



Training on Victims' Rights and Participation in Criminal Proceedings

Held on 21 and 22 June 2016 in Nairobi, Kenya

REPORT



Contents

Introduction	2
International Legal Framework on Victims' Rights.....	2
Definition of victim.....	3
Protection	3
General principles of victim participation	4
Victim Participation in the USA	5
Crime Victims' Rights Act	6
Stare decisis	6
Definition of victim.....	6
Right to confer with prosecutors.....	7
Right to be heard before indictment	7
Sentence	7
Restitution.....	7
Victim Participation in South Africa	9
Challenges to Victim Participation in Kenya	10
Overview of the Victim Protection Act (VPA) in Kenya.....	12
State liability.....	12
Role of victim counsel	12
Victims' views and concerns	13
Victim Protection Board.....	13
Sharing Experiences on the Application of the VPA	14
Recommendations on the Implementation of the VPA	16
(1) Protection of victims and witnesses	16
(2) Victim participation.....	16
(3) Compensation	17
(4) Support structure for victims	18
(5) Compliance with the VPA.....	18
ANNEX A	20
ANNEX B	22

Introduction

The participation of victims in criminal proceedings has received increased attention in recent years. This has led to the adoption of a victim participation scheme at the International Criminal Court (ICC), to the adoption of a range of standards at the international level and progressively, with the adoption and/or strengthening of provisions on victim participation in many countries worldwide. Kenya has followed these examples with the adoption of the Victim Protection Act (VPA) in 2014 which grants victims a range of rights throughout the criminal process.

In view of the novelty of victim participation in Kenya, REDRESS and the Office of the Director of Public Prosecution hosted a training session on victims' rights, with a focus on victim participation, on 21 and 22 June 2016 in Nairobi for 25 Kenyan prosecutors. The goal was to build understanding on the international framework and on comparative practice in other common law jurisdictions to assist with the implementation of the VPA. As a result, the participants developed recommendations on the future application of the Act.

The full programme is attached in **Annex A**. The trainer biographies are attached in **Annex B**.

International Legal Framework on Victims' Rights

Carla Ferstman started the first day off with an overview of the international law concerning victims' rights.

International and regional norms

She pointed out that not so many international treaties recognise victims' rights in criminal proceedings when compared to the numerous treaties that consider the rights of defendants. Some examples where victims' rights are mentioned include Art. 13 of the United Nations Convention Against Torture (CAT) which focuses on the right to complain and the obligation on States to protect victims, and Art. 14 CAT which provides for the right to a remedy (such as compensation and/or rehabilitation). Similarly, Art. 2 of the International Covenant on Civil and Political Rights (ICCPR) includes the right to an effective remedy which over time has enabled victims to access justice. Additionally, Art. 12 of the Convention on Enforced Disappearances (CED) contains the right of victims to report facts; the obligation of the State to protect victims and their families as well as those who are at risk on account of helping them; the right for family members to access information about the proceedings and what happened and the right to reparation. International treaties are progressively beginning to engage with victims' rights and there is a growing body of jurisprudence which is concerned with the application of these treaty provisions.



Dr. Ferstman discussed international principles, including the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* and the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* both of which are non-binding but reflect a consensus on standards applicable to victims, as well as several domestic laws. According to such principles and standards, victims have the following rights, to:

- (1) see justice happen;
- (2) know (receiving information, preserving archives);
- (3) receive reparation;
- (4) access to justice and fair treatment;
- (5) access appropriate support for victims through the justice system (victims cannot be expected to “perform” as witnesses only; there needs to be services in place to enable them to testify in dignity and to avoid re-traumatisation);
- (6) obtain a remedy, i.e. right of access to courts.

For the regional level, Dr. Ferstman mentioned the *European Directive establishing minimum standards on the rights, support and protection of victims of crime* which creates a binding obligation on Member States of the European Union to afford victims’ rights. Although not all European countries have the same laws or legal traditions, European Union Member States were able to find common ground through this text, which recognises victims’ rights to be protected, to access information and to participate in proceedings. In Africa, the African Commission on Human and Peoples’ Rights (ACHPR) adopted the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* which discusses the need to protect victims. Additionally, the Committee on the Prevention of Torture in Africa is in the final stages of developing a General Comment on torture victims’ right to redress. Also, the International Conference of the Great Lakes Region has adopted a protocol on the protection of victims of sexual and gender-based violence in criminal proceedings. Dr. Ferstman emphasised that in view of these international standards, victims’ rights must be incorporated even in common law countries, even though traditionally criminal procedures have focussed principally on the role of prosecutors and defendants.

Definition of victim

Dr. Ferstman continued to discuss the definition of victims which is important because it delineates the scope of persons that are entitled to certain rights. Victims are generally people who suffered harm individually or collectively. They can be direct or indirect victims, or family members, or interveners who suffered harm when they try to help. It is thus important to establish who determines who a victim is and what kind of proof victims need to show.

Protection

Another area which Dr. Ferstman covered was the issue of protection against reprisals, threats, and re-victimisation. She gave some examples of measures in the courtroom: hiding the identity of the victim from the public can give a sense of strength and sense of privacy. Some

victims, however, prefer to testify publicly because that is a form of empowerment for them. Confidentiality from investigation to trial to post-trial is crucial but normally victims' identities cannot be shielded from accused persons, who have a right to know the nature of the charges against them. Relocation is an option but will not always be appropriate. It can sometimes be a form of punishment on the victim, so that temporary relocation should also be considered as possible forms of protection, if this would be sufficient to ensure the safety of the persons concerns. Whether long or short-term, relocation needs proper facilities and set-up.

Dr. Ferstman pointed out that it is crucial who decides about protection measures. Usually it is the prosecution who decides about the nature and extent of protection measures. This is because protection models usually have in mind an informant in a high profile organised crime case. Protection models were not usually conceived with the case of a victim of abuse of power by the police or other public officer. In such circumstances, it may be important to ensure that protection models are more independent from state structures. In some countries, non-governmental organisations (NGO) are involved in protection when it comes to allegations that victims have made against the state. To discourage putting victims at risk, criminalising acts of witness tampering and reprisals is also important.

General principles of victim participation

Dr. Ferstman then introduced the practice of victim participation in different countries as discussed in the REDRESS report "Victim Participation in Criminal Proceedings".¹ At the outset, victims have the right to file a complaint about a crime. The complaint process should be victim-friendly which entails proximity of police officers, sensitive officers, and privacy. Active follow-up by authorities instead of victims having to continually seek information is also important. It is also important that measures are put in place to ensure that victims do not need to pay money (bribes) to have their cases investigated.

During the pre-trial stage, Dr. Ferstman indicated that the rights afforded to victims may vary, depending on the legal system. However, there are a number of commonalities applicable to the majority of legal systems. If a prosecutor decides not to indict, in most jurisdictions victims can ask for judicial review or appeal to a higher authority to challenge that decision. Victims thus should have recourse in such a case. At the trial stage, Dr. Ferstman described the main differences between civil law countries and common law countries. In the former, victims can be a full party to the proceedings, while in the latter, victims can usually participate in the beginning and at the end of trial, e.g. during sentencing, but less so during the trial itself.

On the right to reparation, Dr. Ferstman mentioned that victims can often make a claim for reparations at the end of the criminal proceedings if the accused person has been convicted. This makes it easier than pursuing a civil crime in separate proceedings because the crime is already proven so only the harm and the victim's connection to the harm must be proven.

During the plenary discussion, participants raised the challenging situation of when victims do not want to participate in the proceedings but the prosecution needs them to serve as

¹ Available at <http://www.redress.org/downloads/publications/1508victim-rights-report.pdf>.

witnesses to prove the case. To deal with such different interests, it was suggested that victims should have counsel or advocates who can engage on their behalf with the prosecutor, to ensure that their views and concerns are properly reflected in the prosecution strategy.

Victim Participation in the USA

Meg Garvin provided an insight to the law and practice in the USA on victims' rights and participation.

She started with a brief look at the history of victim participation by explaining that during colonial times, petty crimes could only be prosecuted by victims, similar to the concept of private prosecutions today. In the 1970s, national courts moved away from this victim-centred approach to a system where victims were considered merely as witnesses because they do not have a "judicially cognizable interest in the prosecution". But this finding was not the subject of a constitutional ruling so it was able to be changed through legislation.



Ms. Garvin went on to speak about studies carried out in the 1980s in the USA which showed that victims who engaged with the justice system had increased symptoms of post-traumatic stress disorder (PTSD) and as a result this led to them not disclosing crimes or not reaching out to public authorities who could afford assistance in principle. As a result of such findings, consultations were undertaken with victims on what they would most need for a better experience with the justice system. One of the recommendations which arose from such consultations was to amend the USA Constitution to include victims' rights; however this did not happen - several new statutes were introduced instead.

According to Ms. Garvin, the first wave of laws to be introduced began in 1997. These reforms granted victims the right to be present at all public hearings. This posed a problem in the *McVeigh* case which concerned an act of terrorism where a large number of victims asked to be present as well as to speak at sentencing. The court had to set up a separate courtroom to broadcast the proceedings because there was no space and there was a risk of commotion. Victims who were going to testify at trial were only allowed to be present during the sentencing phase. These procedural limitations were challenged by the victims but the Supreme Court determined that there was no violation of the right to be present at trial. This was because the prosecution had made sufficient efforts to guarantee the right of victims to be present and the victims had the right to choose between being present throughout the trial and testifying as witnesses.

Crime Victims' Rights Act

Ms. Garvin then turned to the latest developments with the adoption of the Crime Victims' Rights Act in 2004 which introduced a number of new rights. Procedurally, victims were given standing to ask for their rights to be respected from the respective courts in addition to the prosecution who also had this standing. The Act conferred an obligation on the courts to order a remedy within a certain time (without specifying which remedy) when victims' claimed their rights were violated. Victims can appeal the trial court's decision to the court of appeal which has the obligation to take up the case (there is no discretion to refuse to hear the matter).

According to the Act, courts have their own obligations to ensure that the rights of victims are respected, but in practice courts have shifted that obligation to the prosecutors. However, victims cannot sue the prosecutor for failing to respect their rights because the prosecution only has to make a best efforts attempt to respect victims' rights. But, victims can complain to an ombudsperson who can issue a citation against a prosecutor. Ms. Garvin pointed out however, that since 2004 no such citation has ever been issued.

Following the adoption of the Crime Victims' Rights Act, additional statutes for particular types of victims, e.g. children, as well as laws on protection and restitution, were passed. Ms. Garvin identified a number of challenges to enforce victims' rights which were the subject of previous court decisions.

Stare decisis

First, the rule of stare decisis was raised to counter the 'new' notion of victim participation. But the case of *Carlin* showed that just because a law did not previously allow a particular practice, a change in the law is possible and must be considered on its face. In the *Carlin* case, the victim received compensation after the first instance conviction but then the accused died during the appeal proceedings so it was not clear if the money had to be paid back because the first instance decision indicated that if the accused died during the appeal, the first instance conviction would be void and the accused would be considered innocent. The victim lawyers and prosecutors contested this principle because of the new victims' rights legislation and won. Therefore, cases that pre-date 2004 do not bind courts anymore when it comes to victims' rights.

Definition of victim

The definition of victims is still being litigated and is not yet settled law. In some cases prosecutors support the victims' lawyers. If not, victim lawyers have the right to ask for a decision from the court. In one case concerning a shooting in a shopping mall where the suspect was killed, the prosecutors found the seller of the gun that had been used and prosecuted him for selling the gun. The parents of the victims requested to be given the status of victims in the case against the gun-seller. According to the Crime Victims' Rights Act, victims are those who were directly or indirectly harmed, i.e. the harm must be causal to the crime and foreseeable for the accused. In the case at hand, the court decided that the seller could not have

foreseen that the shooting would happen. The victims' lawyers tried to get the case file from the prosecutor to prove foreseeability but the court denied this access.

Right to confer with prosecutors

In the case of *US v. Heaton*, the court proactively made sure that the prosecutors respected the right of victims to confer with the prosecution. The prosecutors sought to dismiss two charges out of six. The court on its own motion asked the prosecutors if they had spoken to the victims, citing the prosecutors' obligation to ensure that victims' rights are respected. As this had not been done, the court denied the dismissal of the two counts until victims were consulted. Eventually, the victims agreed with the dismissal and the prosecutor's motion was granted. Had the victims disagreed, the court would likely have decided the matter taking into account the impact the dismissal would have on victims' other rights, such as their right to restitution.

Right to be heard before indictment

The case of *State v. Dean* highlighted the right to be heard before a decision on indictment is made. The victims were not informed about the plea bargaining which took place during the decisions about charging. The prosecutors asked the court to be relieved of the duty to inform the victims because they argued that it would undermine the plea bargaining process. The victims found out only when the plea bargain was made public and requested the trial court to reconsider and then appealed. The appeal court found that victims' rights were violated (but did not order specific actions to be taken because the plea was not official at the moment of the appeal).

Sentence

In the USA, victims have always had the right to give impact statements during sentencing but the Crime Victims' Rights Act has strengthened that right. In the case of *Kenna v. US*, the victim lost his business to fraud and because of this he got divorced and had a heart attack. Both defendants entered pleas and the process went to sentencing. For the first defendant, the victim was notified of the date of the hearing, was present and gave an impact statement. For the second defendant, the victim was notified of the date of the hearing and was present but was not allowed to give an impact statement because the court was of the view that he had already been heard in respect of the first defendant. On appeal, the appellate court voided the sentence and ordered the trial court to re-do the entire sentencing process because of the failure to accord the victim the right to present his impact statement. As a result of this ruling, trial courts always make sure to ask victims for victim impact statements.

Restitution

The case of *Paroline v. US* demonstrates that courts must also listen to victims' arguments when it comes to restitution claims. A victim of child pornography demanded a high amount of compensation for her therapy, following the conviction of a person who possessed some of the images. The prosecutor wanted to ask for a much lower amount. The defence rejected the compensation claim because they argued that there was no harm suffered from the pictures.

The victim's lawyer brought the case to the Supreme Court which decided to refer the matter to the legislators.

Ms. Garvin explored the changes of attitude towards victims in the US justice system. Originally, victims were considered persons who were only seen but not heard. Now, victims have become the owners of rights. That means that prosecutors cannot waive victims' rights on their behalf.

Nevertheless, there continues to be several limitations in respect of the implementation of victims' rights. Victims can only exercise their rights through a lawyer but most of them do not have the wherewithal to hire a lawyer. There are concerns that the state will have to pay for victims' lawyers. As a result, a lot of the burden to help ensure that victims' can exercise their rights tends to rest with the prosecutors.

In addition, in most of the states in the USA there is no civil cause of action for damages that can be lodged by victims when there has been a failure to afford them their rights. Victims can only ask the court for the cessation of the violation (to stop denying their rights) or that the procedure is re-started. Only two states allow civil claims but the monetary damages that may be awarded are capped at 2,000 USD.

Ms. Garvin concluded by pointing out that victims are mostly allowed to participate during the pre-trial and sentencing phases. There is no right to produce evidence or other form of victim participation during the trial phase. Some victim lawyers have been making objections during trials but it is not officially part of the trial procedure and must be agreed separately with the parties to the proceeding.



During the plenary discussion, the participants raised the issue of victims' expectations which prosecutors feel are difficult to satisfy and often lead victims to challenge the prosecutors' decisions. To reduce victims' frustration, it was suggested that it can be helpful to provide victims with an independent advocate that can state their

case. This may reduce frustration even if at the end, they still might lose the argument. It was also suggested that victims understand the explanations provided by their own lawyers very differently, and tend to have more trust in them.

The participants and trainers also discussed whether victims always have to give an oral impact statement since in Kenya a written statement would suffice. It is advisable to give the victim a choice on whether or not they wish to be heard orally.

Participants also noted the challenge specific to Kenyan law in the rule that allows victims to request disclosure of evidence the defence intends to use at trial, whereas the prosecution does not have such a right. The participants were not able to solve this issue conclusively but made some suggestions. For instance, it was mentioned that according to Kenyan laws the

prosecutor is considered a complainant, s/he could request disclosure based on this status. In the US, the prosecution is entitled to raise issues concerning victims' rights if the victims consent to it.

When the prosecution decides not to prosecute a particular case, e.g. if a suspect absconds or if the prosecutor believes that there is insufficient evidence for a prosecution or that the prosecution is not in the public interest, in the USA victims can request access to the case file to see why there was no prosecution. If there is a suggestion that the file was closed on illegal grounds (e.g., corruption or *mala fides*) the victims can seek a remedy. If there is no suggestion of corruption but the victims are nevertheless dissatisfied with the decision, they unfortunately will not have grounds for a remedy.

Victim Participation in South Africa

Lilian Artz turned to the South African system and looked at the challenges both victims and prosecutors face.

Dr. Artz started by looking at the crime statistics in South Africa. A representative study with 9,000 children found that 1 in 3 had experienced sexual violence. But most victims only report the most grievous crimes, e.g. loss of material property or physical injury. Many victims, especially in cases of



sexual violence, only report after having experienced many incidents of violence. In many cases victims withdraw their complaint because of a connection to the suspect, unequal power relations, pressure, or for other reasons. A study on the withdrawal of complaints by domestic violence victims found many different reasons why victims withdraw their complaints, including threats, out-of-court mediation, reconciliation with offenders or a lack of possibility to contact the police. This goes to show that victims need assistance and support to engage with the justice system. Dr. Artz also pointed out that Africa does not have a long history of human rights and litigation. Some conduct that is now understood to be a crime may have been understood as a tolerated custom, not so long ago.

Turning to the South African system, Dr. Artz explained that there is no comprehensive law on victim protection but there is a victim protection office. The positive duties of the state are stipulated in different laws which make these duties difficult to implement. Under these different laws, there are conflicting notions of who a victim is and what their protective needs are. The Victims Charter is not a law and cannot be enforced even though it codifies many victims' rights as listed in the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. But most of these rights have not been operationalised yet. For example,

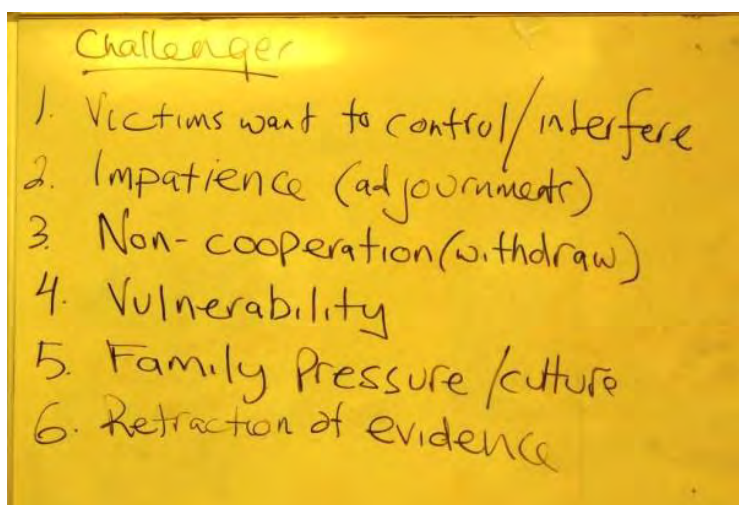
there is no victim participation in bail hearings or during the trial proceedings, but victim impact statements are used at sentencing and parole hearings.

The South African context poses various obstacles to victim participation. There were many problems with implementing the Victims Charter. The attitude towards victims among law enforcement has not changed yet and victim empowerment is not yet being implemented as a governmental objective. Support services for victims are very rare. The only services provided are medico-legal services at health centres which complete the police form and offer HIV/Aids prevention. Most psychosocial services are provided by NGOs but these are not necessarily sustainable due to fluctuations in NGO programming and resources. It is therefore important that state structures implement victim support.

Dr. Artz listed a number of challenges that need to be addressed. First, the cooperation and coordination between different entities within the justice system need to be improved. In addition, the lack of resources has to be tackled. With regard to the capacity of police officers, Dr. Artz pointed out that one-off trainings are inadequate due to frequent rotations of officers working on a case. Another challenge is that victims misunderstand the role of prosecutors. On the other hand, prosecutors need to know about referral systems for victims, so that victims can have access to the necessary support.

During the discussion, the question on the liability of prosecutors for the failure to respect victim rights was raised. Dr. Artz pointed to the decision in *Carmichele v. Ministry of Safety and Security and Minister of Justice and Constitutional Development* in which the South African Constitutional Court ruled on a lawsuit filed by a victim of an assault, against the state for failing to protect her. The Constitutional Court allowed the claim for damages against the state to proceed.

Challenges to Victim Participation in Kenya



In a group work exercise, the participants identified the following challenges when dealing with victims:

(1) Victims lack understanding of the role of the prosecution and/or of the criminal process

- Victims want to control the prosecution and direct which witnesses should be called (interference).

- Victims suspect that the prosecution is compromised when prosecutors speak to the defence.
- Victims are impatient and do not accept and understand the court process, e.g. adjournments, and blame the prosecution for delays.
- Victims do not want to take advice and think prosecutors are misleading them.
- Victims have high and unrealistic expectations.
- Victims do not understand that the prosecution has a duty to confer with both defence and victims.
- Victims do not trust the prosecution..
- Victims see the justice system as a failure.
- Victims insist on keeping evidence so the prosecution can no longer use the evidence because the chain of custody is broken.

(2) Victims do not cooperate with the process or withdraw their complaint

- Victims fail to come to testify because they have withdrawn their complaint or have formed an out-of-court agreement with the defendant.
- Victims retract their statements. Victims refuse to come to court. This can be caused by family pressure and cultural practices.
- Sexual offences victims often want to withdraw the case although the perpetrators are often repeat offenders.
- Victims do not receive enough support from the society.
- Victims sometimes retract their statements on the stand.
- When cases start afresh victims become frustrated and no longer appear in court.
- Victims report the crime but they do not want to pursue the case.
- Victims are intimidated. Victims go back to the offenders' house.
- Some victims lie.
- Victims are not available for pre-trial proceedings.
- Victim advocates' views sometimes clash with the prosecution's views.
- Some crimes are culturally accepted.

(3) Protection issues

- Victims refuse to undergo witness protection or reject different options.
- There are not sufficient protective measures for victims who testify.

(4) Needs of vulnerable victims

- Working with vulnerable victims is difficult.
- There are no rescue centres.
- When minor victims belong to the same family as the accused, the victims must appear in court with the accused.
- Different genders between the prosecutor and the victim creates the bias that the prosecutor cannot prosecute a person of the same gender.
- Victims, especially in cases of sexual violence, are stigmatised.

(5) Lack of support for victims

- When victims are traumatised their statements are not complete.
- There is a no follow-up through counselling.
- Victims are difficult to access.
- Law enforcement officers have difficulties identifying victims and providing support to them.
- Police files that transferred to the prosecution lack information on victims.

Overview of the Victim Protection Act (VPA) in Kenya

James Kironji brought the discussion of victims' rights and participation to Kenya by giving an overview of the rights stipulated in the VPA.

Mr. Kironji started by referencing Section 3(b) of the VPA which states that the purpose of the Act is to "protect the dignity of victims". However, he pointed out the definition of the term "dignity" remains unclear. He gave some examples of where the dignity of victims could be affected,

such as publicly calling out the victim's name in a sexual offence case or offensive questioning by the defence counsel. Protecting the dignity of victims also entails protecting their privacy.



State liability

Mr. Kironji presented jurisprudence which confirms the liability of the state when the police or the prosecution fail to respect and guarantee the rights of victims. For example, in *Gonzalez v. US*, the victim's husband continued to breach a restraining order but the authorities failed to intervene. The husband went on to kill the victim's daughters. The Inter-American Commission on Human Rights determined that the state was accountable for the failure to intervene.

Role of victim counsel

Mr. Kironji then discussed the role of the victim counsel. He emphasised that victim counsel should take an active role rather than merely a watching brief, i.e. "taking notes of hearings." It should be noted that sometimes the interests of victims are not aligned with those of the prosecution. The VPA does not give victims' counsel the right to cross-examine witnesses but they can adduce evidence which has been left out. However, it remains unclear what this means in practice, e.g. whether or not victims may ask questions during the examination when they think the prosecution has left out certain issues. International Justice Mission (IJM) has filed written submissions on behalf of victims which take a different perspective from the

prosecutor's submissions. Mr. Kironji called for guidelines on the extent of legal representation for victims.

Victims' views and concerns

Moving to the interests of victims, Mr. Kironji explained that it is necessary to avoid multiple processes for victims when they face concerns, e.g. threats. The VPA indicates that victims' views and concerns can be presented and considered where their "personal interests" have been affected (Section 9(2)(a)). However, it is not clear when this is the case. For example, the change of the prosecutor in a case might not affect the personal interest of victims, but most other decisions may well do. Traditionally, victims are not consulted during the process, e.g. when an appeal is filed. Victims' counsel still need to request to be notified although victims have the right to information according to the VPA.

At sentencing stage, the court often relies on the assessment made by the probation officer but with little regard for victims' views. As a result, in most cases probation is recommended by the probation department no matter what the victims' concerns are.

According to Mr. Kironji, a victim may have access to more information and may be more invested in the case than the prosecution. Their participation in the preparations can enrich the prosecutor's work. This can bring about a better educated and satisfied victim who has more confidence in the justice system. There are some instances where victims try to be a co-prosecutor and seem overly dominant. But in other instances prosecutors only regard victims as witnesses.

On the issue of protection, Mr. Kironji pointed out that the VPA must be read together with the Witness Protection Act which allows for a number of protective measures, e.g. the option of video testimony. Also, under the right to privacy, the media can be excluded from covering the trial.

Victim Protection Board

Explaining the Victim Protection Board, Mr. Kironji stated that two NGO representatives are members of the Board. There is a concern that the representatives of the Government on the Board might try to limit victims' status to mere complainants. The Victims Charter which the

Board is mandated to implement has not been operationalised as the Board has not received funding to start operating. Currently, the Board lacks an office, secretariat and chairperson.

During the plenary discussion, the issue of calling out victims' names when the case is coming up in the court was widely debated. Some participants suggested to simply call out the name



of the accused because victims will know him/her.

Mr. Kironji clarified that the VPA does not appoint a body to determine the victim status of a person but such a process exists for vulnerable victims.

One participant raised the need to sensitise judges on the use of the VPA as it contains new procedures. Another participant added that with the VPA the traditional system is changing but that such changes will take time.

Some participants also mentioned difficulties in cooperating with victims' counsel. Often victims' counsels do not fully understand the case and only note mistakes made by the prosecutor. Many victims' counsels do not consult with the prosecution. A few provide valuable information and can assist the prosecutor with additional research. The participants expressed the need to understand the role of the prosecutor vis-à-vis victims' counsel. Participants expressed their wish to lead on the case and preferred victims' counsel to point out gaps. Mr. Kironji reiterated that prosecutors have a wider role and more duties than victims' counsel and that their interests are not always aligned. The prosecution is a state organ and has more powers than victims' counsel. This allows the prosecutors to determine the relationship.

The coordination between the police and the prosecutor in communicating with victims was also a point of discussion. Decisions not to prosecute are always made in writing and sent to the police. Thus, the participants expect the investigating officer to inform the victim. Mr. Kironji suggested creating a common process to inform victims to improve the channel of communication.

The right to the disclosure of evidence which had been discussed previously was brought up again. The participants discussed whether it would be possible to access the defence's evidence through the victim - who has the right to disclosure, whereas the prosecutors do not have this right. One participant suggested asking the victim to request disclosure and then to share the materials with the prosecution. Ms. Garvin added that prosecutors in the US explain the benefits of such a request and allow the victim to make a decision on whether or not to support the prosecution. However, it is unclear if information obtained through the victim can be used in trial. Another suggestion was to challenge the law that creates this imbalance.

On the topic of protection, a participant was concerned about the fact that protective measures are only granted for the duration for the trial. Mr. Kironji agreed with this concern and explained that due to the limited funds available to the Witness Protection Board many victims are taken out of the protection programme shortly after their testimony.

Sharing Experiences on the Application of the VPA

Following the overview on the law, Mr. **Kironji** went on to discuss the practice of using the VPA in Kenyan courts.

This session was joined by representatives of a number of NGOs that provide free legal aid to victims, including Kituo Cha Sheria, FIDA Kenya, Independent Medico-Legal Unit (IMLU), and Katiba Institute.

In the case of *Veronica Giathi et al*, the accused objected to the participation of the victims' lawyers in the hearing. However, the court ruled that the procedure can be amended to accommodate victim participation. This was confirmed in *Gideon Mwiti Irea* and in *Musili*.

In the case of *Kimaru*, the victim was abused by her step-father resulting in a pregnancy. She reported the case to the police but continued to live with her step-father. During the trial hearings, her step-father locked the victim in the house to prevent her from testifying. IJM worked with the prosecutor to locate the victim and bring her to court.

In the case of *Boniface*, the magistrate rejected the prosecutor's request for a DNA-test from the accused. The defence argued that DNA tests constitute a form of self-incrimination. The prosecution did not challenge the rejection but IJM filed a complaint against it at the High Court. The decision of the Appeal Court was still pending at the time of the training.

In bail hearings such as in the case of *Naashon*, IJM presented affidavits proving the victim's fear of the accused because the latter was a powerful police officer. IJM intended to show the need for protection despite the lack of actual threats.

Mr. Kironji raised the challenge that previous jurisprudence on constitutional cases had ruled that the family of victims who are deceased did not have standing to file a complaint. It is unclear if this jurisprudence also applies to criminal procedures. Another challenge is that other laws, such as the Evidence Act and the Criminal Procedure Code, do not contain the same rights as those stipulated in the VPA. He emphasised that there is a need to incorporate the stipulations of the VPA into other laws and to develop more jurisprudence on the rights of victims.



necessary funds.

In the plenary discussion, the participants raised the need for a process to first determine the victim status of a person in order to ensure that all parties know who can participate, e.g. when the family of a victim seeks to participate.

Additionally, the participants expressed the need for the Victim Protection Board to start operating. Some suggested that NGOs or Board members should call on the government to provide the

Recommendations on the Implementation of the VPA

In the final session, the participants developed recommendations on how the VPA should be implemented in the future. The discussions were carried out in five groups with each focusing on a specific issue.

(1) Protection of victims and witnesses

On the issue of protection, the participants proposed:

- Redaction of victims' names as early as possible, e.g. at police level, especially for vulnerable victims.
- Regulations on referrals for victims to safe houses, the duration of their stay and the protection offered there.
- Regulations on special protection for vulnerable victims.
- Intermediaries should operate at police stations to take statements and assist victims.
- Develop a victim referral system.
- Allowing the use of voice distortion devices.
- Victims' views should be put on record at bail hearings to help prosecutors decide whether or not to oppose bail.
- Section 11(1) of the VPA should specify who has the duty to provide protection from harm at each stage of the matter, i.e. from the moment reporting to after the end of the court process.
- Regulation on appointing a representative for vulnerable victims.
- The VPA should distinguish the role of intermediaries and representatives as in the Sexual Offences Act.



(2) Victim participation

On the issue of victim participation, the participants proposed:

- The VPA should stipulate who is involved in facilitating victim participation and victim support and at what stage these persons are involved.
- In the Prevention of Terrorism Act, the Investigating Officer is given 90 days to investigate otherwise instructions are given to continue or finalise the investigations. To improve access to justice, a similar provision could be applied to certain cases or victims, such as child victims or specific types of sexual violence.



- It should be ensured that the victim as well as the accused understands the proceedings and decisions at each stage of the proceedings.
- Better collaboration with civil society organisations as support organisations.
- Providing victims with information after every decision is taken or the process is concluded. This should include managing expectations of victims..
- Victims should be informed that they can give Victim Impact Statements at any stage, i.e. at trial, sentencing and parole/release hearings. Inform victims that their Victim Impact Statement will not necessarily impact the outcome of the case..
- Preparing victims for the release of the accused. Protective measures should be extended or amended after release if necessary.
- Psychosocial services should continue after the conclusion of the trial.

(3) Compensation



On the issue of compensation, the participants proposed:

- Upon conviction the prosecution or the victim's representative should apply for compensation under the relevant provisions.
- The prosecution or victims' representative should provide evidence to the court on the amount requested as compensation.
- Where the amount of damages is unknown or disputed an evaluation report can be requested at the cost of the court. Alternatively, these costs can be recovered as part of the compensation award.
- The determination on compensation can only be reversed upon appeal.
- Where the ownership of the accused's property is disputed, the court should order the safe custody of the property until the decision on the compensation is made by the court. If the accused is responsible for the destruction of this property, court can determine the compensation award based on the value of the property.
- According to the VPA the court can order that a certain part of fines can be contributed to the Victim Trust Fund. There should be a guide for the courts to determine this amount, e.g. based on a formula.
- Victims should be able to claim any costs incurred during the proceedings from the Victim Trust Fund, such as expenses for psycho-social support, legal costs.

- The Board of Trustees of the Victims Trust Fund should hear evidence on the requests for compensation.

(4) Support structure for victims

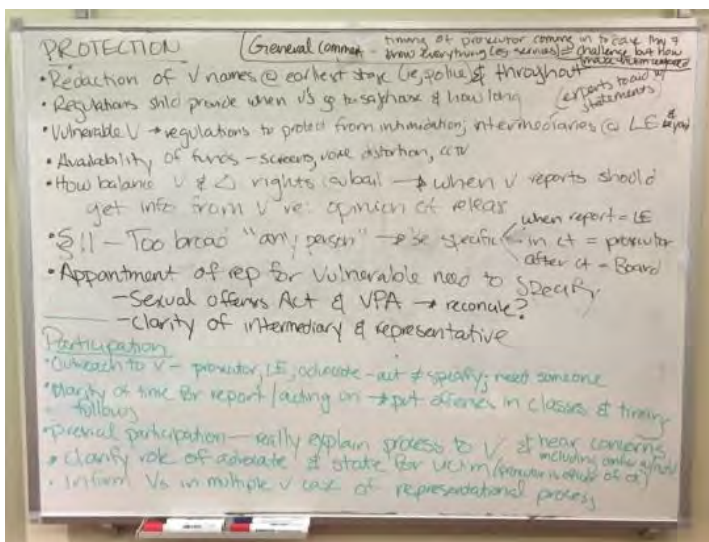
On the issue of support, the participants proposed:

- Victims who are directly affected should have the right to the support services listed in Section 11(2) of the VPA. Families/guardians, witnesses and others affected should also have this right.
- Victims should be referred to support services provided by NGO, particularly legal and counselling support, public health services, special services for children provided by social workers and NGOs.
- Support persons should have the right to document and file cases, make further referrals, monitor cases, and Provide support services.
- Support should be provided as soon as the violation is reported to an authority.
- As long as the victim does not feel safe during the criminal proceedings (or thereafter), they should be entitled to support.
- Victims include vulnerable victims, ordinary victims, complainant-victims.
- Section 3(c) of the VPA specifically calls for cooperation between “all government departments and other organizations and agencies involved in working with victims of crime”. Prosecutors have a duty to protect victims within their total legal capacity.



(5) Compliance with the VPA

On the issue of compliance, the participants proposed:



- The Victim Protection Board should have accessible offices.
- All external monitoring and oversight bodies need to be informed about and familiarised with the VPA.
- There should be a system in place to channel complaints or reports of dereliction of duty. The Victim Protection Board could be the body to channel complaints to oversight bodies.

- The Victim Protection Board could provide information on compliance with the VPA standards, provide guidance to complaints bodies on how to resolve VPA-related complaints, and request that the complaints bodies report their decisions or actions back to the Board.
- Complaints could be sent to: (i) Parliamentary Committee on the Administration of Justice and Legal Affairs; (ii) Public Complaints Standing Committee; (iii) Kenyan National Commission for Human Rights; (iv) Independent Policing Oversight Authority (IPOA); and (v) Cabinet Secretary.

ANNEX A

Victim Participation in Criminal Proceedings

Training Program

held on 21 and 22 June 2016 in Nairobi

DAY 1

Time	Item	Trainer/Facilitator
8:30 – 9:00	Registration and breakfast tea	
9:00 – 9:30	Welcome and Introduction <ul style="list-style-type: none">- Objectives- Agenda	Nikolas Mutuku, Deputy Director of Public Prosecution, and Beini Ye, REDRESS, Legal Adviser
9:30 – 11:00	International legal framework on victim rights <ul style="list-style-type: none">- Applicable international instruments- Victim rights under international law- Balance of rights of accused with rights of victims- Avoiding two prosecutors- Dealing with vulnerable victims- Examples of interventions by victims at ICC	Carla Ferstman, REDRESS, Director
11:00 – 11:30	<i>Tea break</i>	
11:30 – 13:00	Victim participation in US <ul style="list-style-type: none">- System of victim participation- Comparison to Kenyan system- Competing interests between victims and prosecutors- Victim rights during plea bargaining- Examples of interventions by victims	Meg Garvin, National Crime Victim Law Institute, Executive Director & Clinical Professor of Law
13:00 – 14:00	<i>Lunch break</i>	
14:00 – 15:30	Victim participation in South Africa <ul style="list-style-type: none">- System of victim participation- Comparison to Kenyan system- Competing interests between victims and prosecutors- Victim rights during plea bargaining- Examples of interventions by victims	Professor Lillian Artz, Gender, Health & Justice Research Unit, University of Capetown, Director
15:30 – 16:00	<i>Tea break</i>	
16:00 – 17:00	Group work on case studies	All trainers

DAY 2

Time	Item	Trainer/Facilitator
8:30 – 9:00	Registration and breakfast tea	
9:00 – 10:30	Presentation of group work results	Carla Ferstman, REDRESS, Director
<i>10:30 – 11:00</i>	<i>Tea break</i>	
11:00 – 12:30	Application of Victim Protection Act (VPA) in Kenya <ul style="list-style-type: none">- Victim rights under VPA- Role of Victim Protection Board	James Kironji, International Justice Mission, Director of Legal
12:30 – 13:30	Application of Victim Protection Act in Kenya <ul style="list-style-type: none">- Experience sharing with practitioners	James Kironji, International Justice Mission, Director of Legal
<i>13:30 – 14:30</i>	<i>Lunch break</i>	
14:30 – 15:30	Recommendations for VPA guidelines <ul style="list-style-type: none">- Group discussions	Carla Ferstman, REDRESS, Director
<i>15:30 – 16:00</i>	<i>Tea break</i>	
16:00 – 17:00	Recommendations for VPA guidelines <ul style="list-style-type: none">- Drafting recommendations	Carla Ferstman, REDRESS, Director
17:00	Closing	Lilian Obuo, ODPP, Head of International Crimes Division

Training on Victim Participation in Criminal Proceedings

held on 21 and 22 June 2016 in Nairobi

Trainer Biographies

PROF LILLIAN ARTZ

Professor Lillian Artz is the Director of the Gender, Health and Justice Research Unit (GHJRU), in the Faculty of Health Sciences at the University of Cape Town. Prior to this, she spent 10 years as a Chief Researcher at the Centre for Criminology in the Faculty of Law, at the University of Cape Town. Professor Artz has published extensively on domestic violence, sexual offences, sex work, and women's rights to freedom and security in Africa and has worked on criminal justice and health care reform in Southern and East Africa over the past 17 years. This includes partnering with local and regional NGO's to improve research, monitoring and advocacy strategies to effect policy change, legal reform and access to health and justice. Her current project work includes research on female offenders in prisons and psychiatric settings, domestic homicide, the epidemiology of child sexual abuse, political ex-prisoners as well as the medico-legal management of domestic violence and sexual offences.

Recent regional projects include the prevention of torture and ill treatment in South Africa, Burundi, Kenya, Rwanda, Mozambique and Uganda. She has worked on the development of medico-legal services and police responses to victims of sexual and other forms of gender-based violence in South Sudan and victim support services in Pakistan. Artz was formerly the Vice President of the Criminological and Victimological Society of Southern Africa and has worked as a technical consultant to a wide range of parliamentary structures, law commissions, criminal justice institutions and international donors in Southern and East Africa.

She is on the editorial board of *Agenda* and *Acta Criminologica* and is co-editor of *Should we Consent?: Rape Law Reform in South Africa* and author of *Hard Time(s): Women's Pathways to Crime and Incarceration* (2012). Her evidence-based contributions to law and policy reform, as well as the development of social justice projects in the African region, have resulted in a number of awards, including a National Department of Science and Technology "Women in Research Award" (2013) as well as the University of Cape Town's first "Social Responsiveness Award" (2009).

CARLA FERSTMAN

Carla Ferstman joined REDRESS in 2001 as its Legal Director and became the Director in 2005. She was called to the Bar in British Columbia, Canada in 1994 and practiced there as a criminal law barrister. Also prior to joining REDRESS, she worked with the UN High Commissioner for Human Rights in post-genocide Rwanda, with Amnesty International's International Secretariat as a legal researcher on trials in Central Africa and as Executive Legal Advisor to Bosnia and Herzegovina's Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). In 2012/13 while on sabbatical from REDRESS she was a Jennings Randolph Senior Fellow at the United States Institute of Peace. She has also been a visiting professional with Australian National University in Canberra. She obtained an LL.B. from the University of British Columbia and an LL.M. from New York University and completed her

DPhil at the University of Oxford. She has published and is a regular commentator on victims' rights, the International Criminal Court and the prohibition against torture.

MEG GARVIN

Meg Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI) and a clinical professor of law at Lewis & Clark Law School. Ms. Garvin is recognized as a leading expert on victims' rights in the United States. She has testified before the US Congress, state legislatures, and various military panels. In 2014, she was appointed to the Victims Advisory Group of the United States Sentencing Commission and during 2013-2014 she served on the Victim Services Subcommittee, of the Response Systems to Adult Sexual Assault Crime Panel of the United States Department of Defense.

She has served as a Board member of Oregon's Citizens' Crime Commission and of the National Organization of Victim Assistance, and as an Advisory Board Member for the Red Lodge Legal Services Program. She has also served as co-chair of the American Bar Association's Criminal Justice Section Victims Committee, co-chair of the Oregon Attorney General's Crime Victims' Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General's Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015.

Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.

JAMES X. KIRONJI

James X. Kironji, is the Director of Casework at the International Justice Mission leading the multidisciplinary team of lawyers, investigators and aftercare specialists who work with and represent child victims of sexual abuse and victims of police abuse of power. Prior to leading the team, James represented hundreds of victims in criminal cases across the country and is a special prosecutor gazetted to prosecute SBGV matters. James has further trained hundreds of justice system officials including police investigators, judges, magistrates and prosecutors on handling victims of crime. James also served in the Criminal Justice Committee of the Law Society of Kenya and the Technical Committee of the National Council for Administration of Justice.

James has practiced law in for eleven years (11) and received his bachelor of laws degree from the University of Nairobi.