\(^7\) G.A. Resolution 34/180 of 18th December 1979
(f) To take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Clause (c) talks about establishing tribunals for the protection of the victims though it does not specifically talk about for awarding compensation to the victims. It will be the matter of discretion for the tribunal to determine whether or not compensation is to be awarded.


This Convention aims to deal with situation of victims of intentional crime and their dependants and to develop schemes for compensation to these victims by the state in whose territory such crimes were committed. In 1977 the Committee of Ministers of the Council of Europe adopted Resolution (77)27 on the compensation of the victims of crime, which recommended that member States provide for state compensations for victims. This resolution underlay the adoption of the European Convention on the Compensation of Victims of Violent Crimes in 1983. The Convention obliges the signatory states to provide for state compensation for victims of intentional violent crimes and for the dependants of persons who have died as a result of a violent crime.

In recent decades, policy makers and criminologists have been particularly concerned with the victim’s position in crime and with protecting the victim’s interests. They have emphasised that assisting victims must be a constant concern of crime policy, at par with the penal treatment of offenders. Such assistance includes measures designed to alleviate psychological distress as well as to make reparation for the victim’s physical injuries. One of these concerns is to provide compensation for the victim or his dependants. In principle, the offender should pay the compensation, by order of the civil or criminal courts or by a judicial or extrajudicial arrangement between him and the victim. However, though the victim can obtain satisfaction by this means in theory, full reparation is seldom made in practice, in particular because of the

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offender’s non-apprehension, disappearance or lack of means. Keeping this in view an attempt was made to make it practically feasible to compensate the victims of crime. Aims of the Convention are:72
(a) To harmonise at European level the guidelines (minimum provisions) on the compensation of victims of violent crimes and to give them binding force.
(b) To ensure co-operation between the Parties in the compensation of victims of violent crimes, and more particularly to promote:
   ➢ The compensation of foreign victims by the State on whose territory the offence was committed;
   ➢ Mutual assistance between Parties in all matters concerning compensation.

According to the Preamble:
The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that for reasons of equity and social solidarity it is necessary to deal with the situation of victims of intentional crimes of violence who have suffered bodily injury or impairment of health and of dependants of persons who have died as a result of such crimes;

Considering that it is necessary to introduce or develop schemes for the compensation of these victims by the State in whose territory such crimes were committed, in particular when the offender has not been identified or is without resources;

Considering that it is necessary to establish minimum provisions in this field;

Having regard to Resolution (77) 27 of the Committee of Ministers of the Council of Europe on the compensation to victims of crime, have agreed to this Convention.

Certain basic principles have been referred to in Part-1 of the Convention with regard to compensation and which are as follows:

➢ When compensation is not fully available from other sources, the State shall contribute to compensate:

Compensation At International Level

(a) Those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence.

(b) The dependants of persons who have died as a result of such crime: 73

- Compensation shall be awarded in above cases even if the offender cannot be prosecuted or punished. 74
- Compensation shall be paid by the State on whose territory the crime was committed. 75
- Compensation shall cover the following:
  - Loss of earnings
  - Medical and hospitalization expenses
  - Funeral expenses
  - Loss of maintenance (as regards dependants) 76
- The compensation scheme may set an upper and lower limit for any element of compensation. 77
- The compensation scheme may specify a period within which any application for compensation must be made. 78

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73 Article 2:
1 When compensation is not fully available from other sources the State shall contribute to compensate:
   a. Those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
   b. The dependants of persons who have died as a result of such crime.
2 Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished. 74
74 Ibid
75 Article 3: Compensation shall be paid by the State on whose territory the crime was committed:
   a. To nationals of the States party to this Convention;
   b. To nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.
76 Article 4: Compensation shall cover, according to the case under consideration, at least the following items: loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance.
77 Article 5: The compensation scheme may, if necessary, set for any or all elements of compensation an upper limit above which and a minimum threshold below which such compensation shall not be granted.
78 Article 6: The compensation scheme may specify a period within which any application for compensation must be made.
Compensation At International Level

- Compensation may be reduced or refused on account of applicant's financial situation.\(^79\)
- Compensation may be reduced or refused:
  - On account of victim's conduct during or after crime.
  - On account of victim's involvement in organised crime.
  - If the award would be contrary to a sense of justice or public policy.\(^80\)
- To avoid double compensation the State may deduct any amount of money received from compensation awarded.\(^81\)
- The State may be subrogated to the rights of the person compensated for the amount of the compensation paid.\(^82\)
- Each Party has been directed to take appropriate steps to ensure that information about the scheme is available to potential applicants.\(^83\)

Hence these principles help the Member States in framing the domestic laws on victims of crime with regard to their compensatory rights. This Convention was drawn up within the Council of Europe by a Committee of Governmental Experts under the authority of the European Committee on Crime Problems.

It aims to harmonise at European level the guidelines on the compensation of victims of violent crimes and to give them binding force and to ensure co-operation between

\(^{79}\) Article 7: Compensation may be reduced or refused on account of the applicant’s financial situation.

\(^{80}\) Article 8:
1 Compensation may be reduced or refused on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death.
2 Compensation may also be reduced or refused on account of the victim’s or the applicant’s involvement in organised crime or his membership of an organisation which engages in crimes of violence.
3 Compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy.

\(^{81}\) Article 9: With a view to avoiding double compensation, the State or the competent authority may deduct from the compensation awarded or reclaim from the person compensated any amount of money received, in consequence of the injury or death, from the offender, social security or insurance, or coming from any other source.

\(^{82}\) Article 10: The State or the competent authority may be subrogated to the rights of the person compensated for the amount of the compensation paid.

\(^{83}\) Article 11: Each Party shall take appropriate steps to ensure that information about the scheme is available to potential applicants.
the parties in the compensation of victims of violent crimes. Victim assistance is equally important as penal treatment of offenders. Such assistance includes measures to alleviate psychological distress as well as reparation for victim’s injuries. This further includes compensation to victim or his dependants. Hence these principles help in making rational and effective crime policy easier.

3.8.5 Recommendation No. R (85)11 Of The Committee Of Ministers To Member States On The Position Of The Victim In The Framework Of Criminal Law And Procedure, 1985

This Recommendation was adopted by the Committee of Ministers on 28th June, 1985 at the 387th meeting of the Ministers’ Deputies. Sometimes the operation of the system tends to add to the problems of the victim rather than diminishing them. Hence, considering this factor this Recommendation was adopted. It must be a fundamental function of criminal justice system to meet the needs and to safeguard the interests of the victim so as to enhance his confidence in the criminal justice. The Preamble seeks to consider that the needs of the victim should be taken into account to a greater degree throughout all stages of the criminal justice process. At the police level, the Police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and State compensation. Under the court proceedings the victim should be informed of his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice.

Recommendation No. 10 recommends for criminal court to order compensation by offender to the victim.

Recommendation No. 11 provides that legislation should provide that compensation may either be a penal sanction or a substitute for a penal sanction or be awarded in addition to a penal sanction.

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84 www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj_vict/recR_85_11e.pdf accessed on 18-07-2008
85 Recommendation 1(2)
86 Recommendation 9
Recommendation 12 suggests for the court to take into account the victim’s need for compensation or restitution while deciding the quantum of sentence for the offender. At the enforcement stage,\(^{87}\) if compensation is a penal sanction, it should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible.

### 3.8.6 Convention on the Rights of the Child, 1989

Since childhood is entitled to special care and assistance, this Convention was adopted\(^{88}\) in 1989 keeping in view the well-being of children particular. As per the Preamble, the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth. Child should be brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.\(^{89}\) The Convention talks about various legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence.\(^{90}\) The whole Convention revolves around the protection of the child and his all round development. As far as compensatory provisions are concerned, Article 39\(^{91}\) promotes physical as well as psychological recovery of child victims of crime. Apart from this, it also talks about such recovery to take place in an environment which helps fostering the dignity of the child. Though the provision does not clearly lay down compensatory provision but incorporation of promotion of physical and psychological recovery and social reintegration are vast phenomena which certainly include compensation to such delicate victims. If due compensation or financial assistance is not provided to them, chances of their exploitation are more.

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\(^{87}\) Recommendation 14  
\(^{88}\) G.A. Resolution 44/25 of 20th November 1989  
\(^{89}\) Preamble  
\(^{90}\) Article 19  
\(^{91}\) Article 39: State Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.
3.8.7 Principles On The Effective Prevention And Investigation Of Extra-Legal, Arbitrary And Summary Executions, 1989

These principles were adopted\textsuperscript{92} to prohibit extra-legal, arbitrary and summary executions and to ensure that such executions are recognised as offences under their criminal laws and are punishable by appropriate penalties. A person should not be involuntarily returned to a country if there are substantial grounds for believing that he may become a victim of extra-legal, arbitrary or summary execution in that country.\textsuperscript{93} Complainants, witnesses and persons involved in investigation have been accorded protection from violence.\textsuperscript{94} With regard to the compensatory rights of the victim, \textbf{Principle 20} recognises this right which states, “The families and dependants of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.” The plus point of this principle is that, apart from recognising compensatory right to dependants of victims, it also talks about the time frame within which the compensation should be provided. Undue delay in compensating the victim of crime retains no worthy importance as by that time, it is too late.

3.8.8 Model Treaty On The Transfer Of Proceedings In Criminal Matters, 1990

This Model Treaty was adopted\textsuperscript{95} to further the ends of justice, the social resettlement of offenders and the interests of the victims of crime.\textsuperscript{96} The Model Treaty takes into consideration the rights of the victim, when the proceedings are transferred from one State to another. According to \textbf{Article 9} which talks about the rights of the victim, states, “The requesting and the requested States shall ensure in the transfer of proceedings that the rights of the victim of the offence, in particular his or her right to restitution or compensation, shall not be affected as a result of the transfer. If a settlement of the claim of the victim has not been reached before the transfer, the

\begin{footnotesize}
\begin{enumerate}
\item Economic and Social Council Resolution 1989/65 of 24\textsuperscript{th} May 1989
\item Principle 5
\item Principle 15
\item G.A. Resolution 45/118 of 14\textsuperscript{th} December 1990
\item Preamble
\end{enumerate}
\end{footnotesize}
requested State shall permit the representation of the claim in the transferred proceedings, if its law provides for such a possibility. In the event of the death of the victim, these provisions shall apply to his or her dependants accordingly.’

Hence this Article of the Convention recognises the right to restitution or compensation to victim in particular while transferring proceedings and also to his/her dependants in case of the death of the victim. As there is a possibility of conflict of laws of both requesting and requested States, due weightage should be given to the compensatory rights of the individual who has suffered. The conflict in laws of two States should not be a hindrance in the compensatory rights of the victim. Also, in case of his death, his dependants should also be compensated as the offence of the offender does not come to an end with the death of the victim. By not compensating the dependants, there will be more chances of crime as well as exploitation. Hence to maintain social balance, compensation is essential.

3.8.9 Model Treaty On The Transfer Of Supervision Of Offenders Conditionally Sentenced Or Conditionally Released, 1990

This Model Treaty was adopted\textsuperscript{97} to meet the ends of justice and the interest of the victims of crime. When the offenders are placed on probation or given a suspended sentence or sent on parole, or in any manner conditionally sentenced or released, there is a possibility of their transfer of supervision on the request of the State. In such cases, the interest of the victims of crime should not be forgotten.

Article 9\textsuperscript{98} clearly states, “The Sentencing State and the administering State shall ensure in the transfer of the supervision that the rights of the victims of the offence, in particular his or her rights to restitution or compensation shall not be affected as a result of the transfer. In the event of the death of the victim, this provision shall apply to his or her dependants accordingly.”

Hence, victims of crime have been given due weightage as far as their compensatory rights are concerned.

\textsuperscript{97} G.A. Resolution 45/119 of 14\textsuperscript{th} December 1990

\textsuperscript{98} Article 9 deals with the rights of the victim

The Tokyo Rules were adopted by General Assembly in 1990:

- To promote the use of non-custodial measures and minimum safeguards for persons subject to alternatives to imprisonment.
- To promote greater community involvement in the management of criminal justice.

The criminal justice system stress has been laid on balancing the rights of offenders and victims in the fundamental aims of the Rules. If dignity is the inherent right of every individual, then a proper balance among rights of offender, victim and society has to be maintained. Keeping in consideration this balance, the sentencing authorities have been conferred the power to dispose of the cases in the following ways:

(a) Verbal sanctions
(b) Conditional discharge
(c) Status penalties
(d) Economic sanctions and monetary penalties
(e) Confiscation order
(f) Restitution to the victim or a compensation order
(g) Suspended or deferred sentence
(h) Probation and judicial supervision
(i) A community service order
(j) Referral to an attendance centre
(k) House arrest
(l) Any other mode of non-institutional treatment
(m) Some combination of the measures listed above.

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99 G.A. Resolution 45/110 of 14th December 1990
100 Principle 1.4: When implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.
101 Principle 8.2
Hence under clause f, due weightage has been given to victim compensation but compensation is the discretionary power of the sentencing authority.

**Principle 8.1** does talk about rehabilitative needs of the offender but not of the victim. For victim it only recognises his interests. It says: ‘The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.\(^{102}\)


This Resolution was adopted\(^{103}\) to call upon the international community to give due attention to the right to a remedy and to receive restitution, compensation and rehabilitation for victims of grave violations of international human rights law and humanitarian international law.\(^{104}\) Apart from this, it also requests the United Nations High Commissioner for Human Rights to hold, with the co-operation of interested governments, to finalise the basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law.\(^{105}\)

3.8.12 Council Of Europe Convention On Action Against Trafficking In Human Beings, 2005

The coming into existence of this Convention\(^{106}\) focuses mainly on the protection of victims of trafficking and the safeguards of their rights. It also aims at preventing trafficking and prosecuting trafficking. It applies to all forms of trafficking whether national or transnational and applies to every victim; man, woman, child and includes

\(^{102}\) Principle 8.1
\(^{103}\) 55th Meeting 19th April 2004/34 accessed from www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj_s_vict/UN%20Res%202004_34.pdf on 14-08-2008
\(^{104}\) Clause 1
\(^{105}\) Clause 4
\(^{106}\) www.conventions.coe.int/Treaty/EN/Summaries/Html/197.htm accessed on 15-06-2008
all forms of exploitation whether sexual, forced labour or services etc. The Preamble, inter-alia, provides for respect for victim’s rights protection of victims and action to combat trafficking in human beings.

Under Article 10, victims are identified and accorded protection and where the victim is a child, he/she is accorded special protection measures. Article 12 seeks to ensure assistance to victims such as:

- Ensuring secure accommodation.
- Counselling and information with regard to their legal rights.
- Access to education for children.

Article 15(3) and (4) talk about compensation and legal redress. Article 15(3) states; Each Party shall provide, in its internal law, for the rights of victims to compensation from the perpetrators. Article 15(4) states; Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23. The purpose of this article is to compensate the victim for the damage suffered. Clause 3 establishes victims’ right to compensation. The compensation is pecuniary and covers material injury, for example cost of medical treatment and non-material injury such as sufferings. This claim can be made against the trafficker because it is he who is at fault and therefore bears the burden of compensating the victim.

Clause 4 is concerned with guarantees of compensation. There are chances when offender has disappeared or declared bankrupt, then in such cases State is required to guarantee compensation. These means of guaranteeing compensation are left to the parties for establishing administrative framework and arrangements for compensation schemes.

Compensation At International Level

These guidelines were adopted\textsuperscript{107} by Committee of Ministers on 2\textsuperscript{nd} March, 2005 at 917\textsuperscript{th} meeting of Ministers' Deputies. The guidelines recognise the sufferings endured by victims of terrorist acts and seek for protection of victims. Part-VII of the Guidelines provides for compensation to victims of terrorist acts. It lays down:

1. Victims of terrorist acts should receive fair, appropriate and timely compensation for the damages which they suffered. When compensation is not available from other sources, in particular through the confiscation of the property of the perpetrators, organisers and sponsors of terrorist acts, the State on the territory of which the terrorist act happened must contribute to the compensation of victims for direct physical or psychological harm, irrespective of their nationality.

2. Compensation should be easily accessible to victims, irrespective of nationality. To this end, the State on the territory of which the terrorist act happened should introduce a mechanism allowing for a fair and appropriate compensation, after a simple procedure and within a reasonable time.

3. States whose nationals were victims of a terrorist act on the territory of another State should also encourage administrative co-operation with the competent authorities of that State to facilitate access to compensation for their nationals.

4. Apart from the payment of pecuniary compensation, States are encouraged to consider, depending on the circumstances, taking other measures to mitigate the negative effects of terrorist act suffered by victims.

Hence these guidelines serve as a practical guide for anti-terrorist policies and legislation which are both effective as well as respect human rights.

3.8.14 Guidelines On Justice In Matters Involving Child Victims And Witnesses Of Crime, 2005

These guidelines were adopted by the Economic and Social Council in 2005\textsuperscript{108} keeping in account that justice for child victims and witnesses must be assured while safeguarding the rights of accused persons. On 22\textsuperscript{nd} July the Economic and Social Council Resolution 2005/20 of 22\textsuperscript{nd} July 2005

\textsuperscript{107} http://www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committes/cdcj/cj-s-vict/Guidelines%20CM.pdf accessed on 14-08-2008

\textsuperscript{108} Economic and Social Council Resolution 2005/20 of 22\textsuperscript{nd} July 2005
Compensation At International Level

Council, on the recommendation of the Commission on Crime Prevention and Criminal Justice\textsuperscript{109} adopted these guidelines. Children, who are victims, need special protection, assistance and support to prevent further hardships and trauma. These guidelines, inter alia, provide for the right to reparation.\textsuperscript{110}

**Clause 35** lays stress on receiving reparation in order to achieve full redress, reintegration and recovery. It also lays stress on the procedure for obtaining and enforcing reparation which should be readily accessible and child-sensitive. **Clause 36** focuses on encouraging and respecting the guidelines and also community justice procedures such as restorative justice. Under **Clause 37**, reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes administered by the States and damages ordered to be paid in civil proceedings. It also lays stress on procedures to be instituted to ensure enforcement of reparation orders and payment of reparation before fines. Apart from the above, under **Part VII Clause 19(a)**, stress has been laid on informing the victim as to availability of relevant services such as health, psychological, social as well as means of accessing such services along with legal or other advice or representation, compensation and emergency financial support, where applicable.

**3.8.15 Recommendations Rec No(8) Of The Committee Of Ministers To Member States On Assistance To Crime Victims, 2006**

This Recommendation was adopted by the Committee of Ministers on 14\textsuperscript{th} June 2006 at the 967\textsuperscript{th} meeting of the Ministers’ Deputies under the terms of **Article 15.b** of the Statute of the Council of Europe.\textsuperscript{111} Several recommendations have been adopted by the Committee of Ministers and the present Recommendation intends to complement the European Convention on the Compensation to Victims of Violent Crime.\textsuperscript{112}

**Clause 3.1** of the Appendix to the Recommendation states, ‘States should identify and support measures to alleviate the negative effects of crime and to undertake that

\textsuperscript{109} E/2005/30
\textsuperscript{110} Part-XIII clause 35-37
\textsuperscript{111} www.coe.int/t/e/legal_affairs/legal_co-operation/steering_committees/cdcj/cj-s-vict/Rec_2006_8.pdf accessed on 14-03-2008
\textsuperscript{112} ETS No. 116, 1983
Compensation At International Level

victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace. Clause 6.4 says, When an offence has been reported to law enforcement or criminal justice agencies, the information provided to the victim should also include as a minimum:

i) The procedures which will follow and the victims’ role in these procedures.

ii) How and in what circumstances victim can obtain protection.

iii) How and in what circumstances victim can obtain compensation from the offender.

iv) The availability, the cost of:
   - Legal advice
   - Legal aid
   - Any other sort of advice

v) How to apply for State compensation.

vi) If the victim is resident in another State, any existing arrangements which will help to protect his/her interests.

Clause 7 provides for right to effective access to other remedies. According to it, victims may need to seek civil remedies to protect their rights following a crime. States should therefore take the necessary steps to ensure that victims have effective access to all civil remedies, and within a reasonable time, through:

i) The right to access to competent courts

ii) Legal aid in appropriate cases

States should also institute procedures for victims to claim compensation from the offender in the context of criminal proceedings.

As far as compensation from State is concerned Clause 8 is fully devoted to it which clearly states, Compensation should be provided by the State for:

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113 Clause 7.1
114 Clause 7.2
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i) Victims of serious, intentional, violent crimes including sexual violence.

ii) The immediate families and dependants of victims who have died as a result of such crime.\textsuperscript{115}

Under the compensation schemes four principles laid down are:

1. States should adopt a compensation scheme for the victims of crimes committed on their territory, irrespective of victim’s nationality.\textsuperscript{116}

2. The compensation awarded to victims should be based on the principle of social solidarity.\textsuperscript{117}

3. The compensation should be granted without undue delay, at a fair and appropriate level.\textsuperscript{118}

4. Since many persons are victimized in European States other than their own, States are encouraged to co-operate to enable victims to claim compensation from the state in which the crime occurred, by applying to a competent agency in their own country.\textsuperscript{119}

With regard to damages requiring compensation, it should be provided for treatment and rehabilitation for physical and psychological injuries.\textsuperscript{120} States should consider the compensation for loss of income, funeral expenses and loss of maintenance for dependants. States may also consider for pain and suffering.\textsuperscript{121} States may consider means to compensate damage resulting from crimes against property.\textsuperscript{122} Finally, State compensation should be awarded to the extent that the damage is not covered by other sources such as offender, insurance or state funded health and social provisions. Hence this recommendation urges the States to provide for various provisions for the facilitation of victims while seeking their right to compensation.

3.8.16 European Union For Victims Of Crime 2009 [Launch Of The Manifesto For Europe, 2008]

\textsuperscript{115} Clause 8.1
\textsuperscript{116} Clause 8.2
\textsuperscript{117} Clause 8.3
\textsuperscript{118} Clause 8.4
\textsuperscript{119} Clause 8.5
\textsuperscript{120} Clause 8.6
\textsuperscript{121} Clause 8.7
\textsuperscript{122} Clause 8.8
This Manifesto was launched at Brussels on 20th February 2008. Year 2008 was the 60th anniversary of the Universal Declaration of Human Rights. It therefore reminded everyone of the serious commitments which international community has taken. Lot of stress has been laid on human rights in general. There is one specific group of people called ‘victims of crime’ who need extra protection and assistance. Remarkable changes have taken place in favour of victims at international, national and regional level. The purpose of the General Assembly in adopting the ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’ in 1985 was to encourage the Member States to put the victims at the centre while addressing crime problems balancing between both rights of victims and offenders. This manifesto was launched to facilitate needs of victims during judicial or administrative processes by:

- Informing the victims of their role and progress of proceedings.
- Allowing views of victims to be presented in proceedings.
- Providing proper assistance to them.
- Taking measures to minimise inconvenience to victims.
- Avoiding unnecessary delay in disposition of cases and execution of orders granting awards to victims.

Hence the launch of the Manifesto has made the Member States to fully implement and expand the policies with regard to protection and promotion of crime victims.


The draft of this Convention was put for consideration on 8th of February 2010. The Preamble of the Convention urges the State Parties to give effect to the provisions contained in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It also recognises that millions of people, including many women and children, throughout the world still suffer harm as a result of crime, abuse of

123 www.unicri.it/wwa/staff/speeches/080220_dir.pdf accessed on 14-08-2008
124 Ibid
125 www.worldsocietyofvictimology.org/publications/Draft%20Convention.pdf accessed on 10-6-2010
power and terrorism, and the rights of these victims still have not been adequately recognised, and they suffer hardship when assisting in the prosecution of perpetrators.

**Article-1** of the Convention defines ‘victim’ as:

"Victims mean natural persons who, individually or collectively, have suffered harm including physical or mental injury, emotional suffering or economic loss or violations of fundamental rights in relation to victimisations identified under scope."

A person is a victim regardless of whether the crime is reported to the police, regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. ‘Victims’ also include, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered in intervening to assist victims in distress or to prevent victimisation.

**Part-II Article-5** of the Convention talks about the rights and duties. It says:

Access to justice and fair treatment:

1. State Parties shall provide victims with access to the mechanisms of justice and redress which is expeditious, fair, inexpensive and accessible, as provided for by domestic legislation, through:

   (a) Judicial and administrative mechanisms which will enable victims to obtain redress;

   (b) Informal mechanisms for the resolution of disputes, including mediation, arbitration, and customary justice processes or indigenous practices, where appropriate, to facilitate conciliation and redress for victims;

   (c) Information about their rights in seeking redress through all these mechanisms.

2. State Parties shall ensure that the judicial, administrative and informal processes are responsive to the needs of victims. This should be facilitated by:

   (a) Giving the victim a fair hearing within a reasonable time in the determination of their entitlement to a remedy for the injury, loss or damage suffered by them as a result of their victimisation without prejudice to the accused;
(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant domestic criminal justice system;

(c) Allowing victims to present their views and concerns themselves or through legal or other representatives without prejudice to the discretion of the court, tribunal or other appropriate authority, and in consonance with the relevant domestic criminal justice system;

(d) The prompt return to victims of their property, taken or recovered by the police or any other agency for the purpose of the investigation, when no longer needed;

(e) Providing to victims, where appropriate, the right of appeal against decisions of the prosecutorial authority not to prosecute in cases where they were victimised.

(f) Providing proper assistance to victims throughout informal, administrative, investigative and judicial processes;

(g) Taking measures to minimise inconvenience to victims and protect their privacy wherever appropriate;

(h) Ensuring the safety of victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(i) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims;

(j) Ensuring the enforcement of any order or decree granting awards to victims.

(3) State Parties shall reimburse victims and witnesses for their reasonable expenses related to the procedure incurred as a result of their legitimate participation in criminal proceedings.

**Article-8** focuses on Assistance. It says:

(1) State Parties shall ensure that the necessary material, medical, psychological and social assistance to victims is provided through government, voluntary, community-
based and indigenous means. Such assistance may be provided through any agencies or comprehensive programs that are appropriate under domestic laws or norms.

(2) State Parties should be encouraged to develop networks of criminal justice, social services, health and mental health services, victim assistance services and other relevant groups or institutions in order to facilitate referrals, co-ordination and planning among those providing assistance.

(3) State Parties should be encouraged to establish local and regional victim assistance centres to co-ordinate networks, develop and make referrals, and provide outreach to victims and direct services where appropriate.

(4) State Parties shall facilitate the referral of victims by the police and other relevant agencies to victim assistance centres or other service institutions.

(5) Language understood by victims should be encouraged. If translators are needed, they should be trained in the subject matter that they are addressing and victim support personnel should be familiar with common terms that will be used.

(6) State Parties shall seek to establish the following kinds of assistance to victims:

A. Immediate Assistance:

(a) Medical attention and accompaniment to medical exams, including first aid, emergency medical attention and medical transport. Support services should be provided to victims when forensic examinations are called for or in the aftermath of death;

(b) Material support such as shelter, housing, transportation, or property repair;

(c) Crisis intervention, involving crisis counseling and problem solving;

(d) Information and notification about what happened to the extent that such information does not interfere with investigation, including notification of any immediate responsibilities to the criminal justice system. Assistance should be offered in notifying family or friends of what happened;

(e) Protection from repeat victimization should be provided through the development of safety and security plans. This may include information on police surveillance, relocation, emergency communication and the like.
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It may also involve assistance with obtaining protection orders through the judicial system;

(f) Victims should be protected from media intrusion;

(g) General support and advocacy should be offered when victims interact with social, justice and medical institutions as well as appropriate referrals for urgent needs;

(h) Confidentiality and privacy should be guaranteed to the extent allowable under current law and policy.

B. Medium Term Assistance:

(a) The continuation of the services provided under A ‘Immediate Assistance’;

(b) Psycho/social health and spiritual interventions that may include post-trauma counselling, mental health therapy, family counselling, pastoral counselling, or traditional healing intercessions;

(c) Assistance with financial needs or claims including filing and advocacy for compensation claims, restitution, insurance, or emergency funds.

(d) Legal referrals should be provided for legal assistance in the criminal or civil justice systems. To the extent possible such legal assistance should be free.

(e) Information, support and assistance concerning options for participation in alternative justice forums should be provided.

C. Long Term Assistance:

(a) The continuation of the services provided under A ‘Immediate Assistance’ and B ‘Medium Assistance’;

(b) Assurances and re-establishment of the victim’s place in the family, community, education and in the workplace should be encouraged;

Article-9 highlights restorative justice by stating:

(1) State Parties shall endeavour, where appropriate, to establish or enhance systems of restorative justice that seek to represent victims’ interests as a priority. State shall emphasise the need for acceptance by the offender of his or her responsibility for the
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(2) State Parties shall ensure that victims shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims’ dignity, compassion and similar rights and services to those described in this Convention.

Article-10 deals with restitution which also includes reparation. It says:

(1) State Parties shall legislate to make offenders responsible for paying fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimisation, provide the opportunity for a sincere apology where appropriate, the provision of services and the restoration of rights.

(2) State Parties shall review their practices, regulations, laws and their constitution to ensure that restitution is an available sentencing option in criminal cases.

(3) In cases of environmental crime, State Parties shall legislate to include restitution to restore the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of the community.

(4) Where public officials or other agents acting in an official or quasi-official capacity have violated domestic criminal laws, State Parties shall legislate to provide restitution to victims from the State whose officials or agents were responsible for the harm inflicted. In cases where the government under whose authority the victimising act or omission occurs is no longer in existence, the State or government successor in title shall provide restitution to the victims.

(5) When there is a court order for restitution, the State Party shall be responsible for enforcing the order.

(6) In cases where the offender is under a legal obligation to pay restitution as well as other pecuniary sanctions, the former shall have precedence over the latter.
(7) In cases where the victim seeks restitution through civil remedies, State shall endeavour to expedite these proceedings and minimise expenses.

Article-11 specifically deals with compensation and states:

(1) When restitution is not fully available from the offender or other sources, State Parties shall endeavour to provide financial compensation to:
   (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of intentional violent crime;
   (b) The victims’ family, in particular dependants of persons who have died (or become physically or mentally incapacitated) as a result of such victimisation.

(2) Compensation shall be provided for:
   (a) Treatment and rehabilitation for physical and psychological injuries caused to victims.

(3) States should also consider compensation for loss of income, funeral expenses, loss of maintenance for dependants, and pain and suffering and other psychological injuries caused to victims.

(4) The establishment, strengthening and expansion of national, regional or local funds for compensation to victims should be encouraged. State Parties may consider providing funds through general revenue, special taxes, fines, private contributions, and other sources.

(5) These funds shall guarantee fair, appropriate and timely compensation. They should also allow for emergency and/or interim payments. Special care should be taken to make the funds accessible. This requires, inter alia, extensive dissemination of information on the eligibility criteria and the procedure to be followed. State should also consider other means to raise public awareness of the existence of these funds.

(6) Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.
(7) In cases of cross border victimisation, the State where the crime has occurred should pay compensation to the foreign national, subject to the principle of reciprocity.

The Convention not only talks about the rights of the victims but also taking of necessary measures for their implementation\textsuperscript{126} and monitoring.\textsuperscript{127}

3.9 Conclusion:

Hence it is apparent that the mandate for reparation for violation for international human rights is well established under international human rights jurisprudence. Obligation exists under international human rights norms to provide reparation if human rights of individuals are violated. The idea is to convince the States to implement these provisions in their domestic laws. The most important concept which matters is the will and determination of the States to implement the international instruments in their States thereby giving respect and honour to the international law.

\textsuperscript{126} Article-12
\textsuperscript{127} Article-13