

CARSV STIGMA TOOLKIT FOR JUSTICE

Part B – Tools



**GUIDE TO GOOD PRACTICE
FOR DEFENCE COUNSEL
IN CARSV CASES**

PRACTICAL GUIDANCE
FROM LEADING DEFENCE EXPERTS

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1 - INTRODUCTION

This Guide to Good Practice for Defence Counsel in CARSV Cases forms part of the Synergy for Justice CARSV Stigma Toolkit for Justice and has been designed as an accompaniment tool to Part A – The Competency Assessment. It can also be used as a stand-alone guide for training, awareness raising or as a reference tool for Defence Counsel working in national and international proceedings.

Defence Counsel play a central role in ensuring due process and a rights-based approach during the justice process. They are simultaneously legal representatives of an accused and officers of the court with clear sets of obligations and duties in relation to both these aspects of their role.

“Everyone should have the same training, and the Defence should be treated as of equal importance in securing valuable answers on the issues.”

ICC Defence Counsel and barrister with experience on SV cases
in national jurisdictions

In cases involving conflict or atrocity-related sexual violence (CARSV) or where there are sexual violence survivors, there is an increased possibility that participants in the proceedings, such as witnesses and victims, may be traumatised and may be at higher risk of retraumatisation and other forms of harm during their interaction and engagement with the criminal process. Defending an accused person and minimising harm to witnesses comes into sharp focus in these cases.

This guide is intended to be an aid to Defence Counsel in their role in these cases by identifying best practice and offering tips on how to conduct such cases in ways which are effective and achieve Counsel's obligations and duties to their clients and to the court. As part of a wider toolkit tackling the influence of CARSV stigma in justice systems, this guide also explains and introduces stigma associated with sexual violence and its manifestation in myths, and also misconceptions about this form of violence and its victims. It sets those misconceptions into the context of a Defence Counsel's duties and obligations.¹

Much can be learned from the good practice, skills and experience of Defence Counsel who have successfully met these duties in international courts before. This guide has been developed based on a series of interviews with leading Defence Counsel, victims' advocates, prosecutors and judges who have experience at international courts, as well as in national jurisdictions. Their guidance and insights are at the heart of this guide through quotations leading each section. You will find them in yellow boxes throughout. The guide also draws from international standards, such as Codes of Conduct for Counsel at international courts, the findings of international courts and the writing of leading authors on this topic. Throughout the guide, reference is made to [‘the Murad Code’, a global code of conduct on gathering and using information about Systematic and Conflict Related Sexual Violence](#). This Code distils minimum standards for safe, effective and ethical work with sexual violence survivors or gathering information about the violence against them. It is applicable to the work of Defence Counsel when they interact with survivors or handle their information.

¹ Craig (2014) [The Ethical Obligations of Defence Counsel in Sexual Assault Cases](#), 460



Note: While this guide relates specifically to cases with CARSTV survivors, it is important to recognise that other participants in the justice process may face greater risks of harm and retraumatisation during justice processes.

“Equal care should be taken in respect of all potentially vulnerable witnesses. Being traumatised by sexual violence is just one reason why a witness may be vulnerable. Other common reasons include a witness's age (particularly children) and mental disorder.”

Former ICTR Defence Counsel, prosecutor and now judge

2 - DUTIES AND OBLIGATIONS OF DEFENCE COUNSEL IN CARSV

2.1 Ethical Obligations of Defence Counsel

Defence Counsel have obligations and duties to their clients and to the court. The parameters of the conduct of a defence case are shaped by factors, including the client's knowledge of events and decisions concerning the objectives of representation; the investigation and available evidence; the law and rules of evidence and procedure; and Counsel's duties, such as independence, professionalism and duties to the court. The [International Criminal Court \(ICC\) Code of Professional Conduct for Counsel](#), parts of which are set out below, is a good representation of the duties of Counsel in most jurisdictions.

CODE OF PROFESSIONAL CONDUCT FOR DEFENCE COUNSEL, ICC

Article 6 - Independence of counsel

1. Counsel shall act honourably, independently and freely.
2. Counsel shall not:
 - a. Permit his or her independence, integrity or freedom to be compromised by external pressure; or
 - b. Do anything which may lead to any reasonable inference that his or her independence has been compromised.

Article 7 - Professional conduct of counsel

1. Counsel shall be respectful and courteous in his or her relations with the Chamber, the Prosecutor and the members of the Office of the Prosecutor, the Registrar and the members of the Registry, the client, opposing counsel, accused persons, victims, witnesses and any other person involved in the proceedings.
2. Counsel shall maintain a high level of competence in the law applicable before the Court. He or she shall participate in training initiatives required to maintain such competence.
3. Counsel shall comply at all times with the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and such rulings as to conduct and procedure as may be made by the Court, including the enforcement of this Code.
4. Counsel shall supervise the work of his or her assistants and other staff, including investigators, clerks and researchers, to ensure that they comply with this Code.

Article 14.2 - When representing a client, counsel shall:

- a. Abide by the client's decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel's duties under the Statute, the Rules of Procedure and Evidence, and this Code; and
- b. Consult the client on the means by which the objectives of his or her representation are to be pursued.

Article 24 - Duties towards the Court

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings ...
3. Counsel shall not deceive or knowingly mislead the Court. ...
4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings. ...

Article 29 - Relations with witnesses and victims

1. Counsel shall refrain from intimidating, harassing or humiliating witnesses or victims or from subjecting them to disproportionate or unnecessary pressure within or outside the courtroom.
2. Counsel shall have particular consideration for victims of torture or of physical, psychological or sexual violence, or children, the elderly or the disabled.

“It is for the client to make a decision as to what the broad objectives of his representation are. Almost inevitably these will be to secure the dismissal of the charges, or his acquittal (if he is pleading ‘Not Guilty’) and to secure the minimum sentence possible if he is convicted. It is for the client to decide how to plead. It is for him to say what his actions were, what actions of others he was aware of, what his state of mind was, what his intentions were and what external factors were operating upon him when he acted as he did. It is not for Counsel to devise explanations or suggest motivations. Other objectives which the client may have, such as the use of the trial to promote a particular political or religious leaning, are likely to be “inconsistent with Counsel’s duties under the Statute, the Rules of Procedure and Evidence, and this Code.

“On the other hand, it is not for the client but for Counsel to decide what submissions are made to the Court, what questions are asked of prosecution witnesses and what defence evidence is adduced to establish the accuracy of those submissions. That is what Article 14.2(b) refers to when it speaks of the means by which the objectives ... are to be pursued. As to these means the duty upon Counsel is not to abide by the client’s decisions but rather to consult the client. That is to say that no action undertaken by Counsel should ever come as a surprise to the client. There must be full and clear consultation. It will be necessary to explain why you propose to take a particular course of action (for example to question, or not to question, a prosecution witness) or make particular submissions. But ultimately, using your judgement as to what will be most likely to achieve a favourable verdict for the client, it is for Defence Counsel to decide upon what is to be done in court, even if the client disagrees.

“Defence Counsel is not the client’s mouthpiece. There may be issues on which your client feels very strongly, issues which they feel ought to be aired loudly and regularly. There may be witnesses towards whom the client has a strong antipathy and whom he wishes to be harassed at length in cross examination. It is not Counsel’s duty to do so. Indeed, it is Counsel’s duty not to do so, both because it is intrinsically improper, but also because it is likely to have an adverse impact on the attitude the Judges will develop towards you and, by extension, your client. Only by resisting the client’s promptings in these respects will you be having the courage to present the case in their true best interests.

“Ultimately you may have to present the client with a choice: either he retains you as counsel, and you conduct the case in a way you think is in his best interests, or he dismisses you and tries to find another counsel.”

Former ICTR Defence Counsel, prosecutor and now judge

In recent years, some jurisdictions have developed procedural rules or case law around the process of cross-examination of ‘vulnerable witnesses’ aimed at ensuring a fair process and ‘best evidence’ while minimising potential harm to such witnesses. *“This is not ‘best evidence’ in the sense of ‘most favourable to a party’. The key consideration in assessing the legitimacy of the questioning is the reliability of the evidence obtained, or, as the Court put it [...] whether it is ‘helpful’ to the inquiry.”*²

² Henderson (2016) [Best Evidence or Best Interests? What Does the Case Law Say about the Function of Criminal Cross-Examination?](#) The International Journal of Evidence & Proof 2016, Vol. 20(3) 183–199, citing English cases: [R.v. Barker](#) [2010] EWCA Crim. 4; [R.v. Edwards](#) [2011] EWCA Crim 3028; [R.v. W&M](#) [2010] EWCA Crim. 1926; [R.v. Wills](#) [2011] EWCA Crim. 1938; [R.v. Farooqi](#) [2013] EWCA Crim. 1649.

2.2 Who Are ‘Vulnerable Witnesses’?

As noted in the introduction, being a victim of sexual violence is only one potential reason for a higher risk of retraumatisation and other forms of harm during a criminal justice process. In addition, each sexual violence survivor, as an individual, may also have intersectional factors which heighten the risk of harm. It is important to understand what some of these risk factors are.



Caution: The ICC and other jurisdictions use the expression ‘vulnerable witness’. However, for many survivors, this term might infer inherent, internal ‘vulnerabilities’ as a victim, rather than represent external risks and threats to their physical and emotional well-being.³

Murad Code Requirements



Principle 1.

Understand Survivors as Individuals

1.1 Adapt to survivor’s individuality: We respect that each survivor is unique. We will tailor our approach to their specific identities, characteristics, groups and contexts, such as their age, gender, evolving capacities, resilience, relationships with and connections to others, socio-economic and political situation, and the discrimination they face. We recognise that such elements change over time and context and that our approach may have to be adjusted accordingly. ...

1.5 Identify heightened risks: We will take additional, specific precautions when there are heightened risks of further harm. We recognise that any individual may face heightened risks which may change over time and context. Heightened risks may arise for child survivors including children born of war and unaccompanied children, persons from LGBTQI+ communities, persons with disabilities or with limited literacy, persons from indigenous or marginalised groups, and others.

There is no definitive set of heightened risk factors. In some jurisdictions, there is a list which focuses on attributes, characteristics or status of the person (see the first box on page 8). In other jurisdictions, it is more broadly defined as focused on the effect on the proceeding – *“that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings”* (see the second box on page 8).⁴

³ The word ‘vulnerability’ may be viewed as disempowering and stigmatising, rather than taking a strength-based approach with corresponding language. See Synergy for Justice CARSV Stigma Toolkit for Justice Part B Tools, Guide to Non-Stigmatising Language.

⁴ See, for example: COPFS, [Vulnerable Victims and Witnesses](#), 01 April 2022; TAG, [Identifying Vulnerability in Witnesses and Parties and Making Adjustments](#), 20 March 2017; Elliott (1998) [Vulnerable and Intimidated Witnesses: A Review of the Literature](#).

Vulnerable witnesses may include:

- ✓ Children (all those under 18 years of age);
- ✓ Persons with physical disabilities;
- ✓ Persons with mental disabilities;
- ✓ Persons with learning disabilities;
- ✓ Persons in the autism spectrum;
- ✓ Survivors of gender-based crimes;
- ✓ Survivors of sexual violence;
- ✓ Persons with high levels of stress;
- ✓ Persons with high levels of anxiety;
- ✓ Persons with an alcohol use disorder;
- ✓ Persons with a drug use disorder;
- ✓ Religious minorities;
- ✓ Ethnic minorities;
- ✓ Racial minorities;
- ✓ Sexual and gender minorities (LGBTQI+);
- ✓ Persons who could face harm for testifying.

UNITED KINGDOM'S YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

Section 16. Witnesses eligible for assistance on grounds of age or incapacity.

For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section if under the age of 18 at the time of the hearing; or if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection.

Section 17. Witnesses eligible for assistance on grounds of fear or distress about testifying.

For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this subsection if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

The **European Court of Human Rights (ECHR)** may also provide a useful framework for considering 'vulnerability'. It looks at vulnerable groups based on historical or systemic discrimination, prejudice or stigma, with individuals rendered vulnerable based on a trait, condition or situation. Corina Heri's review of 'vulnerability' case law at the ECHR reveals the following typology:

- ★ **"dependency-based vulnerability**, which concerns minors, the elderly, and those with psychosocial and cognitive disabilities (i.e., mental illness and intellectual disability);
- ★ **vulnerability due to state control**, including that of detainees, military conscripts, and persons in state institutions;

- ★ **vulnerability due to victimisation**, including by domestic and sexual abuse, other violations of Article 3, or because of a feeling of vulnerability;
- ★ **vulnerability in the migration context**;
- ★ **vulnerability due to discrimination and marginalisation**, which covers ethnic and religious minorities, LGBTQI people, and those living with HIV/AIDS;
- ★ **vulnerability due to pregnancy or situations of precarious reproductive health**;
- ★ **vulnerability due to the espousal of unpopular views**; and
- ★ **intersecting vulnerabilities.**⁵

*"Taken all together, the many grounds for vulnerability recognised by the Court thus far create a patchwork that covers significant parts of every human individual's life span, and of some lives in particular. In other words, we all begin our lives as children, many of us grow dependent in our old age, and, over the course of our lives, a significant number of us experience hospitalisation, mental health issues, detention, pregnancy, victimisation, migration, or a host of other factors that can make us vulnerable. Seeing the Court's approach in this way, namely as a patchwork that loosely covers all human individuals at one stage of life or another, aids the recognition that dependence and physical fragility are natural characteristics of human life, and universal."*⁶

One of the issues that Counsel will potentially face is actually identifying such vulnerabilities, e.g., in many countries, witnesses will not have been diagnosed with autism. Witnesses might also be reluctant to disclose a history of domestic abuse that is unrelated to the case in which they are testifying. The ICC Prosecutor's Office has specialised psychologists who conduct vulnerability assessments prior to substantive interviews, and who make recommendations. It would be helpful if the legal aid scheme for defence could be amended and urged to allow for such persons to be appointed and to be involved in investigations.

In many jurisdictions, there are special protections, measures or assistance in law for these witnesses to reduce the potential harm to them as they engage with the justice system.⁷ Defence Counsel has the responsibility to request special measures for any vulnerable witnesses they might call for direct examination, as well as to respect any special measures put in place for the prosecution's vulnerable witnesses.

5 [Garib v. The Netherlands](#), (Application No. 43494/09)39. Judgement Dated 6 November 2017 Dissenting Opinion Of Judge Pinto De Albuquerque Joined By Judge Vehabović: "It is precisely this consideration of the additional harmful effects produced by the combination of factors of discrimination which has proved indispensable in addressing complex situations of discrimination. It is not always sufficient to add together the multiple factors of discrimination, especially where the intersection between them exacerbates their consequences. Such synergy does not necessarily result in an accumulation of forms of unitary discrimination, but in a new form of multidimensional discrimination. In view of the significance of the phenomenon, its consequences in terms of the effectiveness of the guaranteed rights, and the international consensus obtained at the present time, the Court today include this aspect in its scrutiny under Article 14 of the Convention." See also United Nations Network on Racial Discrimination and Protection of Minorities, [Guidance Note On Intersectionality, Racial Discrimination & Protection Of Minorities](#); [Gonzales Lluy et al. v. Ecuador](#) IACtHR, Judgement dated 1 September, 2015 (Preliminary objections, merits, reparations and costs), para.290; [Vicky Hernández et al. v. Honduras](#), IACtHR, Judgement dated 26 March, 2021 (Merits, reparations and costs), para.129; [B.S. v. Spain](#), ECtHR, Application no. 47159/08, paras.56-63.

6 Heri (2019) [Responsive Human Rights: Vulnerability, Ill-Treatment and the ECtHR](#) Uni of Zurich.

7 Council of Europe Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims, adopted on 14 June 2006, "Article 3 Assistance ...3.3. Victims should be protected as far as possible from secondary victimisation. 3.4. States should ensure that victims who are particularly vulnerable, either through their personal characteristics or through the circumstances of the crime, can benefit from special measures best suited to their situation." See also Grans (2023) [The Impact of Vulnerability on State Obligations in Criminal Proceedings on Domestic Violence: Interpreting the Istanbul Convention and the European Convention on Human Rights](#), Women & Criminal Justice, DOI: 10.1080/08974454.2023.2296624. See e.g., [Mraović v. Croatia](#), ECtHR, Application no. 30373/13, paras.48-59.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (2012/29/EU) ESTABLISHING MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME:

“Article 22 – Individual assessment of victims to identify specific protection needs

1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.
2. The individual assessment shall, in particular, take into account:
 - a. the personal characteristics of the victim;
 - b. the type or nature of the crime; and
 - c. the circumstances of the crime.
3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.”

Useful resources:

- The Advocate’s Gateway [Toolkit 10 Identifying Vulnerability in Witnesses and Parties and Making Adjustments](#).

2.3 Understanding Stigma Surrounding Sexual Violence: Myths, Misconceptions and Misunderstandings

One frequent way in which survivors can be re-traumatised during the justice process is through the use of myths, misconceptions and misunderstandings about sexual violence or its victims/survivors. Not only can this impact survivors, but it can also affect the overall justice process. Rooted in patriarchal and harmful gender narratives, these prejudicial beliefs seek to place the blame or shame on the survivor, or to minimise or justify the crime. These beliefs are not accurate and are not based in fact (or science). They are a manifestation of social stigma. Unfortunately, there is a long history universally of these beliefs creeping into justice process in sexual violence cases. Recent studies have highlighted just how frequently they are used and how often they do lasting damage to survivors.⁸

⁸ See e.g., Zydervelt (2016) [Lawyers’ Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?](#) Br J Criminol, 551-569 (New Zealand); St George *et al.* (2021) [Blaming Children: How Rape Myths Manifest in Defense Attorneys’ Questions to Children Testifying about Child Sexual Abuse](#), J Interpers Violence, NP13902-NP13927 (U.S. child sexual abuse cases).

Myths, misconceptions and misunderstandings about CARSV/SV include the following:	Facts about CARSV/SV ⁹
<ul style="list-style-type: none"> X CARSV is the rape of a woman by armed soldiers; it is the inevitable consequence of men's biological urges; SV is motivated by sexual desire and lust; SV is separate from the other forms of violence in conflict. X Men cannot be raped; women cannot perpetrate rape. X SV is always physically violent; victims always put up a fight; there should be signs of physical injuries. X Consent is possible even in coercive circumstances; consent can be implied from prior sexual activities. X Respectable women are careful not to 'invite' sexual interest. Women who are not 'respectable' put themselves at risk of sexual violence by the way they dress or act. X False reports of SV are common; real victims cry out for help and report immediately; delayed reporting is a sign of fabrication. X Victims can recall every detail of the SV; victims always cry and are very 'emotional' when recalling SV. X SV is less serious if it's not very violent, if it's against men, if it's against older women or mothers, if it is not rape. X SV brings shame and dishonour to the survivor. X Rapists are 'monsters'; they are not ordinary family members or professional men; they are not like us. X Members of certain ethnicities/ nationalities/ religions are more predisposed to committing rape. X Rape is the inevitable consequence of any conflict or period of instability. 	<ul style="list-style-type: none"> ✓ CARSV takes many different forms; it is about power and dominance; it is not about sex, it's about violence. ✓ Men and women can be perpetrators and victims; it's not just soldiers who commit CARSV. ✓ SV is not always physically violent, physically forced or at gunpoint; many victims do not fight back to save their own lives or due to toxic immobility/fear; scientific studies show that most survivors present with no injuries at all. ✓ All persons have the full right of autonomy, privacy and the non-violation of bodily integrity in each situation, on every occasion. Consent cannot be implied. Consent is impossible in coercive circumstances. Prior sexual activities of the victim are irrelevant in law and fact. ✓ The characteristics, age, gender, personality, appearance and clothing of the victim are rarely relevant in law and fact, both to whether the crime took place and to the victim's reliability as a witness. ✓ Contrary to some popular misconceptions, false reporting about rape is rare – estimated between 0.2-5% of reports.¹⁰ Furthermore, the vast majority of survivors report after significant periods of time, if ever. The range of non-reporting to police ranges between 80-99%.¹¹ Note: This does not mean that victims may not be mistaken about identification details or other relevant facts. This also does not mean that where the facts show an error or incorrect reporting that this should not be pursued. However, a generalised assertion that false reporting is common, without any evidence of fact in the case, should not be made. ✓ Trauma manifests differently for different people at different times; survivors should not be expected to present in similar ways. Trauma affects how we process and recall memories of traumatic events. Gaps in memory do not necessarily impute credibility or reliability. ✓ SV is a crime of violence, and survivors are victims of that violence – it not an issue of 'dishonour' or 'immorality'. ✓ Anyone might be a perpetrator of SV. Assumptions or biases about what 'real' perpetrators look like can be misleading.

9 See Synergy for Justice CARSV Stigma Toolkit for Justice Part B Tools, The Myth Debunker for in-depth information and studies on myths, misconceptions and misunderstandings surrounding CARSV/SV.

10 "There is neither scientific proof nor research findings that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences" *Mukungu v. Republic*, Kenya, [Court of Appeal Decision](#) (2003) AHRLR 175 (KeCA 2003) para.12; see Burrowes (2013) [Responding to the Challenge of Rape Myths in Court. A Guide for Prosecutors](#), 8; Ferguson & Malouff (2016) [Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates](#), Arch Sex Behav, 11-13; [Orchowski et al.](#) (2021), Koon-Magnin (2022) [Sexual Assault and Harassment in America: Examining the Facts](#), 81; [Lilley et al.](#) (2023).

11 [Australian Institute of Health and Welfare](#) (2020), [Parti & Robinson](#) (2021), 159. [Skinnider et al.](#) (2017). See also [Amnesty International](#) (2019) [Time for Change](#) estimates 90% in Norway.

The use of stigmatising beliefs breaches the ethical duties of Counsel appearing for the prosecution or the defence.

"For example, the question of knowing why the victim did not talk about his rape earlier or did not denounce him should no longer be a question asked, in the sense that it shows nothing and is only challenging the victim's statements."

International Criminal Tribunal for Rwanda (ICTR) and ICC Defence Counsel

"When we are facing charges before the international courts, we are necessarily handling events that occurred during an internal or international conflict where most of the time there is no state authority. So there is absolutely no point asking someone why did he or she not denounce the rape. The answer will probably simply add shame and will certainly not taint her credibility, nor will it help the accused. The person will most probably say, 'I couldn't go to the police, there is no police'. 'I could not complain to the authorities in the middle of a war', etc. or worse, 'The police or authorities were in the same armed group as the perpetrator'."

Defence Counsel at the ICC, ICTR and International Criminal Tribunal for the former Yugoslavia (ICTY)

It is important to recognise why the use of stigmatised attitudes and sexual violence myths and misconceptions contravenes Counsel's legal and ethical duties:

1. It misleads the Court.¹²
2. It leverages inaccurate information.¹³
3. It relies on irrelevant information.¹⁴
4. It often explicitly contravenes the rules of evidence and procedure.¹⁵
5. It perpetuates discriminatory attitudes.¹⁶
6. It harms and attacks the dignity of the witness/victim.¹⁷
7. It disrespects protective and other measures put in place for traumatised witnesses.

12 See e.g. *R.v. Lytle*, 2004 SCC 5, [2004] 1 SCR 193 (Supreme Court Canada): "[t]he purpose...must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or imply in a manner that is calculated to mislead is in our view improper and prohibited."

13 *R.v. Osolin*, [1993] 4 SCR 595 at 669, 109 DLR (4th) 478 (Supreme Court Canada): "eliciting evidence from a complainant for the purpose of encouraging inferences pertaining to consent or the credibility of rape victims which are based on groundless myths and fantasized stereotypes is improper."

14 *R.v. Shearing*, [2002] 3 SCR 33 (Supreme Court Canada): "[t]his does not turn persons accused of sexual abuse into second-class litigants. It simply means that the defence has to work with facts rather than rely on innuendoes and wishful assumptions."

15 *R.v. Osolin*, *ibid.*, "[c]ross-examination for the purposes of showing consent or impugning credibility which relies upon 'rape myths' will always be more prejudicial than probative. Such evidence can fulfil no legitimate purpose and would therefore be inadmissible to go to consent or credibility." "Defence counsel are ethically obliged to restrict their carriage of a sexual assault case (including the evidence they seek to admit, the lines of examination and cross-examination they pursue, and the closing arguments they submit) to conduct that supports findings of facts within the bounds of law. Put another way, defence counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on [...] social assumptions about sexual violence that have been legally rejected as baseless and irrelevant." Craig (2014) *The Ethical Obligations of Defence Counsel in Sexual Assault Cases*, 460.

16 "Any conduct by a defence lawyer that promotes or exploits stereotypes in sexual assault cases violates their ethical duty to not act in a discriminatory fashion." Tanovich (2016) "Whack" No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases, Ottawa Law Review.

17 *R.v. Mills*, [1999] 3 SCR 668, Supreme Court Canada: "[e]quality concerns must...inform the contextual circumstances.... [A]n appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence.... The accused is not permitted to 'whack the complainant' through the use of stereotypes regarding victims of sexual assault."

The use of such misconceptions *“explicitly invoke stereotypes and discriminatory beliefs and they do so by seeking to introduce irrelevant evidence and advance impermissible lines of reasoning.”*¹⁸

ICC Judge Ibáñez Carranza has challenged the use of CARSV stereotypes and myths in court: *“Sexual crimes are very difficult to acknowledge and to denounce in any context. [...] About the same issue, now regarding the vulnerability of children and especially of children that purportedly have been abused, sexually abused, I would like to make a question ... Why we don't have to believe the testimony of witness victim because apparently her primary reluctance to acknowledge and even denounce this crime that was committed on her, taking into account that she was at that time a young girl and it's difficult for women to acknowledge this?”*¹⁹

Murad Code Requirements



Principle 3.

Be Responsible and Have Integrity

3.2 Dignity and respect: We will support survivors with dignity, respect, humanity, courtesy, appreciation, and as decision-makers.

3.3 Do not stigmatise: We will examine and confront our own limitations in understanding perspectives and experiences beyond our own; our own biases, fears, trauma and triggers; and our own attitudes, prejudices and assumptions in relation to sexual violence and survivors. We will not convey any message to survivors (through our tone, words, body language or other actions) which blames, shames, further harms, judges, belittles, patronises, ridicules or disrespects them. We also will not present or publish any information about them which could do this.

3.4 Ensure accuracy: We will check that our understanding and representation of the information gathered are correct and free from misrepresentations or assumptions. Whenever possible, we will check the accuracy with the survivor and make any necessary corrections.

3.8 Be accountable: We will be transparent and accountable against the commitments reflected in this Code. We understand the potential harms to a survivor, their family and community if we fail to do so. We acknowledge a survivor's right to complain, including to others, about our work, and we will listen when they wish to complain directly to us. We will be open to feedback to improve our work.

¹⁸ Craig (2014) [The Ethical Obligations of Defence Counsel in Sexual Assault Cases](#), Osgoode Hall Law Journal, Vol.51, No.2.

¹⁹ [Prosecutor v. Ntaganda, ICC Appeal Hearing Transcript](#), 14 October 2020, 65-67.

3 - COMPETENCY AND TRAINING

"I think training is always important; you can't get enough of it. No matter how experienced you are, there is always something new to learn. [...] Depending on who the audience is, training might include how to approach and interview a witness; how to examine/cross-examine a victim/witness; the particular legal, ethical and evidentiary issues which arise in SGBV cases; how to work with police and other agencies in investigations; how to work with medical, psychological and other experts; ethical considerations; and putting together a theory of the case. [...] If the Court provides a training program for [Defence] team members as well it should address specific rules of evidence/procedure for the specific Court in question, ethical obligations, rules of confidentiality, the use of databases and issues related to access to disclosure, use of electronic evidence, and similar matters."

Defence Counsel at numerous international courts

Training and competency are an essential aspect of acting as Defence in cases involving CARSV/SV. The appropriate skills and tools will allow Defence Counsel to effectively represent their client, while reducing and mitigating any harm to witnesses. Some key areas of competency, and links to associated resources, are set out below, including: (1) communication and advocacy skills with 'vulnerable witnesses'; (2) survivor-centred approaches; (3) trauma-informed approaches; and (4) cultural competency, including understanding stigma and other social misconceptions and harmful narratives.

"Investigators and resource persons should be aware of the lessons learnt from the ad hoc Tribunals, but also instruments such as the PSVI's Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence against Men and Boys, and the Murad Code that seek to guide the sensitive investigations of these cases, as well as materials produced by the Office of the Prosecutor. Defence Counsel should understand what internationally accepted approaches and best practices in the conduct of investigations are."

ICC Defence Counsel

Useful resources:

1. PSVI's 2nd Edition of the [International Protocol on the Documentation and Investigation of Sexual Violence in Conflict](#) (IP2)(2017);
2. IICI [Training Materials and Guidance on the IP2](#) (2018);
3. IICI [Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence against Men and Boys](#) (2016);
4. IICI [Guidelines on Remote Interviewing](#) (2021);
5. The [Murad Code](#), a Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence (2022).

"It is essential to have experience and to be able to objectively see the perception we give as counsel to the judges."

Defence Counsel before the ICC, ICTY, ICTR and Extraordinary Chambers
in the Courts of Cambodia (ECCC)²⁰

MURAD CODE REQUIREMENTS



Principle 7.

Build Systems, Competency and Support

7.4 Build the right competencies: We will do this work only where we have the necessary knowledge, demonstrated skills and attitudes across our team. Those competencies include sexual violence and stigma sensitisation; understanding gender, diversity and context; working with people of different genders, disabilities and ages; informed consent and basic referral skills; risk recognition; safe communication and interviewing skills, including with children and in relation to remote interviews; trauma awareness and understanding; and information protection and preservation. We will keep the skills and knowledge which make this work safe and effective for our intended purpose up to date.

7.5 Recognise our limitations: We acknowledge that everyone has limits to their experience, expertise and perspective, as well as to their role or mandate. We will reflect honestly about, and will stay within, the boundaries of our knowledge, skills and understanding. Beyond our limitations, we will consult and work with others, such as trauma, security and child experts.

CARSV Stigma Toolkit for Justice Defence Indicator:

Competency Indicator D1: Criminal bar association (or other professional body to which defence representatives and counsel belong) appropriately prioritises survivor-centred approaches and non-traumatising and non-stigmatising professional competency and practice across its members.

Elements of good practice for this indicator include:

Defence bar resources, supports and encourages training and sensitisation of Defence Counsel on CARSV, vulnerable witness skills and laws around relevancy and admissibility of evidence and procedures. Including training to counter CARSV/SV myths from law school, through bar examination or other professional accreditation processes. Consideration of mainstreaming as core competency of Defence Counsel or further professional accreditation to represent or act in court in cases with vulnerable witnesses.²¹

²⁰ See e.g., SRA (2018) [Judicial Perceptions of the Quality of Criminal Advocacy](#).

²¹ Synergy for Justice, CARSV Stigma Toolkit for Justice, Part A, Defence Indicator D1.

3.1 Communication and Advocacy Skills when Working with ‘Vulnerable Persons’

Training needs include:

“Questioning technique and awareness of the issues specific to sexual and gender-based violence.”

Investigating magistrate in national jurisdictions

“Communication skills.”

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

“There should be a training for anyone who is interviewing or cross-examining a rape victim, whether it is a woman or a man, in order not to add to the victim’s trauma.”

ICC Defence Counsel

[Simulated training experience, with reflection and feedback] *“I once hired some actors and asked one of them to play the role of the rape victim. I had some students in the gallery and the lawyer doing the cross. At the end of the cross I asked the victim (actor) how she felt and she said it was so aggressive and harsh ... it was a very negative experience. I asked the audience what they thought and they all responded that it was not a nice experience to watch how uncompassionate and aggressive the lawyer was. I asked the lawyer, who said that his goal was to push, as sometimes the witness would break and give up. I responded that sometimes it’s not good enough and not worth the risk. There is no need to be aggressive. Let the witness answer the questions and explain. You don’t need to tell the witness she or he is lying. You just put the facts to her and build your case with a very soft tone and you can argue later.”*

Defence Counsel before ICTY, ICC, ECCC, and Mechanism for International Criminal Tribunals (MICT)

Useful resources:

- ICCA [Raising the Bar](#) (2019);
- ICCA [The 20 Principles of Questioning](#), Advocacy for Vulnerable People and Children (2022);
- ICCA e-learning [Sections | Advocacy & the Vulnerable \(Crime\) \(easygenerator.com\)](#);
- The Advocate’s Gateway [Toolkit 2 General Principles from Research, Policy and Guidance: Planning to Question a Vulnerable Person or Someone with Communication Needs](#), as well as [specialised guidance](#) for witnesses who are young, have learning disabilities, hidden disabilities, have autism or are deaf;
- Birkbeck University of London Communication and Participation in the Court of Protection;
- IRISS [Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children](#) (2001).

3.2 Survivor-Centred Approaches

"In justice systems which traditionally consider survivors only as witnesses — as opposed to central rights-holders and participants in justice — calls for more survivor-centred justice have been met with resistance from justice actors due to assumptions that this approach is at odds with the rights of the accused. Using comparative research and reforms across many jurisdictions, this toolkit aims to assist justice actors to find a better balance between the rights of the survivors, the rights of the accused and just outcomes."²²

The expression 'survivor-centred' may feel contrary to a system which has the objective of establishing facts to determine whether or not the accused is criminally responsible for a crime(s). A survivor-centred approach could perhaps be better understood as a humanistic approach through which any person engaging with the justice system is recognised as an individual, with their own strengths, risks, needs and rights, and who should receive dignified and respectful interaction and engagement.

"... for sexual violence, I believe that it requires human qualities, common sense, as soon as you touch upon people's intimacy, we cannot afford to arrive with big clogs. It is therefore important to anticipate the subject and to approach it with delicacy. Today when I broach the subject in the context of my duties as a magistrate, at the start of the interrogation, I will bring up the subject and I will make a preamble, I will say that I am well aware that it will be complicated, my objective is the manifestation of the truth, I have no choice but to ask questions which may be disconcerting."

Investigating magistrate in national jurisdictions

What are survivor-centred approaches?

Elements of survivor-centred approaches in justice include:

- Recognition of victims/survivors as rights-holders and decision-makers (based on informed consent) in a justice process;
- Ensuring that victims/survivors are supported through the process, including with legal representation/ advice and psychological support (based on consent);
- Ensuring that victims/survivors have full information about the process and what to expect;
- Understanding that victims/survivors are not a single homogenous group or category;
- Recognising victims/survivors as individuals who have faced traumatic events and who face a multitude of risks engaging with the justice system, including internalised and social stigma;
- 'Do no harm', including ensuring that interactions are respectful and dignified;
- Upholding confidentiality and all other protective measures in law and put in place for the process;
- No discrimination or use of discriminatory language or concepts, including ensuring gender-responsive, age-attuned, intersectional approaches.²³

²² Synergy for Justice (2022) CARSV Stigma Toolkit for Justice Introduction, How the Toolkit Can Help.

²³ OHCHR (2019) [Protection of Victims of Sexual Violence: Lessons Learned](#).

"I recommend training in ... the law of victims' rights."

ICC Defence Counsel and victims' representative in national jurisdictions

Useful resources:

- [Murad Code](#)

3.3 Trauma-Informed Approaches

"Counsel/support staff should receive training on the impact of trauma on the coherency of a victim's evidence and on how to conduct respectful cross-examination. It is no longer acceptable for a victim of SGBV to be painted as responsible for the violation and or unreliable."

ICC Defence Counsel

"Generally, I think courts should be more trauma-informed. ... Taking trauma seriously is not revolutionary, but to 'operationalise effectively' the scale and impact of trauma needs to be understood and support systems need to be in place. The research suggests that the quality of the process of fairness and the integrity of a court can only be enhanced by courts being trauma-informed and taking practical steps to improve infrastructure and make changes in practice and process with trauma in mind. The tools for a trauma-informed court may differ depending on the circumstances and the personnel. It might include the implementation of a feedback system, training in skills related to trauma-informed practice, witness preparation, reflective practice skills, and more generally seeing how a court centre can reduce stress, not create it, including reducing waiting times and having regard to the risks of secondary stress, particularly from adversarial approaches or toxic professional or judicial conduct."

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

Closely related to survivor-centred approaches, trauma-informed approaches are essential in CARSV/SV cases and the treatment of vulnerable witnesses. Counsel can be effective and reduce the possibility of harm and re-traumatisation by understanding the range of effects traumatic events have on individuals and avoiding misconceptions, triggering internalised stigma. The Synergy CARSV Stigma Toolkit for Justice: Part B Tools, The Myth Debunker provides in-depth information and studies on myths, misconceptions and misunderstandings related to trauma and sexual violence survivors.

What is a trauma-informed approach?

The 4 'R's' ²⁴	6 Principles of a Trauma-Informed Approach
<p>Realisation: Understand how trauma affects victims and survivors of atrocity crimes, including how they recall events and are affected by recalling events. Recognise how court processes can deepen the effects of trauma or re-traumatise people.</p> <p>Recognition: Be able to recognise signs and symptoms of trauma, and how they may differ across different groups or intersectional factors, such as age, gender, religion, nationality.</p> <p>Response: Adapt to and adopt a trauma-informed response, such as by changing words and language, behaviours, and policies to take into consideration the experiences of trauma.</p> <p>Resist Re-Traumatisation: Actively avoid or reduce triggers and stressors.</p>	<ol style="list-style-type: none"> 1. Safety 2. Trustworthiness and transparency 3. Peer support 4. Collaboration and mutuality 5. Empowerment, voice and choice 6. Cultural, historical and gender issues

Fundamentally, Defence Counsel should be able to realise the widespread impact of trauma, understand potential paths for recovery, recognise the signs and symptoms of trauma in survivors of sexual violence, and respond by fully integrating knowledge about trauma into interactions with them throughout the investigation and proceedings of a case, with the purpose of avoiding re-traumatisation.²⁵

Re-traumatisation. “[R]e-traumatisation refers to additional traumatization during a survivor’s interactions with professionals and processes in the justice system and other fields ... While individuals in these fields may be doing their best to help, they can unintentionally re-traumatize survivors through negative statements, behaviours, and attitudes.”²⁶

MURAD CODE REQUIREMENTS



Principle 10.

Ensure Respectful and Safe Interactions

10.2 Be trauma-sensitive: We will be able to recognise and monitor the signs of trauma and distress, and know when and how to minimise and respond to the potential traumatising effects of an interaction. We understand that trauma can impact the order and pace at which events are recalled and discussed.

24 Summarised from SAMHSA, [Concept of Trauma and Guidance for a Trauma-Informed Approach](#), 2014.

25 SAMHSA (2014) [Concept of Trauma and Guidance for a Trauma-Informed Approach](#).

26 Katirai (2020) [Retraumatized in Court](#), 88-89, partly quoting Campbell (2005) [What Really Happened? A Validation Study of Rape Survivors' Help-Seeking Experiences with the Legal and Medical Systems](#).

“Undoubtedly, the biggest challenge lies with the trauma that holds the victims, a trauma that is such a heavy burden on them that they cannot find it in themselves to speak up.”

ICC Defence Counsel and victims’ representative in national jurisdictions

Trauma is also often associated with internalised stigma. *“[Traumatic events] elicit a profound question of ‘Why me?’ The individual’s experience of these events or circumstances is shaped in the context of this powerlessness and questioning. Feelings of humiliation, guilt, shame, betrayal or silencing often shape the experience of the event. When a person experiences physical or sexual abuse, it is often accompanied by a sense of humiliation, which can lead the person to feel as though they are bad or dirty, leading to a sense of self blame, shame and guilt.”*²⁷ It is therefore important to recognise that the use of stigmatising language or questions based on sexual violence misconceptions which shame, blame or silence survivors will be re-traumatising. Equally, the manner and pace of questioning can also deepen feelings of powerlessness and loss of control.

“In general, a respectful approach, that demonstrates appreciation for the impact of trauma on coherency, that accepts the potential truth of a claim to be a victim of SGBV and which focuses on matters that do not target the veracity of the claim as such but for example, the identification of perpetrator, may generally be more effective. There are of course outlier cases where such an approach may not be appropriate.”

ICTY/ICTR/International Residual Mechanism for Criminal Tribunals adjudicator

A Survivor’s Experience

*“[T]hese lawyers don’t understand when they’re standing, badgering you, like how much they are going to affect the rest of your life, essentially. They don’t, that’s just their job. Their job is to ask questions, but it’s how they ask the questions, it’s quite demoralising and demeaning, so it is, the way they talk to you. [...] You’re made to feel as though you’re the one that has done this. And that is hard because you’ve already been through the whole guilt stage ... like this is all my fault, maybe I shouldn’t have said that, maybe I shouldn’t have done that. Should have, would I, could I? ... When I came out of court, I was, I was so like ... I was done, I couldn’t sort of function, as it were. I had to go to the doctor’s, and he put me on medication and stuff like that, and that’s the first time in the whole process where I had to be, and it was after court. It’s not as though I had to when it happened because I was, like, okay. It wasn’t until after court.”*²⁸

“Counsel should read the literature on the effects of trauma on victims.”

ICC and national judge

27 SAMHSA (2014) [Concept of Trauma and Guidance for a Trauma-Informed Approach](#).

28 Brooks-Hay *et al.* (2019) [Justice Journeys: Informing Policy and Practice through Lived Experience of Victim-Survivors of Rape and Serious Sexual Assault](#).

Useful resources:

- **Dr. Felicity Gerry QC** (2022) [Why being trauma informed is an issue for court integrity.](#)
- **An Michels** (2020) [The Psychologist-Client Relationship at the ICC: a Roadmap for Development of the Client-Victim Relationship](#), in Jasani & Townsend (2020) *The Impact of Victim Participation at the ICC: Bridging the Gap Between Research and Practice.*
- **Alison Smith** (2020) [Victim Testimony at the ICC: Trauma, Memory and Witness Credibility](#), also in Jasani & Townsend (2020).
- **Synergy for Justice** (2023) *CARSV Stigma Toolkit for Justice: Part B Tools, The Myth Debunker*, section V. What Trauma Looks Like.
- **Mind** (2010) [Achieving Justice for victims and witnesses with mental distress.](#)

3.4 ‘Cultural Competency’

“In order to practise law in a culturally competent manner, [...] we must (1) value an awareness of humans, and oneself, as cultural beings who are prone to stereotyping; (2) acknowledge the harmful effects of discriminatory thinking and behaviour upon human interaction; and (3) acquire and perform the skills necessary to lessen the effect of these influences in order to serve the pursuit of justice.”²⁹

“To better understand the context and the victim, I recommend specific knowledge of the culture related to the case dealt with.”

ICC Defence Counsel and victims’ representative in national jurisdictions

“[I]n order to prepare ... and know what will happen and what you are walking into, it is necessary to focus on what influenced the witness, her/his culture and context, the view of her community, etc. When you speak to women you also speak to all her social understanding. So you have to figure out who the victims are. ... You also might want to seek out (local) groups to get a sense of ... the community.”

ICTR and ICC Defence Counsel

“Counsel should also have a detailed familiarity with the previous jurisprudence of the Court on these crimes and the academic commentaries that have examined those judgements from a gender-sensitive perspective.”

ICC Defence Counsel

²⁹ Voyvodic (2005) [Lawyers Meet the Social Context: Understanding Cultural Competence](#), *Canadian Bar Review* 564, 571–572.

Recognising and reducing the influence of stigma in justice processes

“Stigma is inherently linked to and shaped by the power structures and dynamics, including gender narratives and expectations of the social and cultural context that it occurs in.”³⁰ Being culturally competent therefore includes understanding stigma and its manifestation in justice processes and in decision-making by justice actors.

“It is no longer acceptable for a victim of SGBV to be painted as responsible for the violation and/or unreliable.”

ICC Defence Counsel

Counsel should demonstrate understanding and sensitivity in recognising stigma, including prejudicial social misconceptions and attitudes and how they affect the justice process. With this awareness and understanding, Counsel should reflect on their own biases and on defence strategies being developed in cases to ensure that stigma is not inadvertently creeping into their practice. Defence Counsel should also be ready to counter the use or reliance on such stigmatised beliefs or misconceptions by others in court, such as the prosecution, judges or witnesses.

Another key component is language and communication. Counsel should educate themselves on non-stigmatising language, and guard against using language or communication which reflect or perpetuate stigmatised attitudes.

CARSV Stigma Toolkit for Justice Defence Indicators:

Competency Indicator D5: Defence Counsel use non-stigmatised and non-stigmatising language and terminology about CARSV, survivors and prosecutions of CARSV in all oral and written motions, applications or submissions to the court.

Competency Indicator D7: Defence Counsel restrict their conduct and defence in CARSV cases to supporting facts and to raising challenges which are legally relevant and permitted in law, and do not invoke or trigger stigma, social misconceptions or myths about CARSV, survivors or perpetrators.

Useful resources:

- [Introducing the national online cultural diversity training program \(nsw.gov.au\)](https://www.nsw.gov.au)
- CARSV Stigma Toolkit for Justice, Stigma in Justice in overview
- CARSV Stigma Toolkit for Justice, Part B Tools, The Myth Debunker
- CARSV Stigma Toolkit for Justice, Part B Tools, Guide to Non-Stigmatising Language.

³⁰ Synergy for Justice (2022) CARSV Stigma Toolkit for Justice, Stigma in Justice Chapter, p.15.

4 - PREPARATION

A successful case requires proper preparation.

Murad Code Requirements



Principle 5.

Preparation is the Foundation

5.1 Prepare first: We will undertake thorough planning and risk assessments, and ensure that the necessary knowledge, capacity, team, policies and procedures are in place before we start gathering information, especially before any engagement with survivors. This is a critical foundation for respecting survivors' rights, and for safe, accessible, ethical and effective outcomes.

*"The absolute cornerstone of handling vulnerable witnesses remains, as it always has been, preparation. ... Thorough and meticulous preparation at an early stage is essential."*³¹

Proper preparation for CARSV/SV cases includes: (1) team selection and team culture, (2) knowing and understanding the context, (3) support for 'vulnerable' witnesses and victims, and (4) measures to ensure the well-being of defence teams and others engaged in the justice process. All of these preparation steps require resources, and it is important to recognise and acknowledge the common issue of the resource inequality of Defence first.

4.1 Resources

*"As a constituent element of the right to a fair trial, equality of arms provides an essential lens through which procedural fairness in any criminal procedure can be ascertained."*³² *"The defence's dissatisfaction with the availability of resources and funding has been expressed by almost all the defence teams at one point or another. This is not surprising, given the fact that most accused before international criminal courts are indigent and, thus, have to operate within the confines of the legal aid system provided by these courts. Legal aid systems around the world have been and are continuously criticised for their inability to properly allocate the scarce resources for the support of indigent accused."*³³

"Everyone should have the same training, and the Defence should be treated as of equal importance in securing valuable answers on the issues."

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

³¹ [Preparation Podcast](#), HHJ Patricia Lynch QC. ICCA (2019) [Raising the Bar](#).

³² Fedorova (2017) [The Principle of Equality of Arms in International Criminal Proceedings](#), in Rohan & Zyberi (Eds) (2017) [Defence Perspectives on International Criminal Justice](#).

³³ Fedorova (2012) [The Principle of Equality of Arms in International Criminal Proceedings](#), Chapter 6 Institutional Support for Defence. Further reading: Jalloh & DiBella (2013) [Equality of Arms in International Criminal Law: Continuing Challenges](#).

“Defence teams are notoriously underfunded. ... If the ICL courts don’t have the money to properly pay defence teams, then they need to stop indicting people until they do. ... Defence teams should be provided with an office for the team either on the premises of the Court or elsewhere so that case materials can be maintained with security, team members have a reasonable place to work, computers will be secure and team business ... can be conducted in confidential circumstances.”

Long-serving Defence Counsel at multiple international courts

“Experts in dealing with trauma and gender experts, much the same set of resources that are provided to the Office of the Prosecutor and used by the Office ... should be available to the Defence. Without an understanding as equal to that of the Prosecutor, and without access to the same resources that facilitate the Prosecutor’s understanding, the Defence will not have the expertise needed to even begin to defend these crimes appropriately.”

ICTY/ICTR/IRMCT adjudication and Truth Commissioner

The recommendations in this guide turn on training and competence, and the importance of ensuring that all parties that interact with vulnerable witnesses and individuals have sufficient competence (through training, skills and experience) to apply a trauma-informed, survivor-centred approach. It is therefore essential that legal aid programmes recognise the importance of, first, appointing highly qualified and motivated lawyers, and, second, assigning sufficient funds to defence teams so that they can apply the same types of assistance and follow the same approaches followed by the prosecution.

Concretely, legal aid rates for the Defence should be pegged to those of their prosecution counterparts, to ensure that the defence profession attracts suitably qualified individuals, and defence teams must be provided with sufficient resources to appoint in-house psycho-social experts who can conduct pre-interview evaluations with potential witnesses to assist Counsel to identify vulnerabilities and recommend appropriate strategies for minimising trauma.

Resources should be made available, for example through an international court’s registry or through the legal aid budget, for training and support, (a) for all Counsel appearing before the court for training on vulnerable witness management, (b) mental health support for all witnesses, including defence witnesses, and (c) vicarious trauma and burnout training for all staff, including defence personnel and investigation teams. Defence teams need adequate resources to protect vulnerable witnesses and ensure safe conditions of work for their staff. The Murad Code is a global set of minimum standards which requires these basic provisions. Courts should ensure the Code can be applied by all court users and Counsel equally.

Proper interviews require sufficient preparation and time. When making case management decisions concerning the length of proceedings, judges must ensure that their estimates take into consideration the time required by the Defence to conduct investigations that comply fully with best practices.

4.2 Team Selection and Team Culture

Team selection

Ensuring diversity on your team is important. It brings different perspectives and understandings and allows flexibility to ensure interactions with witnesses outside and inside court can be gender-informed and culturally informed. This is as important for your investigative team members as it is for your courtroom team members. Survivors of diverse backgrounds might feel uncomfortable disclosing information to someone who does not look like them, does not share the same culture and has not had the same life experiences. The opposite may also be true – some people may not feel comfortable with people from the same place or background. It is therefore important to have the flexibility of a diverse team to meet the needs of individual witnesses, and to use pre-interview assessments to understand those needs. Resources are necessary to support that diversity.

Murad Code Requirements



Principle 7.

Build Systems, Competency and Support

7.3 Select the right team and partners: We will build a team (including interpreters, intermediaries, guides, fixers) and select partners and others acting on our behalf who share our commitment to this Code. We will also consider the diversity, representation, confidentiality, safety and flexibility implications of these selections.

Gender

While competency, cultural sensitivity and experience are essential, often there is also a gender component. During interactions with CRSV survivors, they may have a preference in terms of who they interact with. This may be due to the harm and trauma of CRSV or for other reasons. Having a diverse team allows a flexible and adaptive response which can reduce harm and increase comfort levels. It then allows you to ask about and honour a survivor's wishes about who they speak to.

A Survivor's Experience

"[The police officer] was a male. He did mention that to me at the very beginning, if I was comfortable with him being a male. And I was [...] at that point as well, I wasn't sensitive about it, I guess. I could imagine, if it was a very recent event or anything, or even if he somehow resembled this person, I would be uncomfortable with it. But I was really happy with them even saying that to me. And it, again it felt like that was a choice, I had a lot of choices."³⁴

34 Gravitas (2018) [Improving Justice Responses to Victims of Sexual Violence: Victims' Experiences](#) (New Zealand).

“Depending on culture norms and other factors, it may be re-traumatizing for female victims of SGBVs to engage with male investigators or male Defence Counsel. Male victims may also have a preference, depending upon the norms of their cultural backgrounds.”

ICC Defence Counsel

“Judge Fremr had also underlined this aspect, that is to say the fact that the victims of sexual violence had been cross-examined by women from the defence team. He appreciated that SGBV witnesses were cross-examined mostly by women lawyers. And I think this is all the more true when the interviewee comes from a culture where sexuality is taboo.”

ICC Defence Counsel and examining magistrate in national jurisdictions

“In addition, [in the past] the victims were always and systematically cross-examined by the senior lawyers, almost always men, no adaptation was made to consider the harm and trauma they had experienced.”

ICC Defence Counsel

“As regards gender, there may be situations in which victims/witnesses may prefer to speak to or be examined by a person of a particular gender, in which case this becomes relevant.”

ICC Defence Counsel

Cultural and linguistic representation

Some survivors may prefer to speak to someone who understands their language, culture and the events which took place where they lived. Others may not wish to disclose or discuss sexual violence with persons from their community, as it may represent a violation of privacy or raise concerns in terms of confidentiality or social stigma. Again, having options on your team can allow the Defence to contribute to a safer, more comfortable environment for witnesses. The same cultural and linguistic understanding can also help with clients. Counsel who are not from the same cultural background should make efforts to better understand cultural differences. Empathy is a core quality which ensures adaptation to the particularities of the individual in question.

“One of the most significant disadvantages of remote international justice is that [the] accused are defended by teams without a cultural or linguistic link to the subject matter of the charges. As such, incorporating defence team members who share a language with the accused and the bulk of the witnesses is important. Rather than speaking in terms of “ethnicity”, a cultural link to the location of the charges, whether regionally or more locally, is also a relevant consideration in defence team composition.”

ICC Defence Counsel

"In terms of language, speaking the language of the person you are defending or the witnesses interviewed can only be advantageous. While most languages are translated in English and French, nuances are often lost, and many words do not have English and French equivalents."

ICC Defence Counsel

"[Speaking the same language as the victim] will not only help the witness to feel more confident, but also to understand the nuances of language and meaning that may be present in his or her responses. If you do not speak the same language as the victim, then it is important to learn the basic introductory words in the victim's language. This will open the interview or interrogation by showing that you have paid attention to the victim and again make the victim feel comfortable. It is also important to learn words that refer to concepts, traditions or ways of life surrounding the victim's story that the victim will likely bring up in the interview, such as names of special rituals in her culture or otherwise."

ICC Defence Counsel

"Language is critical, however. If Counsel does not speak the accused's language, Counsel should employ someone who does, preferably someone from the same region as the accused and/or victim(s). The better and smoother the communication, the better is Counsel's ability to effectively represent the accused. When Counsel is interviewing witnesses or, in some cases, the victim(s), it is of major importance those individuals are as comfortable as possible and free to express themselves as easily as possible, including in local dialects or using local slang. Someone on the defence team should be fluent in the relevant language if at all possible."

Defence Counsel at numerous international courts

Team culture

"Studies have also found a correlation between acceptance of male rape myths and sexism, adherence to traditional gender roles (particularly traditional male roles), and acceptance of rigid gender binary roles (which also correlates strongly for female rape myths). Male rape myths also correlate with homophobia and, like female rape myths, are associated with increasing age and decreased levels of education. Given these correlations between harmful gender norms and beliefs and the findings that men hold such beliefs and accept rape myths more often than women, ensuring a diverse workplace and an inclusive workplace culture where such beliefs are challenged and not accepted is central. Workplace culture becomes a critical element to reducing stigma, stigmatised attitudes and stigmatising behaviours among justice actors."³⁵

Consider, for example, the recent reports on organisational culture with the Metropolitan Police force in London, and how racism, homophobia and sexism have been institutionalised and affect their interaction with people in the justice systems and how they do their job.³⁶

³⁵ Synergy for Justice CARSV Stigma Toolkit for Justice, Defence Indicator 2.

³⁶ See e.g., [The Casey Report](#) (2023), the IOPC [Report on Operation Hotton](#) (2022).

“You have to pay attention to the attitude of the team, but if a member of this team is not respectful, it will go downhill. You have to pay attention and be critical of your team, especially when it comes to harassment and sexism, also regarding internal memoranda, etc. We have to set a high standard and be vigilant about it. The conduct has to be monitored, and a standard has to be set in the team. It has also an impact on how do you treat rape victims in the cross-examination afterwards.”

Defence Counsel ICTR and ICC

CARSV Stigma Toolkit for Justice Defence Indicator:

Competency Indicator D2 of the Stigma Toolkit highlights elements of good practice surrounding appropriate defence bar culture, but this applies equally at the defence team level, too:

Competency Indicator D2: The defence bar has a healthy, safe, respectful workplace culture, including specifically on gender equality, inclusivity and non-discrimination.

Elements of good practice on this indicator include:

1. Defence bar is diverse, inclusive and representative in terms of gender, sexual orientation, race, ethnicity, religion, ability and other characteristics. Full diversity of thoughts and perspectives is welcomed as a positive contribution.
2. Defence Counsel demonstrate respect for all persons whatever their gender, sexual orientation, race, ethnicity, age, socio-economic status, culture, faith and abilities.
3. [Codes of Conduct for lawyers and investigators have clear and accessible provisions setting out standards for ethics, integrity, gender equality and sexual harassment, and training is given to ensure that these standards are understood fully.]
4. People of all SOGIESC, race, ethnicity, age, socioeconomic status, culture, faith and abilities have equal opportunities and feel valued, and feel respected, included and comfortable in work and social interactions with colleagues.
5. There is zero tolerance in policies and practice for language, behaviours and actions that discriminate against individuals, including any form of harassment, including any form of sexual harassment or abuse. Reporting procedures are in place and accessible to any person experiencing discrimination or harassment.

4.3 Know Your Context

“Contextualize [the] interrogation, ask general questions, try to understand the context in which the violence was committed.”

ICC Defence Counsel and examining magistrate in national jurisdictions

Murad Code Requirements



Principle 6.

Know and Understand the Contexts

- 6.1 Know the context:** We will ensure that our team and those acting on our behalf base their work on a good understanding of the context in which the SCRSV took place and of the immediate environment around the survivor. We will identify positive and negative, direct and indirect impacts of the elements in this Principle on survivors, their families and communities, and our work, and will ensure this understanding informs our preparation and work.
- 6.2 Understand culture:** We will identify relevant cultural and social norms, attitudes, traditions, rites and customs, as well attitudes about children, their decision-making and the age of adulthood.
- 6.3 Understand gender:** We will assess gender dynamics, norms, violence and inequalities, and understand how they create risks of revictimisation and barriers to survivor support and other rights.
- 6.7 Be familiar with laws and practices:** We will familiarise ourselves with relevant formal and informal laws and practices (including ancestral systems). Such laws and practices may, for example, provide avenues to legal recourse for survivors, discriminate or perpetuate discrimination, criminalise a survivor for what has happened, fail to recognise a survivor as a victim of a crime, or legally require that we report information about crimes to authorities. We will discuss these with a survivor before they share their experience, so they can consider whether or not, and how, to proceed.
- 6.8 Understand appropriate communications and interactions:** We will work to understand the significance and impact of all forms of our communication and interactions in the context, ensuring gender, age, disability, social, cultural and context sensitivity and respect. We will identify and use inclusive and non-harmful forms of communication which reflect survivors' identities, and respect non-harmful social norms and practices. We will also seek to understand cultural and other aspects of communication, including mannerisms, derogatory terms, common expressions and euphemisms, and gaps in language relating to SCRSV or the survivor.

"Understanding the witness culture in rape cases is critical to understanding the context and strategy ... We need to understand how rape is impacted in witness culture, and that also comes through language. Gender is also important. It is often easier for a rape survivor to feel free to express herself when questioned by a woman, especially in some societies."

ICTR and ICC Defence Counsel

“It is important to ask the interpreter what words you can use to ask the victim about her experience. For example, some words to describe female organs are sometimes taboo in some cultures and may make the victim uncomfortable, and therefore unwilling to answer questions about the rape for the rest of the interview.”

ICC Defence Counsel

4.4 Supporting Survivors and Vulnerable Witnesses

“It can be important and useful to have a psychologist (the best thing is that he or she speaks the victim’s language) as a back-up if the victim’s trauma is too big and prevents him or her from being able to answer the slightest question from the investigators or members of the team correctly (for example, if he or she cries at every question). This will help the victim on the one hand, and on the other hand, help to clarify the circumstances and the facts. In addition, if the psychologist does not speak the same language, then each member of the team must be able to deal with the reactions of a traumatized victim in order to make him or her more comfortable during the questioning.”

Defence Counsel with experience in prosecution, adjudication and victim representation

“Many victims find themselves too traumatized to even say a word, as is the case with rape victims or people mistreated based on gender. Their ordeal and the trauma that goes with it compel them to silence. Therefore, victims have to be supported legally, psychologically and culturally speaking. [...] Proper accompaniment of victims, including by specialists and psychologists, is crucial to the success of the interview.”

ICC Defence Counsel and victims’ representative in national jurisdictions

Murad Code Requirements



Principle 5.

Preparation is the Foundation

5.6 Know about available support: We will identify services, access points and survivor groups and actors (formal and informal) for survivor support, including, at a minimum, medical, psycho-social, protection, survivor advocates and other legal services. If available, we will consider existing lists of such actors and access points (‘mappings’). We will assess whether these are accessible, safe, confidential, effective, and suitable for survivors of different ages, disabilities, genders, etc. We will identify and reduce barriers to accessing support for survivors whenever possible.

Murad Code Requirements



Principle 7.

Build Systems, Competency and Support

7.7 Ensure appropriate support: We will only proceed when there is appropriate, accessible support in place which can respond to a survivor's needs. This includes medical, psycho-social, protection and legal support. We will discuss these options with the survivor and help refer them safely if they choose. If these needs are acute, we will prioritise access and referrals ahead of our work. We will put in place a clear plan for emergency access to support so it can be available before, during or after our interaction with the survivor.

Murad Code Requirements



Principle 10.

Ensure Respectful and Safe Interactions

10.2 Be trauma-sensitive: We will be able to recognise and monitor the signs of trauma and distress, and know when and how to minimise and respond to the potential traumatising effects of an interaction. We understand that trauma can impact the order and pace at which events are recalled and discussed.

The Murad Code sets out some fundamental requirements for those seeking information or asking questions about conflict-related sexual violence. It requires you to know about available support for survivors in their locale (often using support service mapping by the humanitarian sector – GBV sub-clusters – or the government) and to provide survivors with the information and opportunity to access that support should they choose, before proceeding with your work with them. Informed consent processes that prioritise this aspect are crucially important.

Presence or assistance of a psychologist

“Also, before the interview, it is advisable to conduct another preliminary interview which will not deal with the facts, but which will have more of an aim to get to know the victim and her environment and to make her feel more comfortable so that she can participate in the second interview which will deal with the facts.”

ICC Defence Counsel

“The presence of a psychologist during the interviews of our witnesses, or to be able to offer the services of a psychologist for the victims after an interrogation, this could be beneficial to effectively and appropriately defend SGBV crimes.”

Investigating magistrate in national jurisdictions

Best practice (and best outcomes) proposes the presence of a psychologist during an interview or conducting a pre-interview with a psychologist to assess risks and ensure the right support and environment. This is the approach taken by the Office of the Prosecutor at the ICC. However, the resources of the defence team or the context in which the interview is taking place may make this a very difficult standard to meet in practice.

In some settings, where there is an active humanitarian response, psycho-social support, counselling and survivor networks, or supporting organisations may be able to assist pro bono and accompany survivors as support persons, based on remuneration of expenses only. If a psychologist is not present or on stand-by, team members should have and know escalation protocols, as well as basic psychological first aid steps which can be taken in the event of distress, re-stimulation or re-traumatisation. It is also important to understand and have prior contact with emergency services in case of acute health or well-being issues arising which need immediate intervention. It must be recognised that there is often a reluctance for NGOs to support defence investigations or for a witness to be known as a witness for the defence. It is therefore important that there are court/legal aid resources to provide psychological support to all witnesses, regardless of whether they are prosecution, victim or defence witnesses.

“[U]nacknowledged or untreated trauma and related symptoms will interfere with the ability of a complainant to fully engage with the requirements of the legal process.”³⁷

Useful resources:

- Michels (2020) [The Psychologist-Client Relationship at the ICC: A Roadmap for Development of the Client-Victim Relationship](#), in Jasani & Townsend (2020) *Advancing the Impact of Victim Participation at the ICC: Bridging the Gap Between Research and Practice*.
- Smith (2020) [Victim Testimony at the ICC: Trauma, Memory and Witness Credibility](#), also in Jasani & Townsend (2020).
- Wolf & Werner (2021) [Victims' Rights Looking Good on Paper — How Criminal Prosecution in Germany Fails Victims of Sexual Violence](#).

If the survivor is a participating victim or prosecution witness in your case, it is likely that other actors such as investigators, prosecutors or the court's Victims and Witnesses Unit have already discussed support needs with survivors. Support measures put in place for these witnesses should be respected by Defence Counsel. The court must ensure that survivors who testify for the Defence can avail themselves of an equivalent degree of support and assistance as those who testify for the prosecution. Other parties and participants must respect such support mechanisms. Defence funding is typically tied to the length of a case, whereas support and protection needs may continue beyond that. Consideration should be given to ensuring that there is a mechanism available to provide ongoing support and assistance to survivors, as required, after the conclusion of the case.

³⁷ Cossins (2020) [Closing the Justice Gap for Adult and Child Sexual Assault](#) (Palgrave MacMillan), 558-559.

4.5 Well-Being and Support for the Defence Team

"The Court should offer psychological services to support defence staff, as for all people working at the court; especially at the ICC, we have to work on subjects of extreme violence."

ICC Defence Counsel and investigating magistrate in national jurisdictions

"Defence team members should not be left to their own devices to figure out coping strategies after traumatic situations have arisen, or the implications of interacting with this type of evidence becomes clear. They should be offered appropriate and professional counselling and support in advance of starting this work, in order to be able to better cope with the reaction that will inevitably arise."

Defence Counsel in national jurisdictions

"A recommendation could be to match a junior staff when it's the people that are dealing for the first time with this type of evidence with a more experienced staff."

ICC prosecutor

Vicarious trauma and burnout

Murad Code Requirements



Principle 7.

Build Systems, Competency and Support

7.10 Manage risks of vicarious trauma: We will ensure measures are in place to minimise the harmful effects of the work on ourselves, our team and others impacted. We will ensure basic training on signs and symptoms of trauma, vicarious trauma, compassion fatigue and burnout, and ensure institutional and team support protocols and safe working methods. We will include measures to manage these risks when people are working outside a team or office environment, including working remotely.

Vicarious Trauma	Burnout
<p><i>"We have not been directly exposed to the trauma scene, but we hear the story told with such intensity, or we hear similar stories so often, or we have the gift and curse of extreme empathy and we suffer. We feel the feelings of our clients. We experience their fears. We dream their dreams. Eventually we lose a certain spark of optimism, humour and hope. We tire. We aren't sick, but we aren't ourselves."</i></p> <p>Charles Figley, Traumatologist, 1995</p> <p>Signs of vicarious trauma – the same as post-traumatic stress disorder</p> <ol style="list-style-type: none"> 1. Re-experiencing trauma – intrusive thoughts, nightmares 2. Difficulty sleeping 3. Irritability 4. Avoidance behaviours 5. Denial of survivor’s trauma 6. No time or energy for oneself 7. Feelings of alienation 8. Feeling depersonalized, dissociated 9. Social withdrawal 10. Feeling disconnected from family, friends 11. Increased emotional reactivity 12. Changes in world view: loss of hope, meaning, belief in humanity. Can include changes in beliefs, e.g., regarding safety, control, trust, esteem and intimacy, that may influence thoughts of vulnerability and mistrust; changes in identity as a professional, friend or family member; and changes in spirituality: meaning, purpose, causality, connection, hope and faith -- often in the form of questioning prior beliefs and the meaning and purpose in life, and can result in hopelessness and cynicism. 13. Loss of confidence or belief in one's ability to make a difference 14. Increased anger and cynicism 	<p>Burnout is similar to vicarious trauma but not related to exposure to trauma. It tends to develop over time, whereas vicarious trauma can occur with one exposure. It also tends to be related to increased workload, institutional stress and lack of control.</p> <p>Signs of burnout</p> <ol style="list-style-type: none"> 1. Apathy 2. Hopelessness 3. Exhaustion 4. Disillusionment 5. Sadness 6. Forgetfulness 7. Irritability 8. Alienated, impersonal, uncaring and cynical attitude towards clients 9. Tendency to blame oneself 10. Feeling of failure 11. Experiencing work as a heavy burden

Appropriate support and tools will allow for Counsel to tackle the effects of working these cases, including vicarious trauma. Such measures include:

- Training in the recognition of the symptoms of vicarious trauma and burnout;
- Team culture which encourages self-care and reduction of workload as a sign of professionalism;
- ‘Dosage’ control – ensuring no team member focuses their work on traumatic issues too long without breaks and switching to other types of work;
- Buddy systems within the team for peer-to-peer support and monitoring for signs of distress and issues;

- Encouraging team and individual time for exercise, socialising, family time and other activities which team members find are useful destressors and decompressors and that help build resilience;
- Basic psychological first aid skills, including grounding exercises which can be self-administered; and
- Access to counselling, support and assistance.³⁸

The significance of this for Defence Counsel extends beyond personal well-being, as it plays a crucial role in developing and executing an effective legal strategy. By protecting and prioritising their well-being, Defence Counsel can optimise their professional performance and ensure that their client's interests are best served throughout the legal process. Defence teams should be extremely mindful of the signs and symptoms of vicarious trauma and burnout mentioned on the previous pages, and if signs are noticed in yourself or team members, action should be taken to address the situation.

³⁸ [Psychological First Aid | Coursera](#); [Every Mind Matters - NHS \(www.nhs.uk\)](#); [GBV - Grounding exercises \(hhri-gbv-manual.org\)](#); [Grounding Techniques - Trauma Research UK](#). Further reading: SVRI (2015) [Guidelines for the Prevention and Management of Vicarious Trauma Among Researchers of Sexual and Intimate Partner Violence](#); [The Vicarious Trauma Toolkit](#).

5 - CRIMINAL PROCEEDINGS

5.1 Investigation



Remember Your Training and Preparation

- ★ *Be clear about your duties and obligations with the client – set **boundaries** if necessary.*
- ★ *Know your **context**: context on where the crimes are reported to have taken place, as well as the context about where survivors/witnesses are located now.*
- ★ *Do **no harm**: risk-assess, mitigate and apply trauma-informed and survivor-centred approaches. Be very clear about protective measures that are in place.*
- ★ *Remember that every witness is a person, and not just a source of evidence.*
- ★ *Know what **support services** are available, including emergency responses. Consider whether you can get the assistance of a psychologist.*
- ★ *Recognise **myths and misconceptions**: do not make use of stigmatised beliefs on sexual violence.*

During the investigation stage, Defence Counsel will take their first steps to understand the facts and circumstances of a case. It will allow them to gather evidence and begin shaping their lines of argument. All members of defence teams should bear in mind the recommendations of experts and, most importantly, know and follow the principles of the Murad Code.

A. METHODOLOGY AND APPROACH

“The methodology is always the same: Conduct as thorough and as independent an investigation as you can.”

Long-serving Defence Counsel at multiple international courts

“The investigation must be extensive and thorough.”

ICC Defence Counsel and victims’ representative in national jurisdictions

“The preliminary investigation before cross-examination is essential to establish the complete picture of the victim and to understand the context. A well-done investigation can lead to the charge being dropped before the trial and cross-examination phase if the suspicion of fabricated evidence is founded.”

Defence Counsel at the ICC, ICTR and ICTY

Murad Code Requirements



Principle 6.

Know and Understand the Contexts

6.9 Minimising negative repercussions: We will identify the risks of and minimise any negative repercussions from our work within a community.

B. LOCATING AND INTERVIEWING WITNESSES

"Limit the interaction with survivors/witnesses to SGBV crimes to those strictly necessary."

ICC Defence Counsel

Consider whether it is necessary to approach and interact with survivors. There may be alternative sources, other witnesses, documents or prior testimony which can give you the information you need. Alternative sources may also help you risk-assess whether your approach might do harm. As discussed in the preparation section, knowing the context, customs and etiquette is important to avoid causing offence or triggering repercussions for a survivor, or in their community. Stigma and other potentially life-threatening harms also require extreme caution, with utmost care around privacy and confidentiality, when approaching a survivor or their relatives. Often, survivors do not even disclose to family members, so any approach to a family member may breach privacy and have serious repercussions for survivors.

Murad Code Requirements



Principle 2.

Respect Survivor Control and Autonomy

2.1 Avoid approaching survivors unexpectedly: Whenever possible, we will work through existing and vetted access or referral points or we will create safe pathways so that a survivor can decide to approach us or be placed in contact with us. We recognise that approaching survivors ourselves or through someone else (rather than creating safe ways for a survivor to choose to come to us) can heighten risks of harm and pressure survivors to cooperate, reducing genuine free choice.

Murad Code Requirements



Principle 4.

Add Value or Don't Do It

4.3 Are there alternative sources?: We will look for alternative sources of SCRSV information and will ask ourselves whether our mandate or objective really requires us to interview survivors or use information sourced from them. We recognise that finding alternative sources removes the potential risks to survivors, those around them and to ourselves, of gathering such information directly from survivors, takes the pressure off survivors and provides more space for them to choose to participate or not.

"[We reviewed] Gacaca and other court documents for inconsistencies in prior statements about the same alleged assault and investigated [through other sources] whether the witness was at the location on the dates of the alleged assault."

ICC Defence Counsel

Informed consent and building trust

"Ensure informed consent!"

ICC Defence Counsel

Fully informed, voluntary consent is the fundamental basis for any interaction with a survivor, including asking them questions or to share information. An informed consent process should be a two-way discussion, with open questions and the provision of responsive information to ensure that a survivor's decision to work with us is based on an accurate understanding and appreciation of our affiliation, purpose, their rights and the risks involved. The initial informed consent discussion can be an important way to build rapport and trust, and to ensure the survivor can make decisions about where a private meeting can take place where it feels safe for them. If in doubt, ask the survivor what they need or would prefer.

Murad Code Requirements



Principle 2.

Respect Survivor Control and Autonomy

2.2 Respect a survivor's choices: We respect an individual survivor's choices as the fundamental basis for all aspects and stages of our interaction. We will ensure that a survivor has full, clear and honest information about our affiliation and purpose, our methodology, and their options, rights and risks, including the confidentiality and deidentification, use, sharing or publication of their information. We will provide this information in an understandable and accessible format for the survivor to inform their decisions whether to engage with us or not, and on what terms. We will be clear with survivors that they can pause or terminate any interaction with us, and decide not to answer any particular question. We will respect a survivor's decision not to participate or continue.

2.6 Reduce pressures: We will proactively mitigate factors that can pressure survivors to share information. Such factors include real or perceived imbalances in power, status, gender or age, and social etiquette, politicisation, or family and community influences (also recognising that concerns for their community can be positive motivators for survivors). We will not use any legal power we may have to compel survivors, as doing this can harm them and any justice processes and outcomes.

2.7 Do not offer benefits in exchange for information: We will not (directly or implicitly) condition or promise access to any aid, assistance, protection or other benefit in exchange for a survivor's agreement to provide information to us. However, we will seek to remove any financial or other cost to a survivor of assisting us. We will not incentivise or commercialise the assistance of those around a survivor, to pressure or require a survivor to speak with us.

2.8 Ensure realistic expectations: We will provide honest and realistic information to survivors about the ways in which their information will be used and the intended outcomes (including any external factors which can influence those outcomes). We will discuss with the survivors what their expectations are and support them to make decisions based on realistic expectations.

2.9 Be clear on limitations: We will be clear and honest with survivors on what we can and cannot do, what we can protect and what we cannot, and where our own limitations and professional boundaries are. If we are unable to adapt our approach to meet a survivor's wishes, we will explain why. Where we are obliged to report or share their information (such as a duty to report crimes to authorities, make disclosures to defence or respond to life-threatening situations), we will discuss these upfront with a survivor and give them time and space to decide whether they wish to proceed to provide information to us.

2.10 Honour withdrawal of consent: We will make survivors aware of their right to withdraw consent at any time during or after the process (including during any interview), and of how they can notify us of that withdrawal. We will be clear about what we are able to do upon withdrawal of consent and what we have limited control over. If consent is withdrawn, we will take the steps we said we would.

“Make time for rapport building, including multiple meetings. Try to give the victim/witness as many options as possible for how to conduct the interview in a way that makes him/her comfortable, even if they aren’t in a position to accept them. ... The most successful interviews have followed the establishment of a connection with a victim/witness through extensive rapport building, which is possible when investigations are well resourced and timely, as opposed to rushed.”

ICC Defence Counsel

“Taking the time to reassure the victim, to tell her that you know it is not easy to talk, that she can ask for breaks whenever she wants, is essential for the interview to take place in the best conditions for the victim and that she feels free to express herself.”

ICC and national judge

Safe spaces

“Overcoming social/religious reluctance to [allow access for] victim of crime may be extremely difficult. Do not interview alleged victims in their own home.”

ICC and national judge

Murad Code Requirements



Principle 9.

Take the Time, Create the Space

9.3 Create a supportive environment: We will create a supportive, physically and psychologically safe environment for in-person and any remote interactions, which is accessible and gender-, age-, disability-, social-, cultural- and context-sensitive. This is a fundamental foundation for trust-building, recounting experiences and decision-making by survivors.

9.4 Ensure privacy: In consultation with the survivor, we will arrange a private, discreet, accessible and safe space to meet in person or remotely and minimise the risk of being observed (including when accessing or leaving the location), overheard or interrupted. We respect that a survivor's right to privacy extends to all communications and contact with them, including before and after any meeting.

Who is present

"Be mindful of other participants to the interview (including interpreters and family members of the alleged victim). Victims/witnesses who attend interviews with their partners/spouses may feel uncomfortable speaking in their presence, or may feel uncomfortable speaking in front of interpreters/investigators."

ICC Defence Counsel

"In addition to the above I think it is extremely important, particularly in ICL cases, for Counsel to never interview a witness alone. Always have someone with you (usually your investigator or a team member). This would be of major importance if you are actually able to interview the victim(s) prior to trial (a very rare occurrence in the ICL courts). Having an investigator from the region, who speaks the language and knows the culture, is a major asset not only in locating witnesses but in obtaining their agreement to speak to Counsel and in facilitating arranging such interviews."

Long-serving Defence Counsel at multiple international courts

Murad Code Requirements



Principle 9.

Take the Time, Create the Space

9.5 Who attends the interview: We will seek to minimise the number of people present during an interview. We will discuss in advance with a survivor who they would like to be present and who may be taking part from our team (providing information such as their roles, gender, age and affiliation). If we cannot honour the survivor's choices, including for a support person, guardian or legal representative to be present, we will discuss the reasons for this with them and will respect their choice if they decide not to proceed.

Note: For defence teams, while the recommendation is that two team members are present during an interview, the Murad Code minimisation rule still applies. There are often good reasons to have certain people support the interview, such as a second team member, an interpreter, a support person, etc. It is important to explain to the witness why such persons are necessary so they can make an informed decision whether to proceed. It is also important to carefully think through how to keep the numbers of people in the room to a minimum while still meeting everyone's needs.

During the interview

An interview is a two-way conversation with a person. If you are worried at any stage about the witness, ask them what they would prefer to do. For example, if the witness gets upset, you can present them with options, but ultimately the witness should decide how they feel, what they need and whether they are ready to continue.

"Before questioning for purposes of statement, have a general chat and then lead gradually into the account of the crime."

ICC and national judge

"If a witness is visibly upset in recounting attacks against them, stop when a victim becomes upset, either for a period or suggest a rescheduling. If the victim is clearly distressed in recounting their experiences, do not continue with their interview."

ICC Defence Counsel

"Decline offers to show physical scars/trauma of sexual attacks and giving reasoned justification for doing so."

ICC Defence Counsel³⁹

³⁹ If medical evidence is available, the witness could be given the option of a medical evaluation or examination by a professional doctor who can document injuries or impacts in a safe and effective way, in compliance with international standards such as the [Istanbul Protocol](#).

Murad Code Requirements



Principle 10.

Ensure Respectful and Safe Interactions

10.4 Create a safe interview process: We will ensure that our interview has a safe, sensitive process and structure. We will ensure any SCRSV questions are asked safely within a broader interview process. We will take the time to close an interview in a safe and careful way, and express gratitude for the survivor's time and courage in recounting their experience. We will discuss with the survivor what to expect after the interview, available support and follow-up information.

10.5 Give survivors control over how they tell their story: We respect the importance of a survivor's control over how they share their experience. We will make the space for a survivor to explain what happened in their own way, at their own pace, and listen actively. We will moderate the pace and tone of our questions. We will not rush survivors, as this creates greater risks of harm and retraumatisation and of the collected information being unreliable or inaccurate.

10.6 Ask open questions: We (as interviewers and interpreters) will use open questions. We acknowledge the potential harmful impact of closed questions on the survivor and on the accuracy and detail of information collected that way. We will use such questions only in exceptional circumstances.

10.7 Contextualise SCRSV: We recognise that SCRSV does not happen in isolation from other violations and harms. We will also be attentive and respectful if a survivor chooses to communicate about other violations or harms that they may have experienced or witnessed.

10.8 Do not ask if you do not need to: We will not ask questions or probe for explicit, sensitive or graphic details of sexual violence where we do not specifically need this for our purpose. If we need this type of information, we will explain why to the survivor and will respect their decision whether to answer or not. We will also not fixate on or sensationalise such details when representing or reporting a survivor's experience.

Note: If it is necessary to collect information on sensitive issues, investigations and trial preparation should be managed in such a way as to avoid repeat questioning on such topics or by different people, and which will facilitate the potential introduction of evidence in court in a manner which is likely to reduce the pressure and need to testify in-person on such matters. In other words, do it once properly, and make the necessary arrangements to ensure the evidence complies with procedural requirements to allow written statements in lieu of oral testimony.

5.2 Pre-Trial Proceedings and Management

“Raise evidential issues with the prosecution – as it is better to challenge evidence in advance than to bring a witness to court and attack them directly.”

Defence Counsel before the ICTY, ICTR and ICC

During pre-trial proceedings, Counsel should maintain a line of communication with the prosecution. Open, constructive and professional communications between parties can lead to fuller disclosure, discussions on appropriate terminology, public v. confidential sessions and the use of pseudonyms, resolution of potential objections in advance, and stipulated or agreed facts which then do not require or may limit testimony in court, or may even result in charges being dropped.

A. DISCOVERY/DISCLOSURE

Full disclosure and review of disclosure material is extremely important to the defence case. Late disclosure impacts negatively on the ability of the Defence to conduct carefully planned investigations. Expecting Defence to conduct spontaneous investigations in response to late disclosure generates risks for potential witnesses. This is a joint responsibility of all justice actors. Counsel should be active in ensuring that timely disclosure has taken place. Particularly in relation to potential ‘vulnerable’ witnesses such as survivors, it is critical that none of the justice actors spring any last-minute surprises. The court and all the parties should be fully prepared and informed of full potential of discussion, with agreement and adaptation to ensure a safe environment for testifying and the risks of harm to the survivor/victim are reduced. Judges should ensure that the proceedings are managed so that late disclosure does not prejudice the ability of the Defence to investigate in a manner that complies with the best practices in this guide.

“There needs to be full disclosure, with no surprise statements revealed five minutes before walking into court, etc.”

Defence Counsel at ICTY and in national jurisdictions

B. GROUND RULES HEARINGS

“Put in place arrangements if necessary, such as a curtain that allows the victim to not see the accused and therefore not relive the trauma. Make sure that the victim goes in first so that she cannot see the accused. There is no point, as the Defence or prosecutor, in opposing this type of arrangement because it allows the victim to feel more at ease and therefore to favour the conditions for his or her interrogation.”

Defence Counsel with experience in prosecution, adjudication and victim representation

Judicial case management has increased in many jurisdictions over recent years, particularly in relation to potentially vulnerable witnesses. ‘Ground Rules Hearings’ have become more commonplace. As the name suggests, these hearings, which take place in advance of any testimony, set the rules for how the testimony will proceed. Whether it is for a prosecution or a defence witness, there should be a review of:

- special or protective measures needed for that particular witness;
- the atmosphere and formality of the courtroom (to reduce stress and intimidation);
- who will ask the questions (e.g., when intermediaries are used for communication);
- the style, pace and estimated duration of questioning;
- what questions and topics are appropriate for this particular witness;
- any agreed upon or stipulated facts which may allow reduction of testimony or cross-examination;
- a reminder as to the rules of irrelevant or misleading questions/information (including any preliminary matters on specific topics such as ‘consent’⁴⁰); and
- a reminder not to use any stigmatising or inaccurate misconceptions about sexual violence or its survivors.

It should be the same counsel who attends the Ground Rules Hearing as will conduct the examination-in-chief and the cross-examination. Defence Counsel should have completed their analysis of their defence case in relation to that particular witness and have prepared cross-examination – see below. Critically, Counsel should have consulted in advance with the witness so that they can make choices on how they wish to proceed. Counsel should take the time with the witness to explain:

- available protective measures and identify pseudonyms that are easy for the witness to remember and understand (e.g., it works well if the witnesses themselves propose the ‘code’ that will be used for them or their village);
- use of interpreters;
- the need to take pauses (e.g., raising our hand is not because a witness has done something wrong but is a visual sign that the witness needs to pause);
- the terminology used by the witness to describe matters that are relevant to their testimony (passing of time, seasons, physical space, body parts); and
- any personal needs (e.g., prayer times) that need to be communicated to the court in advance, etc.

Some of the aspects that could be considered or raised in the Ground Rules Hearing include:

“A serene atmosphere always makes it easier to establish the truth.”

ICC Defence Counsel and victims’ representative in national jurisdictions

“Come speak with your prosecution counterpart, even if it is not a prerequisite. When your counterpart knows where you are going, what type of questions you are going to ask, that you might ask a sensible question, then they won’t be unnecessarily worried. It brings a more collegial atmosphere, which brings a more relaxed atmosphere in court.”

ICC prosecutor

⁴⁰ Note: For CRSV, at the ICC, ‘consent’ or the absence of ‘consent’ is not an element of the crime, rather it is coercive circumstances more fully detailed in the ICC Elements of Crimes. Counsel should ensure they are fully familiar with the international case law relating to consent and coercive circumstances, to ensure they do not stray into stigmatised misconceptions or irrelevant arguments based on sexual violence myths.

“No needless interruptions or pointless objections; no damaging interventions from the bench, etc.”

Defence Counsel at ICTY and in national jurisdictions

“Prosecutors who object too often can affect the flow of a witness.”

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

“Sometimes witnesses need more time than the court may wish to give – I had a witness who took five days, but she needed the time. Otherwise I think all parties should have the same training and understand how the Defence need to operate.”

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

“Prerecorded video evidence is useful.”

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

CARV Stigma Toolkit for Justice Defence Indicator

Competency Indicator D4: Defence Counsel contribute to the creation of an environment and processes which allow survivors to give their evidence to court in the most effective and safe manner which reduces anxiety, stress, distress, trauma, intimidation, power differentials and uncertainties.

R v. FA: In this case, where a special measure (intermediary) was granted for the witness, parties successfully communicated and worked together for the cross-examination. “Ms Kate Man, registered intermediary, Ms Smart for the applicant and Ms Lindop for the respondent Crown have worked as a team, the better to promote the interests of justice in the conduct of this case. It is clear they have had in mind not only the course of the hearing and the welfare of [the witness], but also the interests of the applicant himself. Questions to be put by Ms Smart to [the witness] in cross-examination were reviewed by the registered intermediary, whose sensible expert suggestions were unhesitatingly adopted.”⁴¹

Useful resources:

- Kirby (2017) [Effectively Engaging Victims, Witnesses and Defendants in the Criminal Courts: A Question of “Court Culture”?](#)
- Randell et al. (2020) [Young Witnesses in New Zealand’s Sexual Violence Pilot Courts.](#)

41 [Regina v. FA](#), [2015] EWCA Crim 209.

5.3 Trial



Remember Your Training and Preparation

- ★ *If evidence or facts are **irrelevant**, don't use them.*
- ★ *Recognise when your argument is **stigmatising**: The use of sexual history, clothing, lack of physical injuries and many more weaponise myths of CARSV/SV against survivors by putting the blame on them.*
- ★ *Treat survivors with **empathy and respect**.*

A. DETERMINING THE DEFENCE CASE

After speaking with their client, meeting with potential witnesses, and gathering and reviewing the evidence, Counsel will begin to concretely determine their case. Essentially, the legal strategy will be decided by establishing the most favourable lines of argument, which witnesses to call, what evidence to lead with and what evidence to challenge. Determining the case is not limited to only one stage of proceedings. In practice, Counsel will begin to mould their legal strategy during the pre-trial proceedings and will have to work proactively during the trial to present the best defence for their client, either by presenting or challenging evidence. When determining their case, Counsel will decide which witnesses to call for direct examination and what evidence to present to the court.

Where does this witness fit into the defence case?

"When considering calling a vulnerable witness to give evidence in support of your client's case, conduct a proper balancing exercise. Again, this should be done in writing, so that the competing considerations are properly addressed and so that there is a record of this having been done.

"On one side: How important is the evidence to your client's case? What are the concrete matters which will make a favourable verdict more likely? Are there any alternative ways of putting the evidence before the court? May the prosecution agree to have the witness's statement adduced in writing, rather than requiring them to attend court for questioning?"

"On the other side: How damaging will it be for the witness to be questioned about their experiences? May it be that even taking a statement will cause re-traumatisation? Would the witness's interests be better protected if they gave their evidence by video, rather than travelling to the place where the trial is taking place? Or may it be that giving evidence and being questioned will be cathartic? These are matters on which Counsel should not come to hasty conclusions. It may be worth asking for the witness to be spoken to by a culturally informed psychologist. This is the policy of the Office of the Prosecutor (OTP), and it is difficult to see why defence witnesses should be treated with any less consideration."

Former ICTR Defence Counsel, prosecutor and now judge

Challenging or countering charges of sexual violence

“There is no point in disputing the rape allegation if the client is not involved, as this will have no impact on the charges but will have a direct impact on the victim’s trauma. On the other hand, it is better to direct the questions to show that the rape was, for example, never made known to the client or that it was a one-time event and not part of a common plan.”

Defence Counsel with experience in prosecution, adjudication and victim representation

“Normally I have seen SGBV survivors brought not to describe the assault in detail, but rather for Counsel to establish that they are a victim of SGBV crimes and that the perpetrators alleged by the prosecution could not have committed the attacks as alleged. As such, they are being called primarily to discuss identification of the perpetrators, rather than the attacks. In that case, the methodology doesn’t differ significantly from the survivors of other crimes, who are all entitled to present their testimony in a way that allows them to feel as safe as possible, with the least risk to their personal safety and security, and with as much dignity as the process allows.”

ICC Defence Counsel

“In [a] case ... involving identification, we hired an eyewitness identification expert to testify. We did not cross-examine the victim about the sexual assaults; only about the identification. When she testified in court that my client was not the person who assaulted her, we no longer called the eyewitness expert, as he was no longer needed.”

ICTY Defence Counsel member

“The main question is always whether your client is involved directly or not. If he is not charged directly, there is no need to challenge the rape. You need to focus on the link between the perpetrator and your client.”

Defence Counsel before the ICTY, ICC, ECCC, and MICT

“Defence Counsel are ethically precluded from using strategies and advancing arguments that rely for their probative value on ... social assumptions about sexual violence that have been legally rejected as baseless and irrelevant.”⁴²

42 Craig (2014) [The Ethical Obligations of Defence Counsel in Sexual Assault Cases](#), 460.

B. PREPARING YOUR OWN WITNESS FOR CROSS-EXAMINATION

If you decide to call a witness who is potentially vulnerable, it is your duty to ensure they know what to expect (familiarisation) and that you have discussed and taken active steps to ensure their needs are met through protective or special measures. Ground Rules Hearings or preliminary/case management hearings, as discussed above, should be used to ensure that what happens in court is as safe as possible for your witness.

Within the permissible bounds of the law (and not straying into 'coaching'), preparation time with a potentially vulnerable witness is a potentially harm-reducing step.

"Examination in chief: Preparation, planning, reflection and time. Use rapport, and use re-examination."

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

"My client had been properly prepared to answer all questions and provide precise, detailed answers."

ICC Defence Counsel and victims' representative in national jurisdictions

"Some techniques which I would recommend would be:

- *Witness preparation or familiarisation session could be good and useful, if you have to go through with the witness quickly to tell them what you will deal with, or ask the judge if you can take two minutes at the start with the witnesses to explain what you will be dealing with;*
- *Protective in-court measures;*
- *Out-of-court help, stand-by psychological help;*
- *In-court support, that was useful – someone sitting with them who speaks their language, to release the stress and reduce intimidating factors;*
- *Headlining is a good way to proceed. Don't surprise them, let them know in advance where you are going with your questions;*
- *A good recommendation could be to use a technique of open narrative, they say it in a natural way, easier for them. May remove stress and anxiety. You don't need to control those kind of witnesses. As Counsel, practise questioning with your team as part of your preparation. This can make it less stressful in court, and it can go better;*
- *Use ordinary language they can understand, or talk to them about terminology beforehand;*
- *Make sure you use medical language and not slang terms; and*
- *It might be harder with double interpretation, but you can agree a signal to let you know that they need a break."*

ICC prosecutor

“This preparation and familiarity with what to expect (as distinct from coaching or influencing what a survivor will say) is important for survivors and their ability to give their best evidence. ‘In addition to completeness and coherence benefits, the Trial Chamber highlighted the benefits of witness preparation for reducing witnesses’ stress and anxiety about testifying in an unfamiliar setting. According to the chamber: Particularly with regard to vulnerable witnesses, such prior preparation may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned about traumatic events. Enabling interaction with counsel on the substantive aspects of their evidence may help to increase witnesses’ confidence and may reduce their reluctance to reveal sensitive information on the stand.’ As ICC Trial Chamber noted: ‘A witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber’s truth-finding function.’”⁴³

There are multiple prosecution guides to preparation meetings with SGBV survivors which may prove useful resources for Defence when they call SGBV witnesses themselves.⁴⁴

“The witness must be prepared for the fact that his testimony can be questioned and not believed. Without a follow-up at this level, it often happens that the violence of not being believed is stronger than the will and the necessity to tell their own truth. In addition, the witness must be prepared for the fact that his or her testimony will not necessarily result in an admission of the facts by the accused.”

ICC Defence Counsel

C. CROSS-EXAMINATION OF ANOTHER PARTY’S WITNESS

“Have a strategy, prepare and plan.”

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

“I think it goes well when the questions asked are precise and Counsel’s own line of defence is clear, as well as the Counsel’s good knowledge of the case.”

ICC Defence Counsel and victims’ representative in national jurisdictions

Preparation and careful strategy are key. What are the critical issues which this witness presents in relation to my client? Perhaps it is the identification of the perpetrators or the presence of the accused which needs to be challenged, rather than the underlying sexual violence. Maybe this witness does not identify or provide any evidence which links the crime to your client, in which case you may not want to cross-examine them at all or may want to seek to agree/stipulate facts which do not relate to your client to avoid having the testimony heard by the judges. The earlier the preparation, the better prepared you will be for challenging the evidence before testimony and to properly engage in a Ground Rules Hearing.

⁴³ Synergy for Justice CARSV Stigma Toolkit for Justice, Prosecution Indicator P7 citing [Ciorciari & Heindel \(2016\) Victim Testimony in International and Hybrid Criminal Courts: Narrative Opportunities, Challenges and Fair Trial Demands](#), *Virginia Journal of International Law* 56(2), and [Prosecutor v. Ruto et al.](#) ICC-01/09-01/11, Decision on Witness Preparation (2 January 2013), para.31.

⁴⁴ [New Zealand Crown Law, Solicitor-General’s Guidelines for Prosecuting Sexual Violence](#) (2019), 14-19 (on meeting survivors before trial); Thomson, Review of Victim Care in the Justice Sector in Scotland (2017), Preparing Victims, 4.19-4.38; Gopalan *et al.*, (2016) Proving Crimes of Sexual Violence’, in Brammertz & Jarvis (eds.), Prosecuting CRSV at the ICTY, 114-117; [Scottish Courts & Tribunals Service, Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk’s Review Group](#) (2021), 40; [Crown Prosecution Service, Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures](#) (2011).

One good exercise during preparation is to practise or run-through your potential questioning with some of your team, to help identify and get feedback on your approach to sensitive topics or hard questions. Teammates can share concerns on how certain questions might be perceived or understood by the witnesses. This allows further fine-tuning to ensure that questions are clearly and sensitively framed, and the length of questioning may be reduced.

"Each witness is different."

ICC Defence Counsel

"So, these two witnesses ... would not have asked questions about the rapes specifically, but would have accessed their cross-examination on the attack of the credibility of the witnesses by confronting them with their different versions. Example: There were many contradictions about the year of birth of the child born of rape. It is thus preferable to choose this angle rather than actually attacking the rape itself because it cannot be known whether the witness may have already been raped by someone else and it would not help to lift the charge in that the client was not accused of being the direct perpetrator. Finally, judges much prefer this method because attacking a victim directly and questioning his or her status as a victim in and of itself never makes a good impression on judges."

Defence Counsel before the ICTY, ICTR and ICC

"In an ICL case, my client was accused of repeated sexual assaults on a Roma woman during the war in Kosovo. The [prosecution] evidence was that my client was seen taking this woman from her house and dragging her up to a KLA post where the assaults took place. Our investigation revealed that while my client was in the general area at the time, it was highly unlikely he had any contact with the victim. We planned to call the witness, who claimed to have seen him taking the victim from her house. On the eve of trial, we learned the OTP had shown a photo line-up to the victim and she did not identify my client. At trial we did not examine the victim at all about the sexual assaults. We examined only on the identification issue. She did not identify my client as her assailant. He was acquitted on these charges."

Long-serving Defence Counsel at multiple international courts

"There is no point in disputing the rape allegation if the client is not involved, as this will have no impact on the charges but will have a direct impact on the victim's trauma. The main question is always whether your client is involved directly or not. If he is not charged directly, there is no need to challenge the rape. You need to focus on the link between the perpetrator and your client."

Defence Counsel before the ICTY, ICC, ECCC, and MICT

“When questioning a witness called by the opposing party who is suggested to be vulnerable (whether because they are a victim of CRSV or for other reasons), be very clear what the aim of the questioning is. Does the client’s case require you to ask any questions at all?”

“If so, are you seeking to demonstrate that the witness may have been mistaken, or is it necessary/ advantageous to demonstrate that they are deliberately not telling the truth? Counsel ought to be able to express the reasons for their questioning, and the reasonable expectations by way of the witness’s answers, in writing. It is never an acceptable aim to question any witness (but particularly a vulnerable witness) simply with the aim of impressing the client with your advocacy skills and commitment to their case. Equally, the aims of intimidating a witness and deterring future witnesses is improper.

“If the aim is to demonstrate dishonesty, this needs to be approached with a great deal of thought and preparation. Judges are usually initially hostile to the suggestion that a witness has perjured themselves. They are quite likely to form an adverse impression of Counsel (and by association, Counsel’s client) who resorts to such suggestions without a proper foundation. The questioning needs to be very focused. The questioner should try to demonstrate a clear example of dishonesty by the witness (or at least economy with the truth) very early in the questioning. This may shift the judge’s sympathy away from the witness, and reduce the chance of an adverse impression being formed or even of the questioning being shut down from the bench.”

Former ICTR Defence Counsel, prosecutor and now judge

Some more tips from experienced Defence Counsel and judges

1. If the sexual violence is not in dispute, don’t go there because you don’t need to.

“Do not cross-examine the victim unless it is absolutely necessary. If you have solid proof the alleged victim is lying, then you may have to cross-examine on that (although if the lying can be established by other witnesses, you may not want to confront the victim; let the lies be established by others). If there are surrounding circumstances which raise a reasonable doubt as to guilt, then you may have to cross-examine on that (such as identification). On the other hand, if the alleged victim’s testimony does not establish the elements of one or more of the sexual crimes charged, it is not a good idea to cross-examine on that. Let it alone, and argue the evidentiary failure later as cause for acquittal.

“In general, it is perfectly reasonable not to cross-examine a witness unless you have cause to believe that they can affirmatively help your case. If they cannot, then don’t cross-examine them. Always treat a sympathetic witness, such as an SGBV survivor, with dignity and respect.

“It is not a good strategy to cross-examine a sexual assault victim unless you have very good cause to believe their testimony will help your client.”

Defence Counsel ICTY and in national jurisdictions

2. **Think about who should do the cross-examination.**

"This point of choosing who is going to cross-examine the victim raises the importance of not always appointing the persons in charge of cross-examination only if they are senior lawyers. We must take into account the link that the witness had previously forged with other members of the team with whom she would have exchanged earlier. Similarly, it is mostly possible for a woman to help the witness feel more free to speak than if she were against a man, depending on the context."

Defence Counsel at the ICC, ICTR and ICTY

3. **It doesn't have to be long or complicated!**

"Sometimes a good cross is less than more. But to ask less, you must work more."

Defence Counsel before the ICTY, ICC, ECCC, and MICT

"An example of a cross-examination that did not go well would be if the person asks too many questions about meaningless details when the witness was really clear on that point before."

Defence Counsel with experience in prosecution, adjudication and victim representation

"Most cross-examinations do not need to be very long, some might be only 10-15 minutes, and the judge may well limit Counsel to that kind of time. Some in my court have been as short as three to four minutes when Counsel have made themselves focus on proper relevant questions."⁴⁵

4. **Have a proper foundation for any challenge.**

"If you have properly prepared and your questions are justified, you must be robust in the face of any objections to your questioning and make sure what you are seeking to do is properly understood – this should enable you to keep going. Sometimes it is effective just to rephrase rather than engage in an objection."

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

"As Defence Counsel, acting on behalf of the defendant, you want to be sure not to challenge a victim without a proper foundation."

ICC Defence Counsel

⁴⁵ HHJ Sally Cahill QC, Ground Rules Hearings, Training Course, [Content | Advocacy & The Vulnerable \(Crime\) \(easygenerator.com\)](#), p.6 of 37.

5. Cross-examination does not need to include your arguments.

“It is not always necessary to let the victim know that you want to prove that she is lying or mistaken. For example, rather show a picture to the victim so the victim can identify the person who raped her without making it clear in advance that it was not the person she was quoting in her statement. In this way the defence proved its case without disputing the rape of the victim. It is therefore better to ask questions about the circumstances of the rape in order to get the charge lifted than to oppose the victim head-on.”

Defence Counsel with experience in prosecution, adjudication and victim representation

“I crossed my only rape victim of my career because there were so many inconsistencies. I felt obliged to put this on the record. It was really uncomfortable. I tried to be as nice as I could be. I read her previous interview and checked with her if she agreed, and she said ‘No, I didn’t tell that, they got that wrong’. That is all I did during the cross. To avoid the victim feeling uncomfortable, you can show inconsistencies without telling the witness ‘You contradicted yourself’, this is just for the record. There is no need to make the victim feel uncomfortable – you just have to put the inconsistencies on record. At the end of the cross, I asked her if she said everything she had to say about those events, and she replied that she felt listened to and thanked me for listening to what she wanted to say.”

ICC, ICTY and ICC Defence Counsel

“There is no need to be aggressive. Let the witness answer the questions and explain. You don’t need to tell the witness she or he is lying. You just put the facts to her and build your case with a very soft tone, and you can argue later.”

Defence Counsel before the ICTY, ICC, ECCC, and MICT

“There is, as the courts have said repeatedly since 1794, time for argument and comment in submissions.”⁴⁶

6. Be calm and gentle – there is no need to be aggressive.

“It is essential to adopt an understanding attitude with the witness, to pay attention to his tone of voice, especially not to be aggressive and to pay attention to the witness’ reactions. It is also desirable to anticipate one’s reactions or needs, for example by saying, ‘I have the impression that things are not going well’, etc.”

ICTR and ICC Defence Counsel

“The cross-examination should be done in a calm, gentle and non-aggressive manner.”

Defence Counsel at the ICC, ICTR and ICTY

⁴⁶ Henderson (2016) [Best evidence or best interests? What does the case law say about the function of criminal cross-examination?](#) International Journal of Evidence., 183-199.

"Some Defence Counsel think that by barking at a witness, they impress their clients. In fact what they are doing is making it less likely that the witness can help, and they are very much annoying the judges – never a smart move."

Former ICTY Defence Counsel, ICC and national judge

"Any adversarial approach is painful in these types of cases."

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

"Certainly the majority of the [defence] lawyers I interviewed were acutely aware of, and empathetic about, the enormous harm to individual complainants wreaked by sexual violence. Many also recognised the additional trauma to sexual assault complainants that results from participating in the criminal justice process. [...] A senior member of the bar with expertise in legal ethics stated: 'Experienced criminal lawyers use a kinder and gentler approach to extract as much information as they possibly can, which may then be used to cross-examine at trial on inconsistencies. [...] The point is that whacking is not only reprehensible, and unethical [...] it is generally also bad lawyering.' [...] Nearly every criminal defence lawyer I interviewed commented about the strategic inadvisability of cross-examining the complainant in an aggressive manner: You're certainly not doing your client any good in that regard."⁴⁷

7. Offer dignity and show respect.

"It is important to be respectful of witnesses, to put them at ease if possible, and to simply let them speak and tell their story. It is a difficult and scary experience for most people to testify in a criminal court. Defence Counsel should avoid being threatening or appearing to be threatening. Treat the witness with dignity and respect."

Long-serving Defence Counsel at multiple international courts

"It is essential to be compassionate; the goal is to put the victim in confidence and not to make him/her feel attacked, otherwise it will be impossible to ask questions because the victim will refuse to answer or will not collaborate, and the interrogation cannot be carried out at best."

Defence Counsel with experience in prosecution, adjudication and victim representation

Murad Code Requirements



Principle 3.

Be Responsible and Have Integrity

3.2 Dignity and respect: We will support survivors with dignity, respect, humanity, courtesy, appreciation, and as decision-makers.

⁴⁷ Craig (2018) *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession*.

8. Be patient. Don't be in a hurry!

"You have to be very patient when asking questions of victims who have suffered or eyewitnessed sexual or any violence. It sounds obvious, but some Counsel and some judges are in too much of a hurry to get an answer and mistake slowness or hesitation for either obstruction or (worse) dishonesty."

Former Defence Counsel at the ICTY, ICTR; judge at the ICC and in national jurisdictions

"It helps to begin by the broad narrative of the potential witness, hoping to gain the confidence of the witness in the process, and then to get to the SGBV issue at the right time. By focusing just on the SGBV event, or beginning the interview by addressing this event, it is harder to get to the truth, whether the event happened or not. It is very important that the witness feels at ease and comfortable with what he or she will bring forward. If a witness does not want to say certain things, do not insist. Rather, find a way to bring the witness to volunteer the information by focusing on broader issues."

Experienced ICTY/ICC Defence Counsel

Prosecutor v. Bosco Ntaganda: *During cross-examination of a survivor, Counsel reminded the prosecution witness several times: "Before beginning, I would like to ... invite [the witness] at any time ... if you really don't feel well, as for a break, and I am convinced that the Bench will grant the request"; "Madam witness, if you do not feel all right, please do not hesitate to request that we take a break".⁴⁸*

9. Respect all protective measures and ground rules put in place.

CARSV Stigma Toolkit for Justice Defence Indicator

Competency Indicator D3: Defence Counsel participate in, follow and respect all protective or special measures procedures designed for survivors' safe and constructive participation in the justice process.

10. Be attentive and responsive.

"... [W]hen [the rape survivor] came to testify, it was really important to pay attention to her behaviour. She did not want to be there, she was trembling. This allows us to adapt the way we address her and to adapt our questions if necessary. In that case, it was necessary to go slow and wait for each of her answer[s], [give] her the necessary time to respond to the different questions and not rush her, for example. At that time, the witness was very resistant."

IRMCT, ICC and STL Defence Counsel

⁴⁸ Prosecutor v. Bosco Ntaganda, ICC, Transcript ICC-01/04-02/06 (2015), 3, 47.

11. Do not use stigmatising language, myths or misconceptions.

“The fundamental questions all Defence Counsel should ask in sexual assault cases include whether their conduct (e.g., cross-examination or submissions to the trier of fact) is grounded in stereotypes about sexual assault and gender, sexual orientation, race or disability. Will their tactics in cases of truthful complainants cause irreparable harm? Will it perpetuate disadvantage, such as dissuading other complainants from seeking justice in the criminal justice system? Will it bring the administration of justice into disrepute?”⁴⁹

“[Be] non-adversarial. Deal with what can be agreed first. Put your case clearly, and do not add to witness distress. No stereotypes. Just facts.”

ICC Defence Counsel and experienced barrister on SV cases in national jurisdictions

“A victim should never be blamed for not saying no, for not screaming, for not telling her relatives.”

Defence Counsel at the ICC, ICTR and ICTY

“For example, the question of knowing why the victim did not talk about his rape earlier or did not denounce him should no longer be a question asked, in the sense that it shows nothing and is only challenging the victim’s statements.”

ICTR and ICC Defence Counsel

“[The right to cross-examine does not include a right to examine what is, objectively, irrelevant material (or overwhelmingly prejudicial material) or to prolong the examination unnecessarily.”⁵⁰

Useful resources:

- ICCA (2022) [The 20 Principles of Questioning](#), Advocacy for Vulnerable People and Children.
- [Content | Advocacy & The Vulnerable \(Crime\) \(easygenerator.com\)](#) cross-examination of vulnerable witnesses podcast.
- Tanovich (2016) [“Whack” No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases](#), Ottawa Law Review.
- Henderson (2016) [Best evidence or best interests? What does the case law say about the function of criminal cross-examination?](#), International Journal of Evidence.
- Synergy for Justice, CARSV Stigma Toolkit for Justice, Part A, Defence Indicators
- Synergy for Justice, CARSV Stigma Toolkit for Justice, Part B Tools, Guide to Non-Stigmatising Language.

⁴⁹ Tanovich (2016) [“Whack” No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases](#), Ottawa Law Review.

⁵⁰ Henderson (2016), *ibid.*

