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Sexual violence victim-witnesses at the Special Court for Sierra Leone: Have lessons from ICTR been learnt?

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law (LL.M.) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Law (LL.M.) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AFRC	Armed Forces Revolutionary Council
AIDS	Acquired Immunity Deficiency Syndrome
CDF	Civil Defence Force
ECOMOG	Economic Community of West African states Monitoring Group
FAR	Forces Armées Rwandaises
GBC	Gender Based Crimes
H.I.V	Human Immune Virus
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
IFHR	International Federation of Human Rights
PHR	Physicians for Human Rights
RUF	Revolutionary United Front
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
SLA	Sierra Leone Army
STDs	Sexually Transmitted Diseases
STIs	Sexually Transmitted Infections
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UNAMSIL	United Mission in Sierra Leone
UN	United Nations

VVF	Vasico- Vaginal fistula
VVF	Vasico- Rectal fistula
WSB	West Side Boys
WVS	Witness and Victims Section
WVSS	Witness and Victims Support Section

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CHAPTER 1

1.1 Introduction

‘...I don’t have any children. I was a virgin before. They ruined me. ...They undressed five of us, laid us down, used us in front of my family and took us away with them. They wouldn’t release us, they kept us with them in the bush... When I escaped, I couldn’t walk.... I was bleeding from my vagina. ...Since I got back I have been so sick...I would like to go back to school, but I can’t ..., I can’t do anything...’¹

Rape and other forms of sexual violence are increasingly becoming the order of the current armed conflicts of both internal and international characters no matter what the reasons behind the conflicts are.² These inhuman acts are mostly committed against female civilian population³ by male soldiers from the government armed forces, rebel groups, paramilitary groups and even peace keeping forces.⁴ The countries whose armed conflicts were characterised by acts of rape and sexual violence include; Rwanda,⁵ Democratic Republic of Congo,⁶ Somalia⁷, Uganda,⁸ Sudan,⁹ Yugoslavia (Bosnia and Herzegovina),¹⁰ East Timor,¹¹ to mention just a few.

Also, during the Sierra Leone civil war which lasted for a decade,¹² women, and of most concern, young girls¹³ were brutally and widely subjected to repeated rapes and other acts of sexual violence which took different forms.¹⁴

¹ Physicians for Human Rights ‘War related sexual violence in Sierra Leone: A population –bases assessment’ 2002 Available at <http://www.physiciansforhumanrights.org/library/documents/reports/sexual-violence-sierraleone.pdf> [Accessed 13 April 2009] at 7.

² Christine Chinkin ‘Rape and Sexual abuse of women in international law’ (1994) 5 *European Journal of International Law* 326 at 326.

³ Megan Bastick et al. ‘Sexual violence in armed conflict: Global overview and implication for the security sector’ Report for the Geneva Centre for the Democratic Control of Armed Forces (2007) at 9.

⁴ Ibid at 9.

⁵ Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*, 1 September 1996. Online. UNHCR Refworld, Available at: <http://www.unhcr.org/refworld/docid/3ae6a8510.html> [Accessed 6 April 2009].

⁶ Bastick (note 3) at 53.

⁷ Ibid at 59.

⁸ Ibid at 65.

⁹ Ibid at 63.

¹⁰ Ibid at 117.

¹¹ Ibid at 97.

¹² Lansana Gberie *A dirty war in West Africa- The RUF and the destruction of Sierra Leone* (2005) at 2.

The international justice system has responded to the atrocities committed both in Sierra Leone and Rwanda by establishing the Special Court for Sierra Leone (herein referred to as SCSL) on 16th January 2002¹⁵ and an ad hoc tribunal referred to as the International Criminal tribunal for Rwanda (ICTR) in order to try the perpetrators of grave breaches of international humanitarian law¹⁶ amounting to crimes against humanity¹⁷ or war crimes¹⁸ including rape and other forms of sexual violence.

In the process of holding the perpetrators accountable, the prosecutors of the two courts use victim-witnesses to provide direct evidence of the crimes committed during the conflict. There are inherent problems which pose difficulties to the victims of sexual violence to comfortably be witnesses in these internationalised courts.

1.2 Statement of the Problem

It must be noted from the onset that, the prosecution of gender based crimes (GBC) is one of the most sensitive area a court can deal with. This is in relation to the fragile nature of the victim-witnesses who largely contribute to the conviction of the perpetrators by giving direct evidence in the form of a testimony of the crimes committed against them. These victim-witnesses have been subjected to life threatening inhuman acts which have lasting effects in their lives.¹⁹ For them to decide to testify is equivalent to reliving the ordeal they were subjected to in absence of effective protection measures taking into account the nature of proceedings before the international courts.

¹³ Amnesty International 'Sierra Leone rape and other forms of sexual violence against girls and women' 2000 AFR/35/00 at 1 Available at <http://www.amnesty.org/en/library/info/AFR51/035/2000> [Accessed 18 April 2009].

¹⁴ Binaifer Nowrojee 'Making the invisible war crime visible: Post conflict justice for Sierra Leone's rape victims' (2004) 18 *Harvard Human Rights Journal* 85 at 86.

¹⁵ Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone 16 January 2002 in C. Tofan (ed) *The Sierra Leone Special Court Collection. Basic Documents (2008)* 1 at 1.

¹⁶ Statute of the Special Court for Sierra Leone in C Tofan (ed) *The Sierra Leone Special Court collection. Basic documents* (2008) Aolf Legal Publishers, Netherlands. Article 1 (2).

¹⁷ Ibid article 2.

¹⁸ Ibid article 3.

¹⁹ Human Rights Watch 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' Available at <http://www.hrw.org/reports/2003/sierraleone/sierleon013.pdf> [Accessed 1 May 2009].

Therefore, unlike ordinary witnesses, victim-witnesses of sexual violence require the availability of a more victim oriented protection mechanism so as to avoid being traumatized and subjected to other life threatening conditions before, during and after the testimony.

The victim-witnesses usually end up taking the bravest decision to testify against the accused before the tribunals. This is so because, the perpetrators who are detained are well known people in the community and have the ability through their family members to make the lives of such victim-witnesses unbearable or even bring an end to such lives by killing them.²⁰ It is therefore a great risk that these victim-witnesses take in order to bring an end to impunity of gender related crimes.

What is of major concern are the procedures and measures that can or have been taken to ensure that the perpetrators are held accountable without compromising the ability of the victims to live a life free from fear, intimidation, reprisal, ex communication and other adverse effects that can result from their involvement as witnesses with the judicial institutions particularly the Special court for Sierra Leone.

1.3 Hypothesis

The SCSL has improved on the ICTR with regard to the protection of victim-witnesses of sexual violence. The court has adopted specific protection mechanism specifically developed to cater for the sexual violence victim-witnesses touching different phases of the judicial process from the investigation, trial and post trial phase. This reveals a progressive awareness and positive response from the international justice system in ensuring that the victims of GBC are given a conducive environment under which they can participate as witnesses in the judicial process.

1.4 Objectives of the Study

This research aims at analysing the problems and measures adopted by different players to minimise the problems victim-witnesses of rape and other forms

²⁰ Human Rights Watch 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone.' Available at <http://www.hrw.org/en/node/11565/section/1> [Accesses 28 April 2009].

of sexual violence encounter when testifying before the SCSL. The research explores the witness protection system in SCSL²¹ and how efficient it is in addressing the problems while identifying the loop holes and suggesting the way forward. It identifies the protection obligations and roles of units and persons involved in the proceedings. This includes the prosecutor's office, defence, judiciary and the Witness and Victims Support Unit.

A comparative analysis of the issues is drawn with the ICTR since acts of sexual violence were also committed in the Rwandan genocide. Although the two conflicts are not similar in nature, character and time frame, the two institutions have a common objective of bringing justice to the victims by prosecuting the perpetrators.

Comparison is necessary for the purposes of this research because, the SCSL was established in the place where the crimes were committed unlike ICTR which was established in a foreign land. Therefore, the threats and difficulties between the two may differ at some point and overlap in others. Drawing examples and lessons from these two institutions will bring an understanding of the difficulties victim-witnesses of rape and other forms of sexual violence face in two different scenarios all of which are part of the international judicial process.

Further, the SCSL had a chance to improve on the shortcomings of the ICTR since it was established 8 years²² after the ICTR came into being.²³ Hence, analysing the witness protection in the light of this will enable to shade an understanding of how the international justice process is evolving in a positive direction towards ensuring a favourable environment, in which victims of gender related crimes can comfortably be witnesses, an important component of the judicial process.

1.5 Methodology

This research has been conducted on the basis of a study of the primary and secondary sources relevant on rape and other sexual violence crimes under

²¹ Special Court for Sierra Leone Rules of Procedure and Evidence in C Tofan (ed) *The Sierra Leone Special Court collection. Basic documents* (2008) Aolf Legal Publishers, Netherlands. Rule 34 which requires the establishment of a Witness Protection Unit.

²² SCSL was established in January 2002 and became fully operational in December 2002.

²³ The ICTR was established in 1994 by a Security Council Resolution 912 and started its operation in 1994 when its first indictment was issued on 12 December 1995.

international law. Clarity is emphasised on the protection of victim-witnesses in the SCSL. The primary sources include in particular the Statute of the SCSL,²⁴ its Rules of Procedure and Evidence²⁵ and SCSL Code of Professional Conduct.²⁶ Further analysis has been conducted on secondary sources including books, journal articles, relevant online reports as well as applicable decided cases on the issues such as the transcripts, judgements and indictments.

Since the research is a comparative analysis, similar sources have been examined with regard to ICTR. Focus is narrowed down to rape and sexual violence victim-witness protection.

1.6 Literature Review

Out of authors reviewed and listed in the bibliography who have written on how the international justice has responded to acts of sexual violence during armed conflicts, Brouwer,²⁷ Sluiter,²⁸ Kelly,²⁹ Nowrojee³⁰ Schabas³¹ and Viseur-Sellers³² have provided general patches of witness protection and in other instances with specific reference to victim-witnesses of sexual violence in the ICTR, ICTY and the ICC. None of the writers have given a comparative analysis between the SCSL and ICTR and how the former has improved on the ICTR sexual violence victim-witness protection mechanism in the effort of ensuring the exceptional requirements of this group of witnesses are met at all times.

²⁴ Statute of the SCSL (note 16).

²⁵ SCSL RPE (note 21).

²⁶ Code of Professional conduct for Counsel with the right of audience before the Special Court for Sierra Leone in C Tofan (ed) *The Sierra Leone Special Court collection. Basic documents* (2008) Aolf Legal Publishers, Netherlands.

²⁷ Anne-Marie de Brouwer *Supranatural criminal prosecution of sexual violence : The ICC and the practice of the ICTY and the ICTR* (2005).

²⁸ Goran Sluiter 'The ICTR and the Protection of Witnesses' (2005) 3 *Journal of International Criminal Justice* 966.

²⁹ Askin Kelly D *War crimes against women: Prosecution in international war crimes tribunals* (1997).

³⁰ Nowrojee (note 14).

³¹ William S Schabas *The UN international criminal tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006).

³² Patricia Viseur-Sellers 'The other voices: Interpreters and investigators of sexual violence in international criminal prosecution' in Helen Durham and Tracey Gurd eds *Listening to the silences: Women and war* (2005).

CHAPTER 2

Analysis of sexual violence during the armed conflicts in Sierra Leone and Rwanda

2.1 Victims and perpetrators of sexual violence in Sierra Leone and Rwanda.

2.1.1 The victims of sexual violence

Sierra Leone war has been notorious for the inhuman acts of amputation of civilian limbs. These acts have gained the attention of the international community including journalists³³ and scholars.³⁴ While these reports have been circulating world wide, women and young girls suffered more than a double share of the atrocities. They have been subjected to every sort of criminal amputation³⁵ and other forms of crimes as was committed against the general population and on top of that; they were the victims of GBC.³⁶

The perpetrators of these inhuman acts never discriminated the women against specific trait. Adult married women³⁷ and nursing mothers³⁸ together with young girls between the age of 10³⁹ and 16⁴⁰ from different tribes and social economic levels were targeted and subjected to the inhuman acts of rape and other forms of sexual violence.⁴¹ The research conducted by PHR indicates that; 94% of 991 female members of household interviewed during its research, acknowledged to

³³ Example, BBC News 'World Africa: Help for Sierra Leone amputees' Tuesday, 2 November 1999. Available at <http://www.news.bbc.co.uk/1/hi/world/africa/502884.stm> [Accessed 23 May 2009] see also Lansana Fofana BBC News 'S Leone's war amputees 'ignored'' 16 September 2005. Available at <http://www.news.bbc.co.uk/2/hi/africa/4250276.stm> [Accessed 23 May 2009]

³⁴ Example, Lansana Gberia (note 12) at 14 to 16 and David Keen *Conflict and collusion in Sierra Leone* (2005).

³⁵ Prosecutor v Issa Hassan Sessay et al Transcript on Examination of Witness TF1-214, 14 July 2004 at 10.08 AM Case No. SCSL – 04-15-T at 30.

³⁶ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19).

³⁷ Report of the Sierra Leone Truth and Reconciliation Commission TRC (2004) 3B at Graphic Packaging Limited Ghana para 6 at 86. Available at <http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20THREE/VOLUME%203%20B.pdf> [Accessed 23 May 2009] at para 81 and 82 at 34. According to the report, female victims who reported to the commission comprised of 3,186 out of 10,002 victims. Most of them reported to have been subjected to rape and or other acts of sexual violence.

³⁸ Prosecutor v Issa Hassan Sessay et al Transcript on examination and cross examination of Witness TF1-064, 19 July 2004 at 10.20 AM Case No. SCSL – 04-15-T at 49. 'I refused [to have sex with him] because I was nursing [but was forced anyway].

³⁹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 293 at 162.

⁴⁰ Amnesty International 'Sierra Leone rape and other forms of sexual violence against girls and women' (note 13) at 2.

⁴¹ Ibid.

have been subjected to acts of sexual violence during the period in which the war lasted i.e. between 1991 and 2000.⁴²

The combatants targeted specifically the virgin young girls.⁴³ This kind of selection can be explained by the deeply rooted culture of Sierra Leone which attaches great significance to virginity in terms of honour to the girl and family.⁴⁴ So targeting this specific group of girls would destroy the most important thing they and the family could be proud of on the basis of their gender.

The Rwandan genocide was also characterised by acts of sexual violence which unlike the ones committed in Sierra Leone, they were specific targeted against Tutsi women.⁴⁵ However, Hutu women who had affiliations with Tutsis through marriage were also targeted⁴⁶ and a small number of Hutu women were however targeted on the basis of their gender alone.⁴⁷

The exact number of victims of rape and sexual violence in Rwanda is unknown due to various factors,⁴⁸ however, it is estimated that, about 250,000 to 500,000 Rwandese women were subjected to acts of sexual violence.⁴⁹

Both in Sierra Leone and Rwanda acts of rape and other forms of sexual violence were perpetrated by soldiers from different armed forces at diverse magnitude.

⁴² PHR (note 1) at 2.

⁴³ Nowrojee (note 14) at 89 and HRW (note 19). In order to determine whether a girl was a virgin, female soldiers would insert fingers in the vagina of the young girls.

⁴⁴ Report of the Sierra Leone TRC (2004) 3B (note 37) para 81 at 102. A girl found not to be a virgin will bring shame to the mother and ultimately the family. However, the war and nature of crimes committed against women have brought significant changes to Sierra Leone culture where virginity is now seen as a 'casualty of war' and no longer carry the great importance as it did before the war.

⁴⁵ HRW, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (note 5).

⁴⁶ Ibid.

⁴⁷ Speech by Anne Marie de Brouwer 'Sexual Violence against women during the genocide in Rwanda and its aftermath Solace Ministries International Conference 30th May, 2007 at 2. Available at http://www.solacem.org/pdf_docs/sexual_violence_of_genocide.pdf. [Accessed 6 April 2009].

⁴⁸ One of the factors that have contributed to the inability to get the exact statistic includes the unwillingness of the Rwandese women to admit being the victims of sexual violence as contrasted by the pregnancy cases reported during that time.

⁴⁹ UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda' submitted by Mr. René Degni-Segui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Resolution S-3/1 of 25 May 1994, E/CN.4/1996/68, 29 January 1996 para 16. Available at

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/aee2ff8ad005e2f6802566f30040a95a?OpenDocument> [Accessed 23 March 2009].

2.1.2 Perpetrators of sexual violence in Sierra Leone civil war and Rwandese genocide

In Sierra Leone, the main perpetrators of sexual violence were the members of the Revolutionary United Front (RUF). This was the largest rebel group. 53 per cent of those interviewed by the Physicians for Human Rights reported to have been subjected to acts of sexual violence by RUF forces compared to 'less than six per cent' positive response from the interviewees of being subjected to acts of sexual violence by other combatant groups.⁵⁰ In accordance with the TRC report, there was an increase in the commission of acts of sexual violence by members of this group after they resorted to guerrilla means of warfare from 1994.⁵¹

The Armed Forces Revolutionary Council (AFRC) which was the alliance of RUF; and the West Side Boys (WSB) perpetrated the acts of sexual violence to some extent.⁵² The PHR have indicated that six per cent of sexual violence abuses brought to its attention were committed by AFRC and five per cent by the WSB.⁵³ However, the TRC report indicates that 11.1 per cent of acts of sexual violence it recorded were perpetrated by members of AFRC⁵⁴ without any statistical data for WSB.

It is important to mention that, the Civil Defence Forces (CDF) a militia initially comprised of traditional men created in 1996⁵⁵ had not perpetrated the acts of sexual violence prior to 1997 due to their respect for traditional values⁵⁶ and the prohibition of sexual violence in its internal rules.⁵⁷ However, due to the change of warfare, acts of sexual violence started to be committed from 1997 although in a very limited scale.⁵⁸ It is noteworthy that, the PHR did not record any allegations of sexual violence made against CDF.

Although to a smaller extent compared to the rebel forces, reports have indicated that sexual violence was also perpetrated by government forces⁵⁹ (Sierra

⁵⁰ PHR (note 1) at 2.

⁵¹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 331 at 171.

⁵² Ibid 356 and 357 at 177 see also HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19).

⁵³ PHR (note 1) at 46.

⁵⁴ Report of the Sierra Leone TRC (2004) 3B (note 37) para 357 at 177.

⁵⁵ Ibid para 347 at 175.

⁵⁶ Ibid para 348 at 175.

⁵⁷ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19).

⁵⁸ Report of the Sierra Leone TRC (2004) 3B (note 37) para 348 at 175.

⁵⁹ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19).

Leone Army- SLA)⁶⁰ and peace keeping forces⁶¹ including the United Mission in Sierra Leone (UNAMSIL) and Economic Community of West African states Monitoring Group (ECOMOG).⁶²

In Rwanda, the main perpetrators were the militia group known as 'Intarahamwe'⁶³ which comprised of members of Hutu ethnicity. However, civilians, soldiers of Rwandan Armed forces (Forces Armées Rwandaises-FAR) and Presidential Guard⁶⁴ perpetrated the acts of sexual violence against Rwandese women and young girls.⁶⁵ It is striking to note that the women in Sierra Leone and Rwanda were not safe even at the hands of those who had a duty of protecting them. This has a great possibility of making the victims very reluctant to trust those responsible for ensuring their safety even after the conflicts have ceased.

It is worth mentioning that, none of the victims or community as a whole has given a thorough explanation as to why the male adult and child combatants would become wild men and subject many Sierra Leone⁶⁶ and Rwandese women and young girls to inhuman acts against their gender. However, different theories have tried to shade an understanding of war time rape by taking into account the root causes of such behaviour.

2.2 Understanding the behaviour of perpetrators of war time rape

2.2.1 The strategic rape theory

According to this theory, the commission of acts of rape and other sexual violence are aiming at fulfilling a strategic plan. Sexual violence against women and young girls in Sierra Leone and Rwanda were committed with the intention to 'dehumanise' subjugate and humiliate the female population.⁶⁷ In Rwanda, the intention had an additional element of fulfilling the genocidal specific intent of

⁶⁰ Ibid at 178 and 179.

⁶¹ Ibid.

⁶² Ibid.

⁶³ UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda' (note 53).

⁶⁴ HRW, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (note 5).

⁶⁵ Speech by Anne Marie de Brouwer (note 47) at 3.

⁶⁶ Ibid at 78. the women who were asked as to why the combatants have committed acts of sexual violence against them did not respond to the question or when responded gave the answer ' God knows.'

⁶⁷ Report of the Sierra Leone TRC (2004) 3B (note 37) para 6 at 86.

destroying the Tutsi population facilitated by the anti Tutsi propaganda prior to the genocide.⁶⁸ As a result, rape and other forms of sexual violence both in Sierra Leone and Rwanda were used as ‘weapon of war’⁶⁹ with the aim of terrifying the population⁷⁰ or bring an end to Rwandese Tutsi population by ‘manipulating norms of honor, chastity, virginity, femininity, masculinity, loyalty, marriage, and kinship, and insert an emanating set of experiences and memories that destroy group bonds through time.’⁷¹ Consequently, vulnerable women were the best target on which the weapon could effectively be utilized.

Rape and other forms of sexual violence in modern warfare are also aiming at encouraging aggression in order to vanquish the foe community.⁷² In other instances many other forms of sexual violence like rape, sexual slavery, and forced marriage are used as a form of consoling or rewarding the fighting forces. This had also featured Sierra Leone war time rape where women in sexual slavery and even forced marriage were forced to engage in sexual activities to satisfy the sexual needs of soldiers.⁷³

Notable, this theory is confined to what is referred to as strategic war time rape, for one to grasp an understanding of other side of the coin in which the behaviour of war time rape has no specific strategy to achieve the below theories have bring to light the reasons for such deviation.

⁶⁸ Allan Thompson and Kofi Atta Annan *The media and the Rwanda genocide* (2007) at 279 to 281.

⁶⁹ Last, Robert ‘An examination of the usage of systematic sexual violence as a weapon of warfare and tool of repression in non-international armed conflicts’ University of Nottingham, 2000.

⁷⁰ Dara Kay Cohen ‘Explaining Sexual Violence During Civil War: Evidence from the Sierra Leone War (1991-2002)’ at 1 and 6 Available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/0/8/7/6/pages208767/p208767-1.php

[Accessed 23 May 2009]. Rape in Sierra Leone was a ‘military strategy’ which was also used to ensure a bond between combatants was maintained. This conclusion was derived from interviews the author had with ex combatants and non combatants.

⁷¹ Tara Gingerich and Jennifer Leaning ‘The use of rape as a weapon of war in the conflict in Darfur, Sudan October 2004 at 8. Available at <http://physiciansforhumanrights.org/library/documents/reports/the-use-of-rape-as-a-weapon.pdf> [Accessed 5 August 2009].

⁷² Ibid.

⁷³ Report of the Sierra Leone TRC (2004) 3B (note 37) para 300 at 163.

2.2.2 The biosocial theory

Apart from the above theory, perpetrators of war time rape in other instances commit the crimes of sexual violence out of perverted human behaviour.⁷⁴ This is evidenced in instances where raping civilian population is not part of the overall military objective but rather an ‘inevitable genetically determined reflex’⁷⁵ facilitated by the availability of the opportunity to do so during war time.⁷⁶ This theory is a combination of considerations of biological factors which are understood to contribute to criminal behaviour together with the presence of conducive environment for commission of such acts.⁷⁷ Hence, this theory accounts for the part of the perpetrators who commit the crimes of rape and sexual violence during war time out of what is considered to be genetically geared reflex, there is no room for other perpetrators who commit the crimes not as a result of such gene. Hence to comprehend these variations, one must undertake to read the two above theories and the one below in tandem.

2.2.3 Feminist and gender inequality theory

According to these theories acts of sexual violence during war time are a result of something that is deeply rooted in the culture and gender settings of the society. Hence, the motive behind the commission of acts of rape during the war is not derived from the sexual desires rather; it is derived from the aspiration of male combatants to exert dominance over the female population.⁷⁸ This further satisfies the advocates of gender inequality theory⁷⁹ which is evidenced by African traditions where women are always considered to be subordinate to men. Hence, in war time situation, it is gratifying for men to commit war time rape because of the belief that the whole scenario demonstrates that men are the superior being.

⁷⁴ Gottschall, Jonathan. “Explaining wartime rape” (2004)4 12 *Journal of Sex Research*129 at 133.

⁷⁵ Ibid.

⁷⁶ Elisabeth Jean Wood ‘Variation in sexual violence during war’ (2006) 34 3 *Politics and Society* 307 at 321.

⁷⁷ Gerramo F vito et al *Criminology: Theory, research and policy* 2007 Jones and Bartlett Publishers United States of America.

⁷⁸ Gottschall, Jonathan (note 74) at 130.

⁷⁹ UN OCHA ‘Use of sexual violence in armed conflicts: Identifying gapes in research to inform more effective intervention’ 20 June 2008 at 2.

With the above understanding, it is noteworthy that, the perpetrators of sexual violence have thus committed these acts in different ways as they thought fit in order to satisfy the perverted human behaviour.

2.2 Forms of sexual violence during the Sierra Leone civil war and the Rwanda genocide

2.2.1 Rape

Generally, rape was one form which Sierra Leone and Rwanda acts of sexual violence took.⁸⁰ It was further characterised by other forms including; gang rape,⁸¹ rape by inserting objects into the vagina and anus⁸² and incest.⁸³ It is important to point out that women were raped in a number of times, a practice which has been referred to as ‘multiple rapes.’⁸⁴ In other instances, they were raped by members of different armed forces at different times during the period in which the conflicts lasted.⁸⁵

It is noteworthy that in most instances in which these women were raped, the family members would be forced to watch⁸⁶ i.e. parents watching the children being raped⁸⁷ or children watching the mother being raped.⁸⁸ This is horrific and brutal

⁸⁰ Prosecutor v Issa Hassan Sessay et al Transcript on examination and cross examination of Witness TF1-196, 13 July 2004 at 10.10 AM Case No. SCSL – 04-15-T.

⁸¹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 289 at 160. According to a confidential testimony to TRC, the rebel took one woman who was a nursing mother after raping her to a house where three other rebels raped her. In another instance two rebels gang raped a virgin 13 year old girl; HRW *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (note 5). In Rwanda, ‘Tutsi women ... taken from their homes or found hiding were frequently subjected to gang-rape.’

⁸² Ibid Report of the Sierra Leone TRC (2004) 3B (note 37) at para 297 at 162. The objects used ranged from sticks to knives, hot coal and even pouring hot oil into the genitals. Further the practice of female soldiers testing the virginity of young girls can be termed to fall under this form of rape since they used their fingers to perform the process; Speech by Brouwer (note 50) at 3. In Rwanda, objects used ‘...included pouring boiling water or acid in vagina; cutting open the womb to expose unborn child before killing the mother; cutting off breasts; slashing the pelvis area; and mutilation of vaginas or buttocks.’

⁸³ Ibid Report of the Sierra Leone TRC (2004) 3B (note 37) para 295 at 162. ‘Brothers were forced to rape their sisters and mothers; fathers were forced to rape their daughters. In some communities, mass incestuous rape imposed on the residents.’ For Rwanda see UN Commission on Human Rights, ‘Report on the Situation of Human Rights in Rwanda’ (note 53) para 18.

⁸⁴ Ibid Report of the Sierra Leone TRC (2004) 3B (note 37) para 283 at 159.

⁸⁵ Ibid para 290 at 161.

⁸⁶ Nowrojee (note 14) at 89.

⁸⁷ Report of the Sierra Leone TRC (2004) 3B (note 37) para 289 at 161. A mother who was watching her child being raped was killed after testing the patience of the rebels by continuously pleading them to stop.

especially taking into account the African culture where sexual intercourse at family level is a sacred thing which family members never watch each other engaged in. One can not ignore the psychological traumatic and social impact this practice has had to the victims and their families.

2.2.2 Sexual slavery and forced marriage.

Sexual slavery was also a form of sexual violence during the Sierra Leone civil war⁸⁹ and Rwandan genocide.⁹⁰ Women were abducted and locked in one room or in other circumstances would be forced to move with the rebels the situation which rendered them powerless and unable to escape. Therefore, the perpetrators exercised what can be referred to as ownership over them and would in turn subject them to rape from time to time. These rebels had no further relationship attached to abductees than being the women who would be forced to satisfy their sexual needs.

Further, in Sierra Leone and Rwanda, women were forced to marry the rebels;⁹¹ (bush wives')⁹² so as to be readily available whenever they wanted sexual gratification. They endured multiple sexual abuses by their bush husbands and in other instances by other combatants.⁹³ In most cases, the women referred hereto as bush wives would be forced to perform domestic chores for the combatants.⁹⁴

It must be emphasised that sexual slavery is a controlled form of rape unlike the other kinds of rape which were committed randomly. In this case, combatants would rape women they have kept under their control and other instances force them into conjugal relationships.

⁸⁸ Transcript on examination and cross examination of Witness TF1-064 (note 38) at 49. The witness testified that during the rape the children were with her watching.

⁸⁹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 300 at 163.

⁹⁰ HRW *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (note 5). Sexual slavery was done on an individual '(forced marriage)' and collective basis... for periods lasting [for] the duration of the genocide.'

⁹¹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 299 at 163 see also HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19); HRW, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (note 5).

⁹² Ibid Report of the Sierra Leone TRC (2004) 3B (note 37).

⁹³ Ibid para 302 at 164. Whenever the bush husband was not present, other combatants in most cases more than one would force the women to have sex with them. However, in other cases, the bush husband would gladly offer the women to other combatants.

⁹⁴ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19). The works they performed included; 'cooking, cleaning, washing clothes, and carrying heavy loads of ammunition and looted items.'

2.2.3 Forced pregnancy, abortion and other forms of sexual violence.

In Sierra Leone many women who were abducted by the rebels and became bush wives were forced to become pregnant and would not be allowed to do abortion.⁹⁵ However, a woman who was pregnant before becoming a rebel's wife was forced to do abortion once she became a bush wife.⁹⁶ Other Sierra Leone and Rwandese women who were not in a forced marriage relationship became pregnant as a result of the repeated acts of unprotected rape.⁹⁷

Other forms of sexual violence during the conflicts included; forced prostitution,⁹⁸ deliberate transmission of sexually transmitted diseases⁹⁹ (this was pronounced during the Rwandese genocide) and indecent assault.¹⁰⁰ It is noteworthy that, all the different ways in which acts of sexual violence were committed during the conflicts have had dire impacts on the victims which touch every area of their lives.

2.3 Impacts of sexual violence on Sierra Leonean and the Rwandese women and young girls.

The effects of sexual violence to Sierra Leonean and Rwandese women and young girls have hideous long lasting effects in their lives.¹⁰¹ Many victims of sexual violence died after being subjected to repeated rapes and other abuses.¹⁰² As noted in the Akayesu case, GBC are '...the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.'¹⁰³

⁹⁵ Report of the Sierra Leone TRC (2004) 3B (note 37) para 306 at 165.

⁹⁶ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19).

⁹⁷ Ibid.

⁹⁸ Llezlie L Green 'Propaganda and Sexual Violence in the Rwandan Genocide: an Argument for Intersectionality in International Law' (2002) 33 *Columbia Human Rights Law Review* 733 755 to 766.

⁹⁹ Ibid. '...women were raped by men who knew they were HIV-positive, thus tried to transmit the virus to Tutsi women'

¹⁰⁰ Report of the Sierra Leone TRC (2004) 3B (note 37) at 166 and 167; 'Sexual Violence and Genocide Against Tutsi Women' Available at <http://academic.udayton.edu/Race/06hrights/GeoRegions/Africa/Rwanda01.htm> [Accessed 6 April 2009]. These include instances under which women were forced to walk naked in public.

¹⁰¹ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19) and Amnesty International 'Sierra Leone: Rape and other forms of sexual violence against girls and women' at 2 (note 13).

¹⁰² Report of the Sierra Leone TRC (2004) 2 List of victims at 273 to 502 (note 39); UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda' (note 60) para 20.

¹⁰³ Prosecutor v Akayesu Judgement ICTR-96-4 -T para 731.

Therefore, for those who survived, the impacts cut across every area of their lives from their physical body to social-economic life taking into account the nature of sexual violence acts and the duration under which they were forced to endure these merciless acts.

2.3.1 Health impacts

2.3.1.1 Diseases affecting the physical body

Sexual violence including rape has affected the health of the victims in numerous ways ranging from contracting treatable diseases to those which have no medical remedy. Most of the victims have been diagnosed with Sexually Transmitted Infections (STIs) and Sexually Transmitted Diseases (STDs) including H.I.V/AIDS¹⁰⁴ due to unprotected sexual intercourse.¹⁰⁵ Other diseases have resulted from being subjected to multiple rapes for prolonged periods, for example; prolapsed uterus lesion, Vasico- Vaginal fistula (VVF), Vasico- Rectal fistula (VVF),¹⁰⁶ throat irritation and mouth infections which results from oral sex.¹⁰⁷ Other women have been gravely injured to the extent that they are no longer able to bear children.¹⁰⁸ This has further psychological impacts.

2.3.1.2 Psychological impacts

In the context of sexual violence during armed conflicts one can not avoid the negative psychological impacts these acts have on the victims. This is evident in the fact that women and young girls were raped in a number of ways by different people. In many times they were raped in public places or in front of or by their family members.¹⁰⁹ Other virgin young girls such acts were the very first experience of sexual intercourse ending their very desire of preserving their virginity and

¹⁰⁴ Report of the Sierra Leone TRC (2004) 3B (note 37) para 467 at 204; UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda' (note 53) para 20.

¹⁰⁵ HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19) most of the army soldiers have tested H.I.V positive after the conflict came to an end.

¹⁰⁶ Report of the Sierra Leone TRC (2004) 3B (note 37) para 451 at 201; HRW 'We'll kill you if you cry: Sexual violence in the sierra Leone conflict' (note 19). VVF results from violent anal rape.

¹⁰⁷ Susan McKay 'The effects of armed conflict on girls and women' (1998)4 *Journal of Peace Psychology* 381 at 385.

¹⁰⁸ Christine Chinkin (note 4) at 350; Report of the Sierra Leone Truth and Reconciliation Commission (2004) 3B (note 37) para 453.

¹⁰⁹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 295 at 162. see also UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda' (note 49) para 18.

honour till marriage. Such incidents keep playing in the minds of these survivors as a result many suffer from depression, suicidal feelings, self blame¹¹⁰ and ‘Rape Trauma Syndrome’¹¹¹ which is associated with Posttraumatic Stress Disorder (PTSD).¹¹² Young girls who have suffered such sexual abuses are at great risk of developing Major Depressive Disorders.¹¹³

On top of these internal feeling, some external forces add to the hardship of living after being a victim of sexual violence.

2.4 Social impacts

2.4.1 Stigma and failure to reintegrate in the community

Both in Sierra Leone and Rwanda, many survivors of sexual violence face difficulties in reintegrating to the community due to the strong sense of stigmatization¹¹⁴ attached to rape and other forms of sexual violence. Majority of those not sexually assaulted in public places have resorted to keeping mum about the crimes committed against them and even covering up the physical injuries they suffered because of fear of being excommunicate by the community¹¹⁵ even where such will not be the case.

Those who were assaulted in public places, however, find it embarrassing to face the members of their community because some community members tend to shun the victims of sexual assault.¹¹⁶ For the bush wives, it has been more difficult

¹¹⁰ Ibid para 482 at 202.

¹¹¹ Krillian ‘Operation Fine Girl- Rape Used as a Weapon of War in Sierra Leone’ 5 July 2007 Available at <http://hub.witness.org/fr/node/1561> [Accessed 29 May 2009].

¹¹² Joop TVM de Jong et al ‘Lifetime Events and Posttraumatic Stress Disorder in 4 Post conflict Settings’ (2001) 286 5 *Journal of American Medical Association* 555. ‘PTSD is the most frequently reported psychiatric consequence of traumatic events and of human-made disasters in particular.’

¹¹³ Michelle F Dennis et al ‘Evaluation of lifetime trauma, exposure and physical health in women with Posttraumatic Stress Disorder or Major Depressive Disorder’ (2009)15 5 *Violence against women* 618 at 619.

¹¹⁴ Report of the Sierra Leone TRC (2004) 3B (note 37) para 435 at 197; ‘The investigation and presentation of evidence relating to sexual violence is in the interest of justice’ (Prosecutor v Akayesu Judgement Case No. ICTR-96-4-T, T.ch.1,2 Sept 1998 para 417) at 5. Available at http://69.94.11.53/ENGLISH/International_cooperation/papers_presented/sexual-violence.pdf [Accessed 3 April 2009].

¹¹⁵ Ibid Report of the Sierra Leone TRC (2004) 3B (note 37) para 436 at 198.

¹¹⁶ HRW ‘We’ll kill you if you cry: Sexual violence in the sierra Leone conflict’ (note 19) a woman was rejected by her husband after finding out she was raped.

as they are viewed as the betrayers.¹¹⁷ More hitches arise for those who have to bear children of the very enemy they would have fought against.¹¹⁸ This is both hard and disturbing to the victim, family and members of the community taking into account the cultural setting that surrounds the African communities like Sierra Leone and Rwanda.

As a result of the above, the displaced victims have been forced to live their lives in foreign environment where life proves difficult in many ways.

2.5 Economic impacts

Typical of post conflict conditions, many survivors in Sierra Leone¹¹⁹ and Rwanda including the victims of sexual violence¹²⁰ were internally displaced or became refugees as a result of the war. In Sierra Leone, for those whose rape was known to their husbands to whom they depended financially, were chased out of their homes with no means of supporting themselves; something which made poverty life inevitable taking into account the limited economic opportunities in a post conflict country like Sierra Leone¹²¹ and Rwanda.¹²² Further, following the health impacts stated above coupled with inadequate health services, many victims of sexual violence have been unable to engage in economic activities.¹²³ Others have opted to prostitution as a means of earning income in order to support themselves and their families.¹²⁴

How the international justice system addresses the above impacts is another avenue which scholars have tried to shade some light on. However, the crimes

¹¹⁷ This has been influenced by the practice of bush wives committing some crimes against other civilians. As such, many women have been unable to remarry as a result of the acts committed against them during the conflict.

¹¹⁸ Report of the Sierra Leone TRC (2004) 3B (note 37) para 437 at 198; UN Commission on Human Rights, 'Report on the Situation of Human Rights in Rwanda' (note 53) para 23.

¹¹⁹ Claudia Anthony 'Historical and political background to the conflict in Sierra Leone' in Kai Ambos and Mohamed Othman (Eds) *The new approaches in international criminal justice Kosovo, East Timor, Sierra Leone and Cambodia* (2003) 131 at 144. About half of 5.5 million people have been either internally displaced or have become refugees.

¹²⁰ Jeremy Giner 'Armed violence and poverty in Sierra Leone: A case study for the Armed Violence and Poverty Initiative Centre for International Cooperation and Security March 2005 at 28.

¹²¹ Ibid at 4. Many women have engaged in petty trade which has very little income.

¹²² HRW *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (note 5).

¹²³ Giner (note 120) at 25; Prosecutor v Akayesu (note 103) Witness JJ testified that 'the pain in her ribs [which resulted from multiple rapes] prevent[ed] her from farming because she can no longer use a hoe, and she used to live on the food that she could grow.'

¹²⁴ Report of the Sierra Leone TRC (2004) 3B (note 37) para 443 at 199.

committed against these women are prohibited under both international and domestic laws of the countries in question. The international criminal justice system has taken a positive step in bringing an end to impunity of GBC both in Sierra Leone and Rwanda.

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CHAPTER 3

Justice for the victims of sexual violence in Sierra Leone and Rwanda

3.1 Establishment of the SCSL and the ICTR

The SCSL was established following a request from the president of the country (President Alhaji Ahmad Tejan Kabbah) to the Security Council to establish a court which will be responsible in holding the perpetrators of inhuman acts during the war accountable.¹²⁵ This step was taken after the RUF breached¹²⁶ the peace accord entered between the parties to the conflict earlier in 1999 which had initially granted them amnesty.¹²⁷

The Security Council through Resolution 1315¹²⁸ endorsed the idea of forming a court for Sierra Leone but did not establish a court under its chapter VII powers. As a result, the Secretary General was requested to negotiate an agreement with the government of Sierra Leone for the creation of an 'independent special court.'¹²⁹ On 16 January 2000 an agreement was entered between the government of Sierra Leone as signed by Attorney General Solomon Berewa and the United Nations as signed by Hans Corell¹³⁰ with the statute of the SCSL annexed thereto. The agreement was further domesticated in Sierra Leone to give it a binding force in the country.¹³¹ The amnesty granted under the Lome Peace Accord was expressly abolished by article 10 of the statute.¹³² The SCSL is situated in the Locus delicti.¹³³

¹²⁵ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council UN Doc S/2000/786 annex. Available at <http://www.undemocracy.com/S-2000-786.pdf> [Accessed 1 June 2009].

¹²⁶ There was an out break for a number of weeks in 2000 after the peace agreement was concluded.

¹²⁷ Peace agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone 3 June 1999 Article IX (3). Available at <http://www.sierra-leone.org/lomeaccord.html> [Accessed 15 April 2009].

¹²⁸ UN Security Council Resolution 1325 (2000) 14 August 2000 in Kai Ambos and Mohamed Othman (Eds) *The new approaches in international criminal justice Kosovo, East Timor, Sierra Leone and Cambodia* (2003) at 250.

¹²⁹ Ibid para 1 at 251.

¹³⁰ Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone (note 18).

¹³¹ Special Court Agreement (Ratification) Act 2002 C. Tofan (ed) *The Sierra Leone Special Court Collection. Basic Documents (2008)I* at 11.

¹³² Statute of the SCSL (note 16); Prosecutor v Kallon, Kamara Cases No. SCSL-04-15-AR72, SCSL-04-16-AR72 Decision on challenge to jurisdiction: Lome Accord Amnesty, 13 March 2004 para 80.

¹³³ Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone (note 18) article 10.

The above mode of establishment differs from the known mode under which the ad hoc tribunals were established. Hence, the SCSL is a ‘treaty-based sui generic court of mixed jurisdiction and composition.’¹³⁴

Prior to the establishment of the SCSL, the ICTR which is situated in Arusha Tanzania was established by the Security Council Resolution 955.¹³⁵ The mode of establishing ICTR differs from that of SCSL because; ICTR was established by the Security Council using its Chapter VII powers.¹³⁶ This is advantageous because the powers conferred upon the tribunal are greater to some extent when compared to the SCSL as shall be highlighted hereunder.

3.2 Jurisdiction of the SCSL and the ICTR

3.2.1 Jurisdiction on crimes

Both the SCSL and the ICTR have mandate to prosecute persons who have committed acts including acts of sexual violence which amount to crimes against humanity,¹³⁷ violations of article 3 common to the Geneva Conventions¹³⁸ and serious violations of international humanitarian law.¹³⁹ These courts have concurrent jurisdiction with national courts.¹⁴⁰ However, the SCSL has primacy over courts within Sierra Leone only.¹⁴¹ This limit makes the court unable to exercise primacy over any individual who may be prosecuted out side Sierra Leone by national courts of any other state which can exercise universal jurisdiction on the stated crimes. However, the ICTR has primacy over national courts of every state.¹⁴² The court can therefore defer to its competence any case in the national court of any state through

¹³⁴ Report of the Secretary-General on the establishment of a Special Court for Sierra Leone 4 October, 2000 UN Doc. S/2000/915 para 9 at 3. Available at <http://www.unhcr.org/refworld/publisher/UNSC,,SLE,3ae6afbf4,0.html> [Accessed 1 May 2009].

¹³⁵ Resolution 955 Adopted 8 November 1994 S/RES/955 (1994) Available at <http://www.un.org/ict/english/Resolutions/955e.htm> [Accessed 1 March 2009].

¹³⁶ Ibid. the resolution expressly states that ‘acting under Chapter VII of the Charter of the United Nations’ the Security Council establishes an international Tribunal for Rwanda.

¹³⁷ Statute of the SCSL (note 16) article 2;

Statute of the International criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994) article 3. Available at <http://www.un.org/ict/statute.htm> [Accessed 24 February 2009].

¹³⁸ Ibid Statute of the SCSL (note 16) article 8.

article 3; Statute of the ICTR (note 137) article 4. The violations are in relation to article 3 common to the Geneva conventions and the Additional Protocol II.

¹³⁹ Ibid Statute of the SCSL (note 16) article 4; Statute of the ICTR (note 137) article 1.

¹⁴⁰ Ibid article 8(1); Article 8 (1).

¹⁴¹ Statute of the SCSL (note 16) article 8(2); Prosecutor v Norman Case No. SCSL-04-14-AR72 para 70.

¹⁴² Statute of the ICTR (note 137) article 8 (2).

the issue of an order without interfering with a state's sovereignty. This power is a result of its mode of establishment.¹⁴³

A special mandate is conferred upon the SCSL to prosecute violations under Sierra Leone laws to which GBC are expressly stipulated.¹⁴⁴ This is a reflection of the gravity of GBC committed against young girls during the conflict which were also prohibited under Sierra Leone domestic laws.

Conversely, due to the nature of atrocities committed in Rwanda i.e. the targeting of a specific Tutsi population, the tribunal has a jurisdiction different from that of the SCSL to prosecute people who have committed the crime of genocide.¹⁴⁵

3.2.2 Personal and territorial jurisdiction

The SCSL has been conferred with the mandate to prosecute natural persons who bear the greatest responsibility in the commission of the above crimes which were committed in Sierra Leone.¹⁴⁶ This form of mandate limits the court jurisdiction over the type of people it can prosecute. As a result, the prosecutor selects his cases carefully to ensure that he does not act ultra vires the enabling document. Reference is made to factors like the position held by the accused at the time of the commission of the crimes¹⁴⁷ and the gravity or massive nature of the crimes in question.¹⁴⁸ Therefore, those who have committed the crimes at a lesser degree are not the subject of jurisdiction of the court. It then becomes important for the national courts to ensure they are held accountable in accordance with the national judicial system.

Unlike the SCSL, ICTR has jurisdiction to prosecute every individual who has committed the crimes stated above either in Rwanda or outside Rwanda.¹⁴⁹

¹⁴³ Prosecutor v Joseph Kanyabashi Decision on the defence motion on jurisdiction Case No. ICTR-96-15-T para 32 at 8. Available at <http://www.ictor.org/ENGLISH/cases/Kanyabashi/decisions/180697.pdf> [Accessed 28 May 2009].

¹⁴⁴ Statute of the SCSL (note 16) article 5 (a).

¹⁴⁵ Statute of the ICTR (note 137) article 2.

¹⁴⁶ Statute of the SCSL (note 16) article 1.

¹⁴⁷ Ibid article 1 see also Report of Secretary General (note 125) para 30 at 7. The inclusion of leaders in the statute 'acts as guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases' and is not an element of crime.

¹⁴⁸ Ibid see also Hassan B Jallow 'The legal framework of the Special Court for Sierra Leone' in Kai Ambos and Mohamed Othman (Eds) *The new approaches in international criminal justice Kosovo, East Timor, Sierra Leone and Cambodia* (2003) 149 at 162.

¹⁴⁹ Statute of the ICTR (note 137) article 1 and article 7.

However, the tribunal is limited to Rwandan citizens with regard to crimes committed outside Rwandan borders.¹⁵⁰

Further, the jurisdiction of the SCSL extends to persons as young as the age of 15 at the commission of the crimes in question¹⁵¹ a feature not found in the statute of ICTR.¹⁵² This is a positive reflection of the type of perpetrators who participated or committed the crimes during the conflict, a mirror of the aim of establishing the SCSL. Hence, these express provisions make it within the jurisdiction of the court to prosecute child soldiers of age 15 at the time of the commission of the crimes. However, the SCSL has not prosecuted any child soldier.

It is noteworthy that; individual criminal responsibility in the SCSL and ICTR¹⁵³ is not limited to those who committed the crimes directly. The courts have been given power to prosecute those who have participated in one way or another in the commission of the crimes.¹⁵⁴ This makes it possible to hold those who were in superior position or facilitated in a certain manner the commission of the crimes but were not the direct perpetrators.¹⁵⁵

3.2.3 Temporal jurisdiction

Both the SCSL¹⁵⁶ and ICTR¹⁵⁷ have been established for a specific purpose triggered by specific events. As a result, their jurisdiction is limited to crimes committed from the period stipulated in each enabling document with ICTR limiting the end of the temporal jurisdiction.¹⁵⁸ The choice of date limit for SCSL was reached by considering factors including: -

¹⁵⁰ Ibid.

¹⁵¹ Ibid article 7.

¹⁵² Use of child soldiers was not a feature of the Rwandan genocide. Therefore it was not practical to put a provision like the one found in the statute of the SCSL.

¹⁵³ Statute of the ICTR (note 128) under article 2 (b) and (d), extends mode of liability to include inchoate crimes particularly; conspiracy, complicity, attempt and direct and public incitement to commit genocide.

¹⁵⁴ Statute of the SCSL (note 16) Article 6; Statute of the ICTR (note 128) Article 6. The articles provide for responsibility as direct perpetrator, aider, abettor, instigator and those who bear responsibility as commanders.

¹⁵⁵ Prosecutor v Kondewa SCSL-03-12-PT Decision and order on defence preliminary motion for defects in the form of indictment 27 November 2003 at para 9.

¹⁵⁶ Statute of the SCSL (note 16). SCSL is mandated to prosecute crimes committed since 30 November 1996 to the time of establishment of the court.

¹⁵⁷ Statute of the ICTR (note 137). ICTR is mandated to prosecute crimes committed between 1 January 1994 and 31 December 1994.

¹⁵⁸ Ibid article 7.

- (a) The necessity of limiting temporal jurisdiction so that the ‘Prosecutor is not overburdened and the Court overloaded;’
- (b) The need of ensuring that the ‘beginning date corresponds to an event or a new phase in the conflict without necessarily having any political connotations’ and
- (c) The fact that the temporal jurisdiction had to ‘encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country.’¹⁵⁹

This limit does not prohibit evidence of grave crimes committed before the stated dates which are directly linked to the accused future commission of crimes as they tend to give background to the cases and hence give a flow of facts as the parties strive to establish their cases. Hence, it is inevitable for either the prosecution or defence to make reference to evidence prior to the stated dates in order to be able to effectively establish their cases.¹⁶⁰ However, the prosecutor can not bring a case which is solely based on acts prior to the limit dates.

¹⁵⁹ Report of Secretary General (note 125) para 25 at 6. ‘30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the court.’

¹⁶⁰ Schabas *The UN international criminal tribunals* (note 31) at 135.

CHAPTER 4

Holding the perpetrators accountable through the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda

4.1 Definition of rape and sexual violence

Neither the SCSL nor the ICTR statutes have provided for definition or elements which constitute the crimes of rape and sexual violence. However, ICTR being the first international tribunal after Nuremberg,¹⁶¹ Tokyo¹⁶² and International Criminal Tribunal for the former Yugoslavia¹⁶³ to convict an accused of rape and sexual violence as both crimes against humanity and genocide, the tribunal has provided a precedent definition of the two terms.

4.1.2 Material and mental elements of the crime of rape and sexual violence

According to the definition given in the Akayesu case, rape refers to ‘a physical invasion of a sexual nature committed on a person under circumstances which are coercive.’¹⁶⁴ This definition has not laboured in the provision of descriptive acts which may constitute the crime. As a result, the liberty is left to a tribunal or court applying the definition to fit in the different forms that rape may have taken in a particular context.¹⁶⁵

However, the international criminal justice system which has evolved from the ad hoc tribunals and special courts to the creation of a permanent International Criminal Court¹⁶⁶ has made a positive growth by providing the elements which

¹⁶¹ Lyal S Sunga *The emerging system of international criminal law: Developments in codification and implementation* (1997) at 280 to 320. The tribunal was established to prosecute the perpetrators of the crimes committed during the Nazi regime.

¹⁶² Ibid. Tokyo tribunal was established to prosecute Japanese officials. Similar to Nuremberg, they were a creation of the allied powers.

¹⁶³ The ICTY is an ad hoc tribunal established by the Security Council to prosecute violations committed in Yugoslavia. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993) article 1. Available at <http://www.un.org/icty/basics/statut/statute.htm> [Accessed 24 February 2009].

¹⁶⁴ Prosecutor v Akayesu (note 103) para 598.

¹⁶⁵ Rape took different forms from penetration of penis in the vagina, anus or mouth to the use of objects and fingers in effecting penetration.

¹⁶⁶ The court was created by the adoption of the Statute of the International Criminal Court UN Doc. A/CONF.183/9 on 17 July 1998 and came to force on 1 July 2002.

constitute the crime of rape. The definition herein is specific and provides details of acts constituting the crime closely modelled to that provided by the ICTY.¹⁶⁷

Therefore, according to ICC Elements of crimes, rape is invasion of the ‘body of a person by conduct resulting in penetration, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body [including a mouth].’¹⁶⁸ The provision of such descriptive definition gives clarity as to what acts constitute the crime of rape. It is noteworthy that the SCSL has also adopted a descriptive form of definition analogous to the one provided in the ICC.¹⁶⁹

Thus, the actus reus of the crime of rape is penetration. However, penetration need not be absolute. The international criminal justice system has recognized that no matter how slight the penetration is the crime of rape is deemed to have been committed provided other elements are satisfied.¹⁷⁰ Thus, when taking into account the different forms the acts of rape have taken in both Sierra Leone and Rwanda, the definition provided and adopted by the international courts covers individual rape, gang rape, rape by inserting objects or fingers into the vagina and anus and any other form of penetration falling within the definition.

Further, the penetration hereabove referred must satisfy the mens rea of the crime. Thus, any form of penetration ought to have been intended by the perpetrator and executed with the knowledge that the victim has not given free consent.¹⁷¹ The lack of consent can be as a result of ‘force or threat of force or coercion’. The force may have been caused by ‘fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment.’¹⁷² It is presumed that the nature of coercive atmosphere during war time satisfies the condition of force or threat of force unless

¹⁶⁷ Prosecutor v. Anto Furundzija (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 10 December 1998 para 174 and 185. Available at: <http://www.unhcr.org/refworld/docid/40276a8a4.html> [Accessed 24 May 2009].

¹⁶⁸ International Criminal Court Elements of Crimes Article 7 (1) (g)-1 Crime against humanity of rape at 1 ICC-ASP/1/3.

¹⁶⁹ Prosecutor v. Alex Tamba Brima, et al Trial Judgment SCSL-04-16-AFRC 20 June 2007 para 693.

¹⁷⁰ Ibid.

¹⁷¹ Ibid. ‘The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.’

¹⁷² International Criminal Court Elements of Crimes Article 7 (1) (g)-1 (note 168).

proven otherwise. As a result coercion is considered ‘an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape.’¹⁷³

Moreover, the SCSL has also been a positive development in relation to crime of rape committed against young girls where the court has expressly stated that; young girls below the age of 14 are incapable of giving consent.¹⁷⁴ Therefore consent under this context is not accepted as a defence.

On the aspect of sexual violence, Akayesu case defined the term to mean ‘any act of sexual nature committed on a person under coercive circumstances.’¹⁷⁵ Therefore, the definition covers all other forms of sexual violence not falling within the category of rape. This includes acts of sexual nature which are the bigger circle committed to facilitate the crime of rape, a result of the crime of rape and any other act not associated with rape example sexual slavery, incest, public nudity, enforced prostitution, forced pregnancy and forced marriage.

Similar to the definition of rape, the commission of crimes of sexual violence requires intention and knowledge of absence of consent on the part of perpetrator. This is also deduced from the presence of force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s incapacity to give genuine consent.¹⁷⁶

With the two key definitions, the international criminal justice system makes room for the above crimes to be prosecuted as follows:-

4.2 Prosecution of rape and other forms of sexual violence as war crime

A war crime is a ‘violation of the laws and customs of war.’¹⁷⁷ The Geneva Conventions¹⁷⁸ particularly breaches of common article 3¹⁷⁹ and Additional Protocol

¹⁷³ Prosecutor v Mikaeli Muhimana Summary of judgment Case No. ICTR- 95-1B-T Para 31 at 10.

¹⁷⁴ Prosecutor v. Alex Tamba Brima (note 169).

¹⁷⁵ Prosecutor v Akayesu (note 103).

¹⁷⁶ International Criminal Court Elements of Crimes Article 7 (1) (g)-6 (note 168) Crime against humanity of sexual violence at 1.

¹⁷⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280, entered into force Aug. 8, 1945. Available at <http://www1.umn.edu/humanrts/instree/1945a.htm> [Accessed 3 June 2009].

II,¹⁸⁰ being expressly articulated in the SCSL¹⁸¹ and the ICTR¹⁸² statutes prohibit the commission of acts of sexual violence during an armed conflict.¹⁸³ The common article 3 provides ‘minimum mandatory rules’¹⁸⁴ for those participating in armed conflict to extend protection to a group of protected persons and refrain from the commission of acts including sexual violence which result in inhuman treatment against any protected persons.¹⁸⁵ It is noteworthy that, the prohibitions under common article 3 have acquired the status of customary international law¹⁸⁶ to which its breach attracts individual responsibility even without express provision in a particular statute or convention.

Notably, the ICTR has not convicted any accused person of rape and other forms of sexual violence as war crime. This was a result of a failure to establish the required nexus,¹⁸⁷ despite the reports revealing the use of sexual violence as a weapon of war¹⁸⁸ specifically targeted on civilian population hence making them the object of attack. This is contrary to the cardinal rule in armed conflict on the requirement of distinguishing between civilians and combatants.¹⁸⁹ Further, these

¹⁷⁸ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950. Available at <http://www1.umn.edu/humanrts> [Accessed 3 June 2009].

¹⁷⁹ This article deals with internal armed conflicts.

¹⁸⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978 article 4(2)(e). Available at <http://www1.umn.edu/humanrts/instree/y6pagc.htm> [Accessed 3 June 2009].

¹⁸¹ Statute of the SCSL (note 16) article 3 (e).

¹⁸² Statute of the ICTR (note 137) article 4(e).

¹⁸³ ‘Outrageous upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.’

¹⁸⁴ Prosecutor v Fofana Decision on preliminary motion on lack of jurisdiction *matériaie*: nature of the armed conflict 25 May 2004 Case No. SCSL-04-14-AR72 para 21.

¹⁸⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War (note 169) article 4 protected persons are those ‘not taking active part in the hostilities.’

¹⁸⁶ Prosecutor v Akayesu (note 94) para 608, 609 and 610. Some of the declarations contained in Additional Protocol II have not attained the status of customary international law.

¹⁸⁷ *Ibid* para 643.

¹⁸⁸ This kind of weapon can be prohibited as a method of warfare since its application specifically targets the civilians even though the combatants have a choice of abstaining from using rape and other forms of sexual violence to achieve intended objective. Further, as noted earlier, rape and other forms of sexual violence have a long lasting effect to the victims and in other instances such effects last for the rest of the lives of civilians, hence, this reflects to a great extent the need for expressly providing the prohibition of such acts as methods of warfare.

¹⁸⁹ Protocol II (note 180) article 13 (2).

acts are contrary to the requirement of treating the protected persons humanely¹⁹⁰ and expressly prohibited under the category of common article 3¹⁹¹ or deduced as falling under the categories stated therein.

Contrary to the ICTR, the prosecutor of the SCSL has taken a cautious gender violence approach by including counts of sexual violence and rape in the indictments, as violations under article 3(e) of the SCSL statute.¹⁹² With this benchmark, the SCSL has convicted the perpetrators of crimes prohibited therein.¹⁹³ It further acknowledged in one of its decision that sexual violence can amount to inhuman treatment¹⁹⁴ or to expand to include torture¹⁹⁵ as stipulated in common article 3, when it results in infliction of ‘human suffering, hardship and humiliation’¹⁹⁶ something which is an inevitable outcome of the acts as analysed in the previous chapter. This shows the political will to prosecute the crimes in every available liability framework as reflected by the way the acts were committed during the conflict.

Importantly, prosecution of rape and other sexual violence is possible as a crime against humanity. These charges are brought in the initial indictments or through amendments¹⁹⁷ as counts under both the violations of common article 3 and acts amounting to crimes against humanity.

4.3 Prosecution of rape and other acts of sexual violence as crime against humanity and Serious violations of Sierra Leone laws in the SCSL

Rape and some of the sexual violence crimes have been expressly spelt out in the statutes of both the SCSL and the ICTR as forming part of crimes against humanity.

¹⁹⁰ Ibid at article 4 (1).

¹⁹¹ ‘Rape and enforced prostitution.’

¹⁹² Example Prosecutor v Issa Hasan Sessay Indictment Case No. SCSL 03-1 count 8; prosecutor v Foday Saybana Sankoh Indictment Case No. SCSL-2003-02-I-001 7 March 2003 count 8 and Prosecutor v Johnny Paul Koroma Indictment Case No. SCSL-2003-03-I-1 7 March 2003 count 8.

¹⁹³ Prosecutor v Issa Hassan Sessay Judgement Case No. SCSL-04-15-T.

¹⁹⁴ Prosecutor v Sankoh Case No. SCSL-03-02-PT Ruling on a motion for a stay of proceedings filed by applicant 22 July 2003 at 9 to 11.

¹⁹⁵ Prosecutor v. Anto Furundzija (note 167) para 159 to 163 at 61-65. Rape used in course of detention or interrogation violates the customary prohibition of torture as defined in the Convention Against Torture.

¹⁹⁶ Statute of the SCSL (note 16) article 3(a).

¹⁹⁷ Breton-le Goff, Gaelle ‘Analysis of trends in sexual violence prosecutions in Indictments by Internationa Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002.’ In the ICTR many charges of sexual violence were initially brought through amendments.

However, the ICTR statute has explicitly provided for only rape and enforced prostitution¹⁹⁸ while the SCSL statute has adopted an extended version of acts amounting to sexual violence. The acts enumerated therein include: - ‘rape, sexual slavery,¹⁹⁹ enforced prostitution,²⁰⁰ forced pregnancy²⁰¹, and other gender based offences under Sierra Leone law.²⁰² Again, this is an extensive exposition of the systematic nature of gender violence crimes during the civil war. Nine years after the establishment of the ICTR, the SCSL sexual violence mandate has revealed the international criminal justice system awareness of the kind of crimes committed during armed conflicts and is no longer confined to a narrow approach. As a result, a more gender conscious investigation and prosecution can be adopted to ensure an end to impunity of all forms of GBC. For instance, for the first time in international criminal justice system, the SCSL prosecutor has brought charges of forced marriage²⁰³ a crime against humanity separate from other counts of sexual violence charged against several accused²⁰⁴ something which was upheld in the AFRC appeals chamber decision.²⁰⁵

One must be aware that, other sexual violence crimes not expressly provided for are triable as crimes against humanity amounting to torture due to the pain and suffering they inflict on the victims. Further, both statutes have ‘a catch-all clause’,²⁰⁶ which is not similar²⁰⁷ but gives room for other forms of sexual violence

¹⁹⁸ Statute of the ICTR (note 137) article 4(e).

¹⁹⁹ Prosecutor v. Alex Tamba Brima et al AFRC Trial Judgment (note 169) para 708 which endorsed the elements provided in the International Criminal Court Elements of Crimes Article 7 (1) (g)-2 (note 165). Sexual slavery occurs where one exercises ownership over persons by depriving their liberty for the purpose of forcing them to engage in sexual acts even without payment of any kind. The exercise of ownership does not require confinement rather, all situations which render the victims unable to have the freedom of liberty.

²⁰⁰ Ibid at Article 7 (1) (g)-2. The elements for this crime entail forcing people to engage in sexual acts for pecuniary or any other gain.

²⁰¹ Statute of the SCSL (note 16) article 2(g).

²⁰² Ibid article 5(a). The offences herein, are the ones committed against young girls below the age of 14 years.

²⁰³ Prosecutor v. Alex Tamba Brima et al , AFRC Appeal Judgment Case No. SCSL-04-16- 22 February 2008 para 195 Forced marriage ‘involves a perpetrator compelling a person by force or threat of force... into a conjugal relationship with another person which implies a relationship of exclusivity.’

²⁰⁴ Amended Consolidated Indictment, Special Court of Sierra Leone, The Prosecutor v Issa Hassan Sesay et al Case No. SCSL 2004-15-PT (6181-6202), 13 May 2004 and Prosecutor v Sam Hinga Norman et al Decision on prosecution request for leave to amend the indictment Case No. SCSL-04-14-PT (7001-7040) 20 May 2004.

²⁰⁵ Prosecutor v. Alex Tamba Brima et al AFRC Appeal Judgment (note 193) para 187 to 203.

²⁰⁶ Letetia Van der Poll ‘The emerging jurisprudence of sexual violence perpetrated against women during armed conflicts (2007) *Africa Year Book of International Humanitarian Law* 1 para 3.2.2 at 16.

to be prosecuted as crimes against humanity. This clause is a residual provision to cover for crimes not expressly provided in the statute. Therefore, its interpretation is not to be strict as to limit its scope and not too wide so as to avoid 'infringing the rule requiring specificity of criminal prohibitions.'²⁰⁸

4.4 Prosecution of rape and other acts of sexual violence as genocide in ICTR

The nature of conflict in Rwanda was different from the one which occurred in Sierra Leone due to the presence of discriminatory nature of acts committed against the civilian population. The international community noted that, what took place during the conflict was 'genocide' (although the Security Council did not use these words) a crime under international law.²⁰⁹ As a result, the ICTR has specific mandate to prosecute the crime of genocide.

With the above background, it is important to highlight that; genocide as a crime under international law was first²¹⁰ incorporated in international convention in 1948.²¹¹ The genocidal acts²¹² are usually discriminatory in character because; a particular group of people is targeted to the exclusion of others. For the case of Rwanda, Tutsi women were specifically subjected to acts of rape and sexual violence as part of the general intention of destroying the group, something which satisfies the gist of the crime of genocide i.e. the required *dolus specialis*.

The ICTR was the first international tribunal to convict an accused of rape and sexual violence as a crime of genocide where it noted that; 'rape and sexual violence... constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group,

²⁰⁷ Statute of the SCSL (note 16) article 2(g) 'other forms of sexual violence'; Statute of the ICTR (note 128) article 4(i) 'other inhuman acts.' Prosecutor v. Alex Tamba Brima (note 162) para 714. The trial chamber dismissed counts of forced marriage/ sexual slavery brought under other inhuman acts on the basis that such acts are redundant as are dealt with in other counts.

²⁰⁸ Ibid at para 185

²⁰⁹ UN Security Council Resolution 918 S/RES/918 (1994) 17 May 1994.

²¹⁰ Jacquie Cassette 'Towards Justice in the Wake of Armed Conflicts? The Evolution of War Crimes Tribunals' (2000)9 5/6 *Africa Security Review*. Available at <http://www.iss.co.za/AF/profiles/SieraLeone/research.htm> [Accessed 24 February 2009].

²¹¹ The Convention on the Prevention and Punishment of crime of Genocide, 78 U.N.T.S. 277 (1951) article 2.

²¹² Statute of the ICTR (note 137) article 2(a) to (e). 'Killing members of the group; causing serious bodily harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group'

targeted as such.’²¹³ These crimes mostly satisfy the three categories of acts amounting to genocide which include;

First, causing serious bodily harm to members of the group²¹⁴ which is evidenced on the impacts of sexual violence analysed in the earlier chapter. Second, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part²¹⁵ through slow death measures such as sexual slavery without provision of food, denial of medical services for the sick and other necessities for sustenance of life. Last, imposing measures intended to prevent births within the group as evidenced in the different forms sexual violence took during the genocide²¹⁶ which can only be construed as aimed at bringing to extinction this particular group of Rwandese population.

To ensure the perpetrators of rape and other forms of sexual violence are being held accountable, the prosecutor engages the victim-witnesses in order to prove the allegations made.

²¹³ Prosecutor v Akayesu (note 103) para 731.

²¹⁴ Statute of the ICTR (note 137) article 2(2) (b) and Genocide Convention (note 211) article 2(b).

²¹⁵ Ibid at article 2(2) (c) and article 2(c).

²¹⁶ Speech by Anne Marie de Brouwer (note 47) at 3 See also Green (note 98) deliberate transmission of HIV/AIDS.

CHAPTER 5

Sexual violence victim-witnesses in international tribunals

5.1 Definition of victim-witnesses

Victims have not been defined under both the SCSL and the ICTR statutes, but the Rules of Procedure and Evidence (RPE) for the special court and the tribunal have provided for an identical definition.²¹⁷ For a better understanding, victims mean; ‘persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering...or substantial impairment of their fundamental rights, through acts or omissions... that are in violation of internationally recognized norms relating to human rights’²¹⁸ to which SCSL and ICTR have jurisdiction to try. Herein, the victims so referred are in particular those women and young girls who were subjected to rape and other forms of sexual violence during the conflicts in both Sierra Leone and Rwanda.

Also, the SCSL and ICTR statutes and their RPE are silent on who is to be regarded as a witness. However, the headquarter agreement between the government of Sierra Leone and the SCSL which supplemented the agreement establishing the SCSL²¹⁹ cater for this deficiency. Hence, under the SCSL a witness encompasses any person from ‘outside’²²⁰ and inside Sierra Leone who appears before the court to give testimony when summoned or requested by the judges, the prosecutor or defence.²²¹ Generally, a witness means a person who is relied on by the prosecution or defence in providing important and relevant information in supporting either side’s case.²²²

²¹⁷ The SCSL RPE (note 21) Rule 2; The ICTR Rules of Procedure and Evidence U.N. Doc. ITR/3/REV.1 (1995) Rule 2. Victim is ‘[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.’

²¹⁸ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of 29 November 1985. Declaration A(1) and B(18) Available at http://www.unhcr.ch/html/menu3/b/h_comp49.htm [Accessed 10 April 2009].

²¹⁹ Headquarter agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone available at <http://www.sc-sl.org/> [Accessed 22 May 2009]. The agreement aimed at ‘regulating matters relating to or arising out of the establishment and proper functioning of the SCSL that were insufficiently dealt with or not dealt with in the instruments’ which established the court.

²²⁰ Agreement between the United Nations and the government of Sierra Leone on the establishment of a Special Court for Sierra Leone (note 18) article 15.

²²¹ Headquarter agreement between the Republic of Sierra Leone and the Special Court for Sierra Leone (note 219) at article 1 (x).

²²² United Nations Office on Drugs and Crimes ‘Good practices for the protection of witnesses in criminal proceedings involving organized crimes Vienna 2008. Available at <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf> [Accessed 2 April 2009].

5.2 Importance of the involvement of victims of sexual violence as witnesses before the special courts and tribunals

5.2.1 Proving prosecution case

The international criminal tribunals including the SCSL and the ICTR have adopted some features of the adversarial system of law²²³ during trial which is used in the common law countries. As a result, the SCSL and the ICTR have placed a noteworthy prevalence²²⁴ in testimony as evidence of the crimes within their jurisdiction²²⁵ or defence as established by the accused, where witnesses are examined by prosecutor²²⁶ and defence lawyers in open or closed court sessions. The victim-witnesses of rape and sexual violence are therefore important as another source of evidence in proving prosecution case. The interests represented during the trial are those which aim at establishing the case beyond reasonable doubt the adopted standard of proof²²⁷ in international criminal special courts and tribunals.²²⁸

These victim-witnesses provide what is known as direct evidence based on their personal knowledge and experience. This kind of evidence is reliable in the fact that it proves the alleged facts directly as opposed to circumstantial evidence. The cogency of the evidence given by the witnesses is ascertained by examining the demeanour, conduct and character of the witness when giving evidence *viva voce*. In absence of any discrepancy, such evidence is deemed to establish the allegations being made.

²²³ 'Adversarial system definition' Available at <http://www.yourdictionary.com/law/adversary-system> [Accessed 5 June 2009].

²²⁴ Schabas *The UN international criminal tribunals* (note 31) at 470.

²²⁵ Prosecutor v Akayesu (note 103) para 733. 'On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women.'

²²⁶ Statute of the SCSL (note 16) article 15(2).

²²⁷ James A Green 'Fluctuating evidentiary standards for self defences in the International Court of Justice' (2009) 58 *International and Comparative Law Quarterly* at 165. Beyond reasonable doubt '...requires that the proposition being presented is supported by evidence of nature that there can be no reasonable doubt as to the factual validity of the proposition.'

²²⁸ The SCSL RPE (note 21) and ICTR RPE (note 217) rule 87(A) which state that; 'A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.'

5.2.2 Available opportunity for victim-witnesses to participate in international criminal proceedings

The SCSL and ICTR's system of justice does not give victims the right to bring claims against the accused, it is the duty of prosecutors to bring charges against the accused and lead the whole prosecution process from investigation to trial.²²⁹

Consequently, victims can only participate in these international trials as witnesses who give evidence of the crimes in question.²³⁰ This is the available opportunity where the victims of rape and other sexual violence contribute to the conviction and ultimate punishment of the perpetrators and expose the cruel inhuman acts of crimes they committed against them. For some victims, the process is usually valuable because they feel a sense of relief, re establishment of self respect and empowerment after relating their experience in a court of law despite the tormenting nature of the crimes.²³¹ Some victim-witnesses discover that they are in control of events unlike during the conflict something which gives them tremendous strength and inward rebuilding. For those who have had an opportunity to attend therapy, testifying is a 'closure' of the traumatic events.²³²

Despite the above, the process of testifying has on both the victims and the ends of justice; the course is not an easy road. The victims face a number of challenges as they try to be part of the judicial process.

5.3 General problems facing victim-witnesses in relation to testifying before the Special Court for Sierra Leone and the International Criminal tribunal for Rwanda

5.3.1 Cultural barriers

The African culture which has similar manifestation both in Sierra Leone and Rwanda has revealed the reluctance of female victim-witnesses of sexual violence in

²²⁹ Statute of the SCSL (note 16) and Statute of the ICTR (note 137) article 15.

²³⁰ Booklet 'Victims before the international criminal court: a guide for the participation of victims in the proceedings of the court.' The established ICC caters for the participation of victims in international trials. Under the ICC victims not only participate as witnesses but do have a right to participate in the judicial proceedings before the court as determined by a judge upon application where they give their views and concerns to the court.

²³¹ Michelle Staggs Kelsall and Shane Stepakoff 'When we wanted to talk about rape: Silencing rape at the Special Court for Sierra Leone' (2007)1 *International Journal of Transitional Justice* 355 at 366.

²³² Patricia Viseur-Sellers (note 32) at 162.

openly sharing their experiences to male officials from different departments of the Special court²³³ and ICTR. As a result, in Rwanda, some victims who had contacts with male investigators were not open about the crimes committed against them and in other instances, the knowledge about sexual crimes was revealed at a much later stage.²³⁴ The absence of female investigators is a result of lack of gender violence prosecutorial strategy as evidenced by the inclusion of charges of sexual violence as an after thought through amendments. This has posed difficulties in gaining the confidence of the victim-witnesses so that they may willingly and comfortably relate their experiences to selected officials from the office of the prosecutor and in turn give testimony before the courts during trial.

Further, both in Sierra Leone and Rwanda, acts of sexual violence carry a strong sense of stigmatization.²³⁵ For this reason, many victims of sexual violence find it difficult to open up about the crimes committed against them due to fear of being exposed to the general community; something which has appalling impacts including being excommunicated²³⁶ or divorced for those who are married.²³⁷ Victims are therefore isolated and unwilling to risk their lives by associating themselves with the SCSL and ICTR officials who will bring up and probably expose²³⁸ the ordeal they were subjected to in absence of effective measures which ensure that their 'secret' is well preserved from the general population.

5.3.2 Health related problems

Another problem which stretches from the investigations to the whole trial process is on the difficulty the victims have in offering their cooperation to the SCSL and ICTR due to their medical condition.²³⁹ Many of the victims of rape and other sexual

²³³ Simon Charter et al *Best practice recommendations for the protection of witnesses: An evaluation of the Witness and Victims Section of the Special Court for Sierra Leone* (2008) para 4.2.1.5 at 15.

²³⁴ Connie Walsh 'Witness protection, gender and the ICTR.' at para 17. Available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/report_en.php [Accessed 23 March 2009]. '[O]ne woman who testified in the Akayesu trial about the violence against her family and the killing of her husband was never questioned about sexual violence in Kigali. The issue was first raised by the male prosecutor after her arrival in Arusha.'

²³⁵ Ibid; Report of the Sierra Leone TRC (2004) 3B (note 37) para 436.

²³⁶ Cochran, Cybele 'Transitional justice: Responding to victims of wartime sexual violence in West Africa' (2008) 9 *Journal of International Policy Solutions* 33 at 33.

²³⁷ Ibid at para 439.

²³⁸ Ibid. 'The fear to reveal their experiences publicly is triggered by the fear of rejection by family members and community as a whole.'

²³⁹ Ibid.

violence committed during the Sierra Leone civil war and Rwanda genocide have contracted H.I.V/AIDS²⁴⁰ and other diseases as analysed in the previous chapter. Subsequently, many victims have been too weak to give evidence due to inadequate medical facilities and resources in these countries.²⁴¹

Further, apart from the physical body medical related challenges, the victims of sexual violence have psychological traumatic impacts of the crimes a condition which is further complicated by lack of adequate psychological medical services in countries like Sierra Leone.²⁴² Accordingly, many have not been helped to overcome the trauma of the crimes committed against them. Thus, victims of sexual violence in Sierra Leone are living in denial and self guilty as a result they are ready and willing to see and even let the perpetrators walk unpunished²⁴³ so as to bury the past.²⁴⁴ Some victims find it unbearably hard to tell their experiences to the investigators during the preliminary contact.²⁴⁵ This is a challenge because; in order for one to be able to reach out to these particular victim-witnesses, psychological help is paramount at the initial identification of the potential witnesses to the whole process of giving testimony.

Moreover, the psychological impacts analysed earlier, render the victim-witnesses of rape and other sexual violence very vulnerable and fragile as they are at a great risk of being re traumatized during investigations and ultimately when giving testimony, taking into accounts the nature of proceedings before international tribunals and special courts. The trial proceedings before the SCSL and the ICTR involve the process of examination in chief and cross examination. The later is what concern the victim-witnesses due to the questions being posed by the defence in the process of establishing a workable defence or casting a doubt on the prosecution

²⁴⁰ Françoise Ngendahayo 'Gender and HIV/AIDS: ICTR challenges' EGM/HIV-AIDS/2000/OP 4, 16 November 2000. Available at <http://www.un.org/womenwatch/daw/csw/hivaids/ictr.htm> [Accessed 4 April 2009].

²⁴¹ Report of the Sierra Leone TRC (2004) 3B (note 37) para 461; 'The investigation and presentation of evidence relating to sexual violence is in the interest of justice' (Prosecutor v Akayesu Judgement Case No. ICTR-96-4-T, T.ch.1,2 Sept 1998 para 417) at 5. Available at http://69.94.11.53/ENGLISH/International_cooperation/papers_presented/sexual-violence.pdf [Accessed 3 April 2009] at 5.

²⁴² Report of the Sierra Leone TRC (2004) 3B (note 37) para 482 and 487. Sierra Leone has one psychiatric hospital with one trained doctor to provide the required services to the victims. This reveals the gap between the need for such services and the availability of medical personnel to offer such service in a post conflict country.

²⁴³ PHR (note 1) at 73 and 74.

²⁴⁴ Peggy Kuo 'Prosecuting crimes of sexual violence in international tribunals' (2002) 34 *Case Western Reserve Journal of international Law* 305 at 316.

²⁴⁵ Charter (note 233) para 4.1.1 at 13.

case.²⁴⁶ These questions may make the victim-witness feel emotional, vulnerable and ashamed as some of the questions are very intimate.²⁴⁷

Additionally, in most cases, the victims come into contact with the perpetrators for the first time during testimony from the time the crimes were committed against them.²⁴⁸ If they are not prepared emotionally, the whole process may become unbearable for them. To ensure their effective cooperation, the victim-witnesses need readily available conducive court environment and effective medical and psychological services to put them in a suitable health position which will make them fit enough to relate their experiences in a court of law without further the negative impacts the crimes have had in their lives.

5.3.3 Security concerns

Both the SCSL and the ICTR witnesses including the victims of sexual violence and their families face serious threat of life,²⁴⁹ others have been killed²⁵⁰ or subjected to different life threatening situations.²⁵¹

The SCSL is located in the place where the atrocities occurred unlike the ICTR which is located outside the territory where the crimes took place. As a result, in Sierra Leone, the security threats to the witnesses are real due to the accessibility

²⁴⁶ International Federation for Human Rights report 'Victims in the balance challenges ahead for the International Criminal Tribunal for Rwanda' No 329/2 November 2002 at 6 and 8. Available at <http://www.unhcr.org/refworld/publisher,IFHR,,RWA,,0.html> [Accessed 10 April 2009]. 'The subject of sex is taboo in Rwanda and the fact the [victim-witnesses have] to describe sexual acts, organs and so on [during testimony is] disturbing in itself.'

²⁴⁷ Roberta Maria Baldini 'International criminal justice, conflict and its response to gender-based violence' Available at <http://www.citieslocalgovernments.org/uclg/upload/docs/internationalcriminaljustice,conflictanditsresponse togender-basedviolence.pdf> [Accessed 2 June 2009]. It is hard for the victim or witness to 'talk repeatedly about intimate body parts, acts of depravity and societal taboos, all of which are rarely the subject of public discourse.'

²⁴⁸ Kuo (note 244) at 317.

²⁴⁹ Human Rights Watch 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone.' (note 27). In Sierra Leone, 'threats have been generalized calls in public meetings against any individual who testifies at the Special Court however, in other instances particular witnesses have been singled out and subjected to verbal intimidation, searched for in their villages, or subject to more serious threats.' 'Survivors of the Rwandan genocide face intimidation as they prepare to testify before the ICTR.' Available at http://www.ddrd.ca/site/what_we_do/index.php?id=1723&subsection=themes&subsection=themes_documents [Accessed 6 April 2009]. Majority of the genocide survivors as reported are women.

²⁵⁰ Ibid. 'A Hutu woman who testified against Jean-Paul Akayesu before the ICTR was killed on January 5, 1997, along with her husband, four of their own children and three other children who were in the house at the time of the attack.'

²⁵¹ 'Survivors of the Rwandan genocide face intimidation as they prepare to testify before the ICTR.' (note 76).

of the court to the general population and the more likelihood of leakage of the information about witness involvement with the court. As a consequence, some sexual violence victims who after being raped were threatened to be killed if they attempted to relate their stories to any law enforcement personnel are reluctant to be involved as witnesses.²⁵² Where they have accepted, they have tended to make the whole process awkward by declining to answer questions or pretend not to understand the questions in absence of effective assurance of their safety.²⁵³

The above fear is complicated by the fact that the perpetrators are selected people who bear the greatest responsibility have relatives, supporters and the means of inflicting harm to the victims and their families. The intimidations are a reality as evidenced by the recent dreadful incident where intimidations were done within the SCSL grounds²⁵⁴ something which has never occurred at the ICTR. It is worth mentioning that, some brave victims have been willing to testify despite the threats.²⁵⁵

While the principal duty of the special court and the tribunal is to punish the perpetrators of inhuman acts committed in Sierra Leone and Rwanda, this duty depends to a great extent on the cooperation of identified witnesses who as mentioned earlier provide vital information about the cases which is admitted as evidence. It is important to note that; the overwhelming majority of prosecution witnesses at the SCSL are victims and the remaining small number are other kind of witnesses.²⁵⁶ Therefore, to ensure their cooperation, a witness support and protection system has been established in both the SCSL and ICTR. This system has to be viable to the victims of sexual violence so as to minimize the inherent problems they face or may face if they participate as witnesses in the international tribunals and special courts.

²⁵² PHR (note 1) at 75.

²⁵³ Transcript on examination of witness TF1-214 (note 35) at 36 to 40.

²⁵⁴ HRW 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone.' (note 20). 'A protected witness was verbally threatened on the grounds of the Special Court complex. Relatives of two accused yelled the name of the witness at a court vehicle with tinted windows in which the witness was being transported, that they knew she was in the vehicle, and a threatening phrase in Krio concerning her testimony.'

²⁵⁵ Ibid.

²⁵⁶ Rebecca Horn et al 'Testifying in an international war crimes tribunal: The experience of witnesses in the Special Court for Sierra Leone' (2009) 3 *The International Journal of Transitional Justice* 135 at 143.

CHAPTER 6

The Special Court for Sierra Leone's notable improvements on the ICTR's witness protection system

6.1 Legal basis for protecting victim-witnesses in the SCSL and the ICTR

The protection of witnesses herein referred to as victim-witnesses, is derived from the human rights perspective. The victim-witnesses, who have rights as guaranteed under the international bill of rights²⁵⁷ and other human rights instruments of international,²⁵⁸ regional²⁵⁹ and national character (mainly the constitutions),²⁶⁰ need a protective court environment and other measures to ensure that their involvement as witnesses does not compromise or infringe any of the rights guaranteed therein some of which derogation is not permitted.

The involvement of victims in the special court and the tribunal poses serious risk to some of their rights including right to life,²⁶¹ dignity,²⁶² privacy,²⁶³ security²⁶⁴ and property.²⁶⁵ This is evident in the problems they encounter in the process of participating or after they have participated as witnesses both in the SCSL and the ICTR. The international instrument on rights of the victims set a requirement of ensuring that the victims are treated with 'compassion and respect for their dignity'²⁶⁶ something which is more than necessary for the victims of rape and other sexual violence taking into account the acts they testify on. Further, the need for assisting the victims in different areas of their lives including 'medical,

²⁵⁷ Universal declaration of Human Right UN General Assembly Resolution 217 A(III) 10 December 1948, International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200 A(XXI) 16 December 1966 and International Covenant on Economic, Social and Cultural Rights UN General Assembly Resolution 2200 A(XXI) 16 December 1966.

²⁵⁸ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly,

²⁵⁹ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) and Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa AHG/Res.240 (XXXI).

²⁶⁰ The Constitution of Sierra Leone 1991 Act No. 6 of 1991 Available at www.sierra-leone.org/Laws/constitution1991 [Accesses 2 June 2009]; The Constitution of the Republic of Rwanda 26 May 2003 Available at http://www.cjcr.gov.rw/eng/constitution_eng.doc [Accesses 2 June 2009].

²⁶¹ UDHR (note 257) article 3; ICCPR (note 257) article 6 (1); ACHPR (259) article 4; The Constitution of Sierra Leone (note 260) article 16; Rwanda Constitution (note 260) article 12.

²⁶² UDHR (note 257) article 1; ACHPR (259) article 5.

²⁶³ UDHR (note 257) article 12; ICCPR (note 257) article 17(1) and (2); The Constitution of Sierra Leone (note 260) article 22; Rwanda Constitution (note 260) article 22.

²⁶⁴ UDHR (note 257) article 3; ICCPR (note 257) article 6 (1); ACHPR (259) article 9.

²⁶⁵ ACHPR (259) article 14; Rwanda Constitution (note 260) article 29.

²⁶⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (note 222) declaration A(4).

psychological, social' and security²⁶⁷ have been well recognized, articulated and documented.

It is noteworthy that, the participation of victims as witnesses in international tribunals is a give and take situation which the victims have to voluntarily agree to. This is supported by the different measures which may be taken to ensure that the rights so guaranteed are not infringed. As a result, the process may entail limiting other rights where necessary for example freedom of movement.

6.2 Witness and Victims Support Sections in the SCSL and the ICTR

In order to ensure the effective protection of witnesses in the SCSL, its statute lays down the need for the establishment of a Witness and Victims Section (WVS) responsible for the protection of both victims and witnesses²⁶⁸ with further emphasis provided in its RPE.²⁶⁹ The duty to establish this unit is conferred upon the registrar of the special court. Hence, the established unit falls within the registry department of the court. The double emphasis provided in both the RPE and the Statute of the SCSL reveals the awareness of the security threats and other pressing problems victims and other witnesses may encounter on the basis of their testimony or in the process of giving such testimony.

Similarly, the ICTR statute provides for an independent article which requires the adoption of different measures²⁷⁰ to ensure the effective protection of witnesses without making any reference to the establishment of a WVSS.²⁷¹ However, the RPE for the tribunal which were adopted *mutatis mutandis* by the SCSL²⁷² categorically provides for the establishment of the WVSS under the registry department of the court.²⁷³

The WVS in both the SCSL and the ICTR referred to as Witness and Victims Support Section (WVSS)²⁷⁴ were established in accordance with the statutes and RPE. The mandates of these sections are provided for in their RPE. It is worth

²⁶⁷ Ibid at declaration A (14) to (17).

²⁶⁸ Statute of the SCSL (note 16) article 16 (4).

²⁶⁹ The SCSL RPE (note 21) Rule 34 (A).

²⁷⁰ Statute of the ICTR (note 137) article 21.

²⁷¹ Ibid article 15.

²⁷² Statute of the SCSL (note 16) article 14 (1).

²⁷³ The ICTR RPE (note 217) Rule 34 (A).

²⁷⁴ The ICTR WVSS was established in 1996.

mentioning that, the SCSL has in both its statute and RPE provided for a wider description of what is to be expected from the section than under the ICTR's two key documents.

Therefore, in the SCSL the established unit is responsible for providing 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses,²⁷⁵ victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.'²⁷⁶ This mandate conferred to the WVS stretches to the principle witnesses including the victim-witnesses and any other person whose life and security may be threatened on account of the testimony so rendered.²⁷⁷ This includes the immediate family members of the victim-witnesses who in many ways may be in danger because of the victim's involvement with the court as a witness.

The WVS in the SCSL and the ICTR share a similar mandate of putting forward recommendations to the court and tribunal on what measures ought to be taken²⁷⁸ in order to ensure the protection of witnesses. Further, the units are responsible for provision of security, support, physical and psychological rehabilitation and medical assistance.²⁷⁹ In addition, they are responsible for developing short and long term plans for the protections of witnesses who have testified before the courts.²⁸⁰

6.2.1 Gender-sensitive protection mandate

Apart from these general protection provisions on all witnesses who appear before the court and the tribunal, the RPE for the SCSL²⁸¹ and the ICTR²⁸² with addition to the SCSL statute²⁸³ provide for a gender based protection mechanism. This aims at identifying and addressing the various needs the victims of sexual

²⁷⁵ War Crimes Studies Centre *Interim report on the Special Court for Sierra Leone* April 2005. 'Witnesses at the Special Court are comprised of both victims and insiders, who may have been perpetrators in the conflict.'

²⁷⁶ Statute of the SCSL (note 16) article 16 (4).

²⁷⁷ *Ibid.*

²⁷⁸ The SCSL RPE (note 21) and The ICTR RPE (note 207) Rule 34 (A) (i).

²⁷⁹ *Ibid* Rule 34 (A) (iii).

²⁸⁰ *Ibid* at Rule 34 (A) (ii).

²⁸¹ The SCSL RPE (note 21) Rule 34 (A) (iii) and Rule 34 (B). Emphasis is added on psychological and medical assistance for victims of rape and other sexual violence.

²⁸² The ICTR RPE (note 217) Rule 34 (B).

²⁸³ Statute of the SCSL (note 16) article 16 (4).

violence may have in the process of testifying based on the general impacts the crimes have had in their lives. Further, the process of testifying triggers other concern such as possibility of retraumatization and excommunication by the community. This differentiates the needs of other witnesses from the sexual violence victim-witnesses.

Therefore, the measures which are implemented in different stages of the process involve taking into consideration the special needs of the victims of sexual violence ranging from the manner in which they have to be approached to the way of handling them during interview and prepare them for testifying and other measures adopted upon the completion of the process of giving testimony.

6.3 Measures adopted by the courts in order to ensure protection of victim-witnesses. A shared obligation

Measures adopted by the SCSL and ICTR are those aiming at aiding, supporting and ensuring the general wellbeing and rights of the victims are protected. Therefore, the measures so implemented are not limited to protection during court proceedings rather, they include every step taken by different actors including the Office of the prosecutor, WVS, defence, registry and the judiciary from the investigation, during testimony and even after the process is completed.

6.3.1 Investigation phase

6.3.1.1 Availability of female investigators

The process of gathering evidence starts at the investigation phase where the prosecutor identifies victims who are potential witnesses to the cases before the SCSL and the ICTR. The prosecutor who is responsible for the investigation²⁸⁴ and prosecution²⁸⁵ of all cases in SCSL and ICTR has a team of investigators who gather evidence from different sources including the victims.

At this stage, the special needs of the victims of sexual violence make it a necessity to have an investigation team comprised of females so as to make the

²⁸⁴ Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (note 26)13 May 2006 at Article 23 (i).

²⁸⁵ Ibid at article 23 (ii).

victims comfortable and more willing to relate their experiences, taking into account their reluctance to talk to men. While the RPE for the ICTR had recognized from the beginning the need of employing qualified women,²⁸⁶ the ICTR often sent investigation teams comprised of men to speak to the victim-witnesses.²⁸⁷ This made it difficult for the victim-witnesses to relate their experiences to men as a result others did not disclose the crimes until a much later stage.²⁸⁸ It is worth mentioning that; the ICTR has recognized the need of including qualified and experienced female investigators in gender related crimes²⁸⁹ but its full implementation is yet to be realized.²⁹⁰

However, the experience has been different with the SCSL. The court has taken a very positive and gender cautious approach learning and improving on the ICTR's shortcomings. From the beginning, the prosecutor dedicated two qualified female investigators to the investigation of sexual violence cases.²⁹¹ This creates the required balanced atmosphere needed in the investigation of sexual violence crimes as evidenced in the cultural barriers which inhibit revealing such experiences to male personnel. As a result, victim-witnesses of gender based violence at the SCSL have been more positive about relating their experiences to selected female members of the staff.²⁹²

Further, unlike most male ICTR's investigators who have limited skills on how to interview and elicit rape and other sexual related evidence (testimonies) from the victims,²⁹³ the qualified female investigators in the SCSL use the special techniques to interview the victim-witnesses in the created suitable interview environment.²⁹⁴ It is acknowledged that 'in the investigation of gender based crimes, there is a way of interviewing rape victims. There is a manner [in which it is done];

²⁸⁶ The ICTR RPE (note 217) Rule 34(B).

²⁸⁷ Walsh (note 234) at para 17.

²⁸⁸ Ibid.

²⁸⁹ Alice Leroy 'The ICTR contribution to the prosecution of sexual violence' 2008 *About Africa Legal Aid (AFLA) Quarterly* 24 at 25 para 9.

²⁹⁰ The ICTR's chief Witnesses and Victims Support Section is a female.

²⁹¹ Nowrojee (note 14) at 100.

²⁹² Charter (note 233) at 15.

²⁹³ Binaifer Nowrojee 'We can do better, investigating and prosecuting international crimes of sexual violence.' Available at http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php [Accessed 23 March 2009].

²⁹⁴ Patricia Viseur-Sellers (note 32) at 158.

there are ways to make rape victims feel comfortable.’²⁹⁵ The availability of this important knowledge and experience on how to gain the trust and confidence of the victims of sexual violence avoids the retraumatization and victimization of the victims of sexual violence in the investigation phase.

In catering for the above deficiency, the ICTR organised a training and seminar programme²⁹⁶ on the techniques for the investigation and interviewing of gender related crimes.²⁹⁷ This programme provided different techniques on how to talk and gain the confidence and trust of the victims-witnesses so that they are more willing to talk and give testimonies; while honouring and ensuring the protection of their dignity²⁹⁸ and privacy. There has been no report of further training workshops.

6.3.1.2 Psychological support at the initial investigation phase

It has been well established that the victims of sexual violence suffer negative psychological impacts of the crimes committed against them. It is therefore paramount to ensure that they receive psychological assistance even at the initial investigation phase prior to being confirmed as witnesses of the courts.

In the ICTR, victims have not been provided with psychological support and counselling at the initial stage²⁹⁹ a deficiency which has resulted in the inability to connect with the victims; a loss for the prosecution potential witnesses. Efforts have however been made to provide the services from ICTR offices in Rwanda to the court in Arusha³⁰⁰ to confirmed witnesses who are to appear before the ICTR. It is noteworthy that, other victims have not received psychological support during their transit from Rwanda to Arusha³⁰¹ a practice which rendered the victims

²⁹⁵ Binafier Nowrojee ‘Gender justice: The work of the International Criminal Tribunal for Rwanda (ICTR)’ 2008 *About Africa Legal Aid (AFLA) Quarterly* 34 at 35.

²⁹⁶ Leroy (note 279) at 25 para 9.

²⁹⁷ Askin Kelly ‘Gender justice: The work of the International Criminal Tribunal for Rwanda (ICTR)’ 2008 *About Africa Legal Aid (AFLA) Quarterly* 17 at 20. ICTR had set up a sexual assault unit in the beginning of its operation which was abolished by the subsequent prosecutor.

²⁹⁸ Nihal Jayawickrama *The judicial application of Human rights law national, regional and international jurisprudence* (2002) at 241. This encompasses the right to be treated as a human being.

²⁹⁹ IFHR report (note 246) at 7. ‘The witnesses interviewed stated that neither before, during nor after giving testimony, did they have any psychological support.’

³⁰⁰ Witness support and protection at ICTR at I Available at <http://www.69.94.11.53/ENGLISH/geninfo/wvss.htm> Accessed on 22 March 2009. The psychologist assists the victim-witnesses from Rwanda until they are handed over to the witness support assistant in Arusha.

³⁰¹ IFHR report (note 246) at 7.

psychologically unprepared for the process ahead. This has been contributed by inadequate availability of psychologists within the tribunal's medical facility.³⁰²

The SCSL has addressed this insufficiency from a different angle in order to ensure victims receive the care they need to put them in a healthy condition prior to giving testimony. Since before being added to a list of witnesses, the victims interviewed during investigation are not witnesses of the court, the Chief of Investigations established a Witness Management Unit (WMU) which is responsible for giving help and support including psychological help to potential witnesses at the pre trial stage prior to being confirmed as witnesses of the special court.³⁰³ The continuity of this important service is made possible upon being confirmed where the victim-witnesses are handed over to the WVS.³⁰⁴ Psychological support in the SCSL has been paramount to the victim-witnesses who have had traumatic experiences as evidenced by a sharp contrast from the ICTR through the availability of 'a group of eleven psychosocial support staff including one clinical psychologist and two counsellors.'³⁰⁵

6.3.1.3 Availability of medical services to cater for sick victim-witnesses

The health impacts of the crimes committed against young girls and women are still experienced even to date. Importantly, the medical services required are not only made available at the investigation phase but, extend to the trial and post trial phase.

Therefore, in the process of assisting victim-witnesses to live their daily lives and participate in judicial process,³⁰⁶ the ICTR's through the WVSS has done a commendable job. It has put in place the Support Programme for Witnesses and Potential Witnesses unit³⁰⁷ which provides medical care³⁰⁸ to confirmed victim-witnesses including the provision of H.I.V medications.³⁰⁹ This medical programme is provided in Kigali through the medical support of the Kisementi Medical Centre³¹⁰ while in Arusha, the WVSS has been using the ICTR medical facility. The

³⁰² Ibid at 7. The tribunal calls psychological experts when the need arises.

³⁰³ War Crimes Studies Centre (note 275) at 21.

³⁰⁴ Ibid.

³⁰⁵ Ibid at 22.

³⁰⁶ Ngendahayo (note 240).

³⁰⁷ Ibid.

³⁰⁸ Witness support and protection at ICTR (note 300) at IV such as gynaecological services.

³⁰⁹ Ibid at III and IV.

³¹⁰ Ibid at IV.

costs for the medical services are catered for by the established Trust fund where almost one third of the expenses are earmarked for rape and sexual assault victims who are H.I.V positive.³¹¹

Similarly, in the SCSL medical needs of all witnesses including the victims of sexual violence are attended to by the WVS³¹² so as to restore the general health condition which will render them physically fit to engage in the judicial process. Particular attention has been given to the victims of rape and other sexual violence to make sure they receive medical help for ‘gender based violence injuries.’³¹³

6.3.2 Pre trial phase

6.3.2.1 Issue of witness protection measures. A balance between the rights of the accused and the need for protecting witnesses

Upon the conclusion of statement taking and verification, the prosecutor after consultation with the victim-witness requests the court for protective measures for victim-witnesses in order to protect the security³¹⁴ of those who face security threats and to guard the victim-witnesses of sexual violence from being rejected by the community.

In the SCSL and the ICTR, measures protecting the ‘privacy and security’ of victim-witnesses are granted by a court on application by the prosecution, defence, victims or witnesses themselves or WVSS³¹⁵ or on its own motion. These proceedings are done on an ex parte basis.³¹⁶ The court’s and tribunal’s chambers and judges share the obligation of ensuring that the witnesses including victim-witnesses are protected during all phases of judicial proceedings. This is evident in the sole mandate conferred upon them of granting protective measures upon request or on their own motion.³¹⁷ This wide discretionary power leaves the fate of victim-witness protection to a sole body of people. If the chamber refuses to grant

³¹¹ Ibid.

³¹² Horn et al (note 256) at 137.

³¹³ Charter (note 233) at 15.

³¹⁴ Ibid at 22. SCSL victim-witnesses of sexual violence have reported to feel very insecure more than other witnesses.

³¹⁵ The SCSL RPE (note 21) and The ICTR RPE (note 207) Rule 75(A) see also Karim Khan and Rodney Dixon *Archbold international criminal courts practice, procedure and evidence* (2005) at para 8-141 pg 407.

³¹⁶ Ibid Khan and Dixon at para 8-144 pg 409.

³¹⁷ Ibid. Provides a ‘judge or chamber may ... order appropriate measures’ of protection. See also Robert Cryer et al *International criminal law and procedure* (2007) 361 at 17.3.4.

protection order, then such victim-witness can never enjoy any protection. Therefore, this imposes an inferred obligation on the judges to be alert and victim cautious³¹⁸ to ensure that the necessary measures are ordered, implemented and adhered to.

Importantly, the Office of the Prosecutor under the ICTR has express obligation of ensuring safety and privacy of victims, witnesses and their families,³¹⁹ a duty which is discharged through requesting a protection order.

The balance between the protection of victim-witnesses and rights of the accused is evident in the requirement of ensuring that the protection orders are given without arbitrarily infringing the rights of accused which include:- equality before the courts,³²⁰ entitlement to a fair and public hearing,³²¹ presumption of innocence³²² and minimum guarantees in determination of charges.³²³ Unlike the SCSL, the ICTR statute expressly requires that a balance between the rights of the accused and the protection of witnesses is observed in the judicial process.³²⁴ Although the SCSL statute does not have an express provision like the ICTR, the RPE for the two courts call for the protection of witnesses to be consistent with the rights of accused.³²⁵

Thus, at the pre-trial stage on the basis of a genuine threat to the life of the victim or her family members, the measures restricting the rights of the accused can be applied for.³²⁶ The required practice is for the chamber to be satisfied whether the risks as expressed by the victim-witness through fear and confidential statement are genuine and supported by objective circumstances³²⁷ through the conduct of investigation on an individual basis.³²⁸ The SCSL has added the requirement of

³¹⁸ Prosecutor v Alex Tamba Brima Decision on the prosecution's motion for immediate protective measures for witnesses and victims and for non-disclosure Case No. SCSL-2003-06-PT 23 May 2003. The SCSL judges expressly state their cautiousness of the need for protecting different rights of the victims and witnesses.

³¹⁹ The International Criminal Tribunal for Rwanda Prosecutor's Regulation No. 2 (1999) Standards of professional conduct prosecution counsel 14 March 2008 at regulation 2(g).

³²⁰ Statute of the SCSL (note 16) article 17 (1); Statute of the ICTR (note 137) article 20 (1).

³²¹ Ibid at article 17(2); article 20 (2).

³²² Ibid at article 17(3); article 20 (3).

³²³ Ibid at article 17(4); article 20 (4).

³²⁴ Ibid Statute of the ICTR article 19 (1). The proceedings before the ICTR must be conducted with 'full respect for the rights of the accused and due regard for the protection of victims and witnesses.'

³²⁵ The SCSL RPE (note 21) and The ICTR RPE (note 217) Rule 75(A).

³²⁶ Ibid at Rule 69 (A).

³²⁷ Khan and Dixon (note 315) at 407. Where there is lack of specific evidence of risk, the measures can not be granted see also Sluiter (note 28) at 967.

³²⁸ Gideon Boas and William Schaba *International criminal law development in the case law of ICTY* see also Prosecutor v Tadic Defence motion to summon and protect Defence witnesses and on giving of evidence by video link IT-94-1-T 25 June 1996 at para 25.

concerns to be raised by the investigator and the WVS as supported by efforts attempting to disrupt the activities of the court.³²⁹ It is important to note that the location of the SCSL in Sierra Leone in itself add an overwhelming possibility of serious threats to witnesses of the court.

Contrary to the above, the SCSL³³⁰ and the ICTR³³¹ have been issuing protective measures to all prosecution witnesses commonly referred to as the issue of ‘blanket’ protection orders a practice which has shone away from the individual assessment of risk. Therefore, some measures are made readily available to witnesses unless they decide to waive them. To ensure the efficacy of blanket protective measures, the SCSL prosecutor unlike the ICTR has grouped the witnesses in categories whereas the victims of sexual violence have an independent sub category A under the category of witnesses of fact.³³² This enables the request and adoption of specific protective measures applicable and significant to victim-witnesses which may not necessarily be needed by other type of witnesses.

Further, since ICTR is located in a foreign country, serious threats of life³³³ and security when they occur before the victim-witness’s arrival to ICTR, victim-witnesses are to report to a local police station where protection is to be offered.³³⁴ One must be aware that, Rwandan victim-witnesses who have taken refuge in other countries have faced similar threats.³³⁵ To ensure their protection, the tribunal requests the help of the United Nations High Commissioner for Refugees and the state concerned.³³⁶

Once the chamber is satisfied as to the exceptional nature of the threats the victim-witness may be facing, the rights of the accused may be limited to ensure the

³²⁹ Prosecutor v Sam Hinga Norman et al Ruling on Motion for Modification of Protective Measures for Witnesses, SCSL-04-14- T, 18 November 2004, p. 11.

³³⁰ Ibid Order 3 at 14.

³³¹ Prosecutor v Musema, Decision on the Prosecutor’s Motion for Witness Protection Case No. ICTR-96-13-T, 20 November 1998 at para 19(1) and 18.

³³² Prosecutor v Issa Hassa Sesay et al Decision on prosecution motion for modification of protective measures for witnesses Case No. SCSL -04-15-T 5 July 2004 at 3.

³³³ ‘Survivors of the Rwandan genocide face intimidation as they prepare to testify before the ICTR.’ Available at

http://www.ddrd.ca/site/what_we_do/index.php?id=1723&subsection=themes&subsection=themes_documents [Accessed 6 April 2009]. Majority of the genocide survivors as reported are women.

³³⁴ Salvatore Zappalà *Human Rights in International Criminal Proceedings* (2003) at 241.

³³⁵ Walsh (note 234) at para 9 ‘... [A] Rwandese refugee requested ...help [in Kenya] because of continued harassment and threats she was receiving due to her cooperation with the ICTR. [She was a rape victim of] the genocide...’

³³⁶ Mohamed Othman ‘The ‘protection’ of refugee witnesses by the International Criminal Tribunal for Rwanda’ (2002)14 4 *International Journal of Refugee Law* 495 to 508.

safety of the victim-witnesses and their families.³³⁷ Protective measures at this stage are provided to what is considered to be necessary. When such threats cease to exist, the measures so adopted become no longer necessary.³³⁸

6.3.2.2 Late disclosure of identity to the defence under Rule 69

The accused has a guaranteed right under the two courts' statutes to examine the witnesses who testify against him.³³⁹ This inevitably entitles him to know the identities of prosecution witnesses who are cross examined during trial by his counsel or the accused himself. Despite this inferred right, in an event of security concerns of the identified witnesses, the accused right to know the prosecution witnesses is limited on the time frame under the identity of prosecution witnesses is revealed to the defence. This ensures that by the time the identity of the witness is revealed to the accused, all necessary protective measures have been effectively implemented and thus the risk of death and other serious bodily harm to the victim-witnesses are fairly reduced.

In international criminal proceedings, there is a rebuttable presumption that the identities of the prosecution witnesses are preserved and thus unknown to the defence at all initial stages of the proceedings³⁴⁰ unless the contrary is established. This sort of arguments is derived from the duties and obligations imposed on prosecution personnel,³⁴¹ interpreters, translators³⁴² and WVS personnel who come into contact with the victims to observe total confidentiality with regard to non public information. Further, the ICTR's prosecutor is expressly required not to disclose information that might jeopardize the safety of victims and witnesses.³⁴³ Hence, these duties when adhered to, make it possible to preserve the identity of the victim-witnesses unless otherwise.

³³⁷ Zappalà (note 334) at 236.

³³⁸ *Ibid* at 238.

³³⁹ Statute of the SCSL (note 16) article (4) (e); Statute of the ICTR (note 137) article 20 (4) (e).

³⁴⁰ Kate Fitzgerald 'Prosecution of rape and other sexual assault under international law' 8 (1997) *European Journal of International Law* 638 at 655.

³⁴¹ The SCSL RPE (note 21) Rule 41 (A), Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (note 26) article 26; Prosecutor's Regulation No. 2 (note 331) regulation 3 (i).

³⁴² Code of Ethics for Interpreters and Translators Employed by the Special Court for Sierra Leone 25 May 2004 article 6 (A) and (B).

³⁴³ Prosecutor's Regulation No. 2 (note 319) regulation 3 (i).

Therefore, upon grant of the protection order by trial chamber, the late disclosure of prosecution witnesses' identity to the accused is permitted only on a temporary basis³⁴⁴ under exceptional circumstances which pose serious threat to life and security³⁴⁵ of the victim or witness.³⁴⁶ This exceptional measure is limited to the extent that it does not infringe the right of the accused to have adequate time to prepare his or her defence.³⁴⁷

It must be noted that, non- disclosure of identity of the witnesses to the accused is contrary to the established guarantees fundamentals of a fair trial.³⁴⁸ If the accused is not aware of who is his accuser, it becomes difficult to organize a defence. Further, the reliability and source of such evidence becomes difficult to check and verify.

In order to ensure that there is a balance between the need for protecting prosecution witnesses and the rights of the accused, the prosecutor in the SCSL is under obligation to disclose the identity of the witnesses to the defence within a reasonable time between thirty³⁴⁹ and sixty days³⁵⁰ before witness is due to testify while the ICTR's prosecutor has to disclose the identity within similar dates but before trial commences or as shall be determined by the trial chamber.³⁵¹

While the ICTR has recognized that the disclosure of the identity of witnesses on 'rolling basis'³⁵² does not provide the defence adequate time to prepare

³⁴⁴ MonRoe Leigh 'The Yugoslav tribunal: Use of unnamed witnesses against the accused' (1996) 90 *American Journal of International law* 235 at 236.

³⁴⁵ Prosecutor v Morris Kallon Decision on the defense application for leave to appeal: Decision on the prosecution's motion for immediate protective measures for witnesses and victims and for non-disclosure Case No. SCSL-2003-07-PT 10 December 2003 para 13 at 4 and 5.

Prosecutor v Aloys Simba Decision on prosecution request for protection of witnesses Case No. ICTR-2001-76-I, 4 March 2004 at para 2.

³⁴⁶ The SCSL RPE (note 21) Rule 69 (A) and The ICTR RPE (note 217) Rule 69 (A)

³⁴⁷ Statute of the SCSL (note 16) article (4) (b); Statute of the ICTR (note 137) article 20 (4)(b).

³⁴⁸ Kostovski v The Netherlands European Court of Human Rights Application no. 11454/85 20 November 1989.

³⁴⁹ The SCSL RPE (note 21) and The ICTR RPE (note 217) Rule 66(A) (i).

³⁵⁰ Ibid Rule 66(A)(ii).

³⁵¹ Ibid Rule 69(C) see also Prosecutor v Morris Kallon Decision on the prosecution's motion for immediate protective measures for witnesses and victims and for non-disclosure Case No. SCSL-2003-07-PT 23 May 2003 Disclosure of identity was ordered to be made 42 days before witness is to testify; Prosecutor v Aloys Simba (note 345) order 9. The prosecutor was ordered to disclose the identity of witness no later than thirty days before the trial.

³⁵² Prosecutor v Bagosora et al, Case No. ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001 at para 25. Prosecutor v Bagosora et al. 'Decision on Defense Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (TC),' 18 July 2003.

its case,³⁵³ because, trial usually begins where prosecution witnesses are heard, 'before the defence knows the names of all prosecution witnesses,'³⁵⁴ the SCSL has adopted the rolling disclosure of identity of the prosecution witness to the accused³⁵⁵ as embedded in its RPE.³⁵⁶ Disclosure of identity of prosecution witnesses' days prior to testimony is inadequate. The SCSL practice has been prompted by its location in the country where atrocities were committed hence, it is deemed remote that alternative to rolling disclosure which is disclosure of identity prior to trial will ever be adopted.

6.3.2.3 Non – disclosure of identity to the public

The prosecutor for both the SCSL and the ICTR can also apply for non-disclosure of victim-witnesses' identities to the public.³⁵⁷ This measure acts as a shield between the witness and the public and thus preserves the ability of the victim-witnesses to continue living their lives where the general population remains unaware of their involvement with the SCSL and the ICTR as victims of rape and other forms of sexual violence.

A fair and public hearing is one of the accused conditional rights which is subject to the safety and security of witnesses.³⁵⁸ The limitation of right of the public to information³⁵⁹ does not affect the accused right to fair trial because the information withheld from the public is revealed to the accused days prior to trial or victim-witness's testimony.

Hence, an issued order by the trial chamber prohibiting the disclosure of victim-witnesses identity to the public³⁶⁰ applies to the two courts' members of staff

³⁵³ Joanna Pozen 'Justice obscured: the non-disclosure of witnesses' identities in ICTR trials' (2005-2006) 38 *Journal of International Law and Politics* 281 at 298.

³⁵⁴ Aloys Simba (note 345) para 6.

³⁵⁵ Prosecutor v Morris Kallon (note 345); Prosecutor v Alex Tamba Brima (note 318).

³⁵⁶ The SCSL RPE (note 21) Rule 69(C).

³⁵⁷ Prosecutor v Issa Hassan Sesay Decision on the prosecution motion to allow disclosure to the registrar to keep disclosed materials under seal until appropriate measures are in place Case No. SCSL-2003-06-PT 23 May 2003 annexure at 3. 'The public includes all persons, governments, organisations, entities, clients, associations and groups other than the judges of the court and the staff of the registry, the prosecution, defence and family, friends and associates of the accused'

³⁵⁸ Statute of the SCSL (note 16) article 17 (2); Statute of the ICTR (note 137) article 20 (2).

³⁵⁹ Prosecutor v. Dusko Tadic, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for witnesses R 31 July 1996 at para 6.

³⁶⁰ The SCSL RPE (note 21) and The ICTR RPE (note 217) Rule 75(A).

including the courts' registry and the defence from the date the order is issued throughout the trial and after the conclusion of the trial.³⁶¹

At the pre trial stage, the registries which are responsible for keeping records of proceedings and evidence of the SCSL and the ICTR³⁶² are under an obligation to withhold from the public any record of the courts which identifies the witnesses.³⁶³ Further, the registries expunge names and identity information from the courts' documents to which the public is authorized to access³⁶⁴ including the transcripts, orders, decisions and judgments.³⁶⁵ In turn, the prosecutor assigns pseudonym³⁶⁶ which are used for all pre trial disclosures and further extends during and after trial whenever reference is made to that particular witness.

As pointed above, the order for non disclosure of victim-witnesses' identity to the public which includes accused associates, family and friends equally binds the accused and his defence team. In both ICTR³⁶⁷ and the SCSL³⁶⁸ there have been instances under which the identity of the protected witnesses has leaked in one way or another. While no measures have really been taken in the ICTR to investigate the possible source of such leakage, the SCSL has pursued claim of leakage of protected witness's identity through its independent counsel and prosecuted the persons responsible.³⁶⁹ Further, the court has worked closely with the local police to ensure those causing threats are held accountable.³⁷⁰ This is a positive effort in ensuring that similar gross and unacceptable behaviours are deterred, those responsible held accountable and hence protection orders are complied with at all times by all parties to the proceedings.

³⁶¹ Ibid Rule 75 (F)(i); Prosecutor v Juvénal Kajelijeli Decision on the prosecutor's motion for protective measures for witnesses ICTR-98-44-I, 6 July 2000 at para 2(d) and para 6.

³⁶² Ibid Rule 81.

³⁶³ Ibid Rule 75(B) (i) (b). This is in relation to addresses, whereabouts and any information which reveals the identities of victim-witnesses. All this information is required to be kept confidentially or under seal by the registry section of the court.

³⁶⁴ Ibid Rule 75 (B)(i)(a).

³⁶⁵ Brouwer (note 27) at 238.

³⁶⁶ The SCSL RPE (note 21) and The ICTR RPE (note 217) Rule 75 (B)(i)(d).

³⁶⁷ Hirondele News Agency 25 March 2002 'Survivors accuse 14 defence investigators of genocide crimes.' Available at

<http://www.hirondele.org/hirondele.nsf/0/48946dbe58a37270c125680100703134?openDocument> [Accessed 29 March 2009]. 'Ibuka and Avega refer to yet another example, of a family which requested anonymity on the case of Georges Rutaganda and while still in Arusha, received a long threatening letter, proving yet again that the identity of these "supposedly protected witnesses" had been revealed.'

³⁶⁸ HRW 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone' (note 20).

³⁶⁹ Prosecutor v Alex Brima et al Decision on the report of the independent counsel pursuant to Rule 77 (c) (iii) and 77 (D) of the RPE Case No. SCSL-04-16-T 29 April 2005.

³⁷⁰ HRW 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone.' (note 20).

6.3.2.4 Safe transport and accommodation

The victim-witnesses in both the SCSL and ICTR are safely transported from their homes to the demarcated safe houses in Freetown for SCSL³⁷¹ and Arusha for ICTR.³⁷² They reside in these areas for the entire period in which they prepare for and give testimony to ensure they receive the relevant support and that their safety is guaranteed.

In the ICTR, the WVSS provides '[s]ecurity escort for witnesses during international travels to and from Arusha.'³⁷³ Concerns have been raised on the manner and means of transport offered. This is in relation to the fact that witnesses have been picked and transported in UN marked vehicles and planes from their homes to Arusha and back.³⁷⁴ This does not ensure their anonymity as neighbours can easily conclude their link to ICTR. The investigators should approach the victim-witnesses in a casual way which does not expose them to the entire population about their contact and involvement with the ICTR. This will make the victim-witnesses feel more secure about the situation and the fear that the neighbours will link them to the ICTR will fairly be minimized.

Upon the arrival of witnesses in the courts' regions, they are provided with '[t]wenty-four hour's security surveillance offered by the courts' security officers together with the local police officers.³⁷⁵ Once they are comfortably settled, the process of introducing the victim-witnesses to the court environment begins.

6.3.2.5 Preparation and familiarization of the court environment

The process of testifying on acts of rape and other sexual violence is a difficult task mainly contributed by the general community and cultural perception of such acts and the detailed questioning which is usually conducted during examination of witnesses. As a result, victim-witnesses need to be prepared and well informed of what they will encounter in the process. Failure to provide adequate preparation may

³⁷¹ Charter (note 233) at 14.

³⁷² Witness support and protection at ICTR (note 300) at III.

³⁷³ Ibid at III.

³⁷⁴ Eva Gazurek and Anne Saris 'The Protection of Women as Witnesses and the ICTR' Available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/witnessProtection/protectionofwitnesses_en.php [Accessed 14 April 2009].

³⁷⁵ Ibid and Charter (note 233) at 14.

result to retraumatization a negative impact on the victim.³⁷⁶ Other unprepared victims refuse to answer questions because of the natural fear of their general safety³⁷⁷ this is unhelpful and delays the proceedings thereby defeating the ends of justice as courts have to adjourn³⁷⁸ in order to make sure the victim-witnesses are prepared and understand the different protection measures the court has taken to protect their rights.³⁷⁹

Both the SCSL and the ICTR have shortcomings.³⁸⁰ However, efforts are made by the WVSs to ensure that witnesses are informed of the nature of proceedings before the courts and familiarised of the court environment days prior to the actual testimony. Victim-witnesses are further informed of the different measures the courts have taken to ensure their safety and the important information of the presence of the accused in the court room during testimony and his knowledge of their identity as revealed to him by the prosecutor.³⁸¹

6.3.3 Trial phase

6.3.3.1 Measures that further the shielding of the victim-witness's identity from the public

Structural designs and proceedings before international courts and tribunals are intended to facilitate public trials. Therefore, during testimony, different 'in court'³⁸² measures are further adopted to alter the public nature of proceedings. The aim is to make sure that the victim-witness's identity is protected from the public because; it will be useless to withhold identity of the witness from the public documents and not implement special measures to ensure witness's identity is not exposed during testimony. Thus, both the SCSL and the ICTR RPE have effectively provided for the following measures during testimony:-

³⁷⁶ Nowrojee, 'We can do better, investigating and prosecuting international crimes of sexual violence' (note 293).

³⁷⁷ Transcript on examination of witness TF1-214 (note 35) at 38 to 40.

³⁷⁸ Ibid at 57.

³⁷⁹ Transcript on examination of witness TF1-214 SCSL-04-15-T 14 July 2004.

³⁸⁰ Nowrojee, 'We can do better, investigating and prosecuting international crimes of sexual violence.' (note 293). In ICTR there have been some cases in which rape witnesses were not prepared as a result they have 'felt shamed, humiliated, or outraged that they were asked to speak bluntly in a public setting about being raped.'

³⁸¹ Mr. Vahidy the chief of witness protection in the SCSL confirmed that witnesses undergo the process of court familiarization prior to giving testimony.

³⁸² Pascale Chifflet 'The role and status of victim' in Gideon Boas & William Schabas eds *International criminal law developments in the ICTY* (2003) 75 at 79.

- i. Giving testimony through image or voice altering devices. This measure has been implemented in relation to victim-witnesses of sexual violence so that those close to the victim who are present during testimony may not recognize her by the tone of her voice even where her face is not seen.³⁸³
- ii. Closed or one way closed circuit television³⁸⁴ or video link.³⁸⁵
- iii. Closed session³⁸⁶ where the public is excluded from trial while the accused continues having access to the proceedings including the examination of witnesses.³⁸⁷
- iv. Other similar technological measures including electronic temporary screen as adopted by the SCSL.³⁸⁸ This measure does not preclude the accused from seeing the witness but rather it provides an opportunity to assess the character of the witness while protecting her from the public as opposed to the closed circuit television.³⁸⁹

With the above measures in place, the courts ensure that the victims possibility of being ex communicated or her life and security being violated as a result of her identity being revealed to the public is fairly reduced. However, the fragile victim-witness calls for special attention during her testimony to ensure smooth running of the whole process which is advantageous to both the victim and the court.

6.3.3.2 Protection during examination in chief and cross examination

As pointed earlier on, the proceedings in the SCSL and the ICTR entail the examination of witnesses where accused is granted right to cross examine prosecution witnesses.³⁹⁰ On top of this procedural requirement, in the ICTR, the need for cross examination is necessary due to the culture of Rwandese women who

³⁸³ Prosecutor v Issa Hassan Sessay et al (note 322) para 33 at 16 and order (g) at 17.

³⁸⁴ The SCSL RPE (note 21) and The ICTR RPE (note 217) Rule 75(B)(c) and Rule 75(B) (c) and (iii).

³⁸⁵ SCSL RPE (note 21) Rule 75(B)(c).

³⁸⁶ Ibid Rule 75(B)(ii).

³⁸⁷ Brouwer (note 27) at 243.

³⁸⁸ Prosecutor v Issa Hassan Sessay et al (note 322) para 28 at 14 and order (e) at 17; Brouwer (note 27) at 259.

³⁸⁹ Ibid at 256.

³⁹⁰ Statute of the SCSL (note 16) article 17 (4) (e); Statute of the ICTR (note 137) Article 20(4)(e).

tend to narrate a story as their own even where they were not the victims.³⁹¹

Therefore, cross examination distinguishes between ‘first and second hand witness testimony’,³⁹² and enables the chamber to make sense of indirect answers to ‘potentially every issue that a witness finds sensitive in a case.’³⁹³

The process of cross examination when extensive and uncontrolled results to retraumatization of rape and sexual violence victim-witnesses.³⁹⁴ This is contributed by the defence counsel’s desire to establish a defence for the accused or indeed to cast a doubt to the prosecution case so that the prosecution does not attain the required standard of proof to secure a conviction. This desire on many occasions overshadows the need to protect the fragile victim-witnesses³⁹⁵ because the strategies adopted may not be victim cautious and thus difficult for the victim-witnesses to comprehend. As a result, some of the SCSL³⁹⁶ and majority of the ICTR’s victim-witnesses have considered this part of the proceedings threatening and sometimes unbearable.³⁹⁷

Many of the ICTR victim-witnesses have had a more negative experience during cross examination due to being accustomed to the civil mode of adjudication where cross examination is not a feature of the system and also due to inadequate preparation for cross examination. In one instance the failure of the judges to exercise the granted authority to control the questioning³⁹⁸ resulted to what has commonly been referred to as the ‘laughing judge’s case.’³⁹⁹ Here the defence tactic in asking questions resulted into more intimate and personal questions which made the whole court environment hostile for the victim-witness.

In the SCSL on the other hand, a more victim oriented strategy has been provided to ensure that victim-witnesses of sexual violence are not subjected to retraumatization. Directives have been provided obliging the defence counsel to

³⁹¹ Pozen (note 353) at 308.

³⁹² Ibid at 309.

³⁹³ Ibid.

³⁹⁴ Askin (note 297) at 21.

³⁹⁵ Marie-Bénédicte Dembour and Emily Haslam ‘Silencing hearings? Victim-witnesses at war crimes trials’ (2004) 15 *European Journal of International Law* 151 at 154.

³⁹⁶ Charter (note 233) at 17.

³⁹⁷ IFHR (note 246) at 8.

³⁹⁸ The ICTR RPE (note 217) Rule 75(D) and 90(F).

³⁹⁹ Hironelle News Agency (note 367) 25 January 2002 ‘Genocide survivors cut cooperation with un tribunal’. A report on the incident of laughing judges.

‘make reasonable efforts to minimize inconvenience to witnessing.’⁴⁰⁰ Further similar to the ICTR, the judges have authority to control the questioning in order to avoid harassment or intimidation.

However, different from the ICTR’s experience, SCSL judges have been seen from time to time to exercise this power and constantly reminding counsel of the existing protection orders whenever they seem to overstep the line in the questioning and urge the witnesses not to mention anything that will compromise their safety.⁴⁰¹ Additionally, they have adjourned cases where traumatized victim-witnesses were not coping with the process of giving testimony and in turn ordered the WVS to further make it clear to the victim-witnesses on the adopted protective measures⁴⁰² a practice which has rendered the victim-witness ready to engage in the process.⁴⁰³ The victim conscious proceedings have to a great extent lessened the negative experiences derived from giving testimony although it has not eliminated them completely.

To make the victim-witnesses’ experience during testimony less threatening the SCSL has permitted the presence of officers of the WVS during testimony.⁴⁰⁴ Their presence has the effect of providing support to the victim-witnesses by knowing people who they have built trust with are present in the court room. It is important to point out that the role of these officials is minimal so as not to impede the rights of the accused.

Moreover, the evidentiary rules for SCSL and ICTR on cases of sexual violence provide a protection gateway which also helps the victim-witnesses during cross examination. Although the SCSL has adopted a non consent definition of rape, it’s RPE and those of ICTR although not similar provide for the special evidentiary rules aiming at reducing inconveniencing and embarrassing the victim-witnesses on the basis of the questions being asked aiming at proving consent or prior conduct.

Therefore, peculiar to the RPE for the SCSL, consent can not be inferred by silence or lack of resistance or words and conduct of a person incapable of giving

⁴⁰⁰ Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (note 26) Article 10 (A) (ii).

⁴⁰¹ Transcript on examination and cross examination of Witness TF1-214 (note 35) at 33 and 34.

⁴⁰² Transcript on examination and cross examination of Witness TF1-214 (note 379) at 56.

⁴⁰³ Transcript on examination and cross examination of Witness TF1-214 (note 35).

⁴⁰⁴ Transcript on examination and cross examination of Witness TF1-196 (note 379) at 7.

evidence⁴⁰⁵ (young girls of tender age or mentally unstable person). Similarities between the two courts' evidentiary rules are found in the inadmissibility of evidence of consent in presence of coercive circumstances⁴⁰⁶ and prior sexual conduct.⁴⁰⁷ The RPE for the ICTR uniquely to that of the SCSL provide for non-requirement of corroboration of sexual assault victim's testimony.⁴⁰⁸ With this benchmark the defence can therefore not pose questions which aim at proving consent where the above conditions have well been established prior to cross examination.

6.3.4 Post testimony phase

6.3.4.1 Follow ups after completion of testimony.

The SCSL has improved significantly on the ICTR with regard to follow ups after the victim-witness has finished giving testimony. The ICTR has been criticized for lack of follow ups once the victim-witnesses have given testimony.⁴⁰⁹

In the ICTR, victim-witnesses are transported safely back to Rwanda after they give testimony. However, they have reported to have felt like they have been used, abandoned and disregarded due to lack of follow ups once returned to Rwanda. One of them commented by saying, '[w]hen they need us, they treat us like eggs, and when they finish with us, they throw us in the garbage.'⁴¹⁰ This is a continual psychological battle the victim-witnesses have to fight. What they need at these crucial times after being subjected to the most inhuman and psychologically disturbing acts is a sense of validation. Lack of follow ups is the opposite of this, something which slows their healing process.

Conversely, in the SCSL, the victim-witnesses have had a rather positive experience on the follow ups rendered although more need to be done.

Once the victim-witnesses complete the process of giving testimony, they are safely transported to their homes for those who face no serious security threats where they are given the 'contact details of key members of WVS staff and

⁴⁰⁵ The SCSL RPE (note 21) Rule 96 (ii) and (iii).

⁴⁰⁶ Ibid Rule 96 (i) and Rule 96 (ii) (a).

⁴⁰⁷ Ibid Rule 96 (iv).

⁴⁰⁸ The ICTR RPE (note 217) Rule 96 (i).

⁴⁰⁹ IFHR report (note 246) at 10.

⁴¹⁰ Nowrojee 'Your justice is too slow: Will the ICTR fail Rwanda's rape victims?'

instructed to contact WVS if they experience any problem relating to their testimony.’⁴¹¹ Since majority of the victim-witnesses have no phones and it is difficult to access these services from their remote villages, there has been an initiative of carrying out post trial visits six months after the testimony for every witness who has testified at the court something which is yet to be implemented.⁴¹² In spite of this positive effort, most victim-witnesses are not made aware of the kind of supportive measures available after testimony. This is due to lack of effective dissemination of information from the responsible WVS officials to the witnesses, something which has to be rectified.

6.3.4.2 Relocation and domestic witness protection

It is noteworthy that, neither of the statutes of the two courts nor their rules of procedure and evidence provide for relocation or domestic witness protection. These post testimony protection mechanism for witnesses are derived from the long term measures language used in the two courts statutes.

Thus, after testimony, the SCSL and the ICTR relocate witnesses who still suffer serious security threats which makes it impossible to offer protection within the countries of residence i.e. either, Sierra Leone, Rwanda or counties in which the victim-witness has taken refuge. However, where the security threats are not alarming in every possible part of the countries of residence, domestic relocation is the adopted measure.⁴¹³ Importantly, measures under this category are issued exclusively on an individual basis; the chambers do not adopt the blanket protection measures for post trial protection.

The ICTR through a proper communication set up, requests the assistance of the Rwandan government to effect the protection of witnesses who are relocated within the country.⁴¹⁴ To facilitate the relocation process, the tribunal requests the assistance of different states⁴¹⁵ to offer protective shelter for the relocated witnesses

⁴¹¹ Horn et al (note 256) at 138.

⁴¹² Ibid.

⁴¹³ Ibid at 256

⁴¹⁴ IFHR report (note 246) at 10.

⁴¹⁵ Sluiter (note 28) at 970.

pursuant to its statute.⁴¹⁶ Financial support is provided to the witnesses for a short duration, until they are in a position to support themselves.⁴¹⁷

In the SCSL, similar pattern is followed. However, there have been some hitches to the relocated witnesses who have faced security threats something which has not been reported in ICTR. It is still unknown as to how such crucial information about relocated witness has leaked. Speculations have suggested that the witness may have divulged the information to a third party.⁴¹⁸

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⁴¹⁶ Statute of the ICTR (note 137) article 28.

⁴¹⁷ *Ibid.*

⁴¹⁸ HRW 'Justice in motion: The Trial Phase of the Special Court for Sierra Leone' (note 20).

CHAPTER 7

Conclusion and recommendations

Sexual violence in armed conflicts is increasingly becoming the weapon of modern warfare. Women and young girls of different ages have become the victims of these horrific acts committed by perpetrators from different armed groups including the rebels, government soldiers and even regional and United Nations peace keeping forces. As noted, the acts are no longer confined to war time rape (group or gang rape, oral sex and rape by insertion of objects into the vaginal and anus). However, they have stretched to encompass other forms like sexual slavery, incest, forced marriage, public nudity, forced pregnancy and forced prostitution.

Importantly, the international criminal justice system has not closed its eyes against these forms of crimes. The political will to prosecute gender based crimes in the SCSL has significantly changed from the ICTR as evidenced by the inclusion of the counts of rape and other forms of sexual violence in the initial indictments. Notably, both courts have taken steps to prosecute those responsible in the commission of such crimes and in other instances convictions have been entered on such counts.

As the prosecutors of the SCSL and the ICTR strive to bring an end to impunity of the least documented gender crimes, they have remarkably involved the victim-witnesses to provide direct evidence of the crimes in question. In the process of involving this specific group of witnesses, the ICTR has been facing a number of challenges. The court has strived to minimize the problems victim-witnesses encounter in the process of or after they have participated as witnesses in the tribunal but a lot is yet to be done. On the other hand the SCSL has revealed the international criminal justice system's progress as it evolves in a positive direction with regard to its awareness of the inherent problems facing the victims of sexual violence as they strive to bring an end to impunity of war time gender based crimes at international level.

Acting on this strength, different players in international criminal proceedings i.e. the prosecutor, judges, defence team and other staffs of the courts have increasingly performed their role in ensuring that the victims of sexual violence do not find it unbearably difficult to participate as witnesses in these courts particularly the SCSL, although the defence team has fallen short of adhering to the

protective orders issued by the chambers. It has been observed that more can be achieved when additional effective victim cautious approached are implemented to cater for the identified loop holes.

One must be aware of the fact that, the SCSL has significantly improved and with the pace they are running on will continue to improve from the ICTR on the pressing problems facing the victims of sexual violence who participate as witnesses. With the location of the SCSL in the area where the crimes were committed, other strong measures have been implemented to cater for this peculiar feature of an international special court example abiding to the rolling basis disclosure of the identity of the prosecution witnesses to the defence.

Although much has been done to bring about a balance of the need of victim-witnesses and the inherent duty of the SCSL of punishing the perpetrators more can be done to further the comfortable and protective court environment for victim-witnesses of rape and other forms of sexual violence.

At the SCSL, there have been recurrent events under which the victim-witnesses are not ready to give testimony as a result judges had to adjourn cases to give room for the WVS to further prepare the victim-witnesses. To avoid this pressing issue which has negative effects to the victim and the whole trial process, the WVS needs to distinguish the victim-witnesses they prepare on a subjective basis. Different victims react differently to the traumatic experiences they have been subjected to and thus their worries about their security differ. The WVS needs to devote more time preparing those victim-witnesses who suffer severe psychological impacts and accordingly constantly reminding and assuring them of the different adopted measures which aim at protecting their security. This will enable to make certain that victims are ready to give testimony when they appear before the special court and not otherwise.

Further, as evident in the chapter ahead a protected victim-witness's identity was leaked by the people working with the accused. Even with the measures taken by the court to punish those responsible, the defence team especially the counsel needs to thoroughly observe his or her duty to the court of assisting in the administration of justice. If defence counsel discovers that the accused has used the information about the identity of the victim-witness in a way that will result in

commission of a criminal act or cause death or serious bodily harm, he or she ought to disclose it to the tribunal even where that information was given in confidence.

Additionally, to ensure continual psychological recovery for victim-witnesses the suggested structure for follow ups needs to be implemented sooner than later. All victim-witnesses have to be informed that they can physically contact the WVS wherever the need arise. Further, the lack of awareness of the kind of supportive measures available after a witness has given testimony has prompted negative reactions from the victims. The WVS needs to make sure that every victim-witness knows what the section offers exactly even where they are no longer giving testimony.

Also, the relocated victim-witnesses have to be informed that the process is a compromise which they have to take and live with for as long as their lives remain in danger. Therefore, they should be educated not to reveal their whereabouts to anyone. The divulging of such important secretive information results to its leakage especially in African cultural context something which endangers the safety and security of such victim-witnesses and it becomes more expensive to relocate them to another place again.

It is however encouraging because, different adopted and proposed measures to be implemented at all phases of the criminal proceedings have and will continue to further the positive experience of Sierra Leone young girls and women witnesses who were the victims of these dreadful inhuman acts of sexual violence including rape. This is something which has significantly changed from what the victim-witnesses of rape and sexual violence have encountered in ICTR. Since the ICTR is in its winding stages, there is little prospect that anything will be adopted to solve the many problems the victim-witnesses of sexual violence have been encountering in the course of giving or after they have given testimony. Therefore, as part of its legacy to international criminal justice, the court has made it possible for subsequent courts especially the SCSL, to learn from its shortcomings and develop the important area of sexual violence victim-witness protection.

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