

# Procedural Steps Addressing Sexual and Gender-based Violence: the Legacy of the International Criminal Tribunal for Rwanda and its Application in the Special Court for Sierra Leone

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## Abstract (100 words):

This paper examines certain procedural strategies adopted by the International Criminal Tribunal for Rwanda (ICTR) to encourage and support victims of, and witnesses to, sexual and gender-based violence and traces their application in the Special Court for Sierra Leone. First, the paper explores specific methods used to protect the identity of victims and witnesses. Second, this paper considers steps taken by the ICTR to provide courtroom support to victims and witnesses. Finally, this paper surveys evidentiary approaches meant to reduce the retraumatization of sexual violence victims. The ICTR indeed has a legacy in these respects, somewhat positive and somewhat flawed.

## Keywords:

International Criminal Tribunal for Rwanda, rape, sexual violence, Rule 92*bis*, Rule 96

## Paper:

The substantive jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) on the topic of sexual and gender-based violence has been simultaneously praised and critiqued,<sup>2</sup> but the tribunal's procedural contributions in this area largely tend to be overlooked. This paper examines the procedural strategies adopted by the ICTR to encourage and support victims of, and witnesses to, sexual violence during the 1994 genocide. The discussion is divided into three parts. First, the paper explores specific methods used to protect the identity of victims and witnesses, when deemed necessary to avoid reprisals and stigmatization. These techniques included assigning pseudonyms, using face and voice distortion on video feeds outside of the courtroom, redacting identifying information from the public record, and permitting evidence to be presented

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<sup>2</sup> E.g. see L. Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR', in A. de Brouwer et al. (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (2013), 123; D. Buss, 'Learning our Lessons? The Rwanda Tribunal Record on Prosecuting Rape' in C. McGlynn and V. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (2010) at 61; A. L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* (2005); B. Nowrojee, 'Your Justice Is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?', United Nations Research Institute for Social Development (2005); B. Van Schaack, 'Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson' (2009) 17(2) *American University Journal of Gender, Social Policy and the Law* 362.

*in camera*. Second, this paper considers steps taken by the ICTR to provide courtroom support to victims and witnesses, for example by permitting breaks as needed for victims, allowing support persons to be present, and accepting written evidence when witnesses felt that they could not verbalize the words to describe their rape. Finally, this paper surveys evidentiary approaches meant to reduce the retraumatization of sexual violence victims, such as admission of written statements, consideration of evidence from non-victim sources, acceptance of victim evidence without a requirement of corroboration, restrictions on the accused's use of the defence of consent, and exclusion of evidence of prior sexual conduct of the victim.<sup>3</sup>

In examining these procedural innovations, the paper also contemplates whether and how the procedural legacy of the ICTR has influenced a subsequently-created tribunal, the Special Court for Sierra Leone (SCSL). When the SCSL was created, it was envisaged that the procedural experience of the ICTR would inform the operations of the SCSL.<sup>4</sup> This is why the SCSL's Statute states that '[t]he Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court'.<sup>5</sup> The ICTR was founded in 1994 and the SCSL in 2002, so the ICTR's practice, as a tribunal on the same continent, was meant to facilitate the SCSL in quickly establishing itself. That said, the SCSL's Statute also permitted deviation from the ICTR's procedures: 'The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation.'<sup>6</sup> This transfer of procedural experience from one international criminal tribunal to another is a key aspect of the ICTR's legacy, and yet that legacy changes as other tribunals adapt the ICTR's approaches to their particular situations.

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<sup>3</sup> Given space constraints, the paper only focuses on certain procedural legacies. There are many other parts of the ICTR's legacy, both positive and negative, that are not explored in this paper, but which deserve greater attention, such as the manner in which victims of and witnesses to sexual and gender-based violence have been dealt with during investigations in Rwanda, how they have and have not been adequately prepared for their courtroom experience at the seat of the court, and whether the ICTR has kept victims and witnesses adequately informed after their courtroom appearance. See Bianchi, *supra* note 2, at 131-134 for an explanation of lessons learned from ineffective interactions with rape victims during prosecution investigations. See also Nowrojee, *supra* note 2, at 4, 12-13, and 20-25 regarding poor investigations, lack of adequate preparation or explanation of the courtroom experience and lack of follow-up and protection after victims provide testimony.

<sup>4</sup> Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (2000), at para. 20. See also paras. 64-65, in which both the ICTR and the International Criminal Tribunal for the Former Yugoslavia were expected to share knowledge and expertise with the SCSL on a variety of matters, including on 'adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals' (para. 65).

<sup>5</sup> Statute of the Special Court for Sierra Leone at Article 14(1), annexed to the 2002 Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138.

<sup>6</sup> *Ibid.*, at Article 14(2).

## 1. Protecting the Identity of Victims of and Witnesses to Sexual and Gender-Based Violence in the Courtroom

While sexual and gender-based violence – rape in particular - was widespread during the Rwandan genocide,<sup>7</sup> many victims of this violence did not wish to testify openly at the ICTR and therefore requested that their identity be concealed from the public.<sup>8</sup> Again, while sexual and gender-based violence - such as rape, sexual slavery and forced marriage – was pervasive in the Sierra Leone civil war, many victims and witnesses appearing before the SCSL were similarly concerned about protecting their identities.<sup>9</sup> However, many were willing to reveal the details of their experiences before an international tribunal, as long as their names and other identifying information were kept from the public.<sup>10</sup> The victims rationally feared the potential negative short- and long-term consequences for themselves and their families if their identities were revealed.<sup>11</sup> Rape is a violation related more to power and violence than to sex, and yet cultural practices often unfairly place shame on the rape victim rather than the perpetrator, or consider rape victims as tainted or unmarriageable, creating significant consequences for victims' psychological and economic well-being.<sup>12</sup> In other words, the cultural and familial after-effects of stigmatization due to rape provide a significant disincentive to women and girls to publicly reveal their identities when discussing their rape before the tribunals. Given the risks associated with public testimony, the ICTR Trial Chambers

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<sup>7</sup> R. Degui-Segui, Report of the Special Rapporteur on the Situation of Human Rights in Rwanda, UN Doc. E/CN.4/1996/68 (1996), at paras. 16-24; Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath* (1996), 1. Bianchi notes that the estimates of the extent of sexual and gender-based violence in Rwanda do not capture a number of sexual and gender-based violations: Bianchi, *supra* note 2, at 126, note 9.

<sup>8</sup> E.g., witness DBE in *Prosecutor v. Nindiliyimana, Bizimungu, Nzuwonemeye and Sagahutu*, Judgment and Sentence, Case No. ICTR-00-56-T, T.Ch. II, 17 May 2011, paras. 1111-1118.

<sup>9</sup> E.g. witness TF1-023 in *Prosecutor v. Taylor*, Judgment, Case No. SCSL-03-01-T, T.Ch. II, 18 May 2012, paras. 1008-1015 and 1180-1187. Note, however, that there were some victims who chose to have their names revealed in public, e.g. Akiatu Tholley, *ibid.*, paras. 1000-1007 and 1171-1179.

<sup>10</sup> The evidence of the ICTR's witness TAP demonstrates this: TAP wished to have her identity protected from the public, but to unveil her secret (of having been raped by Gacumbitsi during the genocide) in the courtroom: *Prosecutor v. Gacumbitsi*, Transcript of 6 August 2003, Case No. ICTR-01-64-T, T.Ch.III, 6 August 2003, page 22 at line 33, page 23 at lines 2-3, page 29 at lines 27-28, and page 32 at lines 18, 29 and 36-37. See a discussion of the motivations in this regard of certain victims in a case at the SCSL: Michelle Staggs Kelsall and Shanee Stepakoff, "When We Wanted to Talk About Rape": Silencing Sexual Violence at the Special Court for Sierra Leone' (2007) 1 *International Journal of Transitional Justice* 355, at 363-373.

<sup>11</sup> This was illustrated in the case of witness TA, who indicated to Nowrojee, *supra* note 2, at 17, that her identity was not adequately protected, her fiancé found out that she had testified to the ICTR about being raped, and he refused to marry her: 'He said, you went to Arusha and told everyone that you were raped.' Nowrojee explains the context: 'In a society such as Rwanda, where women are valued highly for their roles as wives and mothers, witness TA's reintegration into society was very much predicated on her marriageability.' The exposure of TA's status as a rape victim affected her ability to rebuild her life.

<sup>12</sup> An example of this is found in the SCSL's judgment in *Prosecutor v. Sesay, Kallon and Gbao*, Judgment, Case No. SCSL-04-15-T, T.Ch.I, 2 March 2009, at para. 1349, describing the stigmatization of female victims of sexual violence: 'Victims of sexual violence were ostracized, husbands left their wives, and daughters and young girls were unable to marry within their community'.

permitted the use of a number of protective measures in cases involving sexual violence, and the SCSL Trial Chambers followed suit.

One of the most common measures used to protect the identity of the victim or witness was the application of a pseudonym rather than the individual's real name. For example, in the ICTR, pseudonyms were a combination of letters (such as witness DBE),<sup>13</sup> and in the SCSL, pseudonyms were a combination of letters and numbers such as TF1-023.<sup>14</sup> While this has protected the identities of victims and witnesses from the international public, Nowrojee notes that this has not always been the case at the local level, at least in ICTR cases: the rules of the court require that the names of the individuals testifying for the prosecution are revealed to the defence in order to respect due process rights of the accused, but, in certain instances, the defence has presumably leaked these names to individuals in the victims' or witnesses' home areas in Rwanda.<sup>15</sup> This, unsurprisingly, has negative consequences, betraying the trust of victims and witnesses in the tribunal and puts individuals at risk of reprisal and/or stigmatization.<sup>16</sup>

Another technique used for victim and witness protection in cases involving sexual and gender-based violence was *in camera* proceedings. While the general rule is for public sessions,<sup>17</sup> judges and defence counsel at both the ICTR and SCSL tended to accept the need for entirely closed or mixed open/closed sessions for victims and witnesses testifying to sexual and gender-based violence.<sup>18</sup> For example, witness TAP testified in a mixed closed/open session in the ICTR's *Gacumbitsi* case, with identifying information revealed in closed session and information regarding her experience during the genocide in open session except when it could reveal her identity.<sup>19</sup> In both tribunals, if identifying information was accidentally revealed during open session, it was expunged from the record. For example, in a case at the SCSL, one protected witness testifying about sexual and gender-based violence asked for the name of her school to be expunged, as she had mentioned it in direct evidence but then realized that, since it was a small school, members of the public might be able to determine her identity.<sup>20</sup> The trial judges agreed, and the Presiding Judge requested the media not to publish the information.<sup>21</sup>

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<sup>13</sup> See note 8, *supra*.

<sup>14</sup> See note 9, *supra*.

<sup>15</sup> Nowrojee, *supra* note 2, at 22. This is a violation of the rules, but it is difficult to prove that the leak came from the defence: *ibid.* at 23.

<sup>16</sup> *Ibid.*, at 22-23.

<sup>17</sup> Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, UN Doc. ITR/3/Rev.22 (2013), at Rule 78 [hereinafter ICTR RPE]; Rules of Procedure of the Special Court for Sierra Leone, Rev.14 (2012) at Rule 78 [hereinafter SCSL RPE].

<sup>18</sup> This is permitted under the Rules of Procedure and Evidence of both tribunals: *ibid.*, at Rules 75 (Measures for the Protection of Victims and Witnesses) and 79 (Closed Sessions).

<sup>19</sup> *Prosecutor v. Gacumbitsi*, Transcript of 6 August 2003, *supra* note 10, at pages 1-64. The SCSL also used mixed open/closed sessions, for example for witness TF1-189 in *Prosecutor v. Taylor*, Transcript for 17 September 2008, Case No. SCSL-03-01-T, T.Ch.II, 17 September 2008, at page 16480.

<sup>20</sup> *Prosecutor v. Sesay, Kallon and Gbao*, Transcript 28 November 2005, Case No. SCSL-04-15-T, T.Ch.I, 28 November 2005, at page 28 at line 26-29, and page 29 at 2-7.

<sup>21</sup> *Ibid.*, at page 29 at lines 7-16.

Other protective methods used within the tribunals were placement of a screen to shield the victim, and deployment of face and/or voice distortion of the victim or witness when that individual's testimony was broadcast outside of the courtroom (for example, in the public gallery or online video feeds).<sup>22</sup> These measures are permitted by the Rules of Procedure and Evidence and are recognized as best practices for international tribunals.<sup>23</sup>

## 2. Providing Courtroom Support to Victims of and Witnesses to Sexual and Gender-Based Violence

Judges in both tribunals have adopted certain courtroom-friendly procedures, such as giving breaks to victims and witnesses testifying to sexual violence when they felt distraught or otherwise very stressed.<sup>24</sup> Sometimes these breaks occurred quite often – for example, in one SCSL trial, a witness needed frequent breaks at a particular point when she switched from testimony of rapes and assaults she had witnessed to a description of her own rape.<sup>25</sup> One can see similar approaches of judges granting regular breaks in this regard, for example in the *Gacumbitsi* case in the ICTR.<sup>26</sup> Sometimes breaks were not given for the victim herself, but to accommodate her situation – for example, in the SCSL, one witness was accommodated with breaks because she had a four month old baby with her in courthouse.<sup>27</sup>

Additionally, both tribunals permitted witness support persons to be present in the courtroom when necessary, to provide views on suitable protective measures, reassurance to victims and witnesses of sexual and gender-based crimes, and views on when the individual's questioning should be halted.<sup>28</sup> For example, in the SCSL's *Taylor* case, the

<sup>22</sup> E.g. in the SCSL, witness TF1-023 benefitted from facial distortion on the broadcast video, *Prosecutor v. Taylor*, Transcript for 22 October 2008, Case No. SCSL-03-01-T, T.Ch.II, 22 October 2008, at pages 18942-18944. In some cases, the person testifying (TF1-028) could be seen, but the microphone broadcasting the voice of the witness was turned off at specific points: *Prosecutor v. Taylor*, Transcript for 8 May 2008, Case No. SCSL-03-01-T, T.Ch.II, 8 May 2008, at page 9287; *Prosecutor v. Taylor*, Transcript of 17 September 2008, *supra* note 19, at page 16480; *Prosecutor v. Taylor*, Transcript of 18 September 2008, Case No. SCSL-03-01-T, T.Ch.II, 18 September 2008, at page 16544.

<sup>23</sup> ICTR and SCSL RPE, *supra* note 17, at Rule 75(B)(i)(c) and (B)(iii). The use of screens and other devices to shield the victim's identity from the public are mentioned as a best practice in International Criminal Tribunal for Rwanda, *Prosecution of Sexual Violence - Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014) at para. 207 [hereinafter ICTR Best Practices Manual].

<sup>24</sup> E.g. witness DBE was granted breaks to compose herself: *Prosecutor v. Ndindiliyimana, Bizimungu, Nzuwonemeye and Sagahutu*, Transcript of 30 March 2005, Case No. ICTR-00-56-T, T.Ch. II, 30 March 2005, at page 68.

<sup>25</sup> E.g. witness TF1-028 was offered frequent breaks to allow her to compose herself: *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Transcript of 7 May 2008 at page 9145, 9158, 9211-9212.

<sup>26</sup> *Prosecutor v. Gacumbitsi*, Transcript of 6 August 2003, *supra* note 10, at page 10 at lines 31-32, page 26 at lines 2-13, page 27 at line 4, and page 42 at line 3.

<sup>27</sup> *Prosecutor v. Taylor*, Case No. Transcript of 28 January 2009, SCSL-03-01-T, T.Ch.II, 28 January 2009, at page 23833.

<sup>28</sup> E.g. in the ICTR, the prosecution noted: 'At this point we have a representative of WVSS, Witness and Victim Support Services, who is – who has indicated that it is not appropriate for witnesses to continue under questioning for extended periods of time without a break, especially when we have a witness who has given evidence of the nature that she has given [on rape], and who has been under extensive cross-

Presiding Judge permitted an individual from the Witness and Victims Support Section to sit at the Registry Bench (near the victim) to support the victim when she was feeling fragile or vulnerable.<sup>29</sup> In that same case, the Presiding Judge permitted the support person to come closer to the witness, so as to provide support through presence.<sup>30</sup>

Another method used by both tribunals was to permit witnesses who felt unable to say what exactly had happened (e.g. to verbalize the act of rape), or who had committed the rape, to write down the words. Sometimes the written words were read into court by someone else, and sometimes not. For example, in one case at the SCSL, a protected witness wrote down, rather than saying, the name of the rebel who committed sexual violence against her, the name of the rebel commander to whom she was handed over and the name of a captain with whom she stayed because saying the names in open session might identify her to the public.<sup>31</sup> This struck a good balance between public trial and witness protection – keeping the session open, but still protecting her identity. In the ICTR’s *Gacumbitsi* trial, witness TAP was asked ‘when you say “They raped me”, can you tell us what they did to you?’<sup>32</sup> She replied ‘It is very painful, it is hard for me to say, so with your permission, perhaps I would write it down.’<sup>33</sup> This was permitted, and her note was read into the record: ‘They raped me, sticking their penises into my vagina.’<sup>34</sup> She did the same again when testifying to another rape.<sup>35</sup> She explained that she could not verbalize this because ‘[t]hings of that nature are not spoken of. Our parents never taught us to speak like that; it was a taboo’.<sup>36</sup>

It should be noted that, despite these procedures, some victims and witnesses did not feel supported in the courtroom. This often had to do with the manner and length of defence cross-examination, which was not always adequately controlled, particularly in the ICTR.<sup>37</sup> Nowrojee and de Brower discuss examples of overly aggressive, insensitive,

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examination today’, *Prosecutor v. Gacumbitsi*, Transcript of 6 August 2003, *supra* note 10, at page 63 at lines 26-30. The ICTR has noted that ‘There should be a continuous needs assessment by a qualified counselor while the witness is testifying. Witnesses should be offered the opportunity to speak with a trained counselor or witness support person before and after their testimony’: ICTR Best Practices Manual, *supra* note 23, at para. 211.

<sup>29</sup> *Prosecutor v. Taylor*, Transcript for 6 May 2008, Case No. SCSL-03-01-T, T.Ch.II, 6 May 2008, at page 9126.

<sup>30</sup> *Ibid.*, at page 9156. However, when the witness – directly and through the support person - requested to stop her testimony due to a bad headache and fatigue, the Presiding Judge appeared frustrated, responding: ‘you realise that we are now going to waste some time when you could have used the lunch break to tell them to get you a Panadol?’, *ibid.*, at pages 9211-9212.

<sup>31</sup> *Prosecutor v. Brima, Kamara and Kanu*, Transcript of 9 March 2005, Case No. SCSL-04-16-T, T.Ch.II, 9 March 2005, at pages 41, 43, and 59. The prosecution explained at page 41: ‘the fear is that her identifying names of rebels with whom she was associated with during that period might indeed reveal her identity, specifically because of the nature of her evidence: she is a victim of sexual violence.’

<sup>32</sup> *Prosecutor v. Gacumbitsi*, Transcript of 6 August 2003, *supra* note 10, at page 10 at line 5.

<sup>33</sup> *Ibid.*, at page 10, line 6.

<sup>34</sup> *Ibid.*, at page 10, line 23.

<sup>35</sup> *Ibid.*, at page 24 at lines 25-26 and page 25 at line 3.

<sup>36</sup> *Ibid.*, at page 11 at lines 12-13.

<sup>37</sup> Nowrojee, *supra* note 2, at 23-24.

irrelevant and unduly repetitive questioning of ICTR witnesses providing evidence of sexual violence.<sup>38</sup>

### 3. Evidentiary Approaches to Reduce Retraumatization of Victims of Sexual and Gender-Based Violence

Prosecutors in both tribunals attempted to limit secondary victimization of victims of sexual and gender-based violence in a number of ways, including seeking admission of written statements through Rule 92*bis* of both tribunals' Rules of Procedure and Evidence, seeking judicial notice of facts surrounding sexual and gender-based violence, tendering evidence from sources other than direct victims, and applying Rule 96 on evidence in cases of sexual assault.

The ICTR's Rule 92*bis* covers proof of facts other than by oral evidence, and indicates that 'a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.'<sup>39</sup> This may include transcripts of evidence given by the witness in other proceedings before the tribunal, as long as the evidence 'goes to proof of a matter other than the acts and conduct of the accused'.<sup>40</sup> If a written statement is admitted under Rule 92*bis*, it is subject to the general requirement of relevance and probative value applicable to all types of evidence under Rule 89(C).<sup>41</sup> Note that the SCSL's Rule 92*bis* is phrased somewhat differently: 'a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused.'<sup>42</sup> The wording of 92*bis* was altered early in the tribunal's existence to focus on information and to make clear that proof of reliability is not a condition of admission.<sup>43</sup>

Both the ICTR and SCSL have made use of Rule 92*bis* to reduce the oral testimony required by victims of sexual and gender-based violence. Rule 92*bis* was used effectively in the ICTR's *Karemera et al.* case. The Prosecutor initially filed a motion seeking admission into evidence of evidence of 63 purported rape witnesses and the admission into evidence of the transcripts of eight purported rape witnesses in previous ICTR proceedings in lieu of them testifying orally.<sup>44</sup> The Trial Chamber found that, while none

<sup>38</sup> *Ibid.*, at 23-24; de Brower, *supra* note 2, at 272-274.

<sup>39</sup> The Rule contains a list of factors in favour of and against admitting such evidence: ICTR RPE, *supra* note 17, at Rule 92*bis*(A).

<sup>40</sup> *Ibid.*, at Rule 92*bis*(D).

<sup>41</sup> *Prosecutor v. Karemera, Ngirumpatse and Nzizorera*, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92*bis* of the Rules and Order for Reduction of Prosecution Witness List, Case No. ICTR-98-44-T, T.Ch.III, 11 December 2006, at para. 8 [Hereinafter *Karemera et al.*, Decision of 11 December 2006].

<sup>42</sup> SCSL RPE, *supra* note 17, at Rule 92*bis*(A).

<sup>43</sup> *Prosecutor v. Norman, Kondewa and Fofana*, Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', Case No. SCSL-04-14-AR73, Ap.Ch., 16 May 2005, at para. 26. The tribunal noted that the situation is different in Sierra Leone, in which a Truth and Reconciliation Commission was operating.

<sup>44</sup> *Karemera et al.*, Decision of 11 December 2006, *supra* note 41, at para. 3.

of the sexual violence was alleged to have been physically perpetrated by any of the accused in this case, the evidence was being put forward to show that the rapes were committed on a widespread and systematic basis by subordinates or co-perpetrators for whom the accused were responsible and/or with whom they were acting in a joint criminal enterprise.<sup>45</sup> The Trial Chamber found that the ‘allegations are so pivotal to the Prosecution’s case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.’<sup>46</sup> In a very different subsequent decision, the Prosecution returned with a request for the admission of written statements from 16 sexual violence witnesses,<sup>47</sup> which was accepted and cross-examination was deemed unnecessary.<sup>48</sup> In the SCSL’s *Taylor* case, several sexual violence victims and witnesses had transcripts of their testimonies from previous SCSL trials admitted under *92bis*, though they were subjected to cross-examination.<sup>49</sup>

In the *Karemera et al.* case, the Trial Chamber also took judicial notice of adjudicated facts concerning rapes committed in various prefectures pursuant to Rule 94 of the ICTR’s Rules of Procedure and Evidence.<sup>50</sup> This alternative method of bringing evidence of sexual violence proved to be successful: when it was combined with *viva voce* evidence and written statements accepted under Rule *92bis*, the Trial Chamber found evidence of the occurrence of rapes in each location.<sup>51</sup>

Another way in which prosecutors at both tribunals aimed to reduce traumatization of sexual violence victims was to introduce evidence of sexual violence through other means such as contemporaneous written reports prepared by the United Nations officials or nongovernmental organizations.<sup>52</sup> Prosecutors at both tribunals also elicited evidence of sexual violence through individuals who had witnessed, rather than directly experienced, sexual violence.<sup>53</sup>

Finally, this paper will consider the legacy of Rule 96 of the ICTR’s Rules of Procedure and Evidence. Rule 96 stipulates that:

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<sup>45</sup> *Ibid.*, at paras. 19-20.

<sup>46</sup> *Ibid.*, at para 20.

<sup>47</sup> *Prosecutor v. Karemera, Ngirumpatse and Nzizorera*, Interim Order to the Prosecutor to File the Written Statements of its Proposed 16 Sexual Violence Witnesses, Case No. ICTR-98-44-T, T.Ch.III, 15 August 2007.

<sup>48</sup> *Ibid.*, at paras. 24-29.

<sup>49</sup> E.g. witnesses TFI-023 and TFI-029 in *Prosecutor v. Taylor*, Judgment, *supra* note 9, at paras. 1008-1015, 1165-1169, and 1180-1187.

<sup>50</sup> *Karemera et al.*, Decision of 11 December 2006, *supra* note 41, at para. 27.

<sup>51</sup> Bianchi, *supra* note 2, at 138; *Prosecutor v. Karemera, Ngirumpatse and Nzizorera*, Judgment and Sentence, Case No. ICTR-98-44-T, T.Ch.III, 2 February 2012, at paras. 1338-1424 [hereinafter *Karemera et al.*, Judgment].

<sup>52</sup> E.g. *Karemera et al.*, Judgment, *supra* note 51, at para. 1414 (report by UN Special Rapporteur Degni-Ségué); *Prosecutor v. Taylor*, Judgment, *supra* note 9, at paras. 6880-6886.

<sup>53</sup> E.g. *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Judgment and Sentence, Case No. ICTR-98-41-T, T.Ch.I, 18 December 2008, at para. 1908; and *Prosecutor Sesay, Kallon and Gbao*, Judgment, *supra* note 12, at para. 1347. Bianchi recommends this method of bolstering direct victim evidence of sexual and gender-based violence through evidence from observers and other eyewitnesses, as well as expert witnesses and medical professionals: Bianchi, *supra* note 2, at 138-139.

In cases of sexual assault:

- (i) Notwithstanding Rule 90(C),<sup>54</sup> no corroboration of the victim's testimony shall be required;
- (ii) Consent shall not be allowed as a defence if the victim:
  1. (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
  2. (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.
- (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
- (iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence.

The ICTR's Rule 96, which is reproduced in the Mechanism for International Criminal Tribunals' Rule 118,<sup>55</sup> covers three distinct procedural and evidentiary issues. First, no corroboration is required for testimony by victims of sexual violence. This is not a rule on admissibility or exclusion: rather, it concerns reliability and assessment of evidence.<sup>56</sup> In practice, the ICTR has noted, echoing the International Criminal Tribunal for the Former Yugoslavia,<sup>57</sup> that this rule 'accords to the testimony of a victim of sexual assault the same basis of evaluation of reliability as the testimony of victims of other crimes',<sup>58</sup> 'something which has long been denied' at the domestic level.<sup>59</sup> While this subrule simply 'treats sexual assault victim testimony on par with that of any other witness',<sup>60</sup> it was deemed necessary due to the negative experiences of rape victims under domestic law in many jurisdictions, in which they often face a higher *de facto* (and sometimes *de jure*) burden of proof than is required for other crimes due to false and discriminatory cultural assumptions about the unreliability of female testimony regarding rape.<sup>61</sup> This

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<sup>54</sup> ICTR RPE, *supra* note 17, at Rule 90(C), which relates to testimony of children.

<sup>55</sup> Rules of Procedure and Evidence of the Mechanism for International Criminal Tribunals, UN Doc. MICT/1 (8 June 2012), at Rule 118.

<sup>56</sup> P. Viseur Sellers, 'Rule 89(C) and (D): At Odds or Overlapping with Rule 96 and Rule 95?' in R. May et al. (eds.), *Essays on ICTR Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (2001), 275 at 280.

<sup>57</sup> *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-T, T.Ch.I, 7 May 1997, at paras 535-539.

<sup>58</sup> *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998, at para. 134; *Prosecutor v. Musema*, Judgment and Sentence, Case No. ICTR-96-13-T, T.Ch.I, 27 January 2000, at para. 45; *Prosecutor v. Rutaganda*, Judgment and Sentence, Case No. ICTR-96-3-T, T.Ch.I, 6 December 1999, at para 17.

<sup>59</sup> *Prosecutor v. Tadić*, Judgment, *supra* note 57, at para. 536. McGlynn comments on the earlier UK practice in which judges warned juries against convicting on the 'uncorroborated evidence of a woman': C. McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?' in C. McGlynn and V. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (2010), 139 at 140.

<sup>60</sup> Sellers, *supra* note 56, at 281.

<sup>61</sup> McGlynn, *supra* note 59, at 143-150. This stems from rape myths, such as those described in F. Shen, 'How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform', 2011 22(1) *Columbia Journal of Gender and Law*, 1 at 9-27.

rule makes it clear that the ICTR's judges may 'rule on the basis of a single testimony provided such testimony is, in [the Chamber's] opinion, relevant and credible.'<sup>62</sup>

Second, Rule 96 imposes limitations as to when consent may and may not be allowed as a defence by the accused.<sup>63</sup> Consent may not be raised as a defence if the victim has been subjected to, threatened with, or had reason to fear violence, duress, detention or psychological oppression.<sup>64</sup> The victim's situational context – such as being held in captivity – disallows the consent defence.<sup>65</sup> This is because, in 'coercive circumstances, even an outward appearance of consent by a victim to engage in sexual conduct may, in reality, be a response given in exchange for survival or amelioration of the coercive circumstances for the benefit of oneself or another': this is a survival strategy and not true consent.<sup>66</sup> Additionally, consent may also not be raised as a defence when the victim reasonably believed that, if s/he did not submit, another person might be subjected to violence, threatened or put in fear.<sup>67</sup> If the accused does raise a defence of consent, the tribunal is obliged to hold an *in camera* hearing to evaluate whether the evidence of the victim's consent is relevant and credible.<sup>68</sup> This is a higher admissibility standard than is required under the general rule, which states: '[a] Chamber may admit any relevant evidence which it deems to have probative value'.<sup>69</sup> This subrule was considered to be essential to correct two types of gender-insensitive practices in jurisdictions around the world: first, some jurisdictions unduly privilege defences of consent by the accused, thereby imposing a higher standard on evidence of rape.<sup>70</sup> Second, judges in some jurisdictions require proof that the victim resisted rape – a requirement which ignores the realities of rape, in which many victims do not resist in order to survive as they have been subjected to or threatened with violence, duress, detention or psychological oppression.<sup>71</sup>

Third, Rule 96 indicates that information on prior sexual conduct shall never be admissible as evidence or as part of a defence.<sup>72</sup> This portion of Rule 96 reflects the

<sup>62</sup> *Prosecutor v. Akayesu*, Judgment, *supra* note 58, at para. 135. See also *Prosecutor v. Rutaganda*, Judgment and Sentence, *supra* note 58, at para. 18.

<sup>63</sup> The International Criminal Court has a similar rule with a screening procedure as to when an accused can elicit evidence of victim consent, discussed by D. Piragoff, 'Evidence in Cases of Sexual Violence', in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), 369 at 384-91.

<sup>64</sup> ICTR RPE, *supra* note 17, at Rule 96(ii)(1)(a).

<sup>65</sup> Sellers, *supra* note 56, at 281; *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T. T.Ch.I, 10 December 1998, at para 271.

<sup>66</sup> Piragoff, *supra* note 63, at 370.

<sup>67</sup> ICTR RPE, *supra* note 17, at Rule 96(ii)(1)(b).

<sup>68</sup> *Ibid.*, at Rule 96(iii). Sellers point out that the focus is in evaluating the relevance and credibility of the victim's consent prior to its admission: Sellers, *supra* note 56, at 281.

<sup>69</sup> The general rule is ICTR RPE, *supra* note 17, Rule 89(C); Sellers, *supra* note 56, at 287, makes this admissibility point.

<sup>70</sup> E.g., McGlynn, *supra* note 59, at 143-150.

<sup>71</sup> See e.g. the discussion of how, in practice in Croatia, resistance is often required as evidence of force: I. Radačić and K. Turković, 'Rethinking Croatian Rape Laws: Force, Consent and the "Contribution of the Victim"', in C. McGlynn and V. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (2010), 169 at 173-174.

<sup>72</sup> The ICTY Rule omits the words 'or as a defence', but these words may simply be superfluous: P. Murphy and L. Baddour, 'General Exclusion of Evidence of Sexual Behaviour of Complainants', in K.A.A.

influence of domestic rape shield provisions – usually more detailed rules restricting the introduction of evidence of the victim’s past sexual behaviour or reputation<sup>73</sup> which are found in various domestic jurisdictions.<sup>74</sup> The ICTY explained the rationale behind the prohibition:

... the prime objective of this provision is to adequately protect the victims from harassment, embarrassment and humiliation by the presentation of evidence which relates to past sexual conduct ... the value, if any, of information about the prior sexual conduct of a witness in the context of trials of this nature was nullified by the potential danger of further causing distress and emotional damage to the witnesses.<sup>75</sup>

Apart from the focus on protecting the victim from retraumatization, the prohibition on this form of evidence also aims to ensure that inaccurate and discriminatory rape myths – in which lawyers, judges and, at the domestic level, juries assume that past sexual conduct must indicate consent to the sexual act in question, or ‘prove’ mistaken belief by the accused in the victim’s consent<sup>76</sup> - do not inform the decision-making. Piragoff refers to this as ‘obfuscation created by stereotypes’, as well as bias and prejudice disingenuously masked as relevance.<sup>77</sup> There can be no waiver of this subrule’s imperative application.<sup>78</sup> While this subrule may result, at least in theory, in the exclusion of relevant evidence with probative value, Sellers notes that this was an explicit policy choice.<sup>79</sup>

Defence counsel in early ICTR cases attempted to challenge Rule 96. For example, defence counsel in *Musema* argued that corroboration is required where a witness is testifying to the occurrence of sexual assault, but this was rejected by the tribunal.<sup>80</sup> Rule 96 was also questioned by the defence in *Rutaganda*.<sup>81</sup> Overall, however, the Rule was not often invoked. In one case at the ICTY, however, the Rule was ‘skillfully circumvented’<sup>82</sup> by the accused, Kunarac, who asserted a mistake of fact and argued that

Khan, C. Buisman and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice* (2010), 138 at 139.

<sup>73</sup> *Ibid.*, at 138. McGlynn describes how evidence of women’s behavior, dress, mental health and sexual history is rarely relevant to the issues at trial, is ‘hugely distressing for complainants’ and impacts negatively on their ability to give their best evidence. Rules restricting the use of sexual history were meant to address this, but did not always achieve their goals due to lack of cohesive implementation: McGlynn, *supra* note 59, at 140.

<sup>74</sup> Murphy and Baddour, *supra* note 72, at 138-139.

<sup>75</sup> *Prosecutor v. Mucić, Delić, Landžo and Delalić*, Decision on the Prosecution’s Motion for the Redaction of the Public Record, Case No. IT-96-21-T, 5 June 1997, at para. 48.

<sup>76</sup> See discussion of these rape myths in the Canadian context at L. Gotell, ‘Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms’, in C. McGlynn and V. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (2010), 209 at 211-212.

<sup>77</sup> Piragoff, *supra* note 63, at 386.

<sup>78</sup> *Prosecutor v. Mucić, Delić, Landžo and Delalić*, Decision on the Prosecution’s Motion for the Redaction of the Public Record, *supra* note 75, at para 58.

<sup>79</sup> Sellers, *supra* note 56, at 289.

<sup>80</sup> *Prosecutor v. Musema*, Judgment and Sentence, *supra* note 58, at paras. 44-45.

<sup>81</sup> *Prosecutor v. Rutaganda*, Judgment and Sentence, *supra* note 58, at para. 18.

<sup>82</sup> de Brouwer, *supra* note 2, at 267.

he believed that witness DB had consented to sexual intercourse because of her actions.<sup>83</sup> Rule 96 was not explicitly asserted or applied;<sup>84</sup> rather, the Trial Chamber rejected Kunarac's claim, given the 'general context of the existing war-time situation', the 'specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foca region during that time' and the threat to the witness from another person close to Kunarac.<sup>85</sup>

The SCSL's Rule 96 was originally the same as the ICTR's, but was changed in 2003.<sup>86</sup> Rather than stating that consent shall not be permitted as a defence in certain circumstances, the Rule indicates when consent cannot be inferred:

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (i) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (ii) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (iii) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (iv) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.<sup>87</sup>

The SCSL judges were influenced by the International Criminal Court's (ICC's) Rule 70, which uses the same language. The states negotiating the ICC's Rules of Procedure and Evidence felt that it was a misnomer to refer to consent as a defence.<sup>88</sup> Rather, '[d]ue to the existence or exploitation of coercive circumstances, consent is vitiated or negated'.<sup>89</sup> This is why the Rule explains when consent cannot be inferred, as opposed to when consent may not be a defence. Note, however, that the SCSL judges did not reproduce the subsequent ICC Rule 71, which mirrors the final part of the ICTR's Rule 96 and explicitly states: 'a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness'. It is not clear why the SCSL did not adopt such a Rule or sub-Rule when it revised Rule 96. The SCSL's approach was therefore simultaneously

<sup>83</sup> *Prosecutor v. Kunarac, Kovać and Vuković*, Judgment, IT-96-23-T & It-96-23/1-T, 22 February 2001, at para. 646.

<sup>84</sup> Rule 96 was discussed in *ibid.*, at paras. 461-464 and 566, but not specifically discussed in relation to Kunarac's claim regarding witness DB.

<sup>85</sup> *Ibid.*, at paras. 645-646.

<sup>86</sup> This is perhaps due to the ICTY's statement in *Kunarac* that the reference in the Rule to 'defence' is 'not entirely consistent with traditional legal understandings of the concept of consent in rape': *ibid.*, at para. 463 and reasoning at 464.

<sup>87</sup> SCSL RPE, *supra* note 17, at Rule 96.

<sup>88</sup> Piragoff, *supra* note 63, at 370.

<sup>89</sup> *Ibid.*, at 370-371.

wider than that of the ICTR – in including subsequent sexual conduct – and narrower – in not prohibiting evidence of prior sexual conduct.

On the one hand, the inclusion of subsequent sexual conduct in the SCSL's version of Rule 96 was particularly helpful in the case of Sierra Leone, in which a number of girls and women forced to become so-called 'bush wives' remained with their 'husbands' out of lack of alternatives due to stigmatization.<sup>90</sup> The rule prevented a negative inference based on the victim's continued sexual relations with her captor – which was directly recognized by Justice Doherty in her dissent in the *Prosecutor v. Brima, Kamara and Kanu* trial judgment.<sup>91</sup> On the other hand, the SCSL rule lacks a prohibition and opened up the possibility of victims being questioned about prior or subsequent sexual conduct (even if it does not affect credibility), which is contrary to the protective anti-discriminatory intent that informs the ICTR rule. However, as in the ICTR, the Rule itself seemed to be uncontroversial, and applied with implicit understanding, rather than through explicit invocation.

The ICTR's legacy on evidentiary approaches to reduce retraumatization of victims of sexual and gender-based violence can certainly be seen in the subsequent practice of the SCSL, particularly in the use of written statements through Rule 92*bis* and use of evidence from sources other than direct victims.

#### 4. Conclusion

This paper has outlined a number of procedural protective and supportive rules and actions that have assisted victims of sexual and gender-based violence in feeling secure enough to provide their testimony to the ICTR and SCSL. However, there have been some missteps and challenges in both tribunals. For example, victims of this type of violence have not always felt supported in the courtroom, both in the ICTR and SCSL.<sup>92</sup> In the ICTR, in multi-accused cases, some victims felt harassed by unnecessarily repetitive and aggressive cross-examination about the details of the sexual violence they suffered.<sup>93</sup> In the SCSL, the rules discussed above did not prevent a majority of trial judges in one case from adopting inappropriate and outdated reasoning that evidence of gender-based crimes is much more likely to impugn the reputation of the accused than any other kind of evidence.<sup>94</sup>

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<sup>90</sup> *Prosecutor v. Brima, Kamara and Kanu*, Judgment, Case No. SCSL-04-16-T, T.Ch.II, 20 June 2007, at Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 ('Forced Marriages'), at para. 48.

<sup>91</sup> *Ibid.*, at para. 45.

<sup>92</sup> See Nowrojee, *supra* note 2, at 21 and 23-24; Kelsall, *supra* note 10, at 373-374.

<sup>93</sup> Nowrojee, *supra* note 2, at 23; de Brouwer, *supra* note 2, at 272-274.

<sup>94</sup> *Prosecutor v. Norman, Fofana and Kondewa*, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, Case No. SCSL-04-14-PT, 24 May 2005, at paras. 64 and 78. For analysis of this and related decisions in this case, see V. Oosterveld, 'The Special Court for Sierra Leone, Child Soldiers, and Forced Marriage: Providing Clarity or Confusion?', 2007 Canadian Yearbook of International Law 131 at 159-168.

That said, there are many positive aspects of ICTR procedural legacy, like the use of written statements, prior transcripts and judicial notice in the *Karemera et al.* case to reduce the need for exposing all rape witnesses to examination and cross-examination. These procedural steps provided helpful precedent to the SCSL, which was originally reliant on the ICTR's experiences to provide guidance. Thus the legacy of the ICTR on procedure in cases involving sexual and gender-based violence extends outwards beyond itself, and will continue to have resonance in the future.