

**WITNESS PROTECTION IN POST-CONFLICT SITUATIONS, A  
PERSPECTIVE FROM THE SPECIAL COURT FOR SIERRA LEONE  
(SCSL)**

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## **Introduction:**

Ladies and gentlemen, it gives me great honour and pleasure to participate in this Judicial Colloquium on Witness Protection in Post-Conflict settings. As a member of the Uganda Judiciary in the Diaspora, let me congratulate the Judiciary upon setting up the International Crimes Division of the High Court (ICD) and on starting its very first trial therein, namely the *Prosecutor v. Kwoyelo*. This proves to the international community that Uganda has now fully launched itself into the complementarity process envisaged under the Rome Statute. I was requested to share my experience and knowledge at the Special Court for Sierra Leone, with particular emphasis on “Jurisprudence and Court-room Measures” for the Protection of Witnesses and Victims.

During Sierra Leone’s Civil war that span over a period of 11 years (from March 1991-January 2002), it is estimated that over half a million civilians were killed, maimed, raped, abducted and /or conscripted into the armed forces. The Special Court for Sierra Leone (SCSL) was established to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone between 30 November 1996 and 18 January 2002.<sup>2</sup> It is an international court<sup>3</sup> established under an Agreement between the United Nations<sup>4</sup> and the Government of Sierra Leone (“Agreement”),<sup>5</sup> and independent from the domestic legal system of Sierra Leone. The Statute of the Special Court (“Statute”)<sup>6</sup> empowers it to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva

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<sup>2</sup> Statute of the Special Court for Sierra Leone, Article 1(1). In January 2002 President Ahmed Tejan Kabbah of Sierra Leone formally declared the war over.

<sup>3</sup> *Prosecutor v. Taylor*, SCSL-03-01-I-059, Decision on Immunity from Jurisdiction, 31 May 2004, para. 57.

<sup>4</sup> Authorised pursuant to United Nations Security Council Resolution 1315 (2000) of 14 August 2000, U.N. Doc. S/RES/1315 (2000).

<sup>5</sup> Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 16 January 2002.

<sup>6</sup> Statute of the Special Court for Sierra Leone, annexed to the Agreement.

Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.<sup>7</sup> The Special Court is governed by the Agreement, the Statute and by its Rules of Procedure and Evidence (“Rules”).<sup>8</sup>

### **Witness Protection and Support:**

The success of a trial is largely dependent upon witness testimony. If witnesses / victims feel insecure, unsafe, threatened or humiliated by the experience of giving evidence, they will be unwilling, unavailable to testify or are likely to retract their testimony at the earliest opportunity. It is therefore in the interest of justice that witnesses / victims testify in a safe and secure atmosphere in which their lives and those of their families are not put at risk simply because they chose to testify. This is particularly important where trials are held in the country or location where the alleged crimes were committed, or where the conflict is ongoing at the time of testimony.

The experience of testifying in court, let alone in a war crimes trial, can be quite daunting even for the victim who looks forward to his or her day in court. The legal environment, equipment, court personnel coupled with the adversarial nature of the proceedings often coupled with facing their assailant, can be intimidating, even distressing. Witnesses or victims testifying at home may be at a relative advantage over those that have to travel abroad to strange locations and climates where trials are held abroad.

Thus the extent to which a witness or victim perceives the courtroom as a supportive rather than hostile environment will, to a large measure, influence his / her willingness to testify. Of course this perception is partly shaped the manner in which the Judges, Counsel, staff of WVS and other court staff treat the witness. A respectful or courteous attitude towards the witness or victim will go a long way to setting them at ease. *(For example, a simple gesture as a brief pause in the proceedings to allow a distraught witness to compose themselves; a glass of water, Kleenex, etc or a*

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<sup>7</sup> Articles 2 to 5 of the Statute.

<sup>8</sup> The Rules of Procedure and Evidence of the Special Court for Sierra Leone (“Rules”).

*comment from the Bench reassuring a rape victim who stated that they are now worthless, all help to make the testimonial experience a bearable one.)*

### **Why Witness Protection?**

***Fear of Reprisal / Recrimination /Revenge:*** Witnesses who testify in these trials are afraid of the perpetrators that may still be at large or persons related or loyal to the suspects who may wish to punish or deter a witness for coming forward and giving incriminating evidence against the suspects. Very often the victim or witness comes from the same village as the perpetrator(s) and is well known by the village.

***Fear of Social Stigma:*** Victims of serious crimes, especially gender-based crimes (e.g. rape, sexual violence, sexual slavery etc) are afraid of being ostracised by society once it is known that they suffered these crimes. Society tends to associate these victims with the perpetrators. Often, victims who survive such crimes have been known to be rejected by their own families and society and find it very difficult to be reintegrated into society. Others have perhaps married or re-married and moved on with their lives and are reluctant to dredge up their painful past. For them, testifying about what happened to them exposes them to social stigma and may even jeopardise their current relationships.

***Trauma:*** Many witnesses or victims are scarred for life by the most horrendous crimes they suffered or witnessed, and are thus reluctant to testify for fear of re-living the experience.

***Fear of self-incrimination:*** Witnesses or victims who took part in committing the atrocities (insider witnesses), often under duress, are afraid to admit having done so, lest they face prosecution themselves or risk social stigma.

***National interest or interests of justice:*** Sometimes it may simply not be in the national interest or in the interests of justice for a witness to testify publicly. An example is where the testimony may involve matters of national security that are more appropriately heard in closed session or at least require that the witness' true identity be protected.

### **Legal Framework for Witness Protection and Support:**

**Article 16.4** of the Statute requires the Registrar to set up a Witness and Victim Support Unit to provide for witnesses and victims who appear before the Court and others who are at risk on account of testimony given by the witnesses (in consultation with the Prosecution) –

- Protective measures
- Security arrangements
- Counselling for trauma victims (e.g. victims of gender-based violence or child victims).
- Other appropriate assistance

**Article 17** of the Statute entitles the accused to a *fair* and *public* hearing, *subject to measures ordered by the Court for the protection of victims and witnesses*. This means that the Court has to carefully balance the *fair-trial rights* of the accused on the one hand, with the *safety and security* of victims and witnesses, on the other.

**Rule 34** of the Rules of Procedure and Evidence mandates the WVS (in consultation with the Prosecution or Defence Office as the case may be) to perform the following functions in relation to victims / witnesses / others at risk on account of the testimony, in accordance with their particular needs and circumstances:

- Recommend to the Court adoption of appropriate security or protective measures;
- Provide adequate security or protective measures;
- Develop short-term / long-term plans for their protection and support;
- Provide other relevant support including counselling, medical assistance and physical and psychological rehabilitation for them.
- Cooperation with Governments and NGOs where appropriate (e.g. in the case of travel visas or relocation)

**Rule 69A** mandates the Prosecution and Defence *in exceptional circumstances* to apply to the Court to order non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Court otherwise decides. In most cases this provision only amounts to *delayed disclosure* of the identity of the victim or witness, but eventually the identity has to be disclosed to the other side in good time to enable them prepare for cross-examination.

**Rule 75** mandates the Court on its own motion / or at the request of either party / or request by WVS, to order appropriate measures for the *privacy, security and safety* of witnesses or victims, but these have to be *consistent with the fair-trial rights* of the accused. Judges are therefore expected to be vigilant, innovative and careful in balancing these competing interests throughout the trial. Examples of Court-ordered measures include –

- Non disclosure to the public and media, of the identity / address of a witness or his family members. (However, the true identity must ultimately be confidentially disclosed to the opposing side) ;
- Delayed disclosure to the opposite party, of the identity / address of a witness or his family members until closer to the time of testimony (in order to avoid possible intimidation);
- Use of a pseudonym (e.g. TFI-123 or DCT-456) in order to conceal from the public the true identity of a witness. (However, the true identity must ultimately be confidentially disclosed to the opposing side);
- Redaction (expunging from the public records of the Court) the names, address and other identifying information. (These are of course retained in the confidential records. Thus for each trial there is a public and a confidential or un-redacted transcript. Judgement is always based on the latter).
- Open session Testimony with voice or image distortion, usually used in conjunction with a screening device that hides the witness from the public eye;

- Testimony by video-link or closed-circuit TV especially for vulnerable witnesses like children or victims of sexual crimes. The witness does not have to sit in the same room with her assailant.
- One-way closed circuit TV enables children to testify without having to be in the same room with or look at the assailant. The children themselves can be seen by everybody else in the court;
- Closed session testimony where the witness testifies completely in camera, only in the presence of the parties and judges are the ultimate protective measure. Members of the public and press are excluded completely. However, in order to retain some degree of “publicity” the Court may permit representatives of monitoring agencies to remain, cautioning them of course to respect confidentiality of the proceedings. (see Rule 79) (This measure is employed to protect national security, the interests of justice, or the privacy, security and identity of a witness or victim.) The Court should state in public the reasons for holding a closed session.
- Judges are obliged to control the manner of questioning of victims and witnesses by Counsel to avoid harassment / intimidation / humiliation / self-incrimination of witnesses (Rules 75 C and 90 E)

Protective measures once ordered in one trial, remain in force until varied / augmented or rescinded by the Court, usually on express request by either party.

Rule 77A mandates the Court to punish for contempt any person who “ knowingly and wilfully interferes with its administration of justice” by threatening, intimidating, bribing, causing injury to or otherwise interfering with a witness who has testified, is about to testify or is in the process of testifying. The maximum penalty on conviction is imprisonment for up to 7 years or fine not exceeding 2 million Leones or both. If a lawyer is convicted of contempt he or she may face misconduct proceedings too.

### **Balancing Table**

<b>Rights of the accused</b>	<b>Safety and security of witnesses /</b>
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		<b>victims</b>
1.	A <i>fair</i> and <i>public</i> trial means the public and media have a right to hear the witness' testimony and observe his demeanour. This normally entails the witness testifying <i>openly</i> .	Where the witness has security or safety concerns however, he / she should testify in open court but have his / her identity concealed from the media and public. (Use of <i>pseudonym, voice / image distortion, screening device</i> ). Short closed sessions may be permitted to allow testimony as to personal details recorded confidentially.  Alternatively, where the Court is convinced that the witness is in grave danger or that the nature of his testimony will inherently give away his identity, then in the last resort a Closed session will be ordered. ( <i>Exceptional circumstances</i> )
2.	Accused has the right to be tried <i>in his presence</i> . This means he / she must hear all testimony and observe the witness' demeanour and be able to cross-examine the witness through Defence Counsel.	Vulnerable witnesses like children or victims of rape and sexual violence may be afraid to sit in the same room with the accused. A vulnerable witness may be accommodated in a separate room adjacent to the court with a connecting TV screen from which the judges, Counsel and the accused can see and communicate with the witness. The latter also observes the proceedings in court from a TV screen. (use of <i>closed-circuit TV or video-link</i> )
3.	Accused has the right <i>to know the case against him</i> in order to	While it may be permissible to protect the witness by concealing his names, address

	<p><i>adequately prepare</i> his defence. He and Defence Counsel are entitled to <i>disclosure</i> of all confidential records containing incriminating or exculpatory evidence. (Under our national criminal justice system this may be quite alien and may even be resisted by Counsel.)</p>	<p>and any other identifying information from the public and media, this cannot apply to the accused. At best the Court may order delayed disclosure of this information but eventually the accused must know and in good time to prepare his defence. (Use of <i>public-non-disclosure</i> and <i>delayed disclosure of identifying data</i>)</p>
4.	<p>The right to <i>cross-examine</i> Prosecution witnesses or witnesses of co-accused means the accused must listen to their testimony; observe the demeanour of the witness and have access to the witness' prior statements if any, including any relevant confidential records.</p>	<p>Measures cannot protect the witness, however vulnerable, from cross-examination by Defence Counsel. It is however, possible to protect the vulnerable witness by keeping them in a separate room, explaining the procedure of cross-examination and by the judges controlling the mode of questioning to avoid intimidation or harassment. (Use of <i>closed-circuit TV</i> and <i>controlled questioning</i>)</p>

**Some important jurisprudence in relation to witness protection:**

**“Exceptional circumstances”:** These depend on the circumstances of each case and different courts have defined the phrase differently.

- (i) In the *Prosecutor v. Tadic*, IT-4-1-10, Decision on Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, the Trial Chamber was confronted with a request by the Prosecution to provide anonymity for one of its witnesses by withholding the witness’ identity from the accused. This of course meant that the Defence could not challenge the testimony in cross-examination. A majority of the Trial Chamber held that it had to balance the right of the accused to “a fair and

public trial” against the protection of victims and witnesses. Observing that the right to a fair trial was not absolute but was subject to derogation “in exceptional circumstances” the Trial took into account (a) the existence of a state of emergency; (b) the situation of an on-going conflict in the area where the alleged atrocities took place; (c) the fact that there was a real fear for the safety of the witness or his family; (d) the testimony was important for the Prosecution’s case; (e) there was no prima facie evidence that the witness is untrustworthy; and (f) the measures were strictly necessary. The motion was granted.

- (ii) In the *Prosecutor v. Blaskic*, IT-95-14, Decision on the Application of the Prosecution dated 17 October 1996 the Prosecution requested for non-disclosure of the identity of certain witnesses from the accused and from the public and media. The Trial Chamber held that “The philosophy which imbues the Statute and Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself. From that time forth however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.” The court ordered delayed disclosure to the accused.
- (iii) In the *Prosecutor v. Sesay et al.* SCSL-04-15-T-180, Decision on Prosecution Motion for Modification of Protective Measures for Witnesses, 5 July 2004 the SCSL Prosecution which had successfully secured certain pre-trial protective measures for its witnesses (including delayed disclosure of identifying information) sought to have those measures extended to the trial stage of the proceedings to witnesses testifying as victims of gender crimes, child witnesses and insider witnesses. In granting the request the Trial Chamber observed “the location of the Special Court in the very country where the crimes were allegedly committed, combined with the fragility of the security situation that still exists, is a paramount and compelling factor in considering the

merits of this application. It increases considerably the risks to all witnesses called upon to give evidence at trials. Again based on the information provided and the un-contradicted statements of the Chief of WVS Nr. Saleem Vahidy, the Prosecution has demonstrated that there still exists legitimate fears on the part of the witnesses called to testify at trial, making it necessary to give considerable weight to security risks that could be encountered.” The court ordered use of a screening device from the public and prohibited photography of witnesses. But witnesses testified in open court.

- (iv) In the *Prosecutor v. Charles Taylor*, SCSL-03-1-T, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with 4 Annexes one of which filed Ex-Parte, 22 January 2007, the Prosecution requested the Court to extend measures earlier ordered for certain witnesses that testified in trials in Sierra Leone, to witnesses testifying in the Hague in the Taylor trial. The Defence objected stating that the Prosecution had not demonstrated that witnesses testifying abroad in the Netherlands were in as much danger as those testifying in Freetown. Although this trial was not held in the country where the alleged crimes were committed, the Trial Chamber observed that it was “satisfied by the evidence presented (by confidential affidavits) that the potential threats to the security of witnesses are genuine and have not diminished since the first and second Protective Measures decisions. It granted the Prosecution Motion.

### **Conclusion:**

Witness protection programmes are not cheap. They can be expensive and overwhelming if not properly thought out or budgeted for. I note that presently, the ICD has no legal framework in existence for the protection of potential witnesses that may appear before it, and that there is a draft Bill in this regard has been prepared by the Uganda Law Reform Commission. In my view and experience however, encapsulating witness protection provisions in a Bill or Act of Parliament may not be the most appropriate or expeditious manner of instituting a witness protection regime. This is because Protective measures are

often a product of judicial creativity in that the court always tailors measures according to the needs of each particular witness. This therefore requires a measure of flexibility that is not accommodated in an Act of Parliament. Also in the likely event that the Witness Protection regime adopted requires amendment later on, an Act is not easy to amend. The kind of regime adopted must allow for change, amendment and growth. Accordingly, the ICD might want to consider coming up with a witness protection regime that is in a set of Rules of Procedure and Evidence or alternatively in a Practice Direction by the Chief Justice, Principal Judge or the Head of the ICD. These can be easily amended or adapted to take into account any new developments, improvements or exigencies that will inevitably arise.

The measures adopted by the ICD will depend in large measure on the creativity of the judges but also on the level of technological advancement and equipment available. Furthermore, the extent to which protective measures are effective will depend on the commitment and respect of confidentiality by Counsel, investigators and Registry staff. The system of witness protection could be easily undermined by failure by key players to maintain court-ordered confidentiality, which could ultimately undermine these trials. Ultimately, the challenge for the ICD is to evolve a uniquely-tailored witness protection regime that will, as the Deputy Chief Justice remarked this morning, be –

- Witness friendly,
- Gender sensitive,
- Child friendly,
- Culturally sensitive, and I add
- Corruption-proof.

Ladies and Gentlemen, I thank you for your attention.

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