

## **Trial Strategies for Empowerment of Victims**

PREPARED FOR PROSECUTORS, INVESTIGATORS AND CIVIL PARTIES BY  
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Below are some suggestions for subtle ways in which to support the empowerment of women through the justice process which do not depend upon the specifics of the legal proceedings. These suggestions are to be adapted to each context by the national practitioners. The suggestions are intended to inspire legal practitioners to think creatively about ways to use the tools that the law and legal procedure and evidence to foster a transformative impact on survivors who participate even where a case does not reach its final result or where a case suffers from political interference or other roadblocks.

The concept underlying this is the following: Many post-conflict justice processes will take time to develop, time to implement, time to overcome the political, security and social environment which may be prohibitive, time for the survivors and others in the conflict-affected communities to come forward and trust in the justice system so as to seek access to justice. Even where cases begin to be brought in court, they can face all manner of hindrances to the smooth functioning of a criminal trial. And of course, not all criminal cases will result in a conviction.

In the circumstances of post-conflict justice, we do not have the luxury of a single minded focus on convictions as the sole goal of the judicial process. We as prosecutors and investigators are called upon to view the legal work we do as part of a much larger picture of post-conflict transformation and transition.

The below are but a few ideas from international criminal practice. They are very small steps in the day to day practice of courtroom advocacy and litigation; but they have the potential to have broad reaching effects on the community of survivors, and the post-conflict communities more generally. It is hoped that the below ideas will inspire colleagues in national practice of international criminal law to look for creative ways to empower survivors and the post-conflict communities.

Also, remember the main point: advancement of women's access to justice and empowerment of women through the justice system is a gradual process in the best of circumstances. What that means from a practical perspective is that at the beginning, many of these motions may be denied by the bench simply because they are unusual or new. But making the motions regularly will build familiarity of the bench with such proposed measures and could pave the path for upcoming cases.

I recommend that if there are no specific provisions in the code which would support the below motions, some of the motions could be made under the procedural provisions which empower the Judges to control the proceedings and to make them as efficient as possible. (examples: Artículo 358 del Código de Proceso Penal de Guatemala)

### **Rationale:**

1. To signal to all victims and communities of survivors, most of whom will not live to see justice done for the crimes they suffered, that the Prosecutors Office considers survivors of sexual violence in the context of the armed conflict to be deserving of meaningful justice and reparations and truth telling and that the Prosecutors are ready to fight for this, and
2. To begin to expose the bench to these concepts and requests so that even if they deny them now, they may be inclined to grant them later. In this manner it can become pattern and practice for the Prosecutors to make such requests of the Chamber, and this can clear the path for other cases to make such requests.

## Examples of ways to empower women survivors through the justice process:

1. **Resist the tendency to over-protect the victims to the point of infantilising them. Avoid making assumptions about them, speaking on their behalf, or making decisions in their stead. Oppose publicly these tendencies by colleagues or by judges. In our wish to protect survivors of atrocities (in particular survivors of conflict-related sexual violence) from further harm, we risk taking over their right to make decisions for themselves, removing their agency, thereby further disempowering them.**
  - a. When a party or the Judge makes a suggestion about what a victim may prefer, try where possible to state on the record that the Prosecution could not presume to know how the victims will react to a particular issue or what their preference would be. Consider asking for a recess to talk to them, or asking for a closed session to preserve their privacy. Put on the record as often as possible terms of respect, admiration, dignity, honour, to the victims. Speak of them in tones of respect such as that due to the wise elders of the community.
  - b. Think of the proceedings not only as a criminal case but also as a process of transitional justice, whereby the experiences of these heroic women are brought out for all to know, are documented for history, are acknowledged. Think of the victims as your beneficiaries; they are the ones who deserve justice. The justice is for them. Each testimony by each of them should be considered to be one of the most powerful, immense, meaningful and potentially dramatic days of their entire lives; yes, even more so than the final judgement. Each one deserves an empowering day in court.
  - c. Any chance that can be given to the victim/witness to make any decision, no matter how small, should be given. For example, to ask if she is comfortable, to ask her if she needs anything, to ask if she can hear clearly, to ask if she can continue or needs a break, etc.
  - d. Think carefully about your own assumptions which you may have about them and try to ensure you do your utmost to not make any assumptions at all
2. The survivors and the affected community should have access to the public portions of the proceedings in the language(s) they understand. This requires simultaneous translation perhaps into numerous languages, as well as a system of broadcasting the proceedings to as wide a scope of the affected community as possible. The “public” interest in such cases is not what is normally considered to be the public. In this case, access by the public to the proceedings may be the only access to justice that the post-conflict community may have. Prosecutors can make requests to the court for the translation and broadcasting to be authorised and implemented.
3. **Sensitive respectful questioning of survivors during testimony**
  - a. In some communities of practice it is uncommon to advocate in court showing anything other than cold functionality. While this may be the accepted practice in the relevant jurisdiction, this is something that the litigators can gradually seek to change. Prosecutors can set an example by posing questions to survivors respectfully and carefully with a small tone of politeness and respect. Survivors can be asked not only about trauma, not only about shame and the assumptions of how survivors of sexual violence are presumed to react, but also about how they supported themselves, how this impacted upon their socio economic progress, how it impacted upon their communities, their leadership – ask questions that you would also ask of highly educated highly respected elders including men – to set the example that these women are not only survivors of sexual violence; they are the elders of our community, who have overcome their suffering and found the strength to rebuild, to raise children, to work and support themselves. Part of their story and part of the historical record includes setting out how the atrocities impacted upon the women and the broader community of survivors. In contexts where there is a tendency to discriminate against individuals who are not literate, who do not speak the language of the courtroom proceedings, who are from traditional or indigenous communities, and in particular rural and elderly women, questioning them in the same manner

as you would question a professor at a university can have a tremendous impact. It will show them respect and give them a sense of being heard, being valued, and being believed – supporting the transformative process of shifting the stigma off of them and onto the perpetrator. It will show them a deference which they deserve to experience, and the good that will come of this small act of respect can be far reaching, in particular if publicised in a manner which is designed to reach out to as many members of the post-conflict affected community as possible. This can also have a tangential effect of inspiring confidence in the prosecutor's office and could encourage other survivors to come forward where they may have previously been reluctant. Carrying out this intentional change in tone of proceedings can also set a precedent for the manner in which these victims and witnesses should be spoken to by all involved in the trial proceedings.

- b. It is also a good idea to consider asking them a few questions, where possible and permissible, about why they have decided to come forward to seek justice.

#### 4. **Objections:**

- a. Some legal communities of practice do not use objections regularly. Where the system so permits, objections can be a powerful personal tool for a prosecutor and a civil party victim representative. Objections can remind the witness who is experiencing badgering or inappropriate forms of questioning by defence that the prosecutor supports them and will defend them from improper treatment. Even where the judge refuses to accept the motion of the prosecutor and permits the defence to continue with disrespectful questioning, the objections can let the bench and the community know that this kind of behaviour is completely inappropriate and unacceptable; and hopefully this will ultimately convince the judge(s) to control such inappropriate behaviour by counsel.
- b. Public objections in favour of the victims can be picked up by civil society and disseminated, thus encouraging greater confidence in the prosecutor's office, and sending a signal of solidarity with those who have been so long denied justice. Again, these impacts are not normally considerations of prosecutors; but where prosecutors are operating in a context of transitional justice where there are likely to be few cases brought to completion, a broader perspective on the potential impact of such public statements of support for the victims can have positive consequences.

#### 5. **Victim Rights**

- a. In circumstances where victims may not wish to have their faces seen on the media in spite of the fact that their names are already in the public domain, there may be no protective measures in place. In such circumstances, there are informal mechanisms that can be put in place to protect the privacy of the victims and others in the affected communities. For example, the Judge can be requested to consider closing the courtroom so the victims can enter with their heads uncovered, and granting the survivors the right to sit behind a screen to shelter them from the public. Even in circumstances where the court is reluctant to grant such measures, making such a motion in public can provide assurance for the survivors and the affected community that the prosecutors are showing respect for the survivors, prioritising their needs, and seeking ways to protect and empower them. Efforts such as this which are picked up by civil society can have a wider impact and can encourage trust in the justice system.
- b. Another solution could be to create a safe room, ideally within the courtroom itself, which allows victims to sit there and see and hear all that is happening in the courtroom, but has shaded glass so that the victims cannot be seen from outside the box. This provides security and safety for victims, but also allows them to be centrally present during the trial proceedings. Of course the simultaneous translation into the language of the victims is critical to enable them to fully follow the entirety of the proceedings. This safe room could

be used even where the victims have not requested specific protective measures. It could have a separate entrance not accessible to the public.

Where the applicable legal framework does not incorporate international jurisprudence, even where practitioners are not in a position to base the case or legal arguments on international jurisprudence, practitioners could explore opportunities to make reference to such jurisprudence with a view toward gradually familiarising the court and the public with international practice. This subtle education and sensitisation of the community and the justice system can gradually increase the awareness of provisions which can serve to protect and empower survivors through their participation in the justice process.

**6. Seek to honour their requests regarding support in the courtroom and order and manner of testimony:**

- a. Where appropriate, seek to make requests of Judges to have the testimony completed before the court adjourns, so as to protect the survivor/witness from having to continue the testimony the following day. Such a delay can make it more difficult for the survivor to continue to feel strong.
- b. Furthermore, seek where possible to request of the Judges to adapt the court hearing schedule in ways which respect and prioritise the needs and concerns of victim witnesses. Though the making of that request may not result in a positive decision by the Judges, the simple public making of this sort of request on the record in public can have a significant impact upon the manner in which the victims and affected communities are viewed. If picked up and highlighted by civil society organisations, there can be a wider positive impact upon the community who will have been shown respect and deference by judicial officials. This in turn can increase the confidence of survivors in the justice system and potentially improve their willingness to come forward with information and evidence.
- c. Where the survivor so-requests, the court can be requested to allow a support person to be present in the courtroom even sitting next to the survivor.