

**PROSECUTION OF SEXUAL VIOLENCE:
REDUCING THE RISK OF RE-TRAUMATIZATION OF SURVIVOR WITNESSES**
by James J. Arguin¹

In January 2014, the ICTR Prosecutor released a manual on best practices in the investigation and prosecution of sexual violence cases in post-conflict regions.² To help develop and refine the recommendations contained in the manual, the Prosecutor convened two international workshops in Kigali, Rwanda and Kampala, Uganda.

The manual contains many practical recommendations for reducing the risk of re-traumatization for survivors and other witnesses of sexual violence. We say reducing the risk because, as our experience has shown, eliminating that risk altogether is not likely in most criminal justice systems.

Whether you practice in a civil or common law or hybrid legal system, survivors and witnesses will be required to relive these painful events by providing statements to criminal investigators and others seeking to document suspected human rights violations. Once these investigations are completed, survivors and witnesses may be called to present their testimony in unfamiliar and sometimes distant courtrooms, often in the presence of the suspect, and usually subject to probing examination by judges or lawyers.

What is more, during their deliberations, judges must scrutinize the testimony of survivors and witnesses to ensure that it is credible and reliable. While

¹ Mr. Arguin is Chief of the Appeals and Legal Advisory Division in the ICTR Office of the Prosecutor.

² The manual can be downloaded from the ICTR website, www.unicttr.org/en/documents.

testimony from survivors of sexual violence is not subject to any more rigorous assessment than testimony from other witnesses,³ judges often approach the testimony with caution because of the surrounding circumstances.

Trauma and stress, for instance, are circumstances that may undermine the accuracy of any witness's testimony, including a survivor of sexual violence. Although there is no universal rule that trauma and stress undermine the reliability of all survivor testimony, it is a factor that judges must carefully consider.⁴

Similarly, identifications made under difficult circumstances, including at night, for only a short time, or from an obstructed vantage point, require particular caution in any case, not just sexual violence cases.⁵ The passage of time between the commission of a crime and the witnesses' report of the crime or their testimony in court likewise may raise doubts about any witnesses' ability to accurately recall details of the event, particularly when their recollection of events is not consistent with other evidence.⁶

Judges must examine any significant variances among a witness's in-court testimony, prior statements from the witness, and testimony from other witnesses

³ *Prosecutor v. Mucić et al. ("Čelebići Camp" Case)*, Judgement, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, at para. 506.

⁴ *Prosecutor v. Kunarac et al.*, Judgement, Case No. IT-96-23 & 23/1, Appeals Chamber, 12 June 2002, at para. 324.

⁵ *Prosecutor v. Bagilishema*, Judgement, Case No. ICTR-95-1A, Appeals Chamber, 3 July 2002, at para. 75.

⁶ See *Kamuhanda v. The Prosecutor*, Judgement, Case No. ICTR-99-54A-A, Appeals Chamber, 19 September 2005, at para. 179; *Nchamihigo v. The Prosecutor*, Judgement, Case No. ICTR-2001-63-A, Appeals Chamber, 18 March 2010, para. 149.

to see what, if any, portion of the testimony may be credited.⁷ Additionally, judges must assess every witness's demeanor in the courtroom, looking at such things as did the witness (a) hesitate or attempt to evade answering questions, (b) provide exaggerated or otherwise improbable responses, and (c) maintain eye contact and poise during questioning.⁸

All of these general rules that guide judges in the assessment of evidence apply equally in sexual violence cases as they do in other cases. On occasion, they have resulted in some or all portions of a survivor's testimony not being credited. This result is difficult for survivors to accept because it implies that the judges did not believe that a crime occurred or that their testimony did not make a difference. Even when their testimony is credited, survivors often may not comprehend why the court or tribunal did not hold the accused responsible. The legal nuances of concepts like superior responsibility or joint criminal enterprise may not have been adequately explained to them. Thus, survivors and other witnesses may mistakenly believe their account of what happened was not believed when, in fact, the evidence overall was simply insufficient to establish all of the legal elements required for a conviction.

Many others survivors will have little or no opportunity to be heard on what punishment should be imposed. At the ICTR, for instance, there was no separate proceeding for sentencing. The adjudication of guilt and sentencing were merged

⁷ See *Rutaganda v. The Prosecutor*, Judgement, Case No. ICTR-96-3-A, Appeals Chamber, 26 May 2003, at para. 325 (citing *Prosecutor v. Akayesu*, Judgement, Trial Chamber I, 2 September 1998, para. 19).

⁸ See *Prosecutor v. Kupreškić et al.*, Judgement, Case No. IT-95-16-A, Appeals Chamber, 23 October 2001, at para. 138.

into one proceeding. Survivors and other witnesses offered testimony on factual issues subject to the usual evidentiary restrictions. They had no opportunity to address the judges on matters relevant to sentencing, such as, their perception of gravity of the crimes and impact the crimes had and will continue to have on them and their families.

The ICTR manual provides several practical recommendations that prosecutors together with judges, registrars, defence counsel, and victim advocates can follow to reduce these risks of re-traumatization and create a more hospitable environment for survivors to present their evidence. Encouraging witnesses to come forward to share their evidence is fundamental to the administration of justice and essential to ending impunity for sexual violence. Key among those recommendations are the following:

- 1. Plan investigations with the legal elements and modes of liability firmly in mind**

To avoid scenarios where crucial evidence is not presented at trial, investigators must work closely with prosecutors to understand the legal elements of the crimes likely to have been committed. The elements of the offense should guide the search for evidence to make sure there are no gaps in the prosecution case.⁹ Annex C to the Prosecutor's manual contains summary of ICTR elements and a checklist of factual issues that should be covered in any investigation of

⁹ See, e.g., *Prosecutor v. Rukundo*, Judgement, Case No. ICTR-2001-70-T, Trial Chamber II, 27 February 2009, at para. 388 (no direct evidence of serious mental harm presented requiring Chamber to rely on indirect evidence to support conviction).

sexual violence. Similar tools should be developed to help guide investigations in other jurisdictions.

In addition to the elements of the offence, any investigative plan must take into account applicable modes of liability. At the ICTR, liability could be established directly or indirectly by proving accused:

- committed, ordered, instigated, planned, or aided and abetted the crimes;
- had superior responsibility for the crimes committed by his subordinates;
or
- was a member of a joint criminal enterprise which acted according to a common purpose involving the commission of the crimes.

Where a suspect is implicated as a superior, merely proving that a crime was committed will not be sufficient. Evidence also must establish that:

- the perpetrator was the suspect's subordinate;
- the suspect knew or had reason to know that the subordinate was about to commit a crime or had already done so; and
- the suspect failed to take necessary and reasonable measures to prevent or punish the subordinate.

To establish an accused's direct or indirect responsibility, investigators must obtain evidence about what happened at the crime scene, for example, when, where, and how the crime was committed; the identity of the perpetrators; and evidence bearing on the perpetrator's mental state.

If the accused was present at the crime scene, witnesses should be questioned about the accused's orders, direct knowledge, and facilitation of the crimes, such as, transporting, leading, directing, controlling, instructing, or rewarding the perpetrators.

If the accused did not physically commit the crimes and was not present at the crime scene, investigators will need to obtain evidence necessary to link the accused to the crime. Depending on the jurisdiction concerned, relevant evidence may include:

- the accused's position and relationship with the perpetrators;
- the accused's attitude towards the commission of the crime (i.e. desire to commit the crime, awareness that the crime would or might occur or indifference to the likelihood or commission of the crime);
- the chain of command and the means by which the accused could exercise control over the perpetrators including the power and ability to sanction the perpetrators; and
- reporting structures through which the accused may have learnt about the crimes.

Consideration should be given to using contemporaneously generated documentary evidence or media coverage from press archives or radio stations. An accused's knowledge of the crimes could be established by radio or television broadcasts, broadsheet reportage or contemporaneous interviews given by the accused. For example, in *Karemera et al.*, the prosecution used a transcript of a radio broadcast and reports about how the *Interahamwe* raped Tutsi women across Rwanda as evidence of the accused's knowledge that these crimes were being committed.

2. Be alert to cultural context and social mores

Due to the unique trauma that survivors and witnesses of sexual violence suffer (a combination of physical, mental, emotional, and psychological harm) a narration of events leading to that trauma may cause re-traumatization.

Accordingly, investigators and prosecutors must be trained on how to conduct interviews with survivors and witnesses to ensure that full and accurate evidence is adduced while also minimizing the risk of re-traumatization.

As a starting point, investigators and prosecutors should understand the history and nature of the conflict with which they are dealing, and the nature and extent of sexual violence in that context. Special consideration for the cultural implications of sexual violence is necessary so investigators and prosecutors can elicit full and accurate information from survivors and witnesses.

In some societies it is taboo to talk openly about sexual intercourse. To understand the cultural implications of sexual violence in a certain society, it is necessary to understand the euphemisms used to describe body parts and sexual matters. At the Tribunal, for example, some Rwandan rape survivors would refer to rape or penetration by stating that the perpetrator ‘married me,’ ‘put his sex in me,’ ‘made me a woman,’ ‘spoiled me,’ ‘killed me with his thing,’ or ‘made me his wife.’

The Tribunal’s experience of investigating and prosecuting sexual violence has primarily involved adult female survivors. However, as noted throughout our manual, investigators must recognize that sexual violence also is committed against men and children. Sexual violence against men and children during conflict, as a weapon of war, is not new and has occurred worldwide. The specific issues surrounding child and adult male survivors of sexual violence require that those investigating and prosecuting these cases receive specialized training on the legal and practical challenges.

3. Provide effective protection and counseling

The dignity and safety of survivors of sexual violence must be prioritized at all stages of investigation and trial.¹⁰ Programs should be designed to protect survivors and witnesses against potential reprisals for their cooperation and presentation of evidence.

Protective measures that prevent or substantially restrict the disclosure of the witnesses' identity in pre-trial, trial, and post-trial stages, are instrumental in securing a witness's willingness to cooperate with the investigation and prosecution. Survivors in sexual violence cases are often subjected to public scrutiny of their sexual past, shamed with the stigma of being "dishonored," and even ostracized by their own families and communities

HIV/AIDS is another source of social stigma. Because of the nature of the crimes, survivors may be presumed to be HIV positive or suffering from other sexually-transmitted diseases. In some cases, the stigma may extend to the children of sexual violence survivors. The perpetuation of these stigmas may result in further traumatization and ostracism for survivors and their families. HIV testing and treatment must, therefore, be conducted with great discretion.

Protecting the identities of survivors and witnesses from disclosure helps reduce the risk of their being re-traumatized or ostracized, which may result from cooperating with investigations and presenting evidence in court. The ICTR, for

¹⁰ The Secretary-General's Report on Sexual Violence in Conflict states that a 'victim-centered approach' to prosecuting sexual violence crimes is 'vital'. UN Secretary-General (UNSG), *Sexual violence in conflict: report of the Secretary-General*, 14 March 2013, A/67/792 - S/2013/149, at para. 116.

instance, allowed for the use of closed session testimony and other measures aimed at protecting the victim's identity from disclosure including the following:

- expunging names and identifying information from public records;
- non-disclosure to the public of protected information;
- use of image or voice altering devices or close circuit television; and/or
- assignment of a pseudonym.¹¹

Rule changes or legislation may be necessary to ensure similar measures in other jurisdictions. Consideration also must be given to the fundamental right of accused persons to know and confront their accuser.

In addition, resources must be in place, either internally or through referral procedures, for survivors and witnesses to receive access to professional psychological and medical treatment and counseling services. Counseling services should be made easily (and confidentially) accessible to survivors of sexual violence. As a matter of course, survivors should be offered the opportunity to meet with a qualified counselor before, during, and after testimony.

Whenever feasible, all survivors of sexual violence should be provided with comprehensive medical care including access to anti-retroviral treatments for HIV/AIDS. Tribunals and courts, however, are not always the most appropriate vehicles for delivering this care; local and national authorities, NGOs, and health care providers are often better suited to meeting these needs. If that is the case, the tribunal or court should provide survivors and witnesses with information about where the necessary medical care can be accessed.

¹¹ Rules 75 and 79, ICTR Rules.

4. Avoid taking multiple statements from the same witness

Recounting the circumstances surrounding sexual violence can be extremely painful and humiliating for survivors and witnesses. Before proceeding to interview a survivor or witness, investigators and prosecutors should carefully analyse the strength of their case and review the evidence collected to date to ensure that the interview is necessary. Survivors and witnesses should not be asked to recount painful experiences when there is no real prospect of a conviction. To make this decision, investigators and prosecutors must have a thorough understanding of the law on sexual violence and the elements of the crimes that must be proved at trial.

Before interviewing a survivor of sexual violence, investigators should liaise with any NGOs or other organization that may have interviewed survivors to establish whether a statement has already been taken from the survivor. Where confidentiality concerns allow, investigators should review any earlier statement to determine whether it is sufficient or if there is a need to interview the survivor again. In making this assessment, investigators should consider whether the statement meets the procedural requirements imposed by the jurisdiction's rules or practice.

If another interview is deemed necessary, to the extent possible, survivors should not be asked to narrate their entire ordeal again. Instead, they should be asked to review their earlier statements to confirm the accuracy of the information provided. If the earlier statement is inaccurate or incomplete, survivors should be allowed to correct or supplement their earlier statement. This approach reduces the

risk of further traumatizing survivors by having them recount their ordeal multiple times.

Prior to conducting an interview, investigators should familiarize themselves with any counseling, medical, and other services that may be available in the area where the victim lives. Local rape crisis centres, women's organizations, and human rights groups may offer services that would benefit the victim. Investigators should be aware of these services and should share the information when the need arises or it is requested.

Investigators, in consultation with prosecutors, should outline, in a checklist, broad areas that need to be covered during the interview. The outline should take into account any prior statements the witness or other witnesses may have provided relating to the events at issue, as well as any legal elements or modes of liability that would need to be proven at trial.

In addition to preparing themselves for the interview, investigators should make sure that any interpreters who will assist them are sufficiently prepared. Interpreters who have had no experience in this area may be psychologically unprepared for what they will hear in the course of the interview. This could, in turn, affect the quality of the translation or the way in which the interpreter communicates with the witness.

5. Consider alternative ways of proving case

Prosecution counsel should bear in mind that evidence of sexual violence might be presented in the courtroom through a variety of sources, not only through survivor testimony. Not all eye witnesses to sexual violence crimes are themselves victims. These witnesses, therefore, provide a readily-available alternative to presenting in-court testimony from a survivor who is unable or unwilling to appear.

Depending on the circumstances of the case and the rules applicable in the relevant jurisdiction, evidence in specific sexual violence cases also might be established through judicial notice of the general circumstances prevailing at the time of the conflict. In *Gacumbitsi*, for instance, the Tribunal recognized that, in cases where rape and other forms of sexual violence are charged as war crimes or crimes against humanity, the circumstances ‘will be almost universally coercive. That is to say, true consent will not be possible.’¹² This judicial finding streamlined the presentation of evidence in subsequent cases and, thereby, reduced the burden placed on survivors having to appear in court to establish the absence of consent.

To reduce the burden on survivors, consideration also should be given to the use of statements in place of *viva voce* evidence. The use of statements in place of live testimony will depend on the jurisdiction’s rules and procedures. But, when available, they can streamline the presentation of evidence.

The Tribunal’s Rule 92*bis*, for instance, permitted the admission of a written statement in lieu of oral testimony so long as it went to the proof of a matter other

¹² *Gacumbitsi v. The Prosecutor*, Judgement, Case No. ICTR-2001-64-A, Appeals Chamber, 7 July 2006, at para. 151 (citing, *Prosecutor v. Kunarac et al.*, see *supra* note 4, at para. 127).

than the acts and conduct of the accused as charged in the indictment.¹³ In the *Karemera et al.* trial, the OTP relied on this rule to admit 19 statements, including transcripts of previous testimony on sexual violence crimes, in lieu of calling witnesses at trial.¹⁴ This approach not only saved valuable court time but avoided re-traumatizing witnesses who would otherwise have been required to testify. Where, however, witnesses referred to the direct role of the accused, admission of their statements alone were not permissible; the witnesses had to appear and be available for cross-examination.

Stipulations or statements of agreed facts also may reduce the burden on survivors. In some cases, the facts relating to whether a crime occurred are not disputed; the dispute instead focuses on whether the accused committed or is otherwise responsible for the crime. In these circumstances, the parties may agree to the substance of the testimony or allow the evidence to be led in examination-in-chief, without cross-examination as to the underlying facts.

The presentation of evidence from expert witnesses and medical professionals with expertise in the dynamics of sexual assault and the impact of sexual assault victimization can be another alternative source of evidence. Expert testimony can be used to assist a court in better understanding and evaluating the evidence presented by factual witnesses, or to demonstrate that the victim's behaviour was consistent with that of someone who had been sexually violated. Medical experts

¹³ Rule 92*bis*, ICTR Rules.

¹⁴ *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44T, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness GAY, Trial Chamber III, 28 September 2007.

also might be called to strengthen evidence regarding the “mental harm” and “bodily harm” aspects of the crime of rape as genocide.

6. Proof witnesses before testifying whenever possible

The judicial process is likely to be a new experience for most witnesses; they will be understandably anxious, particularly about having to confront the accused and answer questions about painful events. To restore a measure of control to the victims, prosecutors should explain the trial process and what is likely to occur in court. Proofing is not coaching; it is simply a process for preparing a witness for what will happen at trial so they will be more at ease and ready to testify fully and accurately.

Where permissible, prosecutors should use a proofing process to meet with the witness shortly before trial to review:

- anticipated areas of direct examination and likely areas of cross-examination,
- prior statements and any other documents that may be used during testimony,
- any exhibits that may be used during trial,
- how to respond to questions from the bench and counsel,
- process for objections and the order of proceedings, and
- need to reveal victim’s identity to the defence because accused has right to know witnesses against him, even if subject to protection measures.

It also a good idea to arrange for witnesses to see the actual courtroom before they testify. Prosecution counsel can point out where the witness will sit, as well as

where the judges, prosecution, and defence will be. Counsel could also, if necessary, point out that the witness will not be visible from the public gallery.

To minimize anxiety and trauma, a witness support assistant should accompany witnesses to court. Witnesses should not be left alone in a waiting room or other location prior to testifying. The judicial process is likely to be a new experience for most witnesses; they will be understandably anxious, particularly about having to confront the accused and answer questions about painful events.

For witnesses with small children, who cannot be left at home, arrangements should be made in advance for child care services while the witness is testifying. These arrangements will allow witnesses to better focus on their testimony.

7. Establish a victim-friendly court environment

Flexibility is required in dealing with survivors of sexual violence. For some survivors, the act of testifying will assist them in the healing process. For others, despite the best efforts of those involved, they may be further traumatized as a consequence of their participation in the court process. In all cases, there should be a victim-friendly court environment whereby survivors are guaranteed a safe and respectful atmosphere, without compromising the rights of the accused.

Where the courtroom is equipped with cameras and the witness is particularly traumatized, the witness can be shielded from seeing the accused directly by having a curtain partially drawn around the witness. In this way, the accused and his counsel will still be able to see the witness through the video monitor and the witness can elect whether or not to look at the accused through the

video monitor on the witness stand. This arrangement also would prevent instances of any accused trying to intimidate a witness by giving “warning” looks.

Alternatively, depending on the law in the relevant jurisdiction, the witness could testify in a room set up next to the courtroom, while the judges and counsel remain in the courtroom watching the testimony via live video monitors. This alternative enables the Chamber and the defence to assess the witness’s demeanor and credibility, without requiring the witness to be in the same room as the accused.

There should be continuous needs assessment by a qualified counselor while the witness is testifying. Witnesses should be offered the opportunity to speak with a trained counselor or witness support person before and after their testimony.

Some jurisdictions also allow for a witness, particularly children, to have a support person present with them whilst giving evidence in court. This support is usually subject to the court’s discretion upon application by the party calling the witness. In evaluating this type of request, the court should consider: the witness’s age, the nature and circumstances of the alleged offence, whether the quality of the witness’s evidence is likely to be diminished by reason of fear or distress, and the right of the accused to a fair trial. Depending on the applicable rules, a support person may be a witness’s friend or family member, a professional counselor, or a person from a witness support group. Strict rules usually govern their involvement. For example, a support person cannot be a witness in the case; discuss the evidence with the witness before or during the court proceedings; communicate through word

or body language with the witness whilst giving evidence; or otherwise participate in the proceedings unless asked a question by the court.

Prosecution and defence counsel should be trained in effective ways of conducting examination-in-chief and cross-examination to minimize re-traumatization of survivors. To effectively handle witnesses of rape and sexual violence during trial, counsel should adopt the following general approaches:

- resolve outstanding disclosure, scheduling, and other procedural issues before the witness appears so valuable courtroom time is not wasted on counsels' arguments and the witness is not inconvenienced;
- allow the witness to settle into answering questions before going straight to the traumatic incident of rape or sexual violation;
- while leading the evidence, only adduce relevant evidence thereby minimizing the witness's stress and limiting the scope of cross-examination to areas relevant to the charges;
- monitor the witness closely by maintaining polite eye contact and remaining alert to the witness's needs, including, for instance, making available a glass of water or tissue; and
- if witnesses become too distressed to proceed seek the court's indulgence for a short break in proceedings to allow them to compose themselves.

The conduct and scope of cross-examination merits particular attention. While the defence unquestionably has a right to cross-examine witnesses, care should be taken to ensure that the questioning of sexual violence victims is not unnecessarily repetitive or harassing. Some of the trials before the Tribunal were joint trials, involving up to six accused. Victims who testified at trial were required to undergo cross-examination by several defence counsel sometimes going over the same questions again and again, for hours, days, and even weeks. If charges of rape

and sexual violence are not relevant to all accused in a joint trial or if the same area already has been adequately covered, prosecution counsel should object and judges should impose reasonable restrictions on the scope of cross-examination.

Prosecution counsel must be alert for improper or overly aggressive lines of cross-examination. Counsel should object, for instance, to any misstatements or attempts to mislead the witness as to their prior testimony or statements. Matters that intrude too far on the witness's privacy (such as prior sexual history) or safety (such as matters that could tend to reveal the witness's identity) should be challenged.

There should be continuous needs assessment by a qualified counselor while the witness is testifying. Witnesses should be offered the opportunity to speak with a trained counselor or witness support person before and after their testimony

At the conclusion of their testimony, judges should thank witnesses for giving evidence. This basic courtesy provides official recognition of the witnesses' contribution to the justice system, and suggests no bias or partiality.

Shortly after testifying, the prosecution team should arrange a de-briefing session between the witness and a qualified counselor. These sessions help settle the witness and reduce anxiety about what transpired in the courtroom—allowing a smooth transition for the witness's trip home and providing some measure of closure.

8. Corroborate survivor testimony

Corroboration is not required,¹⁵ but corroboration can be an effective way to support survivor testimony. By trial, survivors and other witnesses to sexual violence may have given multiple statements and testified in multiple cases. Invariably differences emerge: mostly minor but sometimes significant depending on the questions asked and the witness's frame of mind at the time. Variations can be used at trial to challenge the survivor's or witness's credibility and reliability. Additionally, because witnesses respond differently to traumatic experiences, doubts may be raised about the accuracy of testimony, particularly relating to identification of the accused or ability to recollect details of the event.

Corroboration can help show that the survivor's testimony about the event because it is compatible with the testimony of other eye witnesses regarding the same event.¹⁶ Forensic, documentary, photographic, and other types of physical evidence also can provide corroboration for key aspects of the survivor's testimony. In conflict and post-conflict regions, it may be difficult to collect forensic evidence, such as, blood or semen samples. Nevertheless, when circumstances permit this evidence should be preserved for use at trial. Documentary evidence like written orders or operational plans could help establish the movement of troops and the presence of a particular unit in the area where the incident occurred. These documents could lend additional support to a survivor's identification of the accused

¹⁵ Rule 96(i), ICTR Rules; *Prosecutor v. Rukundo*, see *supra* note 9, at para. 201.

¹⁶ See *Nahimana et al. v. The Prosecutor*, Judgement, Case No. ICTR-99-52-A, Appeals Chamber, 28 November 2007, at para. 428 ('two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or sequence of linked facts').

or the perpetrator's membership in a particular unit under the accused's effective control. Media reports could help establish the widespread use of sexual violence in certain conflict areas. These reports could be helpful in establishing a superior's knowledge of the crimes. Similarly, photographic evidence of the crime scene may help establish the witness's ability to observe events at the crime scene by establishing relevant positions of physical structures and other landmarks.

9. Keep survivors and other witnesses informed of case progress

Witnesses should be kept informed about the progress of proceedings throughout all phases of the judicial process. Ongoing engagement with survivors and witnesses by the prosecution is important for a number of reasons, including providing information regarding the progress and outcome of proceedings, ongoing medical and psychological support, and monitoring the security of witnesses following testimony.

It is inevitable that witnesses who receive little or no support following their testimony will feel abandoned by the judicial process. This prospect is a matter of concern not only for the individual concerned but for the prosecution. Lack of ongoing support may further traumatize survivors, and decrease the likelihood that they will participate in future proceedings where their evidence may be relevant. Moreover, a lack of ongoing support for survivors has the potential to bring the prosecuting authority, and indeed the justice system itself, into disrepute.

A tribunal's responsibility towards survivors and witnesses should not end with the completion of their testimony or return of the judgement. Many survivors

and witnesses are interested in the outcome of proceedings in which they have participated, and the outcome could affect their emotional well-being.

While all judicial decision must be given appropriate respect, adverse trial judgements are particularly difficult for survivors and witnesses, especially if they turn on matters of witness credibility. Prosecution counsel should prepare witnesses for the possibility that the judges may not accept some or all of their testimony. Adverse findings should not be viewed as a personal attack on the witness but rather a reflection on the strength of the case overall.

A sufficiently knowledgeable team member should, if possible, meet with witnesses and survivors to explain the outcome of the trial in easy to understand terms. In situations where the outcome may not be favorable, the prosecution counsel should be accompanied by a counselor or social worker, as hearing the news may be traumatic. In our experience in trying cases against high-level accused, the outcome often did not turn solely on credibility issues relating to whether the sexual violence occurred but, rather, on legal issues relating to whether those incidents could be attributed to the accused. Counsel should explain these and other nuances to survivors and witness, and identify what, if any, appellate avenues may exist for the prosecution to challenge the outcome.

Even where a trial judgement is favorable in the sense that it results in a conviction, witnesses and survivors may still be discouraged if the sentence imposed is overly lenient. A lenient sentence could be viewed as implying that the victim's testimony did not matter much or that the crimes were not regarded as being

particularly grave. Additionally, for some survivors, a lack of opportunity to address the court on sentencing may exacerbate their disappointment at the lenient sentence.

Summaries of judgements also should be broadly distributed within affected communities to promote broader awareness and contribute to reconciliation.

10. Advocate for giving survivors a voice in sentencing

While no sentence can erase the loss and pain inflicted by those who have been convicted, sentencing remains critically important to all survivors, particularly survivors of sexual violence perpetrated as an act of genocide, crime against humanity, or war crimes. Sentencing delivers a sense of justice to survivors by providing official recognition from the international or national community that a grave violation of their rights was committed. This official recognition helps restore a sense of power and personal dignity to those who have been victimized. Further, a sentence that reflects the gravity of the crimes can promote reconciliation by enabling survivors to move forward with their lives.

One of the ICTR's greatest failures was its failure to provide survivors with a meaningful role in sentencing. Thousands of survivors testified as witnesses at trial but there was no separate sentencing phase where they could be heard on the impact the defendant's crime on their lives and the lives of their family members. This approach is contrary to a growing body of international law recognizing the importance of giving survivors a role in sentencing, including the Rome Statute,

Articles 68(3) and 76(2), and United Nations Draft Convention on Justice and Support for Victims of Crime and Abuse of Power, Article 5(2)(b).

Allowing survivors to be heard on sentencing helps restore a sense of power by demonstrating that their words can have an impact. It also promotes rehabilitation by impressing on the defendant the seriousness of their conduct and providing an opportunity for self-reflection. And, it assists the Chamber in assessing the true gravity of the offender's conduct.

11. Build sustainable partnerships to support survivors and their families

The ICTR was not a permanent court or part of any governmental structure. Therefore it had to create self-standing mechanisms to provide support for survivors and witnesses. The ICTR's closure opens a potential gap in long-term services for survivors.

Arrangements must be made in advance with international and national actors to ensure that long-term needs are met. At the ICTR, for instance, the Mechanism for International Criminal Tribunals (MICT) has assumed responsibility for victim and witness services. The MICT maintains a clinic in Kigali that provides services or referrals to all former witnesses who testified before the ICTR. Additional support is provided by victim's groups, national authorities, and NGOs.

But many survivors are still struggling to meet basic needs to survive and recover. Unlike the Rome Statute, the ICTR Statute does not provide survivors with a right to compensation or reparations. It merely allows for the Registrar to

transmit a judgment to national authorities so that survivors may bring an action in a domestic court to obtain compensation or reparations.

A better system of reparations or compensation for victims of sexual violence should be established with the financial support of national authorities and the international community.¹⁷ As the Secretary-General's Report on Sexual Violence recently observed:

International justice is as much about the hope, dignity and restoration of victims as it is about accountability of perpetrators. Reparations (including restitution, compensation, satisfaction and rehabilitation) and guarantees of non-repetition are measures that aim to repair or redress the impact of harm cause to or crimes committed against individuals.¹⁸

For the fight against impunity to be truly effective it is not enough that leaders and perpetrators of sexual violence are held accountable before courts and tribunals. Many survivors will continue to need ongoing medical and psychological support long after legal proceedings have concluded. Many also will require financial and socio-economic support if they are to rebuild their lives and become fully-integrated members of society. Prosecutors and others involved in the criminal justice system at both the national and international levels are uniquely positioned to support these long-term efforts.

¹⁷ For example, the International Organization of Migration has implemented large-scale victims' reparations programs such as the German Forced Labour Compensation Program. It also provided longstanding collaboration and support to the Sierra Leone Reparations Program and, more recently, worked in collaboration with the ICTY to provide reparations for wartime victims in the Former Yugoslavia.

¹⁸ See Secretary-General's Report on Sexual Violence in Conflict, *supra* note 10, at para. 116.