
Victims of crime and the Charter of
Fundamental Rights of the
European Union

VICTIMS' RIGHTS ARE HUMAN RIGHTS

MAIN MESSAGES

- ❑ Victims of crimes have a right to the punishment of offenders.
States have an obligation to avoid impunity.
This is not an obligation of result but of best endeavors (of due diligence).
- ❑ Victims of crime have a right to have access to criminal and civil justice.
- ❑ Because this right should be effective in practice victim support is needed.

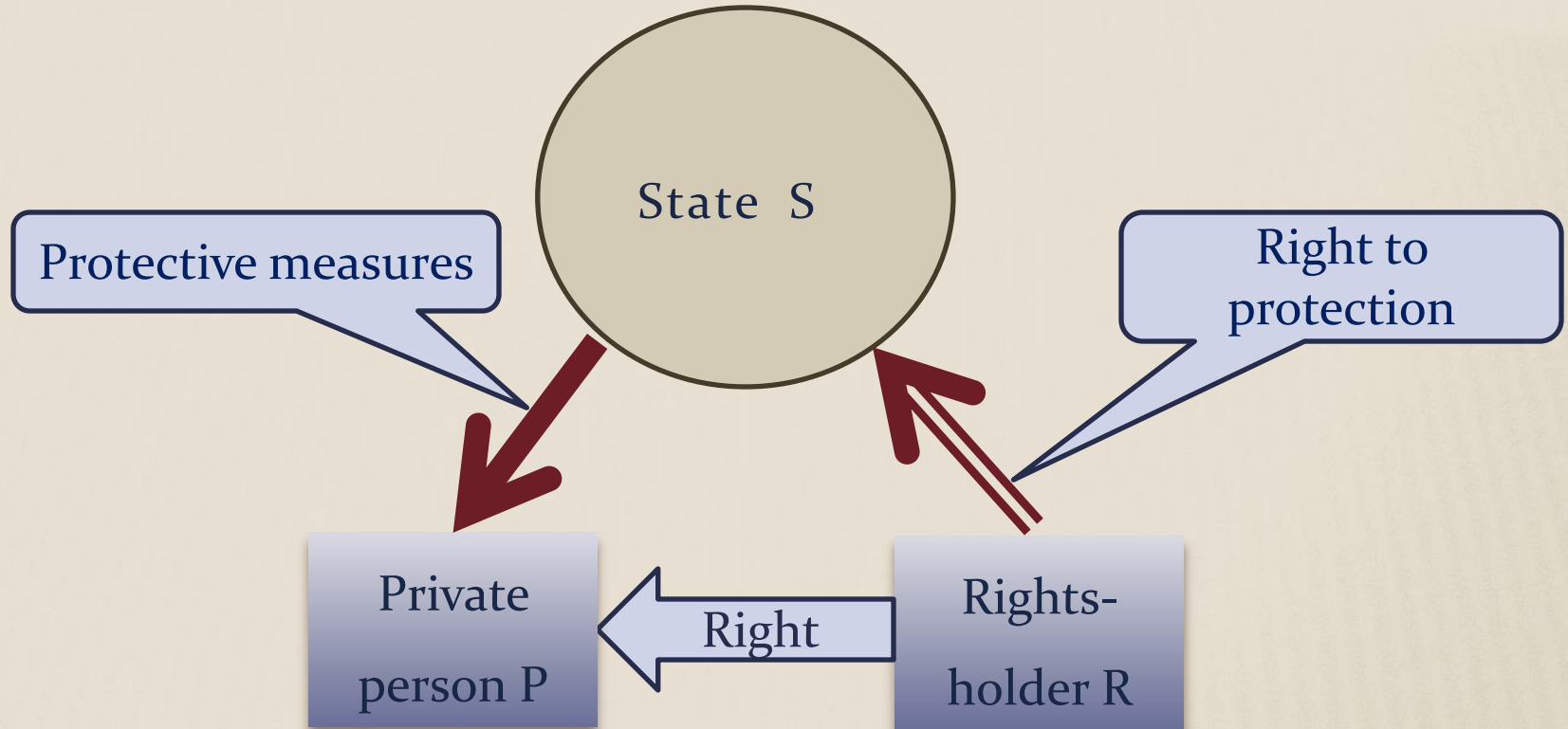
WHAT IS A HUMAN RIGHT?

“In what should we say that human rights are grounded? Well, primarily in personhood.”

(James Griffin, *On Human Rights*, 2008)

- ✘ This presentation relies mainly on case-law of the ECtHR in Strasbourg.
- ✘ HRs result in three obligations on states.
- ✘ Human rights have a **triangular structure**:
 - + They concern other individuals as primary duty-bearers but
 - + also the state as a guarantor of these primary duties.

THE BASIC STRUCTURE OF A HUMAN RIGHT

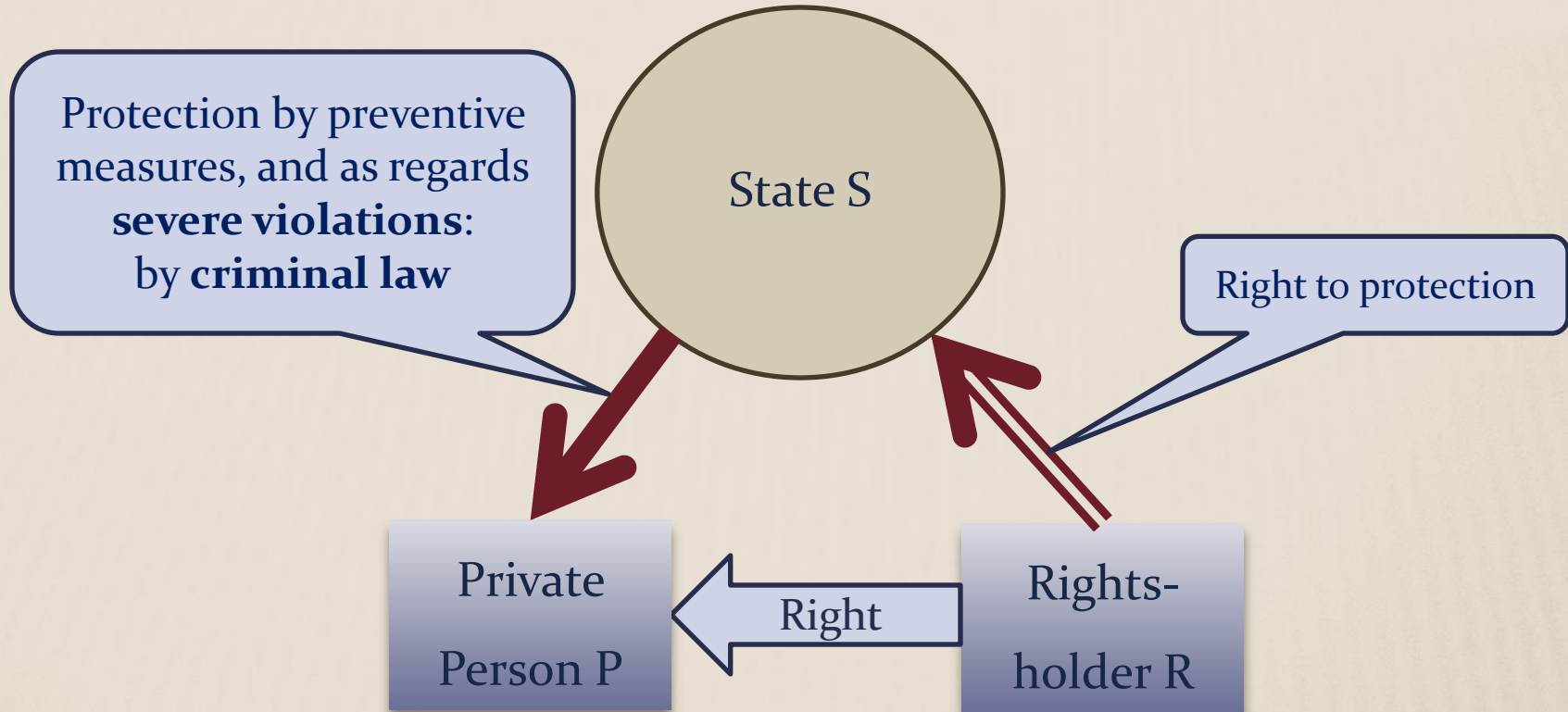


The (first) obligation of a State: to guarantee and to protect human rights

“... in the execution and decision of justice men acquire a security against each other’s weaknesses and passion, as well as against their own, and under the shelter of their governors, begin to taste at ease the sweets of society and mutual assistance.”

David Hume, *A Treatise of Human Nature*, 1739

CRIMINAL LAW PROTECTING INDIVIDUALS AGAINST SEVERE HR-VIOLATIONS



ECTHR, CASE MC V. BULGARIA

‘While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, **effective deterrence against grave acts such as rape**, where fundamental values and essential aspects of private life are at stake, **requires efficient criminal-law provisions.**’ (emphasis added)

ECtHR, *M.C. v. Bulgaria*, no. 39272/98,
4 December 2003, para 150.

ECTHR, X AND Y V. THE NETHERLANDS

‘The protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake.

Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions’.

(emphasis added)

ECtHR, *X and Y v. The Netherlands*, no. 8978/80,
26 March 1985, para. 27.

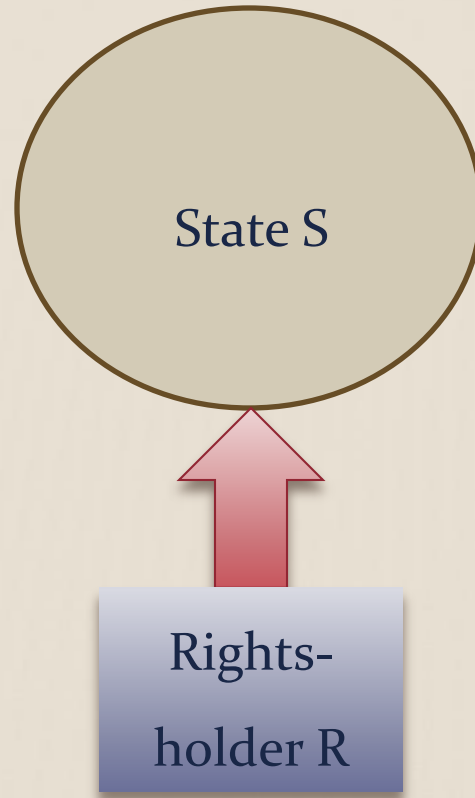
ECTHR, ALEX MENSON V. UK

“... by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction ..., Article 2 § 1 imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.” (Dec., 6 May 2003)

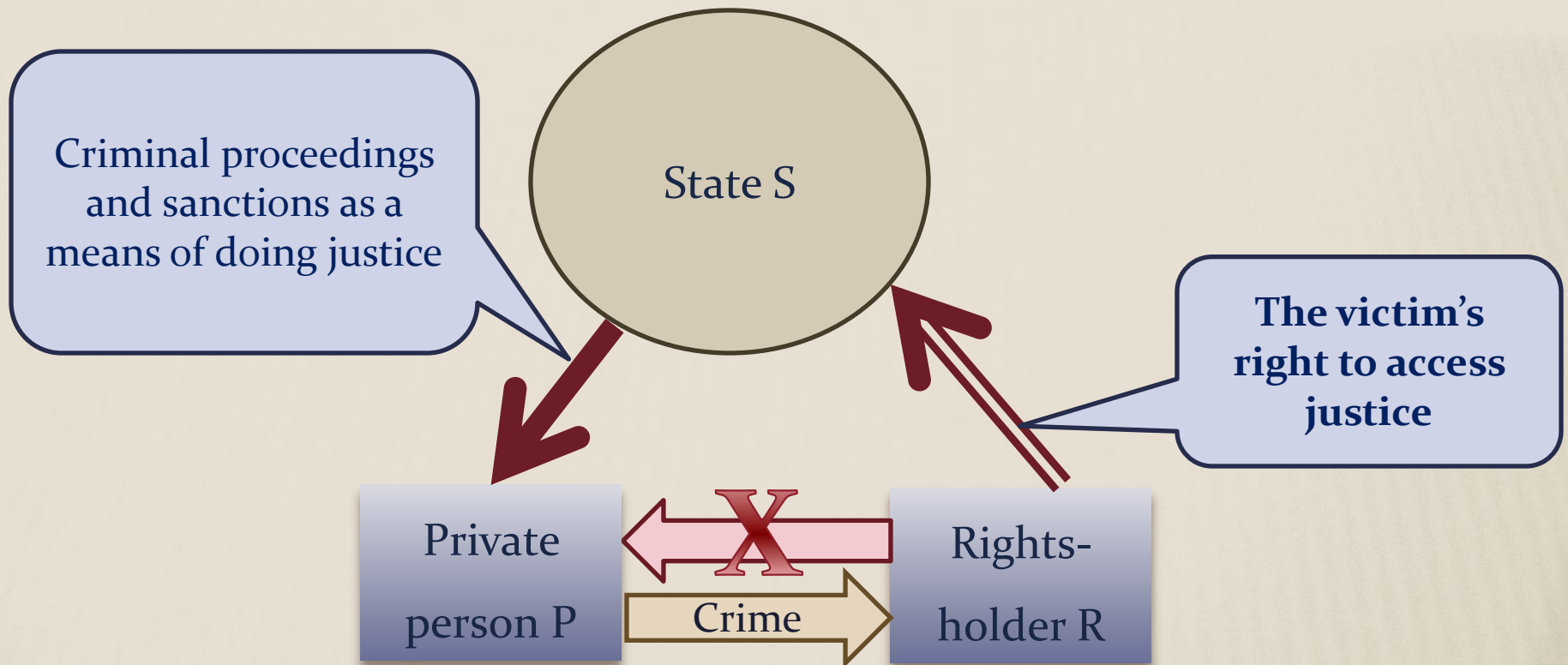
A NOTE ON THE TERM 'DETERRENCE'

- ✘ The ECtHR over and over again refers to the deterrence-function of criminal law provisions. What needs to be added is the expressive and normative functions of criminal law and criminal justice: the 'communication of deserved censure.'
(Antony Duff, Stirling)
- ✘ In favour of such a 'communication-concept' of criminal law:
 - + To convey censure of certain forms of behaviour as violations of human rights is just the flip-side of these rights.
 - + Criminal law definitions are neither psycho-terror nor crude manipulation but appeal to individuals as responsible moral agents capable of respecting the human rights of others.

THE SECOND OBLIGATION OF A STATE: TO RESPECT THE HUMAN RIGHTS OF INDIVIDUALS



IF DETERRENCE FAILS, A THIRD OBLIGATION OF THE STATE ARISES: TO DO JUSTICE TO THE OFFENDER AND TO THE VICTIM



CRIMINAL JUSTICE SERVES TWO RIGHTS OF VICTIMS

- The right of victims to see that the protection of their rights is enforced (the procedural limbs of substantive articles)
 - The right of victims to experience that justice is done (Article 13 ECHR)
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RIGHT TO EFFECTIVE PROTECTION

Criminal proceedings reinforce criminal law definitions as a means of effectively censoring and deterring criminal conduct.

“The Court stresses that the main purpose of imposing criminal sanctions is to restrain and deter the offender from causing further harm. However, these aims can hardly be achieved without the sanctions imposed being enforced.”

ECtHR, case of A. v. Croatia, 14 October 2010, para. 78

EFFECTIVE PROTECTION REQUIRES AN EFFECTIVE INVESTIGATION

‘The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The investigation must be, inter alia, thorough, impartial and careful.’

ECtHR, *Carabulea v. Romania*, judgment of July 2010, para. 127.

EFFECTIVE INVESTIGATION

‘The investigation must also be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken all reasonable steps to obtain all available evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy report’.

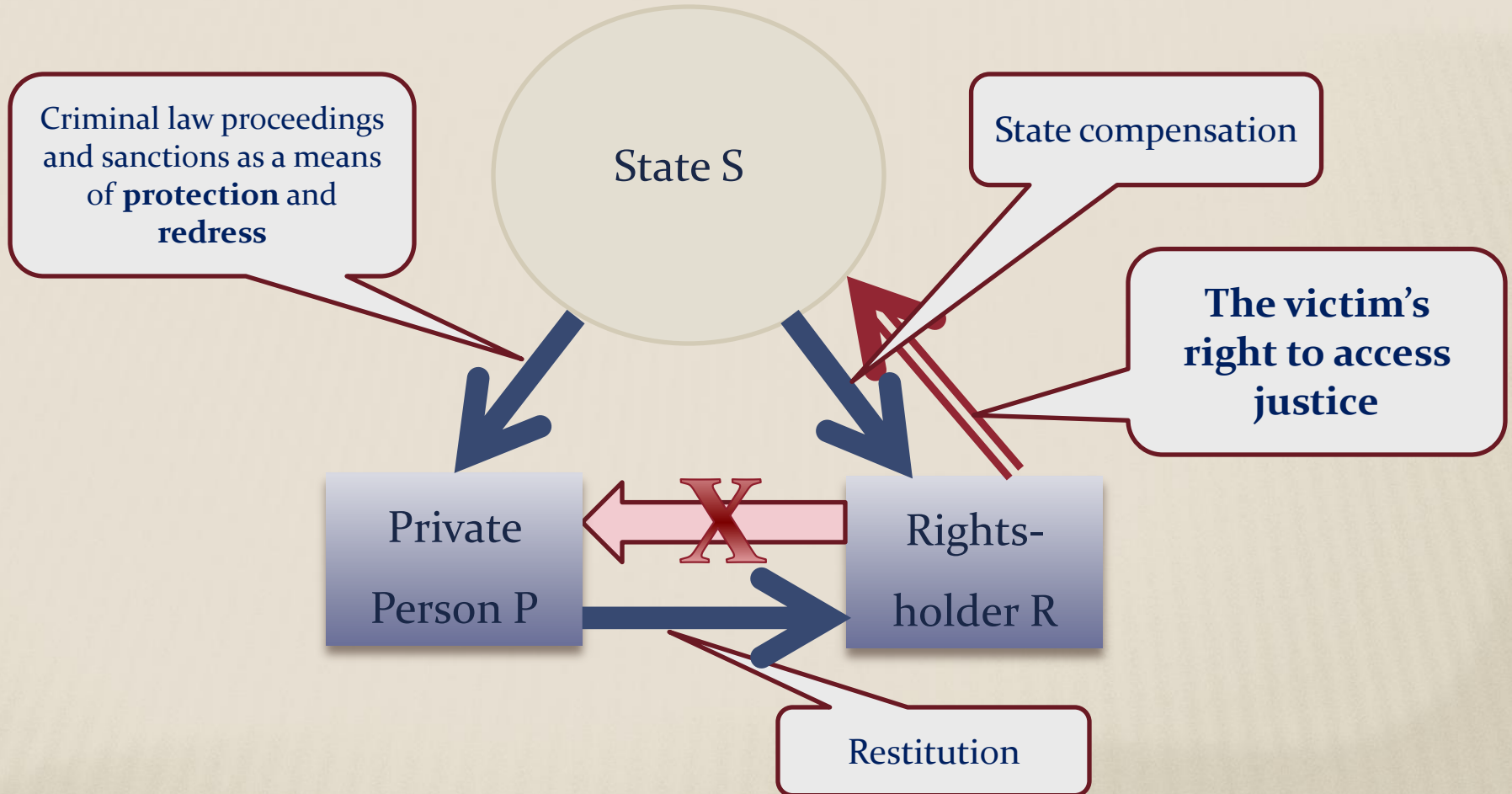
ECtHR, *Carabulea v. Romania*, para. 165.

AGAIN: CRIMINAL LAW IS NEEDED

‘The Court has already found in similar cases that any other remedies, including a claim for damages, are theoretical and illusory, and not capable of affording redress to the applicant.’

ECtHR, *Carabulea v. Romania*, para. 166.

STATE COMPENSATION AS PART OF AFFORDING REDRESS TO THE VICTIM



OPINION OF ADVOCATE GENERAL LENZ, CASE 186/87

“In enacting legislation for the compensation of victims of crime it takes a position analogous to that of a guarantor with regard to compensation for harm which could not otherwise be redressed, harm arising from the **infringement of rights which it was the State’s duty to protect but which it was not able to guarantee.**” (emphasis added)

Opinion of Mr Advocate General Lenz,
Cowan v Trésor public, 186/87, December 1988

THE VICTIM'S RIGHT TO ACCESS (CRIMINAL AND CIVIL) JUSTICE UNDER THE ECHR AND UNDER THE CHARTER

Under the ECHR

- ✘ Procedural limbs of substantive articles
- ✘ Access to justice under Article 13 ECHR
- ✘ (Normally, no rights of victims under Article 6 ECHR, except *partie civile*)

Under the FR-Charter

- ✘ Procedural limbs of substantive articles
- ✘ Access to justice under Article 47 of the Charter
- ✘ **Right to fair trial under Article 47 of the Charter**

WHAT DOES THE VICTIM'S RIGHT TO ACCESS JUSTICE INCLUDE UNDER THE ECHR AND THE FR-CHARTER?

Rights under the ECHR and the FR-Charter:

- × Comprehensive definitions in substantive criminal law;
- × Proceedings initiated *ex officio*;
- × A thorough and effective investigation capable of leading to the identification and punishment of offenders;
- × Effective access to the investigatory procedure;
- × A legal remedy against a decision of the public prosecutor to discontinue proceedings;
- × Promptness of proceedings;
- × A sufficient element of public scrutiny;
- × No manifest disproportion between the gravity of the act and the punishment imposed.

Additional rights (only) under Article 47 of the FR-Charter

- × Right to a fair and public hearing by an independent tribunal;
- × Right to be advised and represented;
- × Right to legal aid.

THE VICTIM'S RIGHT TO ACCESS JUSTICE MUST BE EFFECTIVE IN PRACTICE

- ✘ ECtHR “The Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective”
- ✘ CJEU: *Effet utile*

Victims must be given all the practical support which they need in order to actually and effectively access justice.

- ✘ *The provision of victim support,*
 - ✘ *raising victims' awareness of their rights,*
 - ✘ *responsiveness of law enforcement personnel to the rights and needs of victims (sufficient training)*
- are all aspects of victims' right to access justice.*