

Chapter 5: Victims in Criminal Proceedings

General Commentary

The involvement of victims in criminal proceedings and the rights or interests afforded to victims vary from state to state. In some legal systems, the role of victims is limited to testifying in court as a witness and making a victim impact statement relevant to the determination of a suitable penalty for a convicted person. The victim has no right to bring evidence before the court, for example. In contrast, in some states, victims play a very active role in proceedings. Specific rights allow the victim to join the criminal proceedings as another party, sometimes known as a “private prosecutor.” A private prosecutor may be present in court, represented by legal counsel. He or she may question witnesses and may bring evidence before the court. In some legal systems, a victim may become a private prosecutor only in tandem with a state-led prosecution. In other legal systems, a victim may initiate a private prosecution irrespective of state action. Other legal systems provide for a range of rights and interests that should be afforded to a victim, for example, the right to be informed of the progress of the case and the right to bring evidence before the court.

The M CCP takes a compromise position between legal systems that provide for no victim involvement in proceedings and those that provide for a high level of victim involvement. Under the M CCP, victims may request the prosecution service to undertake an investigation (Article 73), victims must be updated on the progress of the case (Article 74), and victims may access evidence (Article 77) and must be notified of any hearing dates, trial dates, appeals dates, and so forth (Article 75). At the main trial, the victim may apply to the court to partake in the proceedings by making a statement, presenting evidence to the court, or examining a witness (Article 76). Unlike in many systems, the foregoing are not automatic rights but may be granted at the discretion of the court or the prosecution service, respectively.

Reference should be made to Article 1(45) and its accompanying commentary for the definition of *victim* and a discussion of the definition.

Under international human rights law, victims are not afforded legal rights per se. However, a number of nonbinding instruments and declarations set out principles relating to victims, including the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that was adopted by the United Nations General Assembly in 1985, and the Council of Europe Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (1985). The M CCP incorporates many of these principles into the M CCP. Some of these principles are also contained elsewhere in this chapter. For example, Principle 6(d) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which requires that measures be taken to protect the pri-

vacy of victims and to ensure their safety and their families from intimidation and retaliation, is addressed in Chapter 8, Part 4, Section 1. Article 99 of the MCCP provides for the notification of victims on the decision of the prosecutor to initiate, suspend, or renew an investigation as set out in Principle 6(a) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It further provides for an appeal against a decision of the prosecutor not to initiate or to discontinue an investigation under Article 100. The issue of victim restitution and compensation contained in Principles 8–13 is addressed in Article 62 of the MCC, which provides for compensation to the victim as an additional penalty that the court may impose upon a convicted person.

Article 72: General Provisions on Victims

1. Victims must be treated with compassion and respect for their dignity by police, prosecutors, and the courts.
2. The courts of [insert name of state], prosecutors, and the police must, at all stages of criminal proceedings, consider the needs of the victims, especially of children, elderly persons, mentally or physically ill persons, and victims of criminal offenses involving sexual or gender violence.
3. The status of a person as a victim is not related to whether the perpetrator of the criminal offense is identified, apprehended, prosecuted, or convicted, and is independent of any familial relationship with the perpetrator.

Commentary

Paragraph 1: This paragraph articulates the requirement of Principle 4 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. A similar requirement is contained in paragraph A(1) of the Council of Europe Recommendation no. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (1985), which provides that victims be treated “in a sympathetic, constructive and reassuring manner.”

Paragraph 2: In dealing with victims, criminal justice actors (the police, prosecution service, and the courts) must take into account the needs of victims. Paragraph 2 requires that criminal justice actors pay particular attention to the needs of especially vulnerable victims (the sick, children, the elderly, and victims of sexual or gender violence), who are often overlooked or not treated with due attention. The term *needs* is used here as it is employed in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, in place of the term *rights*. Article 46

also places an obligation on the prosecutor to consider the needs of victims. Reference should be made to the commentary to Article 46.

Paragraph 3: Paragraph 3 is inspired by Principle 2 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Article 73: Requests by a Victim to the Prosecutor to Undertake an Investigation

The prosecutor in a criminal case must take into consideration the request of a victim to undertake a specific investigation, collect certain evidence, or take specific measures. The prosecutor may accept or reject the request of the victim.

Commentary

Article 73 provides that a victim can make certain requests to the prosecutor with regard to a specific investigation. Although the prosecutor is not required to follow those requests (he or she is bound only by the applicable law and code of ethics), the prosecutor must give the requests due consideration. In implementing the requirement contained in Article 73, a post-conflict state should set up a mechanism and procedure that allow the victim to petition the prosecutor and to receive a response.

Article 74: Updating a Victim on the Progress of a Case

The prosecutor in a criminal case must take reasonable steps to keep the victim informed of the progress of the case.

Commentary

Principle 6(a) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be informed of the progress of proceedings. In addition to Article 74, Article 110 on the questioning of victims, requires that the police or the prosecutor inform the victim of his or her right to be

notified and take the name and contact information of the victim to ensure that the prosecutor can contact the victim.

Article 75: Notification of a Victim of Criminal Proceedings

1. Where a victim indicates to the prosecutor in a case that he or she wishes to be notified of any proceedings in the case, the prosecutor must take reasonable steps to notify the victim in advance of the date, time, and place of:
 - (a) the initial detention hearing under Article 175;
 - (b) each continuation of a detention hearing under Article 188;
 - (c) the confirmation hearing under Article 201;
 - (d) the trial under Chapter 11;
 - (e) the conditional release hearing under Article 273; and
 - (f) any appeal under Chapter 12.
2. The notification may be delivered orally to the victim. Notification of a victim may be otherwise than in accordance with Article 27, provided that the notice is of a nature that is reasonable under the circumstances and likely to convey actual notice of the proceedings.
3. Defects in the notification of the victim do not deprive a court of jurisdiction to proceed in a case.

Commentary

Article 75 elaborates on the principle set out in Article 74 that the victim must be kept informed of the progress of the case. Principle 6(a) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be informed not only of the progress of proceedings but also of the timing and the disposition of the case. The service requirements contained in Article 27 of the MCCP do not apply to the notification of victims. Instead, the prosecutor is required to make earnest efforts to contact the victim either in writing or orally (e.g., by telephone). Where there has been a defect in the victim notification process, Paragraph 3 provides that this will not interfere with the progress of the criminal case. Under Article 110 on the questioning of victims, the police or the prosecutor must inform the victim of his or her right to be notified of the date, time, and place of proceedings and must take the name and contact information of the victim in order to ensure that the prosecutor can contact the victim.

Article 76: Participation of a Victim in Criminal Proceedings

The competent court may, upon request of the victim, allow the victim to:

- (a) make a statement in the course of proceedings;
- (b) supply evidence in court proceedings; or
- (c) present questions to witnesses and expert witnesses, directly or through his or her counsel.

Commentary

Principle 6(b) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the needs of victims be facilitated by “allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.” Article 76 gives effect to this need by providing the court with discretion, upon the request of the victim, to partake in proceedings (either a hearing or a trial).

Article 77: Access to Evidence

The competent court may, upon the request of the victim, allow the victim or his or her counsel to inspect, copy, or photograph records and physical evidence available to the court or to the prosecutor if the victim has a legitimate interest in doing so.

Commentary

Where a victim has been granted the right to participate in criminal proceedings, the court may need to grant the victim access to evidence to enable the victim to adequately prepare for the proceedings. The granting of access to evidence is solely at the discretion of the court. The court may refuse access to evidence where the victim has no legitimate interest in accessing it, and the court may refuse access in other cases, where, for example, allowing access to evidence would run counter to other provisions of the M CCP, such as those on witness protection (Articles 147–155) and on witness anonymity (Articles 156–162), or where granting access to evidence might endanger the criminal investigation or the lives or health of people.

Article 78: Counsel for a Victim in Criminal Proceedings

A victim whose request for participation in proceedings has been granted under Article 76 may be represented by counsel.

Commentary

Principle 6(c) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be provided with proper assistance throughout the legal process. One interpretation of this requirement is that the victim should be given the opportunity to have legal assistance. A victim who is granted the opportunity to partake in court proceedings under Article 76 may be represented by counsel. There was some discussion among the drafters about whether a victim should be granted free legal assistance. Although this would be preferable, given the extreme lack of defense counsel in many post-conflict states and the typical resource constraints on a post-conflict criminal justice system, the drafters concluded that providing victims with legal assistance free of charge would be an unattainable goal in a post-conflict state or any state that is resource starved.

Article 79: Medical and Psychological Assistance for Victims

The competent legislative authority must endeavor to make arrangements for the provision of medical and psychological assistance to victims.

Commentary

Principles 14 and 15 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power require that victims “should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means” and that victims be informed of the availability of health and social services and other assistance and be afforded access to them. The *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) contains

extensive discussion on victim assistance, including victim assistance programs and the role and responsibility of frontline professionals to victims. In some states, and even in post-conflict Kosovo, victim assistance units have been established to provide direct services or to liaise with community organizations. Such units have been established in prosecutor's offices and police stations.

In a resource-starved post-conflict state, the state may not be able to provide both medical and psychological assistance to victims. In many states, post-conflict and non-post-conflict, victim assistance is provided by nonstate actors such as non-governmental organizations or other voluntary or community-based groups. It may be useful for the authorities in a post-conflict state to work with such organizations to implement the requirements contained in Article 79.

With regard to victims of domestic violence, a post-conflict state and non-governmental and civil society organizations need to consider the provision of safe shelter in cases where the victim cannot return to his or her home. This is outlined in the *Framework for Model Legislation on Domestic Violence* that was drafted by the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences and adopted by the United Nations Commission on Human Rights (UN document E/CN.4/1996/53/Add.2, paragraph 15[d]). The Framework document also outlines other emergency and nonemergency assistance that should be provided to victims of domestic violence (paragraphs 60 and 61).