



TRAUMA-INFORMED SURVIVOR-CENTRED LAWYERING STANDARDS



INITIATIVE FOR STRATEGIC
LITIGATION IN AFRICA

TRAUMA-INFORMED SURVIVOR-CENTRED LAWYERING STANDARDS

The purpose of these standards is to give lawyers guidance on how to provide trauma-informed and survivor-centred legal support to victims of trafficking.

Interpretation

Survivors and Victims

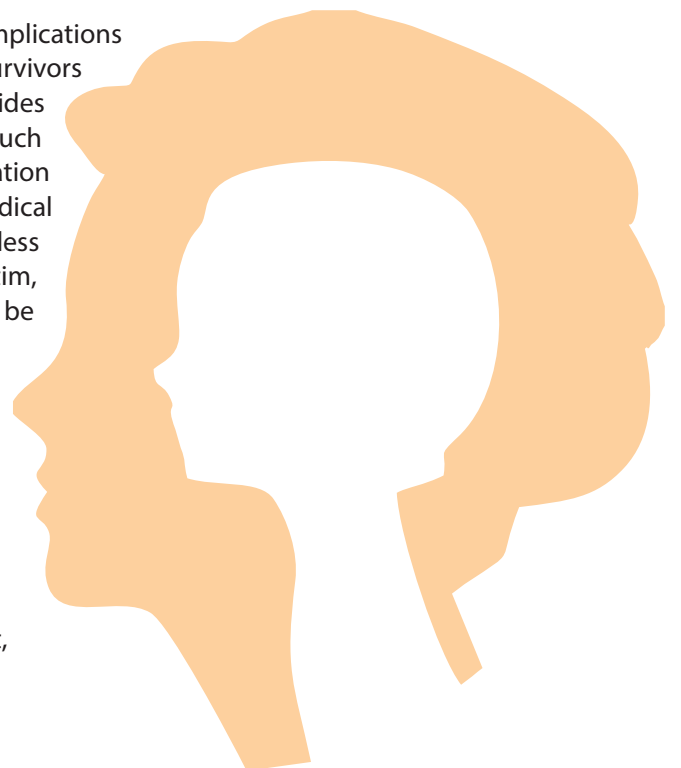
Like most texts on trauma-informed and survivor-centred lawyering¹ these standards shall begin by distinguishing between the term “victim” and “survivor”. Both terms can be used to refer to a person or group of persons who have individually or collectively suffered harm, be it physical or psychological as a result of acts or omissions that violate their rights. The status of a victim exists regardless of whether or not the perpetrator(s) has been identified, apprehended, prosecuted or convicted. It is also not extinguished by a familial or other relationship with the perpetrator. It can also be used to refer to the persons who are affected by the act or omission such as immediate family, dependants and spouses. The term victim can also be used to refer to persons who suffer harm, whether psychological or physical, as a result of their efforts to intervene on behalf of the victim. This final definition of victim means that even lawyers can be considered victims.² The distinction depends almost entirely on the preference of the client. Most clients may prefer to be addressed as “survivors”.³ Thus, it is crucial for lawyers to inquire their client’s preferred terminology and respect the ways their clients self-identify by referring to them as they wish to be addressed.⁴

It is also important for lawyers to explain to survivors the legal implications of the term “victim”. In many jurisdictions, the law refers to all survivors as victims regardless of how they choose to identify. It also provides certain protections, support and special measures for “victims” such as the ability to testify in camera or in a witness box; first consideration for services such as witness protection; free or subsidized medical or psychosocial support but to name a few. Therefore, regardless of whether a person chooses to identify as a survivor or a victim, whenever they interact with state machinery, they shall be considered “victims”.

These standards shall, however, use the terms “victim” and “survivor” interchangeably.

Lawyer

Different countries have different terminologies for persons who are certified to appear before courts on behalf of other persons including attorneys, advocates, lawyers and barristers. In this text, the term that shall be used to refer to such persons is “lawyer”.



¹ Such resources include Human Trafficking Guide Published by the Institute for Strategic Litigation in Africa (2020).

² General comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and People’s Rights (2017) at para. 16-17

³ Interview with Yasmin Manji, Trauma Therapist.

⁴ Strategic Litigation for Sexual and Gender-Based Violence: Lessons Learned, Office of the United Nations High Commissioner for Human Rights (2020), at pg.1

What is trauma-informed lawyering?

Trauma-informed lawyering requires an understanding of what trauma is. The Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition) (hereinafter “**DSM-5**”) explains that trauma can arise from *exposure to actual or threatened death, serious injury, or sexual violence in one (or more) through:*⁵

1. Directly experiencing a traumatic event.
2. Witnessing a traumatic event happening to another person.
3. Learning that the traumatic event(s) occurred to a close family member or close friend: the manual specifies that where the traumatic event is the actual or threatened death of a family member or friend, the death or threat must be violent and/or accidental.
4. Experiencing repeated traumatic events or being constantly exposed to details of traumatic events. This happens mostly in the case of persons who, as a result of their work, are tasked with giving services or other support to persons who have undergone trauma such as medical personnel, police, lawyers, caseworkers and therapists.

A traumatic event is one which “... renders an individual's internal and external resources inadequate, making effective coping impossible...”⁶ Traumatic events include but are not limited to:⁷

“... exposure to war as a combatant or civilian, threatened or actual physical assault (e.g. physical attack, robbery, mugging, childhood physical abuse), threatened or actual sexual violence (e.g., forced sexual penetration, alcohol/drug-facilitated sexual penetration, abusive sexual contact, noncontact sexual abuse, sexual trafficking), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war, natural or human-made disasters, and severe motor vehicle accidents...”

DSM-5 notes that, in the cases of trauma arising through the means set out in no.4. above, the exposure and/or experience has to be as a result of work. It is unlikely that watching traumatic events on television or online or seeing them in pictures can result in trauma unless this is being done in the course of a person's work e.g. persons who are tasked with collecting information on extra-judicial killings, sexual and physical violence or other kinds of violence. Consequently, trauma arising through these means does not occur in the case of children.⁸ It does however, occur in first responders and care givers such as social workers, lawyers and therapists. Therefore, it is crucial for trauma-informed lawyers to prioritise self-care alongside their work.⁹

Understanding the interactions between trauma and trafficking

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter “**the Palermo Protocol**”) defines human trafficking as the “... (1) recruitment, transportation, transfer, harbouring or receipt of persons, by (2) means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the (3) purpose of exploitation....”

Traumatic events can occur both during the act, that is, part (1) and the exploitation, that is part (3). Traumatic events can include the recognised means set out in part (2). For instance, the use of force or abduction which are recognised means under the Palermo Protocol are also traumatic events as envisioned by the DSM-5.

⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders- Fifth Edition* (Washington DC, American Psychiatric Publishing, 2013) at page 271

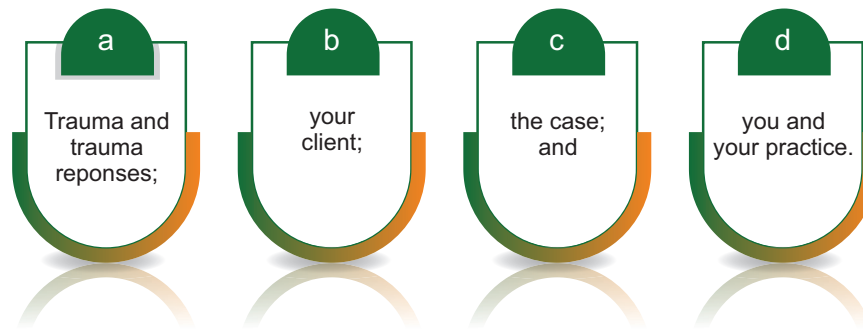
⁶ Sarah Katz and Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, (Clinical Law Review, 2016) at pg. 360

⁷ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition)*, (Washington DC, American Psychiatric Publishing, 2013) at page 274

⁸ The African Charter on the Rights and Welfare of the Child defines a “child” in Article 2 as *every human being below the age of 18 years*.

⁹ Interview with Yasmin Manji, Trauma Therapist.

Having understood this definition, trauma-informed lawyering requires lawyers to seek to understand what the above definition means for:



This must be done on a case by case basis as although two persons go through the same traumatic event, the extent of their trauma will not always be the same and the ways in which their trauma manifests will be different. This is because trauma arises from pain which can be both objective, that is, capable of being measured or perceived, and subjective, that is, only discernible by the person experiencing it and incapable of being accurately quantified by others.¹⁰

What is survivor-centred lawyering?

Survivor-centred lawyering “... is the idea that clients should be the primary decision-maker in determining the direction of their legal case or transaction, whereas attorneys should maintain the appearance of neutrality and provide legal counsel as objectively as possible...”¹¹ It is a means by which lawyers ensure that the human rights of trafficked persons are at the centre of the protection and prosecution interventions which they undertake on behalf of survivors.¹² This means that, in implementing a survivor-centred approach, lawyers become duty bearers in relation to the survivors. Their duties include:

- (a) **The duty to respect the rights of survivors:** lawyers have the obligation to respect the rights of survivors especially their right to information and right to autonomy.
- (b) **The duty to mitigate future violation of rights:** Although lawyers cannot control the actions of the state, private actors and perpetrators, they can take measures to prevent violations of survivor’s rights during investigation, trial and post-trial stages- or where this is not possible, mitigate the effects of these violation. In the context of prosecution of trafficking cases, these rights include but are not limited to: the right to dignity; the right to security of the person; right to privacy; the right to a fair trial; rights to adequate food, housing and water; right to information; freedom of movement; right to the highest attainable standard of mental and physical health; and the right to work.

It requires that the lawyer facilitate the meaningful participation of the survivor in all phases. Key elements of meaningful participation in this regard are:¹³

- (a) informed consent;
- (b) clear and transparent communication with the survivor in a language that they understand;
- (c) providing them with the information they need to manage their expectations at all stages of the process; and
- (d) continuous risk assessment and management.

¹⁰ Interview with Yasmin Manji, Trauma Therapist.

¹¹ Lawton J.D, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, New York University School of Law, 2015 at pg. 147

¹² Recommended Principles and Guidelines on Human Rights and Human Trafficking, Office of the United Nations High Commissioner for Human Rights (2002), at Principle No. 1

¹³ *Strategic Litigation for Sexual and Gender-Based Violence: Lessons Learned*, Office of the United Nations High Commissioner for Human Rights (2020), at pg. 2

Survivor-centred lawyering requires that lawyers:

- (a) begin all engagements by finding out what the survivor's definition of justice is in the present engagement and check in with the survivor frequently in case this definition changes;
- (b) recognise that the need to develop progressive jurisprudence and achieve justice in the court room is often at cross-purposes with the survivor's idea of justice and there is need to put in place interventions to address this where possible;
- (c) putting personal and professional preferences aside in favour of realising the client's right to make informed but autonomous decisions.¹⁴

All the above must be balanced against a lawyer's obligations as an officer of the court.¹⁵

Standards of Trauma-Informed and Victim-Centred Lawyering in the Context of Trafficking in Persons

1. Engagement and working with the Survivor

- 1.1. The initial meetings between a lawyer and the survivor should be geared towards:
 - 1.1.1. understanding the facts of the survivor's case; and
 - 1.1.2. exploring the survivor's definition of "justice": is it a guilty verdict? Is it compensation? Is it payment of unpaid wages? Is it an apology? Is it a public acknowledgement of wrong-doing? Is it a combination of any of these?
- 1.2. Lawyers need to be cognisant of the privilege they hold and power they wield as a result of their profession and take all possible steps to put the survivor at ease. Some measures you can put in place include:
 - 1.2.1. Asking the survivor where they feel safe and comfortable and having initial meetings there. It is crucial to ensure that the selected venue can ensure confidentiality and privacy;¹⁶
 - 1.2.2. Think through things that could make the survivor more comfortable such as having water or other drinks available.
- 1.3. Putting the survivor at ease will make it easier for them to explain their cases to you.
- 1.4. Promising practices for survivor interviews include:¹⁷
 - 1.4.1. Having a trained mental health professional, preferably the survivor's therapist, present at the initial meetings to assist in interviewing the survivor. This should be done with the prior consent of the victim. It is important to inform the survivor that the purpose of the meeting is to collect facts and/or evidence for the case. So, there is need for lawyers to be conversant with the laws governing client-doctor privilege and client-lawyer privilege and the limits and exceptions thereto.
 - 1.4.2. Have a permanent record of the interview to prevent having to ask the same questions again: this record can be written, audio or video should also be done with the consent of the victim

¹⁴ Lawton J.D, Who Is My Client? Client-Centered Lawyering with Multiple Clients, New York University School of Law, 2015 at pg. 148

¹⁵ Most jurisdictions recognise lawyers as officers of the court who have obligations to the court. This position is usually codified in the codes of conduct of lawyers in different jurisdictions.

¹⁶ *Using Feminist Practices to Improve the Justice Delivery System for Survivors of Gender-Based Violence*, One Future Collective- Morarka Leadership Foundation, 2020 at pg. 5

¹⁷ Interview with Sarah Katz, Associate Clinical Professor of Law and Trauma-Informed Lawyering Expert

- 1.4.3. Letting the survivor tell their story at their own pace and in their own terms then asking questions to ensure that you capture all of the evidence required by law.
- 1.5. Understanding a survivor's definition of justice will enable the lawyer to identify the survivor's best interests and, consequently, determine what are the appropriate and effective remedies in the survivor's case and the means through which these remedies can be pursued.
- 1.6. An effective remedy is one which is:¹⁸
 - 1.6.1. **available without impediment:** Impediments may be:
 - 1.6.1.1. legal e.g. in the cases where the law discriminates against persons by, for instance allowing the forced marriage of women;
 - 1.6.1.2. physical e.g. for survivors who come from rural areas where courts and other judicial measures are scarce;
 - 1.6.1.3. financial e.g. although in some jurisdictions, victims of trafficking are exempted from paying court fees in civil cases for damages against their perpetrators¹⁹ this exemption does not eliminate all the costs of such suits such as lawyers' fees; costs of service; and costs of attending court for both the victim and other witnesses.
 - 1.6.2. **offers a prospect of success to the survivor:** This is dependent on the survivor's definition of success.
 - 1.6.3. **can sufficiently repair the harm suffered:** In cases of human trafficking, although it is impossible to wholly repair the damage done, it is possible to make efforts to address some of the damage such as financial loss or loss of property. It is of note that in jurisdictions where compensation orders may be obtained but cannot be implemented, compensations would cease to be an effective remedy.²⁰
- 1.7. From the above, it is clear that an effective remedy is not necessarily a judicial one. It must however be a remedy recognised in law. Lawyers must always keep this distinction in mind.
- 1.8. In some instances, the law prescribes what justice looks like for victims. In such cases, the survivor has limited options. For example:
 - 1.8.1. As a result of the state obligation to protect children from child labour;²¹ abuse and torture;²² harmful social and cultural practices;²³ sexual exploitation; and²⁴ sale, trafficking and abduction²⁵ states have placed an obligation on Children Offices to ensure that all cases involving children are heard in a court of law.²⁶ Thus, all survivors of trafficking under the age of 18 do not have the option to forego legal proceedings where it is not part of their definition of justice;
 - 1.8.2. Although judicial systems are increasingly recognising alternative dispute resolution (hereinafter "**ADR**") in the form of reconciliation and compensation, this recognition is limited in criminal cases. For example, in Kenya, Article 159(2)(c) the Constitution recognises ADR as a guiding principle for judicial authority. However, under Article 159(3), ADR is only applicable in cases where its promotion is not inconsistent with the Constitution, morality, justice or any written law.

¹⁸ General comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and People's Rights (2017) at para. 23

¹⁹ For instance, Section 16 of the Counter-Trafficking in persons Act (No. 8 of 2010) in Kenya allows for victims to be exempted from paying court fees in civil suits for damages against their perpetrators.

²⁰ General comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and People's Rights (2017) at para. 26

²¹ Article 15, African Charter on the Rights and Welfare of the Child

²² Article 16, African Charter on the Rights and Welfare of the Child

²³ Article 21, African Charter on the Rights and Welfare of the Child

²⁴ Article 27, African Charter on the Rights and Welfare of the Child

²⁵ Article 29, African Charter on the Rights and Welfare of the Child

²⁶ For instance, in Kenya, this obligation is enshrined in Section 120 of the Children's Act (No. 8 of 2001)

Unfortunately, justice as it is used here is not to be defined by the victims but by the courts and law. Consequently, Section 176 of the Criminal Procedure Code (CAP. 75) of Kenya, ADR is expressly prohibited as the sole mode of dispute resolution in cases of felonies²⁷ and trafficking in persons is a felony.²⁸

- 1.9. It is the obligation of a victim's lawyer to know the various laws governing trafficking in persons as well as criminal justice as a whole in the country and identify whether these limitations exist and inform the survivor of what their options are, based on the facts of their case. For instance, although ADR is not allowed in the case of felonies, the court has been known to take this as a general principle to which there are exceptions.²⁹
- 1.10. Another crucial issue that survivors must be informed about is the issue of statute of limitations. Where an adult victim does not want to pursue criminal charges but wants to instead pursue a civil claim such as a claim for compensation under tort or a claim to recover their lost wages under contract law then there are time limitations in which these actions can be brought as a result of the doctrine of laches.³⁰
- 1.11. A trauma-informed lawyer will explain these limitations and their effects on access to justice to the survivor.
- 1.12. When it comes to criminal cases, in many countries e.g. Kenya³¹ and South Africa,³² there is no limit to the time in which charges of trafficking can be brought. This can be used as a loophole through which a survivor can get the justice they want by attaching the remedy they are looking for to the criminal case. However, this is a longer, more difficult and more time-consuming route to take and this is a fact of which survivors must be made aware.
- 1.13. Two central presumptions of survivor-centred care are that:³³
"... clients will have the better understanding of what is most important to the client and the client should be able to make the decision about their case based on the client's own understanding of what is best..."
- 1.14. In order to honour this, lawyers should allow the survivor to make their decisions after informing them of their options and the various means available in law through which these remedies can be pursued. This means stepping back from the decision-making process but being available to provide clarifications and further information where requested.
- 1.15. Taking a trauma-informed approach to a survivor's interests means acknowledging that the survivor's interests may change over time as they work through their trauma. When this happens, the lawyer must adjust their strategy to factor in how to pursue the new desired outcomes and terminate processes relating to the old ones. A lawyer must never begrudge a survivor these changes.³⁴

²⁷ Section 2 of the Penal Code (CAP. 63) of Kenya defines a felony as, among other things, any offence that carries a sentence of more than three (3) years.

²⁸ Section 3 of the Counter- Trafficking in Persons act (No. 8 of 2010) of Kenya, provides that trafficking in persons carries a sentence of thirty (30) years.

²⁹ For instance, in the Kenyan case of **Republic v Mohamed Abdow Mohamed** [2013] eKLR which was a murder case, the victim's family and the accused reached an agreement based on their traditional Somali culture and requested the Director of Public Prosecutions (hereinafter "the DPP") to withdraw the case. The DPP applied to the court to have the case withdrawn on the basis of the agreement and the application was granted and the case was dismissed because, in the view of the court, "...the ends of justice will be met by allowing rather than disallowing the application..."

³⁰ Black's Law Dictionary (9th Edition) defines the doctrine of laches as "...unreasonable delay in pursuing a right or claim almost always an equitable one - in a way that prejudices the party against whom relief is sought..."

³¹ Section 42 of the Limitation of Actions Act (CAP. 22) of Kenya acknowledges that the Act does not apply to criminal proceedings.

³² Section 18 of the Criminal Procedure Act of South Africa, 1977 (as amended from time to time) expressly provides that there is no time limit with regards to trafficking in persons cases.

³³ Lawton J.D, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, New York University School of Law, 2015 at pg. 149

³⁴ *Strategic Litigation for Sexual and Gender-Based Violence: Lessons Learned*, Office of the United Nations High Commissioner for Human Rights (2020), at pg. 3

2. Providing legal support to the Survivor

- 2.1. The legal system as it exists is not built for survivors. This is obvious from a number of features such as:
 - 2.1.1. The requirement that survivors repeat their stories over and over again. For instance, when the case is being heard in the first instance, the survivor must repeat their ordeal in detail to the police, the doctors, the prosecution, the court and the defence or their counsel. This forces them to repeatedly re-live their trauma and is a form of re-victimisation;³⁵
 - 2.1.2. The common practice of using cross-examination to weaken a witness' credibility;³⁶
 - 2.1.3. The length of cases often leaves survivors feeling anxious and defeated.³⁷
- 2.2. The role of a victim lawyer is to mitigate the effects of these aspects of the legal system that are harmful to survivors.

Co-ordination with the different actors:

- 2.3. In the context of criminal cases, important actors include the police, the medical personnel and the prosecutor. Upon receiving informed consent from the survivor, co-ordinating these actors includes:
 - 2.3.1. **Identifying all of the elements necessary to prove the Survivor's case and the aspects of these elements that can be proven by the Survivor's statement:** The purpose of this is two-fold:
 - 2.3.1.1. To ensure that the survivor's statement to the police includes all the elements that only they can give evidence on. A simple test for this would be asking the question: *what evidence, if not given by the survivor, will amount to hearsay?* The rules of evidence in most jurisdictions prohibit hearsay evidence.³⁸ Thus the goal is to determine the elements in respect of which only the survivor can give direct evidence.³⁹
 - 2.3.1.2. To ensure that the survivor does not give evidence that another witness can authoritatively and admissibly speak to. For instance, where there is physical evidence, the doctor who examines the survivor is well placed to speak to the extent and nature of the injuries; the survivor merely has to state that they sustained injuries and those injuries were caused by the accused.
 - 2.3.2. **Being present as the survivor makes their statement and acting as a liaison between the survivor and the police:** This is necessary to ensure that:
 - 2.3.2.1. all the elements identified above as elements that only the survivor can testify on are included in the survivor's statement. As a result of trauma, survivors often forget details or the chronology of events. It is therefore necessary for their lawyers to be present so as to mitigate this effect of trauma by pointing out to the survivor the parts they may have left out;
 - 2.3.2.2. elements that can be proven by other witnesses are included in their statements; and
 - 2.3.2.3. assisting to mitigate the effects of the survivor's trauma on the statement for instance assisting the survivor with matters such as chronology and filling in important gaps.

³⁵ *Using Feminist Practices to Improve the Justice Delivery System for Survivors of Gender-Based Violence*, One Future Collective- Morarka Leadership Foundation, 2020 at pg. 6

³⁶ Jagusch S., *Cross-Examination of Fact Witnesses: The Common Law Perspective*, Global Arbitration Review, October 2019 available at: <https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/cross-examination-of-fact-witnesses-the-common-law-perspective> and (accessed on 16th March 2021)

³⁷ *Using Feminist Practices to Improve the Justice Delivery System for Survivors of Gender-Based Violence*, One Future Collective- Morarka Leadership Foundation, 2020 at pg. 4

³⁸ For instance, Section 63 of the Evidence Act (CAP. 80) of Kenya requires that all oral evidence be direct evidence, that is evidence of things that were perceived using the 5 senses of the person giving the evidence.

³⁹ *Evidential Issues in Trafficking in Persons Cases*, United Nations Office on Drugs and Crime (2017), at pg.11

2.3.3. **Constantly checking in with the investigating officer to ensure that the evidence collection process is in line with the law:** This requires a victim's lawyer to form a strong, cordial relationship with the investigating officer and find the balance between respecting the independence of the police force and upholding the best interests of the survivor. Some initiatives that can be taken in this regard are:

2.3.3.1. Advising the police on measures which can be taken to ensure that the accused's statement is admissible: To do this most effectively, a victim's lawyer has to be well versed with the laws and rules governing admissions and confessions. For instance, in Kenya, statements made by suspects to the police which meet the criteria set out in under Section 25A of the Evidence Act (CAP 80) and the Evidence (Out of Court Confessions) Rules, 2009 can be admitted as confessions. Where this happens, the survivor can be saved from having to testify on some matters thus reducing chances of revictimization and re-traumatisation.

2.3.3.2. Advising the police on evidence required to prove elements of the survivor's case. For instance, age assessment reports⁴⁰ are necessary to prove whether the survivor is an adult or a minor which in turn determines the elements of trafficking that will need to be proven.⁴¹ Additionally, working around a victim's trauma may require calling of additional witnesses who can corroborate the important elements of the survivor's case and help the court see the survivor as credible despite their physical and emotional distress; difficulty concentrating; and avoidance of the trauma of their trafficking.⁴²

3. Facilitating the Survivor's Involvement in the Criminal Process:

Survivor Participation in the Trial Process

3.1. International standards recognise that victims have a right to be heard in criminal cases against their perpetrators; a right to be provided with information about the trial processes; and a right to participate in the trial process, have their views heard; clarify facts and seek reparation.⁴³

3.2. In order to realise these rights, countries have included in their counter-trafficking laws, provisions which recognise these rights and mandate the state to promote and fulfil them. Some countries also have passed legislation which provides for the rights of victims of crimes generally which also apply to victims of trafficking. For instance, in Kenya, the Counter Trafficking in Persons Act (No. 8 of 2010) recognises survivor's rights to: testify in camera;⁴⁴ to make victim impact statements that will be considered by the court during sentencing;⁴⁵ and right to restitution either as part of the criminal case⁴⁶ or in a civil case.⁴⁷ Additionally, there is a Victims Protection Act (No. 17 of 2014) allows victims to participate either directly or through a representative who can be a lawyer;⁴⁸ to access evidence that both the prosecution and defence intend to rely on;⁴⁹ and to adduce evidence that has been left out.⁵⁰ These sections have been interpreted by the Supreme Court of Kenya to mean that victims have a right to participate in trials.

⁴⁰ This is a practice which has evolved from the courts. As was explained in the Kenyan case of *Joseph Kieti Seet v Republic* [2014] eKLR age can be proven by birth certificates; parents or guardians; observation or medical reports.

⁴¹ Article 3(c), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁴² These are some of the common symptoms of trauma identified in the Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition) (2013)

⁴³ *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, United Nations Office of the High Commissioner for Human Rights (2010) at pg. 154

⁴⁴ Section 11, Counter-Trafficking in Persons Act (No 8 of 2010)

⁴⁵ Section 12, Counter-Trafficking in Persons Act (No 8 of 2010)

⁴⁶ Section 13, Counter-Trafficking in Persons Act (No 8 of 2010)

⁴⁷ Section 16, Counter-Trafficking in Persons Act (No 8 of 2010)

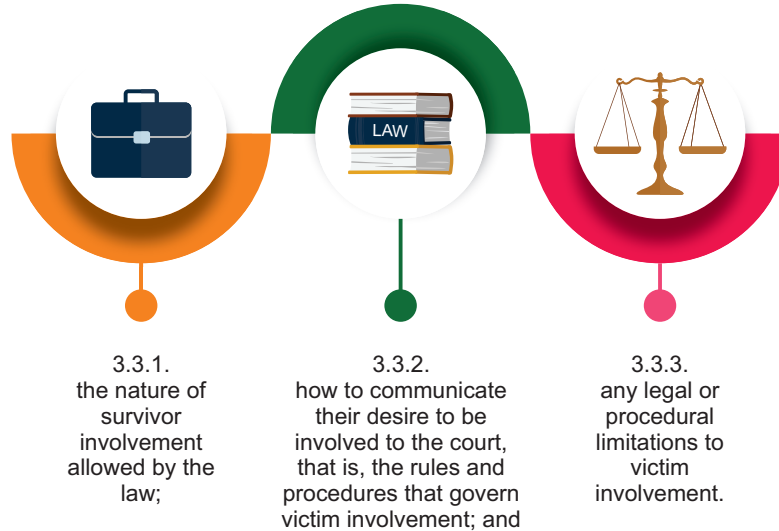
⁴⁸ Section 9 as read with section 14, Victim's Protection Act (No. 17 of 2014)

⁴⁹ Section 9(1)(e), Victim's Protection Act (No. 17 of 2014)

⁵⁰ Section 13, Victim's Protection Act (No. 17 of 2014)

However, their participation shall not be equal to that of the prosecutor and, it falls on the court to determine the extent of their participation on a case by case basis.⁵¹

- 3.3. Where a survivor's definition of justice includes participating in the criminal trial, it becomes the role of their lawyer to inform them of:⁵²



- 3.3.1. the nature of survivor involvement allowed by the law;
- 3.3.2. how to communicate their desire to be involved to the court, that is, the rules and procedures that govern victim involvement; and
- 3.3.3. any legal or procedural limitations to victim involvement.
- 3.4. Thereafter, together with the survivor, the lawyer should map out how the survivor would like to be involved given the parameters set out in the law. This mapping out should cover:
- 3.4.1. Whether and when the survivor shall physically attend court and whether they would like to be accompanied and by whom;
- 3.4.2. What additional involvement the survivor wishes to undertake; and
- 3.4.3. Whether and when the lawyer shall attend court on the survivor's behalf.
- 3.5. One way to minimise the traumatic effects of trials is to attend court dates on behalf of the survivor in instances where the survivor's presence is not required. This way, the survivor gets to follow their case without having to see their perpetrator which has been known to increase survivors' fear and anxiety. This in turn affects their ability to participate in the trial freely.⁵³

Survivor Testimony

- 3.6. Survivors' testimonies are an important source of evidence and oftentimes are critical to securing a conviction.⁵⁴ Taking a trauma-informed lens to survivor testimonies means recognising that:
- 3.6.1. The court room can be an intimidating place. It would be helpful to explain to the survivor what to expect in terms of what a court room looks like, where the various parties will be seated or standing and the order of the proceedings. Where possible and safe, it may help to take the survivor through an actual walk through at the court.⁵⁵

⁵¹ *Joseph Lendrix Waswa v Republic* [2020] eKLR

⁵² Paragraph 6(a), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

⁵³ *Evidential Issues in Trafficking in Persons Cases*, United Nations Office on Drugs and Crime (2017), at pg.14-15

⁵⁴ *Evidential Issues in Trafficking in Persons Cases*, United Nations Office on Drugs and Crime (2017), at pg. 23

⁵⁵ Interview with Yasmin Manji, Trauma Therapist

- 3.6.2. All survivors need some kind of support or assistance. Unfortunately, many legal systems recognise this for children survivors but not for adult survivors. It is important for survivor lawyers to identify how they can work around this in their respective jurisdictions.⁵⁶
- 3.6.3. Survivors may need additional support when preparing for their testimonies. Therefore, there is need for the lawyer to work with a mental health professional in these preparations because clients who are better prepared, make better witnesses.⁵⁷
- 3.6.4. Survivors may have difficulty remembering details or explaining them or they might be entirely resistant to testify on some issues.⁵⁸ This makes it double important for lawyers to have conducted the analysis set out in Paragraph 2.3.1 and only focus on the facts which only the survivor can testify to. Additionally, where necessary, adducing evidence from mental health experts regarding the effect of trauma on survivor's ability to be calm, collected witnesses with clear and easy to follow testimonies.⁵⁹
- 3.6.5. Cross-examination is not a trauma-informed of victim-centred process. For example, the Evidence Act (CAP. 80) of Kenya provides in section 154 states that:
When a witness is cross-examined he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—
(a) *to test his accuracy, veracity or credibility;*
(b) *to discover who he is and what is his position in life;*
(c) *to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.*

This is a rule that is contained in the evidence laws of various countries. The legal argument for allowing this is that questioning the accuracy, credibility and injury of survivors is part and parcel of the perpetrator's right to fair trial. This is because there may be probative value in questioning the credibility, accuracy or character of the survivor- that is, questioning these aspects of the survivor may support the perpetrator's defence.⁶⁰
- 3.6.6. Additionally, in many jurisdictions, where the accused persons cannot afford the counsel and the state cannot provide them with counsel, then cross examination ends up being by the accused. This can also happen in instances where the accused person refuses counsel. It is important to prepare the survivor for this and, where possible, try to mitigate it by requesting the court to let the survivor testify via video link or while in a witness box.

4. Facilitating the Survivor's Refusal to Participate in the Criminal process

- 4.1. Survivors have a right to decide whether or not to participate in criminal trials and their right to receive support and protection as well as their right to pursue redress through other measures such as civil remedies must not be tied to their cooperation with the criminal process.⁶¹

⁵⁶ Interview with Yasmin Manji, Trauma Therapist

⁵⁷ Interview with Sarah Katz, Associate Clinical Professor of Law and Trauma-Informed Lawyering Expert

⁵⁸ Interview with Sarah Katz, Associate Clinical Professor of Law and Trauma-Informed Lawyering Expert

⁵⁹ Interview with Sarah Katz, Associate Clinical Professor of Law and Trauma-Informed Lawyering Expert

⁶⁰ Ward T. and Fouladvand S., *Human Trafficking, Victims' Rights and Fair Trials*, The Journal of Criminal Law, 82 (2). pp. 138-155. At pg. 16.

⁶¹ Recommended Principles and Guidelines on Human Rights and Human Trafficking, Office of the United Nations High Commissioner for Human Rights (2002), at Principle No. 8

- 4.2. This is not the position in many countries. A survivor's ability to access protection, support and other remedies is often tied to not only their willingness to participate in criminal proceedings but also the quality of their participation.⁶²
- 4.3. Where a survivor does not want to participate in the criminal trial, it falls to their lawyer to:
 - 4.3.1. Explore other means through which the survivor can get support for instance through referring the survivor to non-governmental organisations or charitable institutions which can provide them with basic needs, medical support and psychosocial support. This is extremely crucial where the state is unwilling or unable to support or protect the survivor;
 - 4.3.2. Explore alternative means through which the Survivor can regularise their status in the country or, if it is safe and in accordance with the survivor's wishes, be repatriated to their home; and
 - 4.3.3. Provide legal support for other legal needs outside the criminal case.

5. Facilitating the Survivor's access to Remedies

- 5.1. The Palermo Protocol mandates states to create measures through which survivors of trafficking can receive compensation for damage suffered.⁶³ Similarly, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, recognises that survivors have a right to:
 - 5.1.1. **Restitution** which is defined as including *"the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights..."*⁶⁴
 - 5.1.2. Compensation to both the survivor for bodily injury or impairment of physical or mental health and their family, particularly where, as a result of the offence, the victim died or became physically or mentally incapacitated⁶⁵
- 5.2. States who have ratified the Palermo Protocol have an obligation to provide for civil remedies for survivors of trafficking. This can be done through the domestic counter-trafficking in persons law. For instance, Section 13 of the Counter-Trafficking in Persons Act (No. 8 of 2010) of Kenya provides for restitution and Section 16 envisions victims of trafficking instituting civil suits for damages.
- 5.3. Remedies such as compensation and restitution can be awarded upon the completion of the criminal case. For instance, in Kenya, the Criminal Procedure Code envisions the granting of compensation as part of plea agreements⁶⁶ or in addition to a conviction.⁶⁷ Similar provisions are included in Section 23 of the Victim Protection Act (No. 17 of 2014). The Victims Protection Act (No. 17 of 2014) also envisions restorative justice in Section 15.
- 5.4. Alternatively, compensation can be sought through a civil suit even where there is no criminal case. For instance, survivors can bring:
 - 5.4.1. a tort case against their perpetrators and seek both specific and general damages; or⁶⁸
 - 5.4.2. a labour law claim against their perpetrators in cases of trafficking for labour-related exploitation (forced labour; debt bondage etc).⁶⁹

⁶² *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, United Nations Office of the High Commissioner for Human Rights (2010) at pg. 142

⁶³ Article 6(6), Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

⁶⁴ Paragraph 8, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

⁶⁵ Paragraph 12, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

⁶⁶ Section 137A, Criminal Procedure Code (CAP. 75)

⁶⁷ Section 175(2), Criminal Procedure (CAP. 75)

⁶⁸ *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 13: Compensation for Victims of Trafficking In Persons*, United Nations Office on Drug and Crime (2009) at pg. 4-5

⁶⁹ *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 13: Compensation for Victims of Trafficking in Persons*, United Nations Office on Drug and Crime (2009) at pg. 6-7

- 5.5. Survivor lawyers must therefore be conversant with the laws of their countries in these regards so as to give victims enough information for them to make informed decision. Such information includes:
 - 5.5.1. The elements that will need to be proven;
 - 5.5.2. The level of involvement required from the survivor to prove their case;
 - 5.5.3. The amount to time the case will take; and
 - 5.5.4. The strengths and weaknesses of their case as well as the chances of success.

6. Safety and Self-Care for Survivor Lawyers



- 6.1. Survivor's lawyers can suffer from:
 - 6.1.1. **Direct trauma:** This would be caused by directly experiencing traumatic events because of being targeted by their client's perpetrators. Such events include harassment; threats of violence; actual violence; and even death.⁷⁰
 - 6.1.2. **Vicarious trauma:** This is caused by having to consistently listen to; document; and build cases that are based on the traumatic experiences of their clients.⁷¹ Vicarious trauma is defined as "... the transformation or change in a helper's inner experience as a result of responsibility for and empathic engagement with traumatised clients..."⁷² Particularly for survivor lawyers, this trauma may be exacerbated by helplessness that arises from knowing that, because of the limitations of the legal system, there is little or nothing that can be done for a client. Otiende and Manji (2018) identify the following as symptoms of vicarious trauma:⁷³
 - 6.1.2.1. Intrusive experiences such as dreams about the victims they work with, nightmares or recounting details of the victim's experiences
 - 6.1.2.2. Strong reactions such as grief, anger, sadness
 - 6.1.2.3. Emotional numbing, or a feeling of shutting down
 - 6.1.2.4. Feelings of helplessness and despair
 - 6.1.2.5. Feeling guilty regarding the privileges they have
 - 6.1.2.6. Loss of meaning in their work or in life

⁷⁰ General comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), African Commission on Human and People's Rights (2017) at para. 16-17

⁷¹ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (Fifth Edition), (Washington DC, American Psychiatric Publishing, 2013) at page 274

⁷² Otiende S. and Manji Y, No longer a Victim: A Best Practice Manual for Assisting Victims of Trafficking, Awareness Against Human Trafficking (HAART), 2018 at pg. 65.

⁷³ Otiende S. and Manji Y, No longer a Victim: A Best Practice Manual for Assisting Victims of Trafficking, Awareness Against Human Trafficking (HAART), 2018, at pg. 65.

- 6.1.2.7. Being easily overwhelmed by their feelings
 - 6.1.2.8. Sensitivity to and avoidance of violence e.g. in movies or the news
 - 6.1.2.9. Change in the service providers core beliefs e.g. no one can be trusted, all people are cruel.
 - 6.1.2.10. Avoidance of intimacy
 - 6.1.2.11. Decreased energy for themselves
 - 6.1.2.12. Withdrawing from others
 - 6.1.2.13. Pessimism or cynicism
 - 6.1.2.14. Loss of spirituality
 - 6.1.2.15. Loss of respect for the people they work with
 - 6.1.2.16. Loss of enjoyment of sexual activity
 - 6.1.2.17. Finding themselves talk about their work too much
 - 6.1.2.18. Increase sense of being in danger, and not feeling safe
 - 6.1.2.19. Increased illness, fatigue, aches and pain
 - 6.1.2.20. Reduced productivity
 - 6.1.2.21. Difficulty decision making
 - 6.1.2.22. Difficulty trusting others
- 6.2. Consequently, it is important for survivor's lawyers to:
- 6.2.1. Have safety protocols in place; and
 - 6.2.2. Be proactive about self-care.
- 6.3. Safety Protocols
- 6.3.1. Safety protocols are rules and practices which enable lawyers to safeguard against or, at the very least, mitigate against direct trauma. Each survivor lawyer should establish safety protocols and institutionalise them in whichever institution or organisation they work for.
 - 6.3.2. Safety protocols should be preceded by an assessment of safety concerns presented by each case as they relate to the survivor and the lawyer themselves. This assessment shall inform the measures that need to be put in place to ensure the protection and safety of both parties.
 - 6.3.3. Safety measures for survivors can be developed and enforced together with state actors such as the police and witness protection agencies; or non-state actors such as Non-Governmental Organisations (NGOs) which work on counter trafficking in persons.
 - 6.3.4. Safety measures for lawyers include:
 - 6.3.4.1. Not widely sharing personal information such as home addresses and personal phone numbers.
 - 6.3.4.2. Informing third parties whenever you are required to attend court or any meeting with either the perpetrator or their representatives (or in cases where it is suspected that the police have been compromised) the police.
 - 6.3.4.3. Documenting all instances of interference with either yourself as the survivor's lawyer or the survivor themselves. These are useful for monitoring and learning purposes in that they can help the lawyer improve their safety protocols. They are also essential to support an application to have bail withdrawn or increased. It can also form the basis of protective orders.

- 6.3.4.4. Ensuring all documentation are kept on secure serves (online) and in secured places (for hard copies).
 - 6.3.5. The above list is not exhaustive.
- 6.4. Self-care
 - 6.4.1. It is important for survivor lawyers to know about trauma generally and how it manifests for them. This will enable them to be proactive about their self-care.
 - 6.4.2. Self-care can be defined as activities and practices which a person can do that will make them feel better.⁷⁴ It includes:
 - 6.4.2.1. preventive measures such as establishing firm boundaries with clients and not blurring the line between work and personal life; and
 - 6.4.2.2. curative measures which come in 2 forms:⁷⁵
 - 6.4.2.2.1. **Self-soothing**, that is, activities and practices which a person can do by themselves to take care of themselves emotionally, physically, and mentally such as taking walks; working out; taking warm baths; doing yoga; meditation; prayer; and doing breathing exercises
 - 6.4.2.2.2. **Relational soothing**, that is, activities and practices which a person does with others that renew them physically, mentally and emotionally such as going for a run with friends; talking to or visiting friends or family; professional therapy; and playing with nieces and nephews.
 - 6.4.3. The above lists are not exhaustive lists as selfcare looks different for every person. It is up to each person to identify the activities that rejuvenate them.
 - 6.4.3.1. The following are some useful guidelines with regards to self-care:⁷⁶
 - 6.4.3.2. No one can do it for you. You must do it for yourself.
 - 6.4.3.3. It does not have to be a complicated or expensive activity, provided it rejuvenates you, it is self-care.
 - 6.4.3.4. It is important to distinguish between healthy and unhealthy coping mechanisms. Unhealthy coping mechanism include violence; drug and substance abuse. Healthy coping mechanisms include:

⁷⁴ Interview with Yasmin Manji, Trauma Therapist.

⁷⁵ Otiende S. and Manji Y, No longer a Victim: A Best Practice Manual for Assisting Victims of Trafficking, Awareness Against Human Trafficking (HAART), 2018 at pg. 67

⁷⁶ Interview with Yasmin Manji, Trauma Therapist.

TYPES OF COPING SKILLS



Self-Soothing

(Comforting yourself through your five senses)

1. Something to touch (eg. stuffed animal, stress ball)
2. Something to hear (eg. music, meditation guides)
3. Something to see (eg. snow globe, happy picture)
4. Something to taste (eg. mints, tea, sour candy)
5. Something to smell (eg. lotion, candles, perfume)



Distraction

(Taking your mind off the problem for a while)

Examples

Puzzles, books, artwork, crafts, knitting, crocheting, sewing, crossword puzzles, sudoku, positive websites, music, movies etc.



Opposite Action

(Doing something the opposite of your impulses that consistent with a more positive emotion)

1. Affirmations and Inspiration (eg. looking at or drawing motivational statements of images)
2. Something funny or cheering (eg. funny movies / TV / books)



Emotional Awareness

(Tools for identifying and expressing your feelings)

Examples

- A list of charts of emotions
- A journal
- Writing supplies
- Drawing
- Art supplies

TYPES OF COPING SKILLS



Mindfulness

(Tools for centering and grounding yourself in the present moment)

Examples

- Meditation or relaxation
- Recordings
- Grounding objects (like a rock or paper weight)
- Yoga mat
- Breathing exercises



Crisis Plan

(Contact info of supports and resources, for when coping skills aren't enough)

1. Family / Friends
2. Therapist
3. Psychiatrist
4. Hotline Crisis team
5. ER / 911



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