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RESEARCH ARTICLE

PROTECTION TO THE RIGHTS OF VICTIMS OF CRIME UNDER INTERNATIONAL LAW

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Abstract

The courts of criminal jurisdiction at the national and international levels in the past did not bestow much attention on the rights of the victims ; rather they concentrated more on matters relating to the proof of guilt of the accused and less on matters relating to the sufferings of the victims. With regard to very few aspects of the criminal case the participation or association of the victim with the proceedings at any stage was relevant. But in modern International Law, the victim is given due attention with regard to his right to life, liberty and safety as also his right to compensation and the relevant bodies are supposed to provide protection to the victim to avail several of his rights. Drawing inspiration from the international legislation, the legal systems at the national level have adopted necessary legislation to enforce the policy of the United Nations with regard to protection of the victims. The development of Human Right Law and Environment Law have of course given a new boost to the concept of rights of the victims. However, there are certain legal impediments on account of which the victims cannot get the protection envisaged in the modern legislation. Among such impediments are the limited scope of the concept of 'victim' and a limitation on the jurisdiction of the courts in the form of immunity of United Nations from national jurisdiction in civil and criminal matters. On a review of the relevant documents one is forced to draw the conclusion that the provisions of law which by one hand give a gift of protective device take away by another hand the very protection envisaged to the rights of victims in civil and criminal matters.

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Introduction:-

At various times in the history of international criminal law Tribunals were set up for the investigation and prosecution of international crimes. The International War Crime Tribunal at Nuremberg and the International War Crime Tribunal at Tokyo were the typical instances of War Crime Tribunals set up to deal with the aftermath of the World War II.

Then after a gap of thirty years or so, the United Nations set up two ad hoc Tribunals, one known as the International War Crimes Tribunal for former Yugoslavia (ICTY), 1993 and the other known as the International War Crimes Tribunal for Rwanda (ICTR), 1994. The Statutes by which these Tribunals were set up did not have

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enough provisions for the protection to the Victims of crimes; they pursued the sole object of punishing those who had committed the crimes by which peace and order of the international society was disturbed.

But when the United Nations set up a permanent body known as International Criminal Court at the Hague for dealing with international crimes the Statute by which such a body was set up provided for protection to the victims of crimes in addition to the traditional task of punishing the criminals. The earlier Tribunals were concerned with the punitive idea much more than anything else therefore they concentrated more on implementing the principles of penal justice and ignored the need for taking care of the victims. What is significant about the International Criminal Court of the recent days is that it has now on its hands the responsibility of providing protection to the victims of crime.

Drawing inspiration from the policies of the United Nations the national legislatures of a good number of countries including India have taken the step of enacting laws for the protection of the victims of crimes.

However, it is observed from the jurisprudence of these bodies that the term 'victim' has been given a restricted interpretation and that there are provisions barring the exercise of jurisdiction by the national and international tribunals on grounds of immunity of United Nations.

This article has the object of highlighting the provisions of the Statutes on the rights of the victims of crime and investigating into the problem coming in the way of availing the protection. The discussion on these two aspects of the matter is presented in two Sections thus:

Section - A 'The Concept of Victim and his Rights under the provisions of national and international criminal law' deals with the wrongful acts known as crimes. It also takes note of the rationale behind the concept of Victim protection and analyses the rights of the 'victim' to entitle a person to seek protection from the agencies which have the responsibility of protecting the victims.

Section - B: 'Immunity of the United Nations from the jurisdiction of national tribunals' deals with the jurisprudence of the tribunals which are charged with the responsibility of administering the law on international crimes. Attention is focused on the exemption granted to the international tribunals against the jurisdiction of the national tribunals because of which doubts arise whether International Law is serious about providing protection to the victims of crime..

Section – A

The Concept of Victim and his Rights under the Provisions of the national and international Criminal law

Meaning and Definition of International crimes

International Crimes are Crimes which affect the peace and safety of more than one state or which are so reprehensible in nature as to justify the intervention of international agencies in the investigation and prosecution thereof.

Traditional examples of international crimes include the War Crimes, Crimes against Humanity and Piracy. More recently: genocide and terrorism have emerged as articulated and defined offences. A large number of offences now form part of the body of international law statutes- more properly called the Treaties. As part of the latter, they are properly organized with a definition of the prohibited conduct and appropriate referrals to international courts for trial and sentencing.¹

Since the post- World War II era the International Law Commission is entrusted by the United Nations with the task of studying the various aspects of the behaviour of States and formulate rules for State Responsibility. Following this method the International Law Commission has studied the subject of State Responsibility for Internationally Wrongful Acts, for several years, . A gist is given below of what the International Law Commission has said about the nature and scope of the wrongful acts of the States in International Law. The principles evolved by the International Law Commission concerning the Responsibility of States for Wrongful Acts

¹Duhaime, Lloyd, Duhaime's Legal Dictionary.

are of vital importance in determining the question when the rules of liability and accountability may be invoked and to what extent the collective entities are liable.

According to the rules formulated by the International Law Commission it is the wrongful acts which can come within the purview of the Protection of Victims of crimes.

The basic features of the internationally wrongful act may be analysed as under :

- i) An internationally wrongful act exists when the conduct consisting of an act or omission is attributable to a State and constitutes a breach of an international obligation owed by that State.
- ii) That the characterization of an internationally wrongful act is governed by international law and is not affected by its characterization as lawful by internal law.
- iii) In International Law the general rule is that conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, that is, as against of the State.
- iv) According to the rules formulated by the International Law Commission the breach of an international obligation is an international crime.
- v) According to the legislation formulated by the United Nations the International crimes are the War Crimes, Crimes against Peace and Crimes against Humanity.

Rationale for the Protection of the Rights of Victims of crime

In the earlier days the enforcement agencies focussed more on certain elements of criminal liability. . The victim of crime was overlooked and lost significance in various stages of the criminal justice. There was however provision for the protection of Rulers of the State, the Diplomatic Agents and their relatives, family members and the staff working in the diplomatic mission. But the reformers, criminologists and penologists found that there was an omission in the system of criminal justice which was in need of being rectified. The review made by such responsible persons resulted in the formation of a movement called the Victim's Rights Movement, which attracted the attention of the global community. The idea of victim protection was translated into objective law after World war II under different titles such as demanding the right to losses in criminal case, fair trial and victim compensation.

Based on the efforts of the reformers the national constitutions of the countries like the United States of America made a provision in the national constitution for the protection of victims. There were Statutes enacted at the national level for compensation to be paid to all those who suffered harm at the wrongful deeds of the individuals.

The international community realized that there is need to do more by adopting the policy of protecting the victims, and therefore they worked on this idea sincerely and developed a body of law on the protection of the victims of crime.

The idea of protection to victims may contribute to supporting the fundamental principles of the system of state administration like the Rule of Law, the system of Good Governance and the System of Accountability.

These requisites have been nicely spelt out in the Preamble of the Canadian Bill of Victims Rights Act 2015 in the following words :

“Preamble

Whereas crime has a harmful impact on victims and on society;

Whereas victims of crime and their families deserve to be treated with courtesy, compassion and respect, including respect for their dignity;

Whereas it is important that victims' rights be considered throughout the criminal justice system;

Whereas victims of crime have rights that are guaranteed by the Canadian Charter of Rights and Freedoms;

Whereas consideration of the rights of victims of crime is in the interest of the proper administration of justice;

Whereas the federal, provincial and territorial governments share responsibility for criminal justice;...”²

Whereas, in 1988, the federal, provincial and territorial governments endorsed;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

²The Canadian Statement of Basic Principles of Justice for Victims of Crime and, in 2003, the Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003

The practical utility of the participation of victims in the system of justice is noted by the scholars in various status in the criminal process. The opinion of the learned jurists is that the Victims of crime can play a wide range of roles and are accorded a number of different statuses in proceedings. In a report on Victim Participation in Criminal Proceedings by the Institute for Security Studies³ the following rough categorization has been made :

i) The Auxiliary Prosecutor:

This form of participation is available in a number of hybrid jurisdictions that provide victims with the opportunity to take part in the proceedings through a legal prosecutor, the victim's representative often has extensive rights to provide opening and/or closing statements, request or adduce new evidence, request the examination of witnesses, question or cross examine witnesses, propose amended charges, raise objections, participate in oral debates on points of fact and law, and file interlocutory appeals;

(ii) The Civil Party :

Civil parties usually have extensive participatory rights in the trial. Such rights may include the right to be legally represented, to make opening and closing statements, to adduce evidence, to cross examine witnesses and to make statements on fact and law.

(iii) The Intervener :

A victim might have certain rights to be heard in the investigation and/or trial, sometimes subject to considerations of fairness to the defence. Jurisdictions either provide victims with certain defined participation rights in the trial, and/or a more general right to be heard on matters that affect their interests. The Cr.P.C. provides the possibility of victim involvement through the appointment of a (person known as subsidiary prosecutor⁷ who acts in proceedings under the direction of the public prosecutor.

(iv) Victim Pact Statement Model:

A number of common law countries do not allow for victims to be represented at trial. These jurisdictions limit victims' active rights at the trial stage to the provision of a 'Victim Impact Statement' at sentencing after a defendant is found guilty. This is either a written document or oral statement setting out the economic, emotional and physical impact that a crime has had on the individual. The purpose of these procedures is to ensure that victims' perspectives are heard in a way which "do(oes) not and should not dictate sentences, but should allow more intelligent sentencing some jurisdictions victims may be cross examined on the content of their victim impact statement."⁴

In India, the Committee on Criminal Justice Reforms⁵ (the Mallimath Committee) issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences and recommend a thorough examination by an expert statutory body.

In 2008 the Committee on Draft National Policy on Criminal Justice (the MadhavMenon Committee reasserted the need for statutory sentencing guidelines.⁶

Meaning and Definition of the term 'Victim'

The United Nations in its basic document on Principles of Justice has classified the victims in two categories, one is the Victims of Crime and the other is the Victim of Power. These two terms have been defined as follows :-

Victims of Crime

The United Nations has been adopting series of measures for the prevention of crimes and the universal recognition of the rights of victims of crime and abuse of power. One such measure is the adoption of the 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power'⁷ on 29th November, 1985.

³Victim Participation in Criminal Law Proceedings, Institute for Security Studies, September 2015

⁴ Ibid, pp. 71-73

⁵ Committee on Reforms of Criminal Justice System Report, 170 (May 2003)

⁶Committee on Draft National Policy on Criminal Justice (2008).

⁷A/RES/40/34

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, 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 victimization.
3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Victim of Abuse of Power

‘Victims’ means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation and necessary material, medical, psychological and social assistance and support.

States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18.

States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.⁸

Nature and Scope of the Rights of Victims

Difference between a victim and a witness :

In International Law a victim is a person who has suffered harm as a result of the commission of a crime within the jurisdiction of the International Criminal Court. The Rome Statute ensures that a number of rights are accorded to victims. The most groundbreaking of which is the right to participate in proceedings independently of the Prosecution or Defence. Victims have the right to have their own legal representatives in the Courtroom presenting their concerns and personal interests to the Court.

A witness is a person who testifies before the Court giving a statement as evidence, often called by either the Prosecution or Defence.

Victims according to the Rome Statute of the ICC are individuals who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC. Victims may also include organizations or institutions that have sustained harm to any of their property which is dedicated to religion, education, art, science or charitable purposes.

The Judges of the ICC determine the types of harm to be taken into account, such as bodily harm, psychological harm, that is where a person's mind has been affected by what he or she has experienced or witnessed or material harm, which consists of loss of or damage to goods or property.

⁸ Paragraph 18 of the UN Document on ‘Basic Principles of Justice for Victims of Crime and Abuse of Power.

Protection of Victims and Witnesses under the Statutes of International Criminal Tribunals:

The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the territory of the Former Yugoslavia (ICTY) since 1991, to 25th May 1993 dealing with the Protection of Victim and Witnesses provides the following :-

“The International Tribunal shall provide in the Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.”⁹

The Statute of the International Criminal Tribunal for the Prosecution of Persons responsible for Genocide and other serious violations of International Humanitarian Law committed in the territory of Rwanda between 1st January 1994 and 31st December, 1995 dealing with the matter of Protection of Victims and Witnesses provides for the following

“The International Tribunal for Rwanda (ICTR) shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.”¹⁰

Rights of the Victims under International Law :

Protection of Victims and Witnesses under the Statute of the International Criminal Court :

The Rome Statute dealing with the International Criminal Court (ICC) at the Hague contains the following provisions with regard to Protection of Victims and Witnesses before the ICC The rights of the victims before the ICC may be discerned from the following provisions :

Victims before the ICC have rights that have never before been granted before an international criminal court. Victims may be involved in the proceedings before the ICC in various ways.

1. Victims can send information to the Office of the Prosecutor and ask the Office to initiate an investigation;
2. At a trial, a victim may voluntarily testify before the Court, if called as a witness for the Defence or the Prosecution or other victims participating in the proceedings;
3. Victims are also entitled to participate in proceedings through a legal representative, during proceedings, victims may participate by presenting their views and concerns to the judges; such participation is voluntary and enables victims to express an opinion independently of the Prosecution or the Defence and offers them the opportunity to present their own concerns and interests;
4. Victims participating in proceedings may also, in some circumstances, lead evidence pertaining to the guilt or innocence of the accused; they may also challenge the admissibility or the relevance of evidence presented by the parties;
5. Lastly, victims can seek reparation for the harm that they have suffered.

The way the victims may participate in the proceedings is, if the Court considers it appropriate, victims may present their point of view directly to the judges at various stages in the proceedings. Such participation is generally through a legal representative (that is a lawyer) who presents their views and concerns to the court since criminal proceedings are quite complex;

To make it easy for the victims to participate they are required to fill out an application form. Victims may obtain a copy of the application for participation forms from the Court’s website or from the Victims Participation and Reparations Section in The Hague. The forms must be returned to the Victims Participation and Reparations Section in the Hague by fax, email or post.

Rights of the Victims under UN Declaration :

The Obligation of States towards the Victims Of crime and abuse of power :

The UN Declaration on Principles of Justice specifies the obligations which the States must undertake for the protection of the Victims of Crimes and Abuse of Power; some of these obligations are the following :-

⁹Article 22 of the Statute of ICTY.

¹⁰ Article 21 of the Statute of the ICTR

Access to Justice :

For the purpose of Access to justice and fair treatment towards the Victims the Declaration lays down the following obligation:

1. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.
2. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.
3. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
 - (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
 - (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
 - (c) Providing proper assistance to victims throughout the legal process;
 - (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
 - (e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

Restitution

Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants.

Compensation

When compensation is not fully available from the offender or other sources, States should 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 serious crimes;
- (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

Assistance

Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.

Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm

inflicted or because of factors such as those mentioned in paragraph 3 above.”¹¹

National Law on the Protection of the Victims and their Rights

In various countries there are laws enacted by the national legislatures to implement the policies enunciated in the UN instruments;

(1) In India, for example, there are statutory enactments providing for compensation to victims of various situations, for example, the Fatal Accidents Act, 1855, the Companies Act, 1956, the Motor Vehicles Act, 1988, Maintenance and welfare of Parents and Senior Citizens Act, 2007, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. But the particular legislation dealing with the protection of the victims of crime and which set a new method for the protection of victims is the Code of Criminal Procedure, 2008. The term ‘Victim’ is defined to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression ‘victim’ includes his or her guardian or legal heir.¹²

(2) In United Kingdom, the Government had given much attention to the problem of compensation to be paid to the victims of crime. The agencies set up for the purpose included the Criminal Injuries Compensation Commission, the Criminal Injuries Compensation Board et. But a very important step taken by the Government was to codify the principles on the subject of entitlements of the victims of crime. A summary of the key entitlements of the victims is contained within Chapters 1 to 3 of the Code of Practice for Victims of Crime.

The Code of Practice forms a key part of the wider Government strategy to transform the criminal justice system by putting victims first, making the system more responsive and easier to navigate. Victims of crime should be treated in a respectful, sensitive, tailored and professional manner without discrimination of any kind. They should receive appropriate support to help them, as far as possible, to cope and recover and be protected from re-victimization. It is important that victims of crime know what information and support is available to them from reporting a crime onwards and who to request help from if they are not getting it.

The Code sets out the services that must be provided to victims of crime by organizations in England and Wales.

The Code sets a minimum standard for these services. Service providers can choose to offer additional services and victims can choose to receive services tailored to their individual needs that fall below the minimum standards.

(3) In New South Wales, the Victims Rights Act 1996 contains the following provisions on the definition of a victim and his rights :

About the definition of the term ‘victim’ the Act says, “For the purposes of this Act, a victim of crime is a person who suffers harm as a direct result of an act committed, or apparently committed, by another persons in the course of a criminal offence. ... A person suffers harm if, as a result of such an act:

- (a) the person suffers actual physical bodily harm, mental illness or nervous shock, or
- (b) the person’s property is deliberately taken, destroyed or damaged.

If the person dies as a result of the act concerned, a member of the person’s immediately family is also a victim of crime or the purposes of this Act.¹³

About the Rights of the Victim, the Act says, ‘The following comprises the Charter of rights of victims of crime;

- (i) A victim should be treated with courtesy, compassion and respect for the victim’s rights and dignity;
- (ii) A victim should be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim.
- (iii) A victim should have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim’s needs.

¹¹ Annexure to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

¹² Section 2 (wa) of the Code of Criminal Procedure, 2008.

¹³ Sec. 5 of the Victims Rights Act of 1966

(iv) A victim should, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim should be informed accordingly.

(v) A victim should, on request, be informed of the following :-

(a) the charges laid against the accused or the reasons for not laying charges;

(b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision for the accused to accept a plea of guilty to a less serious charge in return for a full discharge with respect to the other charges;

(c) The date and place of hearing of any charge laid against the accused;

(d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.”¹⁴

(4) In United States, the Victims' Rights and Restitution Act of 1990 - Requires all Federal law enforcement agency officers and employees to make their best efforts to accord victims of crime with the right to:

(1) be treated with fairness and respect for the victim's dignity and privacy; (2) be protected from their accused offenders;

(3) notification of court proceedings;

(4) attend public court proceedings related to the offense under certain conditions;

(5) confer with the Government attorney assigned to the case;

(6) restitution; and

(7) information about the conviction, sentencing, imprisonment, and release of the offender.¹⁵

The Act directs the Federal law enforcement agency heads to designate the persons responsible for identifying the victims of a crime and providing certain services to such victims such as:

(1) informing them where to receive medical care and counselling;

(2) arranging protection from an offender; and

(3) keeping the victim informed of developments during the investigation and prosecution of the crime and after the trial such as the arrest of a suspected offender or an escape of a convicted offender.

The Revises Federal criminal code provisions regarding orders of restitution requires Federal courts to order convicted criminals to pay restitution to cover the full amount of the victim's losses without consideration of the economic circumstances of the offender or the fact that a victim has received or is entitled to receive compensation with respect to a loss from other sources. (Currently orders of restitution are discretionary.) Authorizes Federal courts to order restitution for any person who, as shown by a preponderance of the evidence, was harmed physically, emotionally, or pecuniarily by the unlawful conduct of the defendant during the crime.

(5) In Canada, the Canadian Bill of Rights 2015 . contains the following provisions on Victims and their Rights :- ‘Victim’ means an individual who has suffered physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of an offence. (victime)¹⁶

Sec.3 of the Act allows others to exercise the rights of the victim if the proper victim is absent or is not able to exercise his the rights himself ::

“Any of the following individuals may exercise a victim’s rights under this Act if the victim is dead or incapable of acting on their own behalf:

(a) the victim’s spouse or the individual who was at the time of the victim’s death their spouse;

(b) the individual who is or was at the time of the victim’s death, cohabiting with them in a conjugal relationship, having so cohabited for a period of at least one year;

(c) a relative or dependant of the victim;

(d) an individual who has in law or fact custody, or is responsible for the care or support, of the victim;

(e) an individual who has in law or fact custody, or is responsible for the care or support, of a dependant of the victim.¹⁷

¹⁴ Part 2, Section 6 of the Victims Rights Act 1966.

¹⁵H.R.5368 - Victims' Rights and Restitution Act of 1990101st

¹⁶Canadian Victims Bill of Rights Act, SC 2015, c. 13. Sec. 2, assented to on 23rd April, 2015

An individual is not a victim in relation to an offence, or entitled to exercise a victim's rights under this Act, if the individual is charged with the offence, found guilty of the offence or found not criminally responsible on account of mental disorder or unfit to stand trial in respect of the offence.¹⁸

Section – B

Immunity of United Nations from the jurisdiction Of National Tribunals

This immunity of the United Nations is governed by the United Nations Charter and the Convention on Privileges and Immunities of the United Nations. According to the UN Charter, "The Organization shall enjoy in the territory of each of its Member States such privileges and immunities as are necessary for the fulfilment of its purposes." The Convention on Privileges and Immunities provides in its Article II that : "the United Nations shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. In other words, the United Nations enjoys immunity from every form of legal process of the host country.

On an interpretation of the law we find that the Convention on Privileges refers to the functional immunity which is designed to ensure the independent functioning of the United Nations from State suits, in practice it has been understood as an absolute immunity.

The following are a few of the important instances in which actions were instituted in the tribunals of national jurisdiction as well as the international tribunals but the same failed ultimately on grounds of immunity of the United Nations.

Maintenance of international presence in disturbed areas for the sake Of Peace, Security and Order

1. The problem of maintaining international presence and being accountable to the respective Member States for maintaining peace, security and order was considered by the European Court of Human Rights in the two famous cases of : Behrami and Behrami v. France¹⁹ and Saramati v. France, Germany and Norway²⁰

The Grand Chamber joined its examination of both applications. Each dealt with a distinct feature of the UN's oversight role in Kosovo for the well being the respective parties. The facts of the cases and the opinion of the Court may be summarized as follows :

1. Mr. Agim Behrami was born in 1962 and his co-plaintiff, son Mr. Bekir Behrami was born in 1990. Both were of Albanian origin. Mr. Agim Behrami complained on his own behalf and on behalf of his deceased son, Gadaf Behrami born in 1988. These applicants lived in the municipality of Mitrovica in Kosovo, Republic of Serbia. Mr. Saramati was born in 1950. He was also of Albanian origin living in Kosovo.

2. In the wake of the conflict between Serbian and Kosovar Albanian forces during 1998 and 1999 the Security Council of United Nations provided for the establishment of a security presence (KFOR) by Member States and relevant international institutions under UN auspices with substantial NATO participation but under unified command and control. NATO pre-deployment to the Former Yugoslav Republic of Macedonia allowed deployment of significant ground forces to Kosovo by 12th June 1999.²¹ By another resolution the Security Council also decided on the deployment under UN auspices of an interim administration for Kosovo (UNMIK) to control its implementation.

(a) The Circumstances of the Behrami Case

On 11th March 2000 eight boys were playing in the hills in the municipality of Mitrovica. The group included two of Agim Behrami's sons, Gadaf and Bekim Behrami. At around midday, the group came upon a number of undetonated cluster bomb units which had been dropped during the bombardment by NATO in 1999 and the children began playing with the CBUs. Believing it was safe, one of the children threw a CBU in the air; it

¹⁷Sec.3 of the Canadian Victims Bill of Rights Act, 2015.

¹⁸ Sec.4 of the Canadian Victims Bill of Rights Act, 2015

¹⁹ Application No. 71412/01

²⁰ Application No 78166/01

²¹Resolution 1244 of 10th June 1999 of the Security Council of United Nations.

detonated and killed GadafBehrami. BekimBehrami was also seriously injured. It was not disputed that BekimBehrami was disfigured and had become blind.

The District Public Prosecutor wrote to AgimBehrami to the effect that the evidence was that the CBU detonation was an accident, that criminal charges would not be pursued but that Mr. Behrami had the right to pursue a criminal prosecution with eight days of the date of that letter.

AgimBehrami complained to the Kosovo Claims Office that France had not respect the resolution of the UN Security Council. The Troop Contributing Nations Office to whom the claim was forwarded rejected the plaint stating that the resolution of the Security Council had required KFOR to supervise mine clearing operations until UNMIK could take over and that such operations had been the responsibility of the UN since 5th July, 1999..

(b) The circumstances of the Saramati case

On 24th April 2001 Mr. Saramati was arrested by the UNMIK police and brought before an investigating Judge on suspicion of attempted murder and illegal possession of a weapon. On 25th April 2001 that Judge ordered his pre-trial detention and an investigation into those and additional charges. On 23rd May 2001 a Prosecutor filed an indictment and on 24th May 2001 the District Court ordered his detention to be extended. On 4th June 2001 the Supreme Court allowed Mr. Saramati appeal and he was released.

But subsequently Mr. Saramati was asked to come, on a false pretext, to take his belongings from the Police officers. When he came to the Police Station he was arrested, detained for a long time tortured for extracting information and afterwards a charge of committing murder was imposed on him; he was tried and convicted of attempted murder under Article 30 of the Criminal Code of Kosovo. Mr. Saramati was transferred to the KFOR detention facility and then to the UNMIK detention facility.

On 9th October 2002 the Supreme Court of Kosovo quashed Mr. Saramati's conviction and his case was sent for re-trial. His release from detention was ordered.

Matter came ultimately before the European Court of Human Rights. In his complaint, Mr. AgimBehrami complained under the European Convention on Human Rights on his own behalf and on behalf of his son GadarBahrami about the latter's death and BekirBehrami complained about his serious injury.

Mr. Saramati complained about his extra-judicial detention by KFOR between 13th July 2001 and 26th January 2002. He also complained that he did not have access to court and about a breach of the respondent State's positive obligation to guarantee the Convention rights of those residing in Kosovo and Norway as the responsible parties.

The President of the Court agreed that the parties' submissions to the Grand Jury could be limited to the admissibility of the cases whether the court could legally decide the matters presented.

The applicants both cases maintained that there was a sufficient jurisdictional link between them and the respondent States and that their complaints were compatible *ratione loci personae* (i.e. court had jurisdiction over the defendant States) and *materiae* (and jurisdiction over the subject matter of their complaints)

The Court observed that since operations established by the Security Council of United Nations through its resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support for member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of contracting parties which are covered by the Resolution of the UN Security Council and occur prior to or in the course of such missions, to the scrutiny of the court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UN Security Council Resolution which were not provided for in the text of the Resolution itself. This reasoning equally applies to voluntary acts of the respondent States such as the vote of a permanent member of the UN Security Council in favour of the relevant Chapter VII Resolution and the contribution of troops to the security mission: such acts may not have amounted to obligations flowing from membership of the UN but they remained crucial to the effective fulfilment by the UN Security Council resolution of its Chapter VII mandate and consequently by the UN of its imperative peace and security aim.

The Court found that the UNMIK was a subsidiary organ of the UN created under Chapter VII and KFOR was exercising powers lawfully delegated under Chapter VII of the Charter by the UN Security Council. As such, their actions were directly attributable to the UN, an organization of universal jurisdiction fulfilling its imperative collective security objective.

In these circumstances, the court concluded that the applicant's complaints must be declared incompatible with the provisions of the European Convention and the Court's ability to subject the UN to its judgment. For these reasons, the Court declared, by a majority, inadmissible the application of Behrami and Behrami and the remainder of the Saramati application against France and Norway because the UN is in principle responsible, but this regional court is unable to command the UN to comply with its judgment.

2. Another important case on this subject is *Stichting Mothers of Srebrenica and others v. Netherlands*²². The Stichting Mothers of Srebrenica is a foundation under Netherlands law. It was created with a view to take proceedings on behalf of relatives of persons killed in and around Srebrenica, Bosnia and Herzegovina, in the course of the events of July 1995. The other applicants were surviving relatives of persons killed. They have stated in their application that they are victims in their own right of violations of their human rights that occurred in the course of the events of July 1995.

In this case several questions relating to the Human Rights of the individuals to their life, liberty and safety as well as the obligation on the part of the United Nations to protect the individuals of a State against the arbitrary and inhuman acts of killing, harming and displacing the persons had come in for consideration. The facts of the case were :

The problem arose due to the division of the State of Yugoslavia in Europe, which before its partition consisted of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia and Yugoslavia itself was known as the Socialist Federative Republic of Yugoslavia (SFRY).. On 25th June 1991 Slovenia and Croatia declared their independence from the SFRY following the Referenda held earlier. Thereupon the Presidency of SFRY ordered its army into action with a view to reasserting the control of the federal government.

Other component republics of the SFRY followed Slovenia and Croatia in declaring independence. Eventually, only Serbia and Montenegro were left to constitute the SFRY successor state, the Federal Republic of Yugoslavia. Hostilities ensued, largely along ethnic lines, as groups who were ethnic minorities within particular republics and whose members felt difficulty identifying with the emerging independent states sought to unite territory that they inhabited with that of republic with which they perceived an ethnic bond.

The United Nations moved in, and the first step taken by it was that by the Security Council "set up a United Nations Protection Force (UNPROFOR) intended to be "an interim arrangement to create the conditions of peace and security required for the negotiation of an overall settlement of the Yugoslav crisis."²³

Subsequent to this Bosnia and Herzegovina declared independence on 6th March, 1992 as the Republic of Bosnia and Herzegovina. Thereupon war broke out, the warring factions being defined largely according to the country's pre-existing ethnic divisions. The main belligerent forces were the ARBH or Army of the Republic

Of Bosnia and Herzegovina, the HVO or the Croatian Defence Council, and the VRS or Army of the Republika Srpska also called the Bosnian Serb Army, mostly made up of the Serbs.

In the war that took place among these factions of the former Republic of Yugoslavia more than 100,000 people were killed and more than two million people were displaced. Almost 30,000 people were missing.

The conflict came to an end on 14th December 1995 when the General Framework Agreement for Peace adopted in Dayton, Ohio, USA, entered into force. One of the effects of the Dayton Peace Agreement was the division of Bosnia and Herzegovina into two component Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (Serb Republic).

²² Application No. 65542/12

²³ Resolution 743 (1992) of 21st February 1992 of the Security Council of United Nations.

But the authorities of RepublikaSrpska felt that the Republic of Bosnia and Herzegovina would continue to be a obstacle in the formation of the republic; therefore Srebrenica came under heavy attack under VRS army. The central government of the Republic of Bosnia and Herzegovina refused to countenance any evacuation of Srebrenica's civilian population since that would amount of the acceptance of "ethnic cleansing" and facilitate the surrender of territory to the VRS.

The next step taken by the United Nations was that the Security Council, by a unanimous decision demanded that ²⁴"all parties and others concerned treat the eastern Bosnian town of Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act."

On 10th July 1995 the VRS forces attacked the Srebrenica "safe area" in overwhelming force. The VRS overran the area and took control of the territory. On July 12, 1995 the Security Council of the United Nations adopted, a resolution demanding an immediate end to the VRS offensive and the withdrawal of VRS forces from the Srebrenica safe areas as well as the safety and restoration of freedom of movement to the UN personnel who were working as UNPROFOR. In the days that followed Bosniac men who had fallen into the hands of the VRS were separated from the women and children and killed. Others managed to evade immediate capture and attempted to escape from the enclave. Some succeeded in reaching safety but many were caught and put to death or died of wound, or were killed by landmines. It was estimated that as many as 8000 Bosniac men and boys had died in this operation at the hands of the VRS and of Serb paramilitary forces. It is this tragedy which is known in International Human Rights Law as the "Srebrenica massacre".

The legal problems that arose in the wake of this conflict and in which one of the major questions that had arisen was with regard to the accountability of the United Nations Organization. The precise question was whether the Organization is immune from the jurisdiction of the international courts or it is answerable to them for its failure to protect the individuals under the provisions of the law, i.e., the Prevention & Punishment of the Crime of Genocide. Such a question had arisen before the Courts of National jurisdiction as well in some other context, the following are the rulings of these institutions concerning the immunity of the United Nations Organization. The rulings of these institutions are the following :-

The immunity of United Nations for the Srebrenica case was challenged for the first time in front of the domestic courts in the Netherlands where the NGO Mothers of Srebrenica initiated a procedure against both the United Nations and the Netherlands. (*Mothers of Srebrenica v. The Netherlands & the UN*). The application was grounded on Dutch civil law and International Law.

In regard to the Dutch civil law, it was argued that the United Nations and the State of Netherlands failed to abide by the agreement which has been concluded with the inhabitants of the Srebrenica enclave (including the applicants) by which the above mentioned parties commit to provide protection inside the Srebrenica "safe area" in exchange for the disarmament of the forces that belonged to the Army of the Republic of Bosnia and Herzegovina (ARBH). Moreover, it was stated that the State of the Netherlands, with the connivance of the United Nations had committed a tort against the applicants since they failed to send well equipped troops to Bosnia and Herzegovina capable of ensuring stable and peaceful environment for the entire zone. Whereas the argument under international law was based on the International Law Commission's Draft Articles on State Responsibility and Draft Articles on the Responsibility of International Organizations, which enshrines a multiple attribution rule that provides a ground of responsibility for both, a state and an international organization involved in an operation. However, in all judicial instances the immunity of the United Nations prevailed and in this regard it has been ruled that domestic courts do not have the jurisdiction to hear cases against the United Nations due to the far-reaching immunity that has been granted to them by the UN Charter and by the Convention on the Privileges and Immunities of the United Nations.

Then it was the European Court of Human Rights which entertained the same challenge. On 8th October 2012 the Stichting Mothers of Srebrenica lodged an application against the Netherlands. The Court was asked to decide whether the Netherlands had violated the applicant's right of "access to a court" as guaranteed by Article 6 of the Convention by granting the United Nations immunity from domestic jurisdiction. In addition, pursuant to Article 13, the Court was asked to assess whether the granting of immunity to the United Nations allows the Netherlands to evade its liability towards the applicant. The applicants claimed that the nature of the immunity from domestic

²⁴Resolution 819 (1993) of the Security Council of United Nations.

courts which international organizations enjoy is of a functional nature, whereas the very nature of their claim, which derives from the act of genocide committed in Srebrenica is of a higher order than any immunity which the United Nations may enjoy. Moreover, according to them the absence of any alternative jurisdiction to remedy acts against the United Nations results in an effective deprivation of applicants right to an effective remedy.

On 27th June, 2013 the Court decided to reject the complaint as manifestly ill-founded. Once again it rejected attempts to question what it takes for an international organization to be legally accountable for its conducts. The Court simply acknowledged the well recognized practice that the immunity granted to an international organization is essentially important for ensuring the proper functioning of such organization in practice. In the Court's view, "it is a long standing practice established in the interests of the good working of these organizations" and as such it has a legitimate objective.

In Conclusion:-

It may be stated that the precepts of International Law do not afford adequate protection to the rights of the victims of crime. The immunity guaranteed to the United Nations Organization deprives the national tribunals of the authority to take care of the victims although the immunity guaranteed to the United Nations and the rights guaranteed to the victims have the same source of law; and both have the status of *jus cogens* in the modern sense of the legal value. There is a strong case of reviewing the law on this subject and saving the victims from the unjust deprivation of the protection they deserve against arbitrary actions of the public authorities including the official agencies of the United Nations.