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SCSL-03-01-T
(32180-32211)

32180

THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate
Registrar:	Ms. Binta Mansaray
Date:	17 January 2011
Case No.:	SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC WITH ANNEXES A AND B

DEFENCE REPLY TO PROSECUTION RESPONSE TO AND REGISTRAR'S SUBMISSIONS RE DEFENCE MOTION TO RECALL FOUR PROSECUTION WITNESSES AND TO HEAR EVIDENCE FROM THE CHIEF OF WVS REGARDING RELOCATION OF PROSECUTION WITNESSES

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I. INTRODUCTION

1. Through this Reply, the Defence will address both the *Prosecution Response to Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses* ("Response")[1] and the *Submission of the Registrar Pursuant to Rule 33(B) Regarding the Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses* ("Submission")[2].
2. Neither the Prosecution's Response nor the Registrar's Submission deny the Defence's central assertion that the four Prosecution witnesses in question (TF1-371, TF1-375, Abu Keita and Varmuyan Sherif) have in fact been relocated by the Witnesses and Victims Section ("WVS"). Instead, the Prosecution and the Registrar attempt to create and hide behind a smokescreen, primarily objecting that: the Defence's motion is untimely and procedurally improper, the Defence has not shown compelling circumstances which justify recalling the witnesses, and the mandate of the WVS and the security of witnesses militates against hearing evidence pertaining to relocation. These objections, however, do not materially undermine the Defence's central allegation regarding the promise of relocation as an inducement. Consequently, the Trial Chamber should grant the Defence's request to recall the four Prosecution witnesses for further cross-examination and to hear evidence from Saleem Vahidy, the Chief of WVS, pursuant to Rule 85(A)(iv).[3]

II. SUBMISSIONS

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[1] *Prosecutor v. Taylor,* SCSL-03-01-T-1147, Public with Annex A Prosecution Response to Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 10 January 2011.

[2] *Prosecutor v. Taylor,* SCSL-03-01-T-1153, Public Submission of the Registrar Pursuant to Rule 33(B) Regarding the Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 11 January 2011. The Defence notes that the Registrar must assume she does not have to abide by the usual filing timeframes and page limits for responses, given that she filed her Submission after the usual 10 day period and exceeded the usual 10 page limit.

[3] *Prosecutor v. Taylor,* SCSL-03-01-T-1142, Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 17 December 2010 ("**Motion**").

Timing of the Defence Motion

3. There are two objections raised regarding the timing of the Defence Motion. Firstly, the Prosecution at paragraphs 3-5 of its Response suggests that the Trial Chamber should refuse to consider the Defence Motion as it was filed after the 24 September 2010 deadline set by the Trial Chamber on 13 September 2010.[4] While the Special Court Rules are silent on whether a Trial Chamber can reconsider a previous decision, the Appeals Chamber has held that a Chamber has an inherent jurisdiction to reconsider its own decisions in order to avoid injustice or miscarriage of justice.[5] Trial Chamber I adopted an ICTR Decision stating that the circumstances in which a Trial Chamber may reconsider a previous decision included instances where "new material circumstances have arisen since the decision".[6] The Defence submits that new material circumstances have obviously arisen since the Trial Chamber's decision on 13 September 2010, and thus the Trial Chamber should reconsider the deadline it previously set and adjudicate the present motion.

4. Specifically, since the 13 September 2010 decision, the Defence has received, on a continuing basis, information from its investigator in Freetown about the relocation of several Prosecution witnesses, whom he has reason to believe are being relocated by WVS as a fulfillment of promises earlier made to them by the Prosecution.[7] When the Defence first began receiving this information, it wrote to Mr. Vahidy for confirmation of the relocation.[8] At the same time, the Defence reminded Mr. Vahidy that since January 2009, the Defence had requested continuing disclosure of any post-testimony benefits issued to witnesses. As none had ever been disclosed, and Mr. Vahidy had never replied to suggest that he was not obliged to provide the

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[4] *Prosecutor v. Taylor,* SCSL-03-01-T, Status Conference Transcript, 13 September 2010, p. 48323 (the Trial Chamber set 24 September 2010 as the date by which the Defence should file any outstanding motions).

[5] *Prosecutor v. Norman et al,* SCSL-04-14-A73, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005, para. 40.

[6] *Prosecutor v. Norman et al,* SCSL-04-14-T-507, Decision on Urgent Motion for Reconsideration of the Orders for Compliance with the Order Concerning the Preparation and Presentation of the Defence Case, para. 14 (but see generally paras. 10-16), citing *Prosecutor v. Renzaho,* ICTR-97-31-I, Decision on Renzaho's Motion to Reconsider the Decision on Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 9 November 2005, paras. 20-21.

[7] Motion, Confidential Annex J.

[8] Motion, Annex B.

information, the Defence had assumed none had been given. This reasonable apprehension by the Defence is contrary to the Prosecution's suggestion at paragraph 4 of its Response that the Defence was asleep on the issue until near the conclusion of the Defence case. Indeed, it was only toward the end of the Defence case that the Defence had reason to believe anything was amiss, such that it could pursue it.[9]

5. Secondly, the Registry at paragraph 7 of its Submission argues that the same information forming the basis of the Defence Motion was requested from the Registrar on 4 October 2010 and thus should have been raised with the Trial Chamber before the closure of the Defence case on 12 November 2010. The Registrar's Submission on this point is absurd if not dishonest. It attempts to fault the Defence for the WVS/Registrar's lack of diligence and professional courtesy by not responding timeously or at all to Defence requests. The Defence, however, cannot be blamed for ensuring that it had exhausted all possible avenues of cooperation with the WVS/Registrar before raising the issue with the Trial Chamber. It is a common law principle that all available remedies should be exhausted before appeal is made to a higher authority. The Defence presumed the WVS/Registrar would act in good faith and provide the requested information. The Defence attempted to resolve this issue on its own, without seeking intervention from the Trial Chamber, despite glaring silence from the WVS and later convoluted arguments by the Registrar as to why the requested information should not be given to the Defence. Ultimately, the Defence was forced to file its Motion as a last resort. The Defence should not be now penalized for the perverse behavior of the WVS/Registry.

The Defence's Request Does Not Amount to Re-Opening its Case

6. The Defence is aware of the legal requirements should it wish to open its case.[10] Contrary to Prosecution assertions at paragraphs 6-9 of its Response, the Defence's

[9] See, for example, Defence arguments currently on appeal to the effect that the Defence cannot be penalized for not acting diligently with regard to information which it did not have in its possession at the time. *Prosecutor v. Taylor,* SCSL-03-01-T-1134, Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 10 December 2010 ("**Contempt Appeal**"), paras. 20-26.

[10] *Prosecutor v. Taylor,* SCSL-03-01-T-1146, Urgent and Public with annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, 10 January 2011, paras. 8-9.

request to recall four Prosecution witnesses and for the Court to call Mr. Vahidy to give evidence does not constitute the re-opening of the Defence's case.

7. The Prosecution's argument overlooks the fact that the Defence's request for the Trial Chamber to call Mr. Vahidy is premised on Rule 85(A)(iv), which provides for "evidence as ordered by the Trial Chamber". Were the Prosecution not so busy trying to justify its behavior in relation to Prosecution witness Naomi Campbell, it would have realized that Naomi Campbell and Mr. Vahidy are being called under entirely different provisions. A person ordered to give evidence by the Trial Chamber is not a Prosecution or Defence witness, but a Court witness. Therefore, the Defence's stated intention to cross-examine Mr. Vahidy[11] is appropriate.
8. The Prosecution's attempt to distinguish the case of *Prosecutor v. Karemera et al* is inapposite.[12] In *Karemera,* the Defence's request to recall Prosecution witnesses BTH was not deemed part of the Defence case, and therefore neither constituted opening nor re-opening its case. Likewise, the Defence's request to recall four Prosecution witnesses for further cross-examination is just that. The core question thus remains: whether something has arisen *ex improviso* in relation to the credibility of these Prosecution witnesses which, in the interests of justice, must be addressed.

Compelling Circumstances Justify Recalling these Witnesses

Purpose of Proposed Testimony

9. At paragraph 11 of its Response, the Prosecution brazenly suggests that promises or disbursements to witnesses after their testimony are "irrelevant, as any such subsequent promises or disbursements cannot impact upon testimony that has already been given by a witness". At paragraphs 16-17 of its Submissions, the Registrar claims that reasonable expenses "have no bearing on the credibility" of witnesses. This assumption is not only self-serving but also misplaced and untrue. To start with, the Defence alleges that promises were made prior to testimonies and are only now being realized,[13] and furthermore that the realization of these promises is not reasonable. Thus, the promise of relocation could have influenced the truthfulness of

[11] Motion, paras. 16-17 and footnote 19.
[12] See Response, para. 8.
[13] Motion, paras. 2 and 18-19.

their testimony. The probative value of the impact of inducements and promises on the truthfulness of testimony was argued by the Defence at paragraphs 20 and 21 of its Motion. The case law cited by the Defence therein was unchallenged by either the Prosecution or the Registrar and clearly indicates that payments made to witnesses by the Prosecution and/or Court could affect the credibility of the witness.

10. The Defence's position is supported by the observations of experts in the field. Notably, a researcher formerly connected with the WVS at the Special Court, Chris Mahony, has published a book on witness protection in Africa, including a chapter on the SCSL.[14] His findings largely support the Defence's position. Mahony concluded: "A study by the WVS found that witnesses often felt their expectations of financial assistance were not met after giving testimony. This *reflects expectations inflated by investigators hoping to secure witness testimony*" (emphasis added).[15] Mahony further concluded: "Insider witnesses have been relocated to developed countries, but this has usually occurred when former government or senior personnel are involved. *To relocate low income Sierra Leoneans or Liberians to Europe or North America could be seen as an inducement*" (emphasis added).[16] Mahony closes his chapter by commenting on the phenomenon of witness protection at the Special Court, and by criticizing the Court for failing to investigate allegations regarding Prosecution witness engagement, finance and jurisdiction, which he believes create a conflict of interest and potential inducement. This, he states:

> "diminishes the credibility of evidence provided to the court, and thus the credibility of the justice the court dispenses. The trial chamber's refusal to examine this issue demonstrates contempt for due process and the equitable justice the court was ostensibly established to pursue".[17]

Thus, the Defence submits that the question of the promise of relocation and other benefits, as an inducement, especially in light of the eventual consummation of that promise, is a matter which affects the credibility of Prosecution evidence. Clearly this is of concern not just to the Defence but to the greater international justice

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[14] Chris Mahony, Institute for Security Studies, The justice sector afterthought: Witness protection in Africa, Chapter Four, "Special Court for Sierra Leone: A new model for African witness protection?", 2010 ("**Mahony**") [Chapter Four is included as **Annex A**; the entire publication is available at: http://www.iss.co.za/pubs/Books/WitnessProt4.pdf].
[15] Mahony, p. 91.
[16] Mahony, p. 92.
[17] Mahony, p. 94.

community. Therefore, the probative value of the requested evidence is such that the Trial Chamber should not shy away from hearing and addressing it.

Justification for not cross-examining witnesses on these issues fully the first time

11. At paragraph 11 of its Response, the Prosecution posits that the Defence was able to raise the issue of promises of relocation with witnesses when the witnesses testified during the Prosecution case and should not therefore be allowed a second opportunity to question them. As examples, the Prosecution points to Defence questioning of TF1-590 and Abu Keita regarding relocation. At the time of the cross-examination of TF1-590, the Defence had information to the effect that TF1-590 had already been relocated outside of Liberia in connection to the ongoing prosecution of Chucky Taylor in the United States. However, the Prosecution citation to Defence cross-examination of Abu Keita[18] is not on point. Therein the Defence questioned Keita based on information that Keita had told another potential witness that he and his family could be relocated to The Netherlands if he agreed to cooperate with the Prosecution.[19] The witness, however, denied the allegation.

12. Indeed, the sequence of events surrounding Abu Keita's testimony and relocation, which is a component of the Defence's Contempt Appeal[20] as well as the instant motion, illustrates the Defence's position on this issue. Abu Keita testifies openly in January 2008, which suggests he has no fear of reprisal or security risks. In September 2009, after testifying, Keita went public with his frustration that the Special Court had reneged on its verbal agreement promising him relocation.[21] He complained that having "performed his own side of the bargain" the Court had "turned its back on him, putting his life in danger by refusing to relocate him and his family". In late 2010, the Defence got information that Keita is in fact being relocated by WVS outside of Africa. The Defence could not possibly have anticipated the need to cross-examine Keita on the circumstances of this relocation at the time of his initial cross-examination. With regard to Varmuyan Sherif, TF1-371 and TF1-375, the Defence had no information at the time of their cross-examination to suggest that they

[18] Response, para. 11, footnote 19.
[19] *Prosecutor v. Taylor,* SCSL-03-01-T, **Testimony of Abu Keita**, 24 Jan 2008, p. 2153.
[20] Contempt Appeal, paras. 21 and 34-35 and *Prosecutor v. Taylor,* SCSL-03-01-T-1157, Defence Reply to Prosecution Response to Contempt Appeal, 14 January 2011, para. 19.
[21] Exhibit D-468.

had been promised relocation (though the Defence did know TF1-371 had already been relocated within West Africa). The Defence was constrained in principle not to put general, fanciful, unsubstantiated assertions to these Prosecution witnesses without a proper evidentiary basis for those questions. Now that the Defence has evidence regarding promises to and the relocation of these witnesses, it should be allowed to pursue that line of questioning.

Judicial Economy

13. Contrary to Prosecution assertions at paragraph 13 of its Response, the instant compelling circumstances defeat concerns regarding judicial economy, delay and court resources. Moreover, the Defence has indicated that the delay involved would be minimal.[22] Additionally, when the Accused's Article 17 rights to confrontation are implicated, upholding the interests of justice must override any question of cost.

14. The Prosecution's not-so-veiled threat of prolonging the proceedings by calling rebuttal evidence regarding threats made against the Prosecution witnesses in question is misplaced. Rebuttal evidence can only be called to rebut evidence called by an opposing party, not to rebut testimony given by its own witnesses' but challenged by the Defence in cross-examination. The testimony of Mr. Vahidy would ostensibly be sufficient in relation to the threats/risks posed to any recalled and/or relocated witness, since it is the WVS and not the Prosecution who is mandated with such assessments. The notion that the Prosecution could introduce evidence of death threats to defence team members to rebut evidence presented about inducements to prosecution witnesses is illogical and is a desperate attempt to confuse issues.

15. To further ensure judicial economy, the Trial Chamber could simply call Mr. Vahidy to testify first. As an officer of the Court, he should be readily and easily available. Mr. Vahidy would then be able to confirm for the Chamber whether the witnesses were in fact relocated, and to explain the basis therefore. The Trial Chamber would then be better placed to determine whether or not to recall the four Prosecution witnesses on the question of prior promises or inducements.

Mandate of the WVS and Security Concerns

[22] Motion, paras. 4 and 25.

16. In paragraphs 8 to 17 of its Submission, the Registrar wrote a treatise regarding the general need for witness protection and relocation, none of which has ever been disputed by the Defence.[23] However, the Registrar avoided providing the Trial Chamber with any useful information relating to the relocation of the four witnesses in question. Instead, the Registrar routinely refers to Rule 34(A), the *Practice Direction on Allowances for Witnesses and Expert Witnesses Testifying in The Hague* (2007),[24] and the *Witness Expense Policy* (2003)[25] as the established operational procedures. Yet, none of these provide any specific guidelines about relocation and/or post-testimony benefits and thus are of little relevance to the current inquiry.
17. Furthermore, the information provided by the Registrar is internally inconsistent. In paragraph 9, the Registrar insists that the WVS does not provide any post-testimony support or benefits to witnesses, including payment of school fees, rent, food, cash assistance, health care, mobile phones, and/or relocation.[26] Then in paragraph 11, the Registrar states "to date, a total of 555 witnesses testified in all four trials before this Court; of them, approximately 160 have received different types of post-testimony assistance, support and protection and support, until such time as they are no longer in the care of WVS". A 2008 Registry report titled "Special Court for Sierra Leone: An Evaluation of the Witness & Victims Section", co-authored by Mr. Vahidy, also acknowledges that post-testimony benefits are provided to witnesses.[27] Given that the Registry obviously does provide post-testimony benefits to witnesses, the Defence is not sure what to make of the Registrar's denial of the Defence's request for information pertaining to them, except that the Registrar must have other reasons for not being forthright about what post-testimony benefits have actually been provided to Prosecution witnesses by the WVS.

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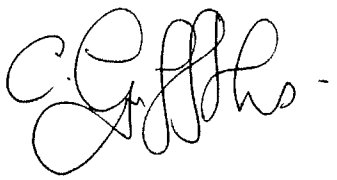
[23] Contra, Response, para. 14. The Defence has never suggested that protective measures should not be used to address a genuine need.
[24] Submission, para. 9 and Annex C.
[25] Submission, para. 9 and Annex B.
[26] See also the same denial made by the Registrar in her letter to Lead Counsel of 17 November 2010. Motion, Annex F.
[27] See specifically, Section 2.3 titled "Background to the WVS" and Section 4.3 titled "Post-Testimony" of Charters, Horn and Vahidy, "Special Court for Sierra Leone: An Evaluation of the Witness & Victims Section", 2008 [Section 2.3 and Section 4.3 are attached as **Annex B**, and the full report is available at: http://www.sc-sl.org/LinkClick.aspx?fileticket=0LBKqqzcrMc%3d&tabid=176].

18. The Registrar's concerns regarding the need for confidentiality in the relocation process can adequately be addressed by hearing Mr. Vahidy and the four Prosecution witnesses in closed session.
19. The Prosecution's[28] and Registrar's[29] objections to the sufficiency of the Affidavit of Prince Taylor as annexed to the Motion are unwarranted. The Defence investigator, in the performance of his duties, has gathered information relating to inducements and relocation from his sources and has properly passed it on to his legal team. As the Registrar concedes,[30] consultations between the WVS and the parties' investigators is a mandatory part of the process.

III. CONCLUSION AND RELIEF REQUESTED

20. The Defence has shown good cause for the Trial Chamber to order Mr. Vahidy to give evidence pursuant to Rule 85(A)(iv) and to recall four Prosecution witnesses for further cross-examination, and requests that its Motion be granted in its entirety. The Defence notes that neither the Prosecution nor the Registry objected to its request for urgent interim measures to the effect that the Prosecution and Registry not be permitted to contact the witnesses prior to them being recalled for further cross-examination,[31] and thus the Defence reiterates this request and the urgency implicit therein.

Respectfully Submitted,



Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 17th Day of January 2011,
The Hague, The Netherlands

[28] Response, Confidential Annex A.
[29] Submission, paras. 4-5.
[30] Submission, para. 14.
[31] Motion, paras. 26-28.

Table of Authorities

Prosecutor v. Taylor

Prosecutor v. Taylor, SCSL-03-01-T-1157, Defence Reply to Prosecution Response to Notice of Appeal and Submissions Regarding the Decision on the Defence Motion Requesting an Investigation into Contempt of Court by the Office of the Prosecutor and its Investigators, 14 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1153, Public Submission of the Registrar Pursuant to Rule 33(B) Regarding the Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 11 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1147, Public with Annex A Prosecution Response to Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 10 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1146, Urgent and Public with annexes A-C Defence Motion to Re-Open its Case in Order to Seek Admission of Documents Relating to the Relationship between the United States Government and the Prosecution of Charles Taylor, 10 January 2011

Prosecutor v. Taylor, SCSL-03-01-T-1142, Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 17 December 2010

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Prosecutor v. Norman et al, SCSL-04-14-A73, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005

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Annex A

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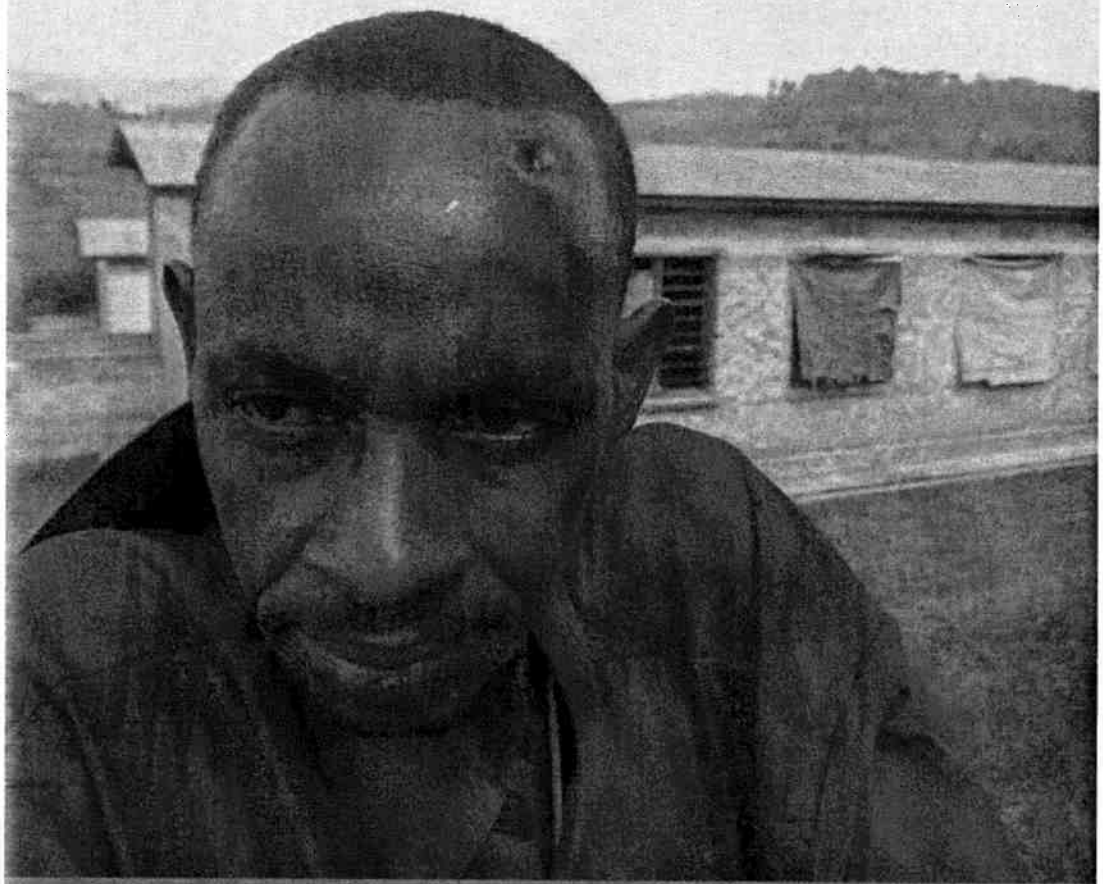
The justice sector afterthought:

Witness protection in Africa



Chris Mahony

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Cover photograph
© (AP Photo/Karel Prinsloo) With a bullet wound on the forehead, Emmanuel Muranjira, 43, recounts his harrowing experience of the 1994 genocide in Rwanda while standing in front of a memorial in Gikongoro province on Monday, Oct. 1, 2001.

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The justice sector afterthought:

Witness protection in Africa

Chris Mahony

The ethnicisation of politics that has shaped Rwandan violence historically taints the lens through which Rwandans view the ICTR. Local Hutus are more likely to perceive the ICTR as a politicised mechanism working against them, while Tutsis may perceive it as an institution of incompetence with inadequate punitive teeth to right the wrongs of the genocide. The ICTR is unlikely to ever recover from its early failures in the eyes of Rwandans. This has serious ramifications for present and future witness cooperation. Future protection mechanisms must take note of the serious, and to some extent eternal, impact of ICTR failures.

CHAPTER FOUR

Special Court for Sierra Leone: A new model for African witness protection?

The witnesses and victims section (WVS) of the SCSL is often cited as a new international criminal justice model for protecting African witnesses. Its role of 'supporting and protecting'[331] witnesses indicates the widening interpretation of witness protection. The WVS has taken great strides in psychosocial support as well as the refining of normative protective modalities to reflect witnesses' psychosocial needs.[332]

Article 16(4) of the Statute of the Special Court for Sierra Leone establishes the WVS. The WVS is then guided by the rules of procedure and evidence adapted from the ICTR under article 14 of the Statute and section 10 of the Special Court Agreement Ratification Act.[333]

The SCSL can be distinguished from its peers as the first international criminal tribunal to be located in the country in which the alleged crimes occurred. The court's narrow mandate – to prosecute 'persons who bear the greatest responsibility' for crimes committed during the conflict – also differentiates it from its predecessors.[334] This means that only those who played a leadership role would be prosecuted.[335] As a result, insider witnesses are more prominently used to establish or contest the chain of command and the knowledge and orders of the accused. Compared to earlier tribunals, where lower level offenders were also prosecuted, a smaller proportion of crime-based witnesses have been used.

The number of witnesses who come under protection reflects a heightened threat to witnesses as a result of both a high volume of insider witnesses and the proximity of the court to both the witnesses and the families and affiliates of the accused. While 25 per cent and 75 per cent of witnesses at the ICTY and the ICTR respectively were provided protection, 95 per cent of SCSL witnesses are provided some form of protection.

The WVS interprets its protective mandate as 'protection physically, psychologically and financially'.[336] With only one case still remaining before the court, and with one accused (Johnny Paul Koroma) still at large, there has yet to be an incident of serious consequence for the security of a witness.

LEGAL FRAMEWORK

As already stated, the WVS derives its mandate from the Statute of the SCSL and the rules of procedure and evidence. Rule 34 dictates the mandate of the WVS. Rule 34(A) requires that, in consultation with the offices of the prosecutor and the defence, the WVS should, in accordance with their particular needs and circumstances, provide physical protection and ensure relevant counselling, psychological, medical and physical assistance for witnesses.[337] The rules of procedure and evidence seek to capacitate the WVS to undertake this task by requiring its staff to include 'experts in trauma' and to cooperate with non-governmental and inter-governmental organisations on psychosocial issues, where appropriate.[338]

Rules 69 and 75 empower the court to order appropriate measures to safeguard the 'privacy and security' of victims and witnesses while considering the rights of the accused.[339] Consideration of witness privacy, as opposed to only security, enhances witnesses' psychological wellbeing. Weighing the privacy of the accused so heavily against the rights of the accused indicates the sensitivity of SCSL proceedings involving, for example, children who had perpetrated sexually explicit crimes.

Rule 92 quarter (A) allows for the admission of written statements from persons who have subsequently died or who are unable to testify.[340] However, rule 92 quarter (B) provides that if written evidence goes to the proof of acts and conduct of the alleged offence, a judge 'may' rule against admitting the evidence. At the judge's discretion, the incentive to kill or intimidate witnesses may be significantly lowered by admitting written evidence and removing the need for the witnesses themselves. However, it significantly compromises the rights of the accused by removing the opportunity for cross-examination, particularly were the judiciary to allow evidence which sought to establish the *actus reus* (the act) or *mens rea* (the intent) of the crime.

Rule 39 mandates the office of the prosecutor to take all necessary measures to provide for the safety, support and assistance of potential witnesses and sources. This allows the prosecutor's office to run a parallel protection programme to the WVS, creating a confused protective mandate. A conflict of interest arises in that the investigators are attempting to procure particular evidence, yet they also have the discretion to provide a source of income to informers and potential sources.

FUNDING

The SCSL has attempted to avoid the difficulties inherent in maintaining the greater fiscal obligations of the ICTY and the ICTR. Unlike these tribunals, the SCSL does not have Chapter VII status. This means the court does not have access to mandatory financial and administrative support from the UN; instead, it relies on voluntary gifts from UN member states.[341] The looming threat of inadequate funding has on occasion brought the court to the point of closing down. The UN secretary-general warned against such a funding mechanism in 2001, fearing it might make the court unsustainable.[342] The impact on the capacity of the WVS to provide adequate protection is not easily discernable. However, it has become common for witnesses and their families to be moved to safe houses for short periods prior to testimony. Greater emphasis is also placed on capacitating witness self-protection and maintenance of anonymity.

NEED FOR WITNESS PROTECTION

Nature of crimes committed

In March 1991, the Revolutionary United Front (RUF), under the direction of Foday Sankoh and backed by Charles Taylor's National Patriotic Front of Liberia (NPFL), entered eastern Sierra Leone and began a conflict that would continue until 2002. The causes and motivations for the conflict are a scholarly point of debate. The Sierra Leone Truth and Reconciliation Commission found that the foundation for state collapse and civil war was one of 'exclusion' of multiple social groups, caused by decades of misrule under an autocratic and patrimonial one-party system which emerged from a political climate of nepotism and cronyism

embedded in the politics of the British colonial state.[343] The war caused the deaths of tens of thousands of Sierra Leoneans. It also caused over one million people to be internally displaced, 500 000 to become refugees and upwards of 400 000 to survive the amputation of one or more limbs.[344]

The war developed distrust between young and old, rich and poor, Freetown and the provinces, north and south, armed and unarmed, male and female, and between ethnic groups and political parties. Allegiances of these many cross-sections shifted between warring parties over the course of the conflict.

Threat to crime-based witnesses

Distrust of Sierra Leonean institutions, including the SCSL, is a significant obstacle for the WVS. An even greater concern is the threat and the perceived threat to witnesses from family, friends and former political or military affiliates of the accused. When testifying in support of the defendant, the alleged victims of the accused, their families and their associates are also a common threat.

The inherent distrust permeating the society causes witnesses to perceive a threat, where the threat interpreted by intelligence personnel and threat-assessment officers might be absent or comparatively less. The conflict served as an instrument through which many vented long held frustrations on those by whom they felt aggrieved. Sierra Leonean witnesses are conscious of the potential for sentiments of retribution to linger until similar civil unrest presents an opportunity for its expression through violence.

While the then largest peacekeeping force in the world, complemented by the disarmament of militia groups, diminished the threat to witnesses after the conflict, and arguably throughout the function of the SCSL, the threat was not precluded from manifesting itself in the future. Even given these mitigating elements, the immediate threat to witnesses, were they to be identified, still remained very real.

The protection of identities is therefore critical for many witnesses before the SCSL. It allows them to avoid the psychological trauma of perceived long-term threat.

By the conclusion of the conflict, once clear and disciplined chains of command within armed groups were undermined by rank-and-file perceptions of their leadership as purely self-interested. When the SCSL announced a policy of targeting only those in command control, combatants rarely held sufficient loyalty to act against perceived court collaborators. The short- to medium-term threat to witnesses has been diminished as a result.

The common threat is therefore quite different from other proceedings. One of the key exaggerating elements of violence was the stigma which came to be associated with combatants. Stigmatisation fuelled combatant discontent towards civilians, which in some cases exaggerated violence perpetrated against them. Openly testifying against an accused identifies a witness as one that stigmatises the accused's family and associates. This creates a long-term threat from long-held discontents.

While some grudges might be harboured for a period of time, the immediate threat should not be dismissed. Reports of threats to suspected witnesses continue, particularly in the south against those testifying against the leaders of the government-aligned militia, the Civil Defence Forces (CDF).

Threat to insider witnesses

The level of threat to insider witnesses has been highest in the Charles Taylor case. Former RUF commander and fellow indictee Sam Bockarie was killed in May 2003. The circumstances surrounding his death remain contentious, but he was reported to have been killed along the border between Liberia and Côte d'Ivoire in fighting with Liberian troops.[345] Observers suspected Bockarie was killed, along with his family, on the order of Taylor to prevent disclosure of incriminating evidence.[346]

The prosecution cites the assault of the daughter of Taylor's former vice-president, turned prosecution witness, Moses Blah, as evidence of a threat.[347] Few corroborated reports of intimidation have actually been reported. While defence witnesses also have access to protection, the threat is significantly less. This is because the defence uses predominantly less threatened expert and character witnesses and fewer victim- and crime-based witnesses.

The concept of insider witnesses is a novel one to Sierra Leoneans. In some cases the stigma of having been a rebel who is then provided a stipend to testify to that fact provides a threat to such witnesses from their communities.[348] The threat is exaggerated where witnesses settled in the communities in which they committed abuses.[349]

ROLE OF INVESTIGATIONS

Proximity of WVS to the prosecution

While the WVS is legally situated under the registry by the Statute of the SCSL,[350] it is physically located in the electronically controlled security division of the court in which only prosecution and WVS personnel are allowed. In this division the WVS shares offices on the same corridor as the prosecution's witness management unit and investigators, separated by a security fence from the defence and registry.

The physical proximity of the WVS to the prosecution, and the relative inaccessibility to the defence, creates the perception that WVS independence is compromised. The first contact witnesses generally have with the SCSL is with either prosecution or defence investigators, who then contact the WVS. Unless there is an immediate threat that requires immediate protective care, the witness is only handled by the WVS when close to testimony. In these cases public anonymity is used, unless the witness wishes to testify in open court.[351] The WVS is continually coming under pressure from both the prosecution and defence to increase measures provided to their witnesses. Most often this relates to financial support.

Distinguishing between witnesses and suspects

The prosecution is required to make critical interpretations about 'those who bear the greatest responsibility', but also to solicit witness cooperation from their former colleagues. Insider witnesses were required to help the prosecution establish the chain of command, orders to commit abuses, or knowledge of abuses without action to stop or discipline them. A decision not to prosecute those without 'a national leadership role' was taken, assisting the solicitation of witness cooperation from former subordinates of the accused.

Some witnesses in the Charles Taylor case were initially reluctant to incriminate themselves until the prosecution's mandate and policy had been clearly explained. The narrow mandate of the SCSL has made soliciting insider testimony more feasible by lowering the suspicion of informants and insider witnesses about the likelihood that they, too, would be prosecuted. As a consequence, investigators were able to avoid a policy of strategically moving up the command chain. Such an investigative process is far more costly and time-consuming. It imposes additional hurdles, including the difficulty of obtaining a plea bargain that judges would accept, and cooperation from states on asylum for witnesses who have gained plea bargains. The prosecution was able to tell insider witnesses, 'You are below our radar screen,' and to provide them with letters which stated, 'We have reviewed this matter and will not prosecute you.'

In the Taylor case, insider witnesses were of critical importance because of the lower threshold of joint criminal enterprise culpability. 'Joint criminal enterprise' means those:

> Participating in the commission of crime, where several persons with common purpose, embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. [It] requires only joint intent and requires all conspirators accountable for each other's criminal acts.[352]

Lowering the culpability bar, combined with the narrow mandate to pursue only those with national leadership roles, meant less need for crime-based witnesses and a reduced threat of prosecution for insider witnesses. Great emphasis was placed on intelligence gathering and separating informants from witnesses.

Distinguishing between informants and witnesses is important because it raises the issue of inducement. Inducement for informants bears little or no scrutiny; however, all contact which could be viewed as inducing must be disclosed by the prosecution or defence. Inducement can therefore be used to encourage informants to provide an introduction to witnesses.

The line becomes blurred when practice does not make clear if an informant is, or is not, a suspect. The prosecution contends that inducement of RUF field commander Issa Sessay to provide information on senior RUF colleagues only took the form of assurances that he and his family would be kept safe from other indictees, not to provide him with immunity. The ad hoc, confusing and unregulated manner in which witnesses, informants and suspects were originally contacted and questioned is illuminated by the statement of then chief prosecutor David Crane:

> Techniques – investigative techniques and intelligence techniques – that were followed by our office, that didn't have to be written down. It's part of the way things are done… I called it dancing with the devil.[353]

Informant or witness? The problem of inducement in the case of Issa Sessay, RUF field commander

The engagement of Sessay is one of isolation from legal counsel, confusion about status as a witness or suspect, and exploitation in a time of political flux. Sessay was told by investigators that if he did not confirm things, investigators would not be able to help him out with 'his problem'.[354] In the days following Sessay's arrest he was held in court custody without access to counsel, offered the prospect of an insider deal without fully understanding the charges against him, and subjected to various forms of pressure and inducement.[355] The pressures included the tacit threat not to assist in the protection of Sessay's family, as well as the potential inducement of a perceived possibility that charges might be dropped or at least downgraded. The court ruled inadmissible more than a thousand pages of testimony taken while Sessay was in custody.[356]

Whether the 'problem' constituted Sessay's potential prosecution or the safety of his family is contested. The use of inducement to provide evidence in exchange for assistance on either interpretation of 'the problem' illuminates serious malpractice within the prosecutor's office.

Prosecution's mandate to provide supplementary protection

Despite disclosure of all payments by the prosecution, the structure of rule 39 of the SCSL's rules of procedure and evidence appeared open to abuse by investigators. Under this rule investigations are provided their own witness management unit and special fund to facilitate the safety, support and assistance of witnesses.[357] Those working in the WVS experienced the symptoms of perceived inducement as a means to solicit testimony. It commonly facilitated reluctance on the part of witnesses to testify because they had not been provided the 'daily allowance' amounts that investigators had promised them. The defence also alleged prosecution duplication of rent provisions after witnesses had been handed over to the WVS, exaggerated petrol and travel payments, and unnecessary security provisions, such as a fence around a witness's orchard.

The view of the prosecution is that rule 39 makes the prosecution responsible for witnesses until close to testimony or the formal submission of a witness list to the court, even if there is a high security risk. However, the WVS understands that witnesses should be provided to the WVS immediately if there is a real and immediate threat. The WVS does not have an office in Liberia. In Liberian cases the prosecutor's office provides protection right up until testimony, unless permanent relocation is required. The prosecution's power to protect witnesses is far greater than that experienced in traditional policing models.

The rules of procedure and evidence allow investigative discretion to protect and support 'potential' witnesses (rule 39). Placing the interpretation of 'potential' witnesses at the discretion of the prosecution enables it to provide protective measures up until testimony. More importantly, it also allows it to make its own judgment about the threat and the level of assistance. This facilitates high prosecution threat interpretations and therefore greater material provision to witnesses to encourage them to testify against an accused. The prosecution has a conflict of interest which undermines its objectivity in assessing risk and deciding on protective measures.

A motion to hear evidence concerning payment to witnesses by the prosecution's witness management unit was declined by the court on the basis that no 'material prejudice' had been caused to objecting parties, and that the motion had not been raised at the earliest opportunity.[358] The submission related to witness payments made by the prosecution for items or services ranging from medical supplies to 'maintenance', 'information', 'time wasted', school fees and rent, some of which had been unnecessarily duplicated.[359] The prosecution in its response cited rule 39(ii) as providing an 'unfettered discretion' to 'take all measures necessary for the purpose of the investigation'.[360] It conflated its mandate with that of the WVS in citing the trauma witnesses experienced in coming to trial as prohibitive, were they to also suffer financially.[361]

One incidence of questionable practice has come under particular scrutiny. It relates to a critical insider witness in the RUF case. The witness was repeatedly taken by the WVS on fully funded Sunday lunch excursions to one of the most expensive and exclusive seaside resorts.[362] This occurred until the WVS decided the excursions were unnecessary and that there were insufficient personnel to carry them out.[363] The prosecution contended that the WVS then asked the prosecution's witness management unit to continue the practice.[364] However, the defence contested that the witness management unit had engaged the practice of its own volition, and that the defence wished to call the deputy head of the WVS, Naeem Ahmed, to testify to this.[365] In its decision on the matter, the court weighed enthusiasm for an expeditious process ahead of determining whether the prosecution had induced a key witness.[366] The prioritisation of expediency ahead

of ascertaining a key element of a fair trial is regrettable, and does not uphold the credibility of the justice process.

Whether finance has been used unethically or not, witness payments and previous conduct relating to Sessay's detention create a perception that discredits the prosecution's evidence. The provision of such a wide prosecution mandate to protect was an erroneous one by those who compiled the rules of procedure and evidence. It has undermined the legitimacy of the process and therefore the standard of justice meted out by the court.

Defence counsel has no legal mandate under the rules or provision of finance to facilitate its own protective capacity. It is completely dependent on the WVS for the transport and upkeep of witnesses when they travel. It is only able to provide a set daily subsistence allowance when witnesses miss work to give evidence. An inequality of arms is clear in the discretion of the prosecutor's office to provide, without independent oversight, protection to its witnesses.

WVS PRE-TESTIMONY PROTECTIVE AND PREPARATORY MEASURES

Protective measures

Upon receipt of witnesses from either the prosecution or defence, the WVS applies protective measures based on threat assessments carried out with cooperation from Sierra Leonean security and intelligence. Many of the WVS's personnel were recruited or are on secondment from the Sierra Leonean security and intelligence sector. While counsel may recommend protective measures, tension has occurred when the prosecution refused to provide witness statements as part of assessment procedure.

Protective measures may include temporary relocation to a safe house, provision of a subsistence allowance (ordinarily 16 000 leones per day), reimbursement of lost earnings, medical cover, schooling, armed 24-hour protection and temporary provision of a mobile telephone.[367]

During the pre-testimony period, witnesses are rarely taken into total protective care and provided all the support listed.[368] Instead, witnesses are ordinarily admitted only when testimony is imminent and are provided protective measures until shortly after testimony is given.[369] The key protective measure for these witnesses is anonymity. Anonymity allows witnesses to stay safely at home until testimony. At this time legal teams inform the WVS of the identity of witnesses and they come under WVS care.[370] Late handover of witnesses to the WVS by the defence is more common due to the generally lower threat. The Taylor defence team did not require full protection for any of its witnesses.

Psychosocial preparation and proofing

WVS psychosocial personnel work with witnesses and threat-assessment officers to establish the most appropriate measures under which a witness should testify. Upon agreement, psychosocial personnel begin to prepare the witness psychologically for trial. This includes touring the courtroom, explaining the testimony experience, protocol and procedure, familiarising witnesses with their statements, and a full preparation for any psychologically difficult aspect of witness testimony.

In its recommendations on pre-testimony preparation of witnesses, WVS personnel cite 'familiarising witnesses with their statements' as an explanation of what to expect during the examination and how the witness should respond.[371] 'Familiarising' implies the rehearsal of witnesses before they testify in the likely areas of examination, cross-examination, re-examination and the form of questions and answers expected.[372] WVS personnel are not present during prosecution or defence proofing of witnesses, where witnesses are 'prepared for their time in court' by their legal teams.[373] It is common practice at the ICTR and the ICTY, but not permitted at the ICC.[374]

The divergent nature of witnesses before the SCSL requires different levels of preparation. Some crime-based witnesses – certainly child combatants or victims – might require WVS-assisted revision of their statements prior to testimony. When witnesses are likely to have forgotten what they said to investigators or when their statements can be of assistance in psychological preparation for potentially traumatic events, proofing might 'be a better modality for enhancing the efficiency, integrity, and legitimacy of trial truth-seeking functions than prohibiting the practice'.[375] However, for highly placed insider witnesses proofing may provide an opportunity to jointly change a statement to the point it no longer accurately reflects the witness's memory, thereby impinging upon the rights of the accused.

In the case of the SCSL, proofing could ease the fiscal pressures the court is under. Proofing facilitates a fully prepared witness, mitigating the potential for extended questioning. Child witnesses, for example, are more likely to have difficulty remembering all elements of testimony given many years prior to their

appearance. Some witnesses make a deliberate attempt to forget traumatic experiences for the benefit of their own psychological wellbeing. Were counsel or the WVS not to proof witnesses, the cost of extended testimony could be detrimental to a fiscally vulnerable tribunal under pressure to conclude operations. The court has received recommendations about such cost-cutting measures from consultants who assessed court efficiency.[376]

DURING-TESTIMONY PROTECTIVE MEASURES

Psychosocial support

Psychosocial support continues during testimony. Psychological assessment informs the needs of witnesses who may be accompanied to the courtroom and throughout testimony by a WVS psychosocial support officer. Particularly vulnerable witnesses are allowed to have a support officer sit next to them while they testify, although this does not occur in The Hague.[377] To a large extent, the ability of the witness to calmly testify is facilitated by receiving encouragement and reassurance, and by understanding the process and how to answer likely questions.[378]

The nature of a legal environment is often foreign to witnesses. Many witnesses ordinarily engage indigenous dispute resolution mechanisms to resolve conflicts. Witnesses are therefore sensitised to the focus on facts and the adversarial nature of proceedings. This can be alarming and intimidating for witnesses who have no experience of such a system.[379] WVS sensitisation is tailored to likely cross-examination, which usually causes the greatest anxiety.[380]

Protection measures

Physical protective measures are continued for the majority of witnesses during testimony. A minority of witnesses who live locally choose to remain in their own accommodation.[381] Communication between psychosocial staff and protection officers about the wellbeing of witnesses and their families is particularly important during this period.

Witnesses are brought to the court in a WVS vehicle which does not have SCSL plates and has tinted windows so that witnesses cannot be identified.[382] Witnesses are driven directly to the entrance of the court and taken straight to a waiting room where they are accompanied by WVS psychosocial personnel until they are called to testify.[383] They are accompanied into court by both a psychosocial support officer and a protection officer who remain with them during testimony and breaks.[384] All measures are facilitated by rule 75 of the SCSL rules of procedure and evidence.

A common problem arises with the translation of testimony. There have been multiple instances of witnesses, when confronted with the transcript of their evidence in chief, consistently denying its accuracy and blaming interpretation.[385]

Anonymity

The most critical and commonly deployed form of protection is witness anonymity, which must be ordered by the court under rule 69.[386] Counsel is dependent on the judges to grant anonymity orders. These orders have generally been provided although the prosecution has lost two witnesses due to court refusal of anonymity. When anonymity is ordered, witnesses are allowed to testify from behind a screen so that they cannot be seen by the public gallery or filmed. In such circumstances, identifying details such as the witness's name or other identifying particulars are not used publicly. Mistakes by counsel on this issue include the court's very first witness. The witness was asked by then chief prosecutor David Crane if he was from a particular village, if he had a brother who had been killed during the conflict, and what his occupation was. The whole gallery knew who the witness was as a result.

Other protective measures are put in place for psychologically vulnerable witnesses, particularly children, who might be allowed to provide testimony in a closed session or via video link from the waiting room.[387] Anonymity has been used to protect around 95 per cent of witnesses before the SCSL without serious incident. The majority of witnesses received by the court have been happy with the treatment they received.[388] The critical element of anonymity is that witnesses do not suffer the trauma of relocation, especially when families are involved. This appears to have been a satisfying element for witnesses, particularly once it was known that relocation would occur within Sierra Leone or the West African region, and not to the West.

Defence counsel feel that the prevalent use of anonymity compromises the judges' obligation, under rule 26 bis, to ensure a fair and expeditious trial that respects the rights of the accused and protects victims and witnesses.[389] They believe that the absence of public scrutiny fails to illuminate testimony falsehoods that the defence has failed to establish. This argument assumes that the public

follows testimony extensively, which is not always the case in Sierra Leone. The prosecution contends that if witnesses provide incriminating evidence they will refuse to testify if anonymity is not provided. They also contend that the onus is on the defence to contest testimony through its own investigations and cross-examination. While witness anonymity is considered alien to the Sierra Leonean justice system, it provides a cost-effective means of protection for a financially restrained tribunal.[390]

Protective measures offered in The Hague

The Charles Taylor case was shifted to The Hague by order of the president of the SCSL due to the security situation in Freetown, which required proceedings to be moved outside the West African region.[391] The move was arranged so that hearings could take place using the facilities of the ICC.[392] The Hague is clearly an unfamiliar environment for Sierra Leonean and Liberian witnesses, but many are excited about the opportunity of European travel. Witnesses are first assembled in Monrovia or Freetown for medical examinations before leaving for The Hague. The Hague hosts ten witnesses at a time at its safe house, with five witnesses rotated in each time five others leave.[393]

Witnesses receive the same protective care relating to provision of accommodation and other basic daily requirements in The Hague as provided prior to testimony. The daily subsistence allowance is equal to 10 per cent of the UN daily subsistence allowance for travel of UN personnel to The Hague. This is determined on the basis that the full amount is not required due to accommodation, food and other basic amenities already being covered.[394] There are concerns about the accommodation and staff in The Hague being insufficient to ensure that witnesses don't talk to each other about the case.[395] The Hague accommodation's remote location restricts witnesses who leave the facility unaccompanied, meaning their freedom is to some extent limited. In some cases, as witnesses get very close to testimony, they have demanded an increased allowance to follow through with testimony. These threats have not been carried out. Insider witnesses have been particularly demanding after being especially well looked after by the prosecution prior to being handed over to the WVS.

POST-TESTIMONY PROTECTION

Reintegration

When witnesses have been provided anonymity they are discretely transported home to continue their lives after testifying.[396] Witnesses are given contact details for WVS personnel in case they require future assistance. In any event, the WVS makes periodic visits to assess witness security and psychological wellbeing.[397] The WVS aims to make an initial visit within six months of testimony.[398] However, the onus is generally on witnesses to express security concerns to the WVS.[399]

When witnesses do not have access to telephones, local police known to witnesses during investigations are used as intermediaries.[400] The fact that many witnesses are known to police potentially compromises their anonymity, particularly in small communities. Successful WVS engagement of local police who are regarded with suspicion indicates effective procedural practice. In the longer-term, however, alternative means of communication are required to mitigate deployment of security forces against witnesses.

A study by the WVS found that witnesses often felt their expectations of financial assistance were not met after giving testimony.[401] This reflects expectations inflated by investigators hoping to secure witness testimony. Others cite the need for greater repetition, before and during testimony, of the nature and extent of the post-trial assistance witnesses will receive.[402] This would alleviate misconception of the material benefit of providing testimony. Clear guidelines are required in order to streamline service provision.[403]

Relocation

When confidentiality is breached, the WVS claims that witnesses are relocated.[404] However, this appears at odds with the use of police as intermediaries.[405] While it is hoped that police intermediaries are of suitable character, preserving witness anonymity in such circumstances is difficult, particularly in a small community. It would therefore appear that not all those whose anonymity is compromised are relocated. A conscious decision made in consultation with the witness might facilitate a mutually acceptable security environment in such circumstances. Protocol needs to be developed to do so.

When relocation does occur, it is generally within Sierra Leone. Relocation to Europe and America is particularly cumbersome, both financially as well as

politically. There is no relocation agreement with another African state due to political obstacles which broadly reflect some regional discontent with the court, which is associated with regional involvement in Sierra Leone's conflict. However, some witnesses who are able to facilitate their own visa or residency requirements are assisted to relocate in the West African region. This option provides a more familiar environment for witnesses. It is also a less expensive option for the WVS and the witness, who might struggle to find adequate employment in a developed state.

The financial implication of relocation has commonly caused investigators and the WVS to favour the use of anonymity. The ability to get work permits for witnesses has been beyond the SCSL's capacity in some circumstances. This places responsibility for the financial upkeep of witnesses on the SCSL, reinforcing the preference for anonymity. Insider witnesses have been relocated to developed countries, but this has usually occurred when former government or senior personnel are involved. To relocate low income Sierra Leoneans or Liberians to Europe or North America could be seen as inducement.

THE RESIDUAL DILEMMA

The SCSL hoped to conclude the final case of Charles Taylor by late 2009. After submission of the defence witness list, it now appears that proceedings will continue well into 2010. Nevertheless, the SCSL is expected to be the first of the present ad hoc tribunals to conclude proceedings.

One of the critical residual issues faced by ad hoc tribunals is witness protection post-completion. The SCSL's residual programme will shape the completion strategy at ICTY, ICTR and the Extraordinary Chambers for Cambodia.

The witness protection residual issue is yet to be finally determined. The court had previously promoted other alternatives, without success. One possibility was the receipt of jurisdiction over witnesses by the ICC but this was rejected on fiscal grounds by states parties to the Rome Statute. Another possibility is a joint initiative with the ICTY and ICTR to create a UN-based 'special office' in The Hague. The UN has not been receptive to this option due to difficulties with establishing a homogenous state relocation protocol where diverse relocation agreements have already been reached with different courts and states.

Presently a witness protection programme in Sierra Leone's domestic justice system receiving jurisdiction over SCSL witnesses appears to be the only available alternative. The domestic programme would have a WVS protection officer attached. These personnel would not have the capacity to provide protection themselves, but would engage local protection colleagues within the programme. This option is currently preferred because it encourages the establishment of a local protection programme while providing a less onerous alternative for donors.

If the domestic programme does not go ahead, a liaison office could be established in its absence in Freetown. There may be the same two personnel attached to a liaison office, which would also be responsible for addressing issues pertaining to the outstanding arrest warrant for former Armed Forces Revolutionary Council (AFRC) leader Johnny Paul Koroma. This would involve a prosecutor and judges remaining on standby should the need arise. Koroma has not been corroboratively seen since his attempted arrest in 2003. The prosecution has spent a lot of time tracing Koroma but has not been able to locate his remains, if dead, or whereabouts, if alive.

A coup, or even an election, which brings to power sympathisers of the accused could provide a threat to witnesses. With two SCSL personnel in charge of witness protection, the court would be powerless to stop the state from ascertaining the identities and whereabouts of protected witnesses.

Even if there are not threatening changes in Sierra Leone's political landscape, there is concern that a locally based institution might leak information to those who wish witnesses harm. While the threat to witnesses generally diminishes after trial, it cannot be dismissed entirely, even in the long-term. A more comprehensive residual mechanism must be developed, which takes the long-term threat more seriously. If the present course is pursued the court might well leave those most at risk more vulnerable in the future. To compromise the safety of those critical to implementation of the court's mandate would leave a particularly bitter legacy.

CONCLUSION

The WVS has established leading best practice in psychosocial practice at international criminal tribunals and in the domestic sphere. It has largely used the prudent, practical and fiscal benefits of anonymity at the expense of more financially and logistically onerous alternatives.

However, prosecution witness engagement, finance and jurisdiction create a conflict of interest and potential inducement. This diminishes the credibility of

evidence provided to the court, and thus the credibility of the justice the court dispenses. The trial chamber's refusal to examine this issue demonstrates contempt for due process and the equitable justice the court was ostensibly established to pursue.

The WVS has managed to avoid a serious security incident thus far. A large UN peacekeeping force initially along with political stability have supported the WVS' own prudent practice. The real test may be yet to come. The greatest question surrounds witness uncertainty upon the court's conclusion. An approach which places jurisdiction in the hands of local actors would undermine the progressive steps taken by the WVS. Such an approach is erroneously premised on three assumptions. First, that the societal cleavages which largely caused the conflict have ceased to exist. Second, that local institutions are sufficiently depoliticised, reformed and capacitated to function independent of criminal or political interference. Finally, that there has been a degree of forgiveness by ordinary Sierra Leoneans at the local level for crimes committed. The nature of the Sierra Leonean conflict shows that insecurity facilitates violent expression of long-held local- and macro-level discontents.

Residual protective measures must seek to avoid inadequate international control and oversight. The SCSL otherwise risks falling victim to local politics. Soliciting external funding and diplomatic support to do so remains the SCSL's major obstacle.

Chapter Five

South Africa's Witness Protection Unit: Africa's first domestic protection mechanism

Witness protection in Africa has been led by South Africa's Witness Protection Unit (WPU). South Africa experienced an immense transition and, as a result, both political change and uncertainty became prominent. To address organised criminality, bold new methods that empowered law enforcement without compromising the rights of accused were required.

The challenge for South Africa's legal system was daunting. The post-apartheid human rights framework within which the justice system and security apparatus were required to operate was relatively unfamiliar to officials. At the same time, witness protection was expected to play a leading role in combating organised criminality. The covert nature of the programme has made an external assessment of practice and challenges difficult.

South African witness protection broadly reflects the country's changing political disposition. In 1996 a national programme was put in place in line with other justice sector reform initiatives. In 2000 the programme was restructured and enshrined in law with the passing of the Witness Protection Act 2000. This chapter provides a brief overview of the legal and historical aspects of South African witness protection. It then examines the structure and function of the programme, illuminating successes and suggesting areas for reform. Finally, the chapter considers the WPU as a potential model for African states that are considering setting up their own programmes.

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Annex B

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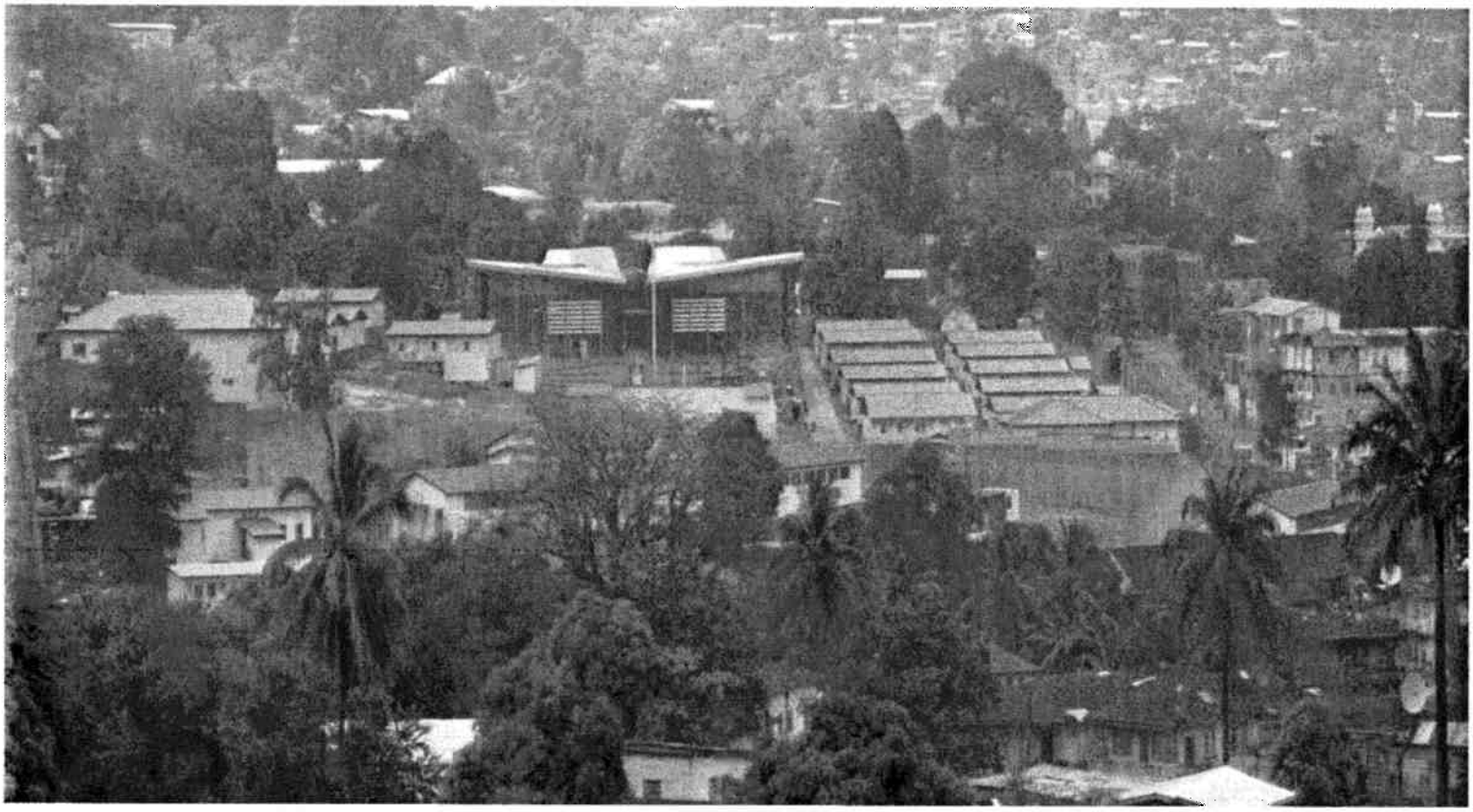
Best-Practice Recommendations for the Protection & Support of Witnesses



SPECIAL COURT FOR SIERRA LEONE

AN EVALUATION OF THE WITNESS & VICTIMS SECTION

About the Special Court for Sierra Leone (SCSL)

The SCSL was set up jointly by the Government of Sierra Leone and the United Nations, following a resolution passed in August 2000. It is mandated to try those who 'bear the greatest responsibility' for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Thirteen people were indicted, and the first witness was heard from in June 2004.

About the Witness and Victims Section (WVS)

The WVS is the neutral body responsible for supporting and protecting all witnesses before, during and after their testimony. It offers case-dependent services such as security, psychosocial support, relocation, and material support. There is limited information available on how to best support and protect witnesses in an international war crimes tribunal, but there is a growing interest in such tribunals as a tool for transitional justice and peace-building.

About the Authors

Mr. Simon Charters managed the Witness Evaluation and Legacy Project at the SCSL in its implementation of this study. He continues to monitor and report on projects from within the Office of the Registrar.

Dr. Rebecca Horn designed the methodology for the research phase and analysed the data. She then implemented the recommendations as the WVS Psychologist.

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Photography Disclaimer: The person (s) showcased in the photography throughout this publication are in no way associated with the WVS of the Special Court for Sierra Leone, nor are they representative of actual witnesses at the Court. Generic photography has been used, thereby not compromising the identity of any of the individuals associated with WVS.

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investigations, and for the establishment of subsequent *ad hoc* tribunals. There is, therefore, a need for best-practice recommendations in this field.

2.2.3 Support for witnesses in the SCSL

Following an extensive period of preparation, the SCSL heard from its first witness in June 2004. The trials have relied mainly on eyewitness testimony, rather than documentary evidence, so a large number of witnesses have testified in the trial chamber, compared to some other war crimes trials (e.g. Iraqi Special Tribunal) (Perriello & Wierda, 2006). The success of the SCSL is dependent, in part, on those who testify before it. If witness welfare is not taken care of, or if the witness experience is negative, there will be consequences in terms of the effectiveness of the trials. Witnesses in international criminal courts are in need of support and protection services in order to ensure that they do not suffer unnecessarily from the experience of testifying (e.g. Ingadottir, Ngendahayo & Sellers, 2000).

In recognition of this, systems have been put in place to ensure that the witnesses are not adversely affected by their experience of testifying in the SCSL. Within the Registry is a specialist unit, the Witness and Victims Section (WVS), which is responsible for the protection and welfare of all those who testify in the SCSL.

2.3 Background to the WVS

2.3.1 The WVS mandate

The WVS of the SCSL draws its mandate from two key documents: the Statute of the SCSL[3], and the Rules of Procedure and Evidence[4]. The latter document gives the fullest description of the WVS mandate, and frames the objective against which WVS output should be assessed:

Rule 34: Witnesses and Victims Section (amended 29 May 2004)

(A) The Registrar shall set up a Witnesses and Victims Section which, in accordance with the Statute, the Agreement and the Rules, and in consultation with the Office of the Prosecutor, for Prosecution witnesses, and the Defence Office, for Defence witnesses, shall, amongst other things, perform the following functions with respect to all witnesses, victims who appear before the Special Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:

i. Recommend to the Special Court the adoption of protective and security measures for them;
ii. Provide them with adequate protective measures and security arrangements and develop long- and short-term plans for their protection and support;
iii. Ensure that they receive relevant support, counselling and other appropriate assistance, including medical assistance, physical and psychological rehabilitation, especially in cases of rape, sexual assault and crimes against children.

(B) The Section personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children. Where appropriate the Section shall cooperate with non-governmental and intergovernmental organizations.

2.3.2 Protection and support of witnesses

The first contact between the SCSL and the potential witness is through the investigation teams of the defence and prosecution. If the individual is deemed to be under a significant perceived threat, then they are brought under the total protective care of WVS early in the process, well before their testimony date is imminent.

[3] Article 16, paragraph 4 of the Statute of the Special Court for Sierra Leone, http://www.sc-sl.org/scsl-statute.html
[4] Rules of Procedure and Evidence (29 May 2004), http://www.sc-sl.org/Documents/rulesofprocedureandevidence.pdf

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2.3.2.1 Services received

Total protective care, as received by those under an initial perceived threat, includes:

- Housing for the witness and his/her family in a safe house;
- 24-hour guard from a close protection officer (case-dependent);
- Provision of a financial subsistence allowance;
- Medical cover;
- Schooling for any minors or dependents of the witness;
- Temporary provision of a mobile phone (case-dependent), and
- Post-testimony relocation either within Sierra Leone, or the West Africa region.

In practice, only a minority of witnesses are taken into total protective care. The majority of witnesses are only taken into WVS care when their testimony is imminent, and WVS supports and protects them until after they have testified and they are ready to return home. During this period, all the witnesses' needs are met by WVS, including:

- Accommodation for the witness (and sometimes their dependents) in secure accommodation in Freetown;
- All food, toiletries and other basic requirements. The accommodation has 24-hour electricity, TV, and other simple forms of entertainment (e.g. board games);
- Financial allowance as recompense for lost wages;
- An initial medical assessment, and all medical provisions;
- 24-hour guard at the secure accommodation. (The guards restrict access to the compound to essential staff; visitors are not allowed. Witnesses are able to leave the compound, but their movements are monitored by the security personnel.);
- 24-hour support from a WVS psychosocial support officer at the accommodation facility, and provision of counselling and emotional support. (In some cases, psychosocial support is also provided to witnesses' dependents.);
- A courtroom briefing to ensure familiarisation with the courtroom and its procedures, and
- Psychosocial support during the witnesses' preparation with their legal team.

Prior to the testimony, witnesses are taken to a witness waiting room, where a WVS psychosocial support officer ensures that they are comfortable and that all their needs are met. A second WVS psychosocial support officer accompanies the witness into the courtroom and stays throughout the testimony, in order to provide emotional and moral support. Particularly vulnerable witnesses are permitted to have the support officer sit next to them as they testify. All witnesses are given an opportunity to debrief with the support officer once their testimony is over.

Once the witness has finished testifying, WVS arranges transport back to their home community. All witnesses are given the contact phone numbers of key WVS security and psychosocial staff, and told to make contact at any time in the future if they require assistance. In addition, WVS staff conduct periodic post-trial visits to the witnesses' home to assess their security and wellbeing.

2.4 Background to the research

2.4.1 Justification

Witnesses are essential to the success of tribunals such as the SCSL, and the quality of their protection and support is vital. If the quality is low, it follows that the quality of the testimony that the witness is able to give may suffer. Best practice should also guard against the further traumatisation of witnesses who have experienced human rights abuses as they participate in the process. It should also ensure that the experience of testifying in a war crimes tribunal is positive and not excessively distressing, frustrating or dangerous; this will encourage future witnesses to testify. It is, therefore, crucial to the effectiveness of international war crimes tribunals that good policies and practices are in place to protect and support witnesses. The aim of this report is to evaluate the

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ence. Best practice should prepare witnesses for what they are likely to face during cross-examination, providing that this does not become 'training' of witnesses.

Recommendations

- The importance of a respectful and friendly attitude towards witnesses should be emphasised to all staff working in an international war crimes tribunal;
- Victim-witnesses should be taught ways of managing their feelings of distress;
- Every effort should be made to reduce witnesses' anxiety before testifying, or to help them to manage their anxiety;
- Women, SGBV survivors, younger witnesses and those required to talk about very painful events may benefit from special preparation and support, and
- Witnesses should be properly prepared for what they are likely to face during cross-examination.

4.3 Post-Testimony

4.3.1 Satisfaction with post-testimony services

In other settings, witnesses who receive no post-trial follow-up have reported feeling 'abandoned' and have evaluated their testimony experience more negatively (e.g. Stover, 2005; Byrne, 2004). In contrast, where there is two-way communication between witnesses and court staff, witnesses report more positive feelings about their overall experience, and a better sense of wellbeing. The experience of SCSL witnesses supports these claims.

There was considerable variation in the level of satisfaction with post-testimony services[16], and witnesses were generally less satisfied than with the services they received during the testimony period.[17] This is to be expected, since witnesses receive a much more intensive level of service during the testimony period. Communication was found to be particularly important: a lack of contact with WVS after the witness returned home, and a lack of awareness that any post-testimony services were available, had the greatest impact on a lack of satisfaction with post-testimony services. Conversely, the factor which had the greatest impact on satisfaction is a belief that WVS had kept the promises they had made to the witness.

Levels of satisfaction with post-testimony security services and medical services were also lower than the satisfaction rating with those services during the testimony period.[18] The greatest predictors of low levels of satisfaction with post-testimony security were a sense that that WVS paid insufficient visits to check on their security, and witnesses being unaware that assistance with security concerns was available.

4.3.2 Post-testimony communication

Communication is key in the post-testimony phase. The findings of this study emphasise the need for WVS to communicate clearly and realistically what witnesses should and should not expect from WVS following their testimony, and to ensure that witnesses actually receive what they have been told they can expect. In most cases, it is not possible for frequent follow-up visits to be made to witnesses, and if this is made clear to them at an early stage they are less likely to feel disappointed later on. The responsibility is usually with the witness to contact WVS if they require assistance with security after testifying. This should be communicated to them clearly, and they should be given the relevant contact details. For those who do not have access to a phone or a reliable phone network, alternative mechanisms for seeking assistance should be established: for example, prosecution witnesses could seek assistance from the local police station, to whom they are sometimes known at the investigatorial stage. Witnesses gave varied responses when asked how confident they felt that they could contact WVS if they needed to. Likewise, they were mixed when asked how confident they were that WVS would respond if called for help.[19]

[16] Using the five-point scale response format which ranged from 'not at all satisfied' (1) to 'extremely satisfied' (5), the m = 3.25, and sd = 1.5.

[17] $F(1,330) = 58.97$, $p<.001$

[18] Satisfaction with security services: m = 2.85, sd = 1.66). Satisfaction with medical services: m = 2.99, sd = 1.76

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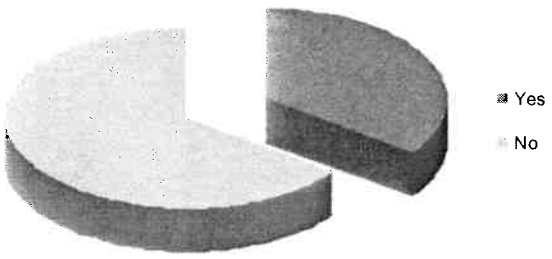
4.3.3 Encouragement and emotional support

The factor which has the most effect on confidence that WVS would respond to requests for help is satisfaction with WVS services during the testimony period, especially encouragement and emotional support – so this should again be prioritised as a best-practice principle. During the testimony period witnesses have intensive contact with WVS, and it is likely to be at this point that witnesses form a judgement of how important their personal safety is to WVS. This judgement is based less on the security services in place than on the attitude of staff – and the impact that this has on witness confidence that WVS would respond in the future does serve to increase their sense of security. WVS staff who show care and concern for the witness not only reassure and assist the witness at that time, but have a much longer-lasting effect on witness well-being.

4.3.4 Witness expectations

Witness confidence is also predicted by whether their expectations were met.

Figure 5. Responses to 'Did you receive what you expected from the SCSL?':



Witnesses whose expectations were not met reported that they had not received the post-testimony financial support and follow-up help that they had expected, medical care, or help with their (or their dependents') school fees. It is clear that witnesses have high expectations in these areas.

Three-quarters of those interviewed thought witnesses should receive special benefits. The reasons for this belief varied, but the most common was that witnesses should receive compensation for having put their lives at risk in order to testify. The type of benefit witnesses felt should be offered was primarily financial assistance or material benefits 'in kind', such as education for the witness's children, medical care, help with accommodation, or assistance to start a business or improve a farm.

Witness expectation is a sensitive but important issue. Other research (e.g. Stover, 2005; Byrne, 2004) has shown that witnesses sometimes have unrealistic expectations of what the institution can provide, or lack accurate information about the process and their rights. There is a fine line between a reasonable level of recompense to ensure witnesses are not disadvantaged by testifying, and services beyond this, which could constitute an inducement to testify. Witnesses and staff may have different ideas of what comprises a 'reasonable level of recompense'. A witness who agrees to testify whilst having unrealistic expectations of what they are likely to receive from the institution is likely to end the process feeling disappointed, frustrated and even betrayed. Ensuring that witnesses have realistic expectations, and that they receive what they have been promised, is key to building witness confidence in WVS. WVS staff (as well as investigators and legal teams) can help to set expectations from their first contact with witnesses by clearly explaining what they should and should not expect.

Witnesses were asked what they felt would improve the post-testimony care. Sixty-eight per cent would have liked more contact with WVS following their testimony, 55% wanted more financial support, and a significant proportion wanted more help with medical care (34%) and school fees for their children (29%). More than one-quarter (28%) said they would have liked their security situation to be assessed by WVS. It may be that it is not realistic for WVS to maintain post

[19] They responded to both items using a five-point scale ranging from 'not at all confident' (1) to 'extremely confident' (5). Confidence they could contact WVS if necessary: m = 3.36; sd = 1.49. Confidence WVS would respond: m = 3.65; sd=1.37

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-testimony contact with all witnesses, or to provide the level of financial assistance witnesses would like. Again, it is important to be clear to witnesses what they can and cannot expect from WVS during the post-testimony period.

A central theme is the importance of clearly setting, and continuously reinforcing, realistic expectations regarding what witnesses can expect from their contact with the court. It is recognised that this will not be an easy task, since some witnesses see their contact with the court as an opportunity to benefit materially, so will be resistant to any suggestions that this is not going to happen in the way they hope. Repetition and consistency regarding what witnesses can expect to receive is important from all staff interacting with witnesses. Some staff may benefit from training in relevant skills (e.g. assertiveness, communicating in a way that reduces conflict) to assist them with this aspect of their work.

Staff would also be assisted if there were clear guidelines as to the services and benefits witnesses are entitled to. Whilst it is recognised that there will always be exceptions to guidelines, and that witness needs are often assessed on a case-by-case basis, this approach makes it difficult for WVS staff to be consistent in the information they give to witnesses. The guidelines regarding entitlements during the testimony period seem to be clearer than those regarding entitlements once the witness has finished their testimony and returned home. It is not clear who is likely to receive assistance with school fees for their children, with rent, with training for themselves or help to establish a business. This lack of clarity may contribute to witness disappointment with post-testimony services.

Recommendations

- There should be clear guidelines as to the services and benefits witnesses are entitled to;
- All staff interacting with witnesses (WVS, investigators and legal teams) should communicate clear and consistent guidelines regarding what the witness can and cannot expect in terms of material assistance and follow-up visits following their testimony;
- WVS managers should ensure that witnesses actually receive what they have been told they can expect;
- WVS should ensure all witnesses have ways of contacting them after returning home, whether through distribution of WVS phone numbers, or identifying an alternative method (e.g. via a local police contact person);
- The importance of a supportive and friendly attitude towards witnesses should be emphasised to all staff (WVS, investigators and legal teams). This plays a crucial role in establishing witness confidence that WVS would help them in the future if necessary, and
- WVS staff should receive training, where necessary, to enable them to give clear and consistent information to witnesses, even when under pressure.

4.4 Security

Witnesses' feelings of safety, both prior to and after testifying, have been found by other researchers to be crucial to their overall sense of wellbeing. The need for safety and security is a basic human need (Maslow, 1943), and if it is not met, it impacts on other aspects of wellbeing (e.g. social and psychological).

Witnesses might be expected to feel more insecure when they return home after testifying. According to Stover (2005), ICTY witnesses' feared recriminations against themselves or their families when, after testifying, they returned to the area in which both they and the accused live, and to their home country in which there were limited support and protection services available. Witness anonymity for the majority of protected witnesses interviewed by Stover (2005) was also not maintained. Basoglu et al (2007) found that one of the factors most strongly associ-