

‘When We Wanted to Talk About Rape’: Silencing Sexual Violence at the Special Court for Sierra Leone

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Abstract¹

This article explores the legal and psychological ramifications arising from the exclusion of evidence of sexual violence during the Civil Defence Forces (CDF) case at the Special Court for Sierra Leone. Using empirical findings from post-trial interviews conducted with the ten victim-witnesses who were originally to testify, we juxtapose what the Special Court allowed the women to say, and what the women themselves wanted to say. From a legal perspective, we then critique the Trial Chamber’s reasons for excluding the evidence and question the legal bases upon which the women were silenced, arguing that wider and wider circles of the women’s experience were removed from the Court’s records despite there being ample authority at an international level to support inclusion. We further look at the gendered biases in international criminal law and how expedience and efficiency usurped the significance of prosecuting crimes of sexual violence in this instance. From a psychological perspective, we discuss the consequences that the act of silencing had for the witnesses, and argue that a more emotionally sensitive understanding of the Court’s notion of ‘protection’ is required.

Introduction

The witnesses ... testify that some women were brought to Base Zero and they were forced to have sex and they were raped and they were held in sexual slavery and subjected to systematic sexual violence with Kamajors like ... King Kondewa himself. This Court will hear [about] ... raping ... committed by this dreadful death squad.

Prosecutor’s Opening Statement, CDF Trial, 3 June 2004²

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² The ‘CDF Trial’ or ‘CDF Case’ are the colloquial names given to the case of *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T). These shorthand names have been used by the authors solely for ease of reference throughout this article. Hereafter, unless otherwise specified, all references to documents including transcripts, decisions and motions, are to CDF trial documents.

If the Court had allowed me to talk, I would have explained to the whole world about how I was captured and raped by the Kamajors and about how they forced me into marriage ... We were many, and we were all raped by these Kamajors, all of us, with force ... When they attacked Bonthe, I fled to one part of the bush, and my daughter went to a different part of the bush ... After two days, I heard that she had been taken to Kondewa, they said that she was going to be his wife, because she was beautiful, and she was killed while trying to escape.

Victim-Witness for CDF trial³

In his opening statement in the trial of the Civil Defence Forces (CDF), a pro-government militia that fought during Sierra Leone's 11-year civil war, former Prosecutor David Crane of the Special Court for Sierra Leone confidently asserted that victims of sexual violence would be testifying in the CDF case. Yet the prosecutor seemed to be proceeding on an assumption not shared by the majority judges: Trial Chamber I had already determined in the pre-trial phase that counts of sexual violence were not to be included in the indictment.⁴ Despite the prosecution's endeavours to elicit the evidence under other counts, a year later in May 2005, the Chamber determined by a two-to-one majority that all evidence of sexual violence should be rendered inadmissible.⁵ Although seven of the women took the stand to testify about other acts of violence, all the women were prohibited from speaking about the principal manner in which they were victimized during the Sierra Leonean conflict.⁶ As a result, evidence of sexual violence was completely precluded from consideration in the recently issued judgment in the CDF case.⁷

In this article, we explore the ramifications of the majority judges' decision to exclude sexual violence evidence and, as a result, to silence testimony regarding sexual violence. More generally, we focus on the role and treatment of victim-witnesses in war crimes trials through a close reading of the proceedings relating to these victim-witnesses. The empirical research upon which this article is based has generated important new insights for a debate that is likely to gather momentum as the International Criminal Court (ICC) proceeds to conduct its first trial.

We acknowledge from the outset that our approach is victim-centred, in that we endeavour to view the events that occurred from the perspective of the victim-

³ Follow-up interview with TF2-128, conducted by the Witness and Victims Section's psychosocial team under the direction of Shanee Stepakoff, April 2007. Hereafter, all interviews refer to follow-up interviews conducted under Stepakoff's supervision (except those identified as Sander); all interview notes and transcripts are on file with the authors.

⁴ 'Decision of Prosecution Request for Leave to Amend Indictment,' 20 May 2004 [hereafter 'Leave to Amend Decision']. The relevant indictment is 'Amended and Consolidated Indictment,' 5 February 2004 [hereafter 'Indictment'].

⁵ 'Decision on the Prosecution's Motion for a Ruling on the Admissibility of Evidence,' 24 May 2005 (issued on 23 June 2005) [hereafter 'Admissibility Decision'].

⁶ The witnesses in question were: TF2-108, TF2-109, TF2-128, TF2-129, TF2-133, TF2-134, TF2-135, TF2-187, TF2-188 and TF2-189. As a result of the Chamber's decision TF2-128, TF2-129 and TF2-135 did not testify.

⁷ *Prosecutor v. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T), Judgement, 2 August 2007 [hereafter 'Norman et al.'].

witnesses. This is largely due to the fact that a significant factor taken into account when writing this article were requests by the women, in interviews conducted nearly two years after they testified or had been due to testify, to have their stories shared in a public forum. These requests were made amidst unprompted comments about the negative impact the silencing had had upon them. As one woman told the interviewers:

I feel so bad, because they raped me very brutally, and that was my main reason for going to court to testify. As soon as I got there, my lawyer told me that I should not talk about that anymore. And up until now, that still causes me pain. It makes me feel bad.⁸

Therefore, we have endeavoured as much as possible to give space to the stories that these women had wished to tell the Special Court.⁹

Due to the nature of criminal trials, the treatment of witnesses must, to some extent, be linked to the treatment of the evidence being presented.¹⁰ Hence, as well as looking at the way the Chamber treated the victim-witnesses, it will be important also to establish *why* the sexual violence testimony was rendered inadmissible in this particular case before the Special Court. First, we trace the history of its exclusion back to the early decision, during the pre-trial phase, to deny the prosecution leave to amend the indictment to include counts of sexual violence. We also situate the choice not to include the evidence in the context of wider debates surrounding the significance of the Court as a transitional justice mechanism within Sierra Leone, and one which (it was anticipated) would place particular importance on gender crimes.

Next, we turn to look at the *impact* precluding the evidence of sexual violence had on the trial proceedings. This inquiry is both legal and psychological: we look at the impact of the Chamber's actions on the evidence that was admitted at trial and the judgement, as well as on the women themselves. We argue that the women's silencing took place largely due to the absence of clear guidelines in the Court's Rules of Procedure and Evidence (hereafter, 'the Rules') surrounding how to treat victim-witnesses when part of their evidence has been rendered inadmissible.¹¹ This lacuna seems reflective of a wider absence of measures necessary to ensure that sensitivities relating to sexual violence are taken into account in the Chamber's deliberations. This is despite the fact that the Special Court's Statute heavily emphasizes the need to investigate and prosecute crimes in this category.¹² Instead, responsibility for the care of victim-witnesses has been relegated almost

⁸ Interview with TF2-188, *supra* n 3.

⁹ In giving space to these stories, we want to stress that we are in no way attempting to cast aspersions on the guilt or innocence of the accused persons: we remind the reader that these women's stories have never been weighed or tested in a court of law.

¹⁰ See, Robert Cryer, 'Witness Evidence Before International Criminal Tribunals,' *The Law and Practice of International Courts and Tribunals* 2 (2003): 411–439.

¹¹ Rules of Procedure and Evidence (last amended 14 May 2007).

¹² Article 15(4) of the Statute places an onus on the Prosecutor to employ staff experienced in investigating and prosecuting gender-related crimes. *Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone*, 16 January 2002 [hereafter 'Statute'].

entirely to the Witness and Victims Section. The Rules, as they pertain to the treatment of witnesses by the Chamber and during the trial proceedings, focus on balancing the protection of witnesses against the rights of the accused. 'Protection' has predominantly been interpreted by the judges in terms of privacy, physical safety and security, rather than protection from emotional or psychological harm.¹³ Although some scholars and practitioners may consider this latter kind of protection inappropriate during adversarial proceedings, we argue that our empirical findings suggest further research on the issue is imperative. Furthermore, we argue that the ICC's Rules should be seen as indicative of an international standard for war crimes trials.¹⁴

At the Special Court, the judges were given a wide ambit of discretionary power to conduct the proceedings 'in the interests of justice,' a phrase which is open to manipulation. In this instance, the majority judges themselves described the phrase as having a 'rubber-band' quality, subject to 'some elastic device which, in the exercise of judicial discretion by the Court, can either be distended or constricted,' depending on the circumstances.¹⁵ To some extent, though not intentionally, this enabled the individual victim-witnesses of sexual violence to be construed as passive and disempowered, reinforcing negative connotations associated with their victimhood. We question what value was derived (and for whom) by allowing them to give testimony on *other* counts, while ignoring the adverse impact this could have when the women were unable to render a coherent narrative account of their experiences.

While we accept that an international criminal trial is ultimately a forum through which the accused and his/her rights must be placed at the centre of proceedings, we argue for a more nuanced approach to the treatment of victim-witnesses than is currently afforded by the language of 'protection' under the Rules. In so doing, we aim to incorporate a feminist voice into war crimes trials that stresses the need to focus on treating victim-witnesses with emotional sensitivity and compassion, rather than as mere instruments in the trial process.¹⁶ As has been noted by Doak:

Since the very *raison d'être* of such institutions is to offer remedies and redress to the victims of violations of international humanitarian law, it would seem *somewhat absurd* if the procedural and evidential rules secured a fair trial for the accused without affording *similar* protections for alleged victims ...¹⁷

¹³ See in particular, Rule 75 of the Rules. Rule 34 does strongly emphasize the need for psychosocial counseling and other supportive services for witnesses. However, the treatment of witnesses by the Chamber and during trial proceedings is not addressed in this Rule.

¹⁴ See in particular, Rule 16(d) of the ICC's Rules (ICC-ASP/1/3/*Rules of Procedure and Evidence*, as adopted 9 September 2002).

¹⁵ 'Leave to Amend Decision,' supra n 4 at para 71.

¹⁶ This position is largely supported (albeit with qualifications, from differing perspectives and often drawing very different conclusions) by a number of feminist scholars, who are too numerous to name here. See however, Doris Buss and Ambreema Manji, ed., *International Law: Modern Feminist Approaches* (Oregon: Hart Publishing, 2005).

¹⁷ Jonathan Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals,' *Legal Studies* 23(1) (2003): 8 [emphasis added].

Finally, we make some brief observations regarding the longer-term psychological impact that silencing had upon these particular victim-witnesses. We do so, relying on findings from interviews conducted with the ten women earlier this year. In sharing their stories throughout this article we hope, in a very small but concrete way, to begin to rectify the psychological and social harm that ensued from the preclusion of their testimony during the Special Court's proceedings.

Justice Delayed or Justice Denied? The Choice of Expedience over Including Sexual Violence Counts in the CDF Indictments

The Special Court for Sierra Leone, which was established by an agreement between the UN and the Government of Sierra Leone to prosecute those bearing 'the greatest responsibility' for atrocities committed during the Sierra Leonean civil war, is generally perceived to be a success story.¹⁸ At least part of this success story has been founded on its physical proximity to the victims (being housed in the country where the conflict occurred) and its ability to deliver justice that is at once expeditious and directly answerable and responsive to local needs.

General praise for the kind of justice that the Court can deliver has included praise for its prosecution of crimes of sexual violence. Article 2(g) of the Statute clearly extended the Court's mandate in this area far beyond that of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTs), by explicitly acknowledging the prosecution of 'rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence,' hence increasing the recognition of all forms of crimes of sexual violence. The prosecution's efforts to live up to this mandate have similarly been seen positively. As was noted by Human Rights Watch:

The Special Court appears to be taking its mandate on sexual violence seriously ... Investigating and prosecuting crimes of sexual violence have been an integral part of the investigative and prosecutorial strategy ... The Court has on staff two full-time gender crimes investigators and has conducted gender sensitivity training for all members of its investigations team.¹⁹

Similar praise has been given by women's human rights groups for the Court's early efforts in this regard.²⁰

Sexual Violence in the CDF Case

Despite praise for the prosecution's strategy regarding charging and investigating crimes of sexual violence, such counts were not included in the indictment faced

¹⁸ Statute, *supra* n 12, art 1(1).

¹⁹ Human Rights Watch, *In War as in Peace: Sexual Violence and Women's Status* (World Report 2004), 325.

²⁰ It will be interesting to see whether this reaction is sustained, in light of both the judgment in *Norman et al.* and the judgment issued by Trial Chamber II in the case against members of the Armed Forces Revolutionary Council in June 2007. In the latter, the accused were not convicted on

by the three alleged senior leaders of the CDF. A pro-government militia group that defended the territory of Sierra Leone against insurgent rebel forces, the CDF primarily comprised traditional hunters known as the Kamajors, who predominantly resided in the southern and eastern parts of Sierra Leone. The headquarters of the CDF are said to have been at 'Base Zero' in Talia Yawbecko, a town and chiefdom in the Bonthe District.²¹ The three accused – Chief Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa – stood trial in joint proceedings, which concluded on 30 November 2006. The Chamber issued its judgment in the case on 2 August 2007 and its sentencing judgment on 9 October 2007.

The prosecution tried to obtain leave to amend the indictment four months before the start of trial proceedings to include counts of rape, sexual slavery, enforced prostitution and forced marriage. Its motion was denied in a majority decision issued at the end of May 2004, just before the trial commenced.²² The prosecution sought leave to appeal the decision, which was also denied.²³

In the majority decision, the prosecution is heavily penalized for submitting its motion to amend in February 2004, despite the availability of evidence of sexual violence as early as June 2003. The majority judges found the arguments of the prosecution regarding why this delay was necessary 'neither credible nor convincing.'²⁴ Yet, according to the Office of the Prosecutor (OTP), initial investigations had not uncovered sufficient evidence to support counts of sexual violence against the CDF. While the OTP had indications of gender-based crimes as early as June and July 2003, it was not until October that solid evidence capable of securing a conviction was obtained.²⁵

In the majority decision, timeliness is emphasized and is seemingly the judges' overriding consideration. They endeavour to balance the right of the accused to be tried without undue delay against the prosecution's obligation to prosecute crimes of sexual violence. In a confusing formulation, the judges determine that the Special Court's time-limited mandate changed the parameters of what could amount to an undue delay, such that it means "a much shorter time frame" that

the counts of sexual violence and sexual enslavement on the grounds that charges included on the indictment against them were pled duplicitously. Instead, all evidence of sexual enslavement was considered under Count 9, as an 'Outrage Upon Personal Dignity,' a violation of the Geneva Conventions. The charge of forced marriage was dismissed (Doherty J. dissenting) on the grounds that no real distinction between forced marriage and sexual enslavement could be made from the evidence. See, *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (SCSL-04-16-T), Judgement, 20 June 2007.

²¹ *Norman et al.*, supra n 7 at para 303.

²² 'Leave to Amend Decision,' supra n 4.

²³ See, 'Majority Decision on Prosecution's Application for Leave to File an Interlocutory Appeal Against the Prosecution's Request for Leave to Amend the Indictment Against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa,' 2 August 2004; and 'Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa,' 2 June 2004 [hereafter 'Prosecution's Submission'].

²⁴ 'Leave to Amend Decision,' supra n 4 at para 57.

²⁵ War Crimes Studies Center, *Silencing Sexual Violence: Recent Developments in the CDF Case at the Special Court* (June 2005).

may be longer than in municipal jurisdictions which are institutional monuments that do not wither away ... like international criminal tribunals.' They assert that the accused should be tried with 'extreme expeditiousness.' When balancing this against the prosecution's obligation to try crimes of sexual violence, they argue that:

The Rules relating to the detection and prosecution of [sexual violence] offences are the same as those governing the other war crimes ... and must not constitute nor give rise to *any exceptions to the general rules* that relate to the respect and protection of the interests of the ... Prosecution and the Accused ... and the overall interests of justice ...²⁶

The absence we identify in the Rules becomes apparent here: a lack of special measures relating to sexual violence offences is identified, and the Chamber is seemingly not guided to give special consideration to the difficulties associated with conducting investigations of this kind. Due to this absence, the majority judges clearly discount a number of significant factors identified in gathering evidence of sexual violence in the CDF case. For example, the fact that CDF members committed gender-based crimes against their own supporters who continue to live in the same communities as the perpetrators was not given adequate attention.²⁷ They seemed to ignore the genuine fear of reprisals victim-witnesses in the CDF case may have had – a fact perhaps even more alarming given that the three accused were considered by some to be national heroes in Sierra Leone upon indictment.²⁸

In a powerful and convincing dissent, Justice Boutet identifies a number of compelling reasons to allow the amendments to include counts of sexual violence. Utilizing the precedents of the ICT's Appeals Chamber, as well as that of national jurisdictions, his Honour determined that: (i) the Prosecutor can only bring a charge against the accused if the evidence procured could amount to a 'reasonable certainty of conviction,' and (ii) the delay to the proceedings must be considered having regard to the nature of counts to be added to the indictment – namely, gender-based crimes.²⁹ With regard to the latter, rather than emphasizing the Court's time-limited mandate, his Honour made extensive use of reports and commentary articulating the challenges associated with obtaining evidence of sexual or gender-based violence, many of which pointed to the prevalent social stigma surrounding the crimes. As noted by Charlotte Lindsey (and quoted by Justice Boutet):

Women may be unable or afraid to report such violations because national institutions have broken down or because doing so may endanger women further. In many

²⁶ 'Leave to Amend Decision,' supra n 4 at para 53 (regarding expeditiousness) and at para 83 (regarding the prosecution of crimes of sexual violence).

²⁷ 'Prosecution's Submission,' supra n 23 at para 15.

²⁸ See, International Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a 'New Model'* (August 2003).

²⁹ Boutet J.'s Dissenting Opinion annexed to 'Admissibility Decision,' supra n 5 at paras 24–26.

cultures 'shame' associated with rape is in a social sense perceived as even worse than the physical act itself ...³⁰

It must be noted, however, that the majority of the Chamber was not alone in the practice of placing expediency and efficiency before the prosecution of crimes of sexual violence. Despite early landmark decisions in the *Akayesu*, *Furundzija* and *Kunarac* cases, women's human rights organizations have noted a general decline in the indictment (in the case of the ICTR) and conviction (in the case of both ICTs) of crimes of sexual violence.³¹ As noted by Binaifer Nowrojee, despite widespread sexual violence in Rwanda directed primarily against Tutsi women, by 2005 the ICTR had handed down 21 judgments with an overwhelming 70 percent of those judgments containing no rape convictions. Even more disturbingly, there have been double the number of acquittals for rape than there were rape convictions during the period she examined. Although Nowrojee largely considers this to be the fault of the OTP, it must be remembered that the landmark decision to include the counts of sexual violence in the *Akayesu* case has been primarily attributed to the discerning judgment of the bench: a lack of judicial sensitivity to the significance of gender crimes is therefore likely to be a significant contributing factor to their continued silencing.³²

Perhaps even more sadly, the silence surrounding the prosecution of wartime rape in the CDF case may only reinforce the stigma associated with prosecuting crimes of sexual violence that exists at the local level in Sierra Leone, where rape – other than rape of a virgin – is still largely not considered a crime.³³

By refusing to allow the prosecution to include counts of sexual violence in the indictment, the Chamber missed an opportunity to include as part of its evidence testimony about a significant aspect of the Sierra Leonean conflict. In coming to its decision, the Chamber seemed to discount both the importance placed on prosecuting gender-based violence in the Special Court's Statute and the difficulties associated with prosecuting sexual violence as a crime. In so doing, the fear of justice delayed seems, instead, to have amounted to justice denied for these particular ten victims. Notions of expedience seemingly undermined the possibility of ensuring that the whole truth of the atrocities committed against them would be given due consideration in the Chamber's ultimate assessment of the case.

³⁰ Ibid, para 27.

³¹ *Prosecutor v. Akayesu* (ICTR-96-4-T) Judgment, 2 September 1998; *Prosecutor v. Furundzija* (ICTY, IT-95-17/I-T) Judgment, 10 December 1998; and *Prosecutor v. Kunarac et al.* (ICTY, IT-96-23-T), Judgment, 22 February 2001. See in particular, Binaifer Nowrojee, 'Your Justice Is Too Slow': Will the ICTR Fail Rwanda's Rape Victims? (United Nations Institute for Social Development, Occasional Paper, 2005).

³² Nowrojee, supra n 31 at 3. As has been noted by Askin, 'It is highly unlikely that the *Akayesu* decision ... would have demonstrated such gender sensitivity without South African Judge Navenetham Pillay's participation in both the trial and the judgment.' Kelly Askin, 'Sexual Violence in Decision and Indictments of the Yugoslav and Rwandan Tribunals: Current Status,' *The American Journal of International Law* 93 (1999): 98.

³³ Human Rights Watch, 'We'll Kill You If You Cry': *Sexual Violence in the Sierra Leonean Conflict* (January 2003).

Part II: Rendering the Victim-Witnesses Silent

Despite being denied leave to amend the indictment, the prosecution sought to include the evidence of sexual violence under Counts 3 and 4 (Physical Violence and Mental Suffering). It issued statements in its supplemental pre-trial brief to the effect that witnesses would testify to acts of sexual violence under these counts, and it made reference to the acts of sexual violence on the first day of the trial.³⁴

Yet in November 2004, when the prosecution began to lead evidence from a witness regarding women who were captured and taken to Base Zero, the defence immediately objected, claiming the evidence was outside the scope of the indictment. Presumably, they feared the ensuing evidence of sexual violence, despite the fact that none had as yet been led. Although the judges dismissed the defence's objection, Judge Thompson noted that allowing any evidence of sexual violence would 'undermine the integrity of the proceedings.' The prosecution was further cautioned against leading evidence that could be construed as such.³⁵

Mindful of the fact that victim-witnesses were to testify specifically to acts of sexual violence (which it continued to assert could be included under Counts 3 and 4), the prosecution submitted a motion in February 2005, requesting clarification regarding the extent to which evidence of sexual violence could be led.³⁶ It did so, intending to avoid unnecessary arguments about the nature of the testimony that could be admitted while the witnesses testified.³⁷ The Rules did not provide a means for dealing with requests for clarification.³⁸ The Chamber issued an unreasoned ruling, denying the prosecution's motion. The unreasoned ruling stated that a reasoned decision was to follow, which it did, but only *after* the witnesses had testified. Here again, the Chamber seemed to be placing values of expedience first. Rather than risking the delays that producing a reasoned decision may have required, they sought to hear the witnesses without providing any real clarity on the point the prosecution raised. Hence, the legal arguments the prosecution had sought to avoid followed, having a detrimental impact both on the victim-witnesses, and, in our opinion, the integrity of the proceedings the judges were seeking to safeguard.

Refusing to Enter 'Forbidden Evidentiary Territory'

The sanctioning of testimony of sexual violence took place over the course of five trial days in mid-2005.³⁹ As the Chamber had already stated in its unreasoned

³⁴ 'Prosecution's Supplemental Pre-trial Brief,' 24 April 2004, paras 91(b), 92, 220(b), 221.

³⁵ Transcript, 2 November 2004, p.54, line 15. Similar objections were raised when key insider witness Albert Nallo testified in 2005 to 60–80 women being captured and brought to Base Zero. At that point, the objections were sustained on the grounds that the prosecution's motion regarding the admissibility of such evidence was under consideration by the Chamber. See, Transcript, 11 March 2005, p.4, line 24 onwards.

³⁶ 'Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence,' 15 February 2005.

³⁷ 'Admissibility Decision,' supra n 5 at para 1.

³⁸ As noted in Boutet J.'s Dissenting Opinion annexed to 'Admissibility Decision,' supra n 5 at para 4.

³⁹ The witnesses testified over the course of the period from 31 May to 6 June 2005.

decision that evidence of sexual violence would be inadmissible, the prosecution avoided leading any direct evidence of gender crimes. However, it did seek to lead evidence of: (i) acts of violence resulting from a rape – namely, a miscarriage;⁴⁰ (ii) acts of violence committed once women had been subjected to a forced conjugal or ‘quasi-marital’ relationship;⁴¹ (iii) the reporting of rapes at Base Zero to a superior – namely, the second accused, Moinina Fofana and the third accused, Allieu Kondewa;⁴² and (iv) the murder of one victim-witness’s mother, following her mother’s brutal multiple rape by the Kamajors.⁴³ As will be shown, in several instances the unreasoned ruling which determined that sexual violence should be rendered inadmissible had a kind of ripple effect whereby wider and wider circles of the women’s experience had to be eliminated from their testimony.

‘When I Wanted to Shout, He Took a Cloth and Put This Cloth in my Mouth. And this Rape Resulted in my Pregnancy Being Destroyed.’

In her own words, victim-witness TF2-187 describes having undergone the following events during the Sierra Leonean conflict:

I went to [redacted], where I found Kondewa [the third accused] initiating [recruits to the CDF]. Kondewa had a colleague, an initiator named [redacted]. When I went, this [redacted] asked me for marriage. I was not happy, but since they were in power, I had to [marry him] to save my life ... I was about to enter [an area] when Kondewa met me. He told me that he wants to have sex with me, and I said, ‘No, I’m two months pregnant.’ When I refused, he tore my skirt and clothes by force, and he raped me, because he had more strength than me. He raped me. I was used. When I wanted to shout, he took a cloth, and put this cloth in my mouth. And this rape resulted in my pregnancy being destroyed.⁴⁴

From the victim’s perspective, as articulated here, the psychological and physical damage appears to have taken place on two levels. On one level, she has been subjected twice (in the first instance, to the marriage and in the second instance, the rape) to conjugal relationships she did not want; on another, she has experienced the loss of the pregnancy.

During court proceedings immediately prior to the witness taking the stand, the prosecution queried whether the witness could testify to the rape that precipitated the miscarriage, in order to give evidence of the miscarriage. The prosecution argued that testimony of the rape was essential ‘in order to tell the story in a

⁴⁰ Transcript, 31 May 2005, p. 32, line 24–49, line 14.

⁴¹ For TF2-188, see Transcript, 31 May 2005. In particular, see p. 18, line 20 (where the sentence, ‘He made me into his wife’ has been expunged from the record, as described by the presiding judge, beginning at 23, line 29). For TF2-189, see Transcript, 3 June 2005, p. 14, lines 3–5.

⁴² To review the actual testimony of these witnesses see: TF2-134: Transcript 3 June 2005, p. 21 onwards; and for TF2-109: Transcript 31 May 2005, p. 30 onwards. TF2-135 was dropped from the witness list and did not testify.

⁴³ Transcript, 3 June 2005, p. 21 onwards.

⁴⁴ Interview with TF2-187, *supra* n 3.

coherent fashion,' but that the charged act it sought to admit evidence about was the physical violence and mental suffering caused to TF2-187 by the miscarriage itself.⁴⁵ Unfortunately, the prosecuting attorney was unable to produce convincing legal precedents to legitimate this assertion, despite their availability. Although he alluded to the judgments in the *Tadic* and *Akayesu* cases supporting the prosecution's arguments, no direct analyses from these decisions was forthcoming.⁴⁶

The prosecuting attorney seemed to rely on the general common law principle that evidence of uncharged acts can be led to the extent they prove an issue relating to the charged acts, such as motive, opportunity, preparation, plan or knowledge. This position has garnered support in the ICTs, with the Appeals Chamber judgment in the *Kupreskic* case (among others) referring specifically to this proposition.⁴⁷ The problem with applying the analysis to this instance was determining how to distinguish between the perpetrator's intent in committing the act of rape, on the one hand, and destroying the fetus, on the other. Given the acts in question were charged as crimes against humanity and war crimes, it seemed less clear where the perpetrator's intention to rape ended and the intention to harm the victim's reproductive capabilities began. Unlike the crime of genocide, where the prosecution may have been able to show that a specific intent to destroy the group to which the victim belonged included not only raping the victim, but destroying her ability to reproduce, in this instance the parameters of the crimes in this case seemed less clear to the bench. Yet, as has been noted by Askin:

... It is important to remember that reproductive crimes may be separate from and in addition to other crimes ... A similar argument can be made regarding victims who become pregnant, bear children or who lose an existing pregnancy as a result of rape. Diseases and other injuries should be considered aggravating factors ...⁴⁸

Unfortunately, arguments in support of such a proposition were not drawn to the judges' attention, and the majority did not accept the more general points put forth by the prosecution. Hence, after adjourning the proceedings, the Chamber determined that there was no 'convincing legal logic' for it to allow the evidence in question, given that it would lead it into 'forbidden evidentiary territory.'⁴⁹ Instead, the witness testified to other acts of violence she witnessed, including watching three pregnant women having their bellies slit and their fetuses removed as part of a Kamajor ritual.⁵⁰ Here, the arbitrariness of the distinctions that allow or deny legal admissibility seem to be most apparent: the witness could discuss other women's suffering at the loss of pregnancies in the context of a knife being inserted into their bellies, but could not discuss the same harm done to her due to

⁴⁵ Transcript, 31 May 2005, p. 40, lines 3–5.

⁴⁶ Transcript, 31 May 2005, p. 42, lines 1–16.

⁴⁷ *Prosecutor v. Kupreskic* (Case No. IT-95-16-A) Appeals Judgement, 23 October 2001, para 321.

⁴⁸ See, Askin, *supra* n 32 at 120 (fn 107); and Kelly Askin, *War Crimes Against Women: Prosecution in International War Crimes Tribunals* (The Hague: Kluwer Law International, 1997).

⁴⁹ 'Admissibility Decision,' *supra* n 5 at para 13.

⁵⁰ Transcript, 31 May 2005.

the rape that preceded it. As Justice Boutet sensitively and sensibly revealed in his dissenting opinion:

Evidence of acts of sexual violence are no different than evidence of any other violence for the purposes of constituting offences under Counts 3 and 4 of the Indictment and are not inherently prejudicial or inadmissible ... by virtue of their nature or characterisation as 'sexual'.⁵¹

The witness herself felt that the central part of her story was lost, detracting from the significance of the courtroom experience as a whole:

Not only me, but we, the [redacted] group, we were suffering from these rapes, and our plan was to talk about these rapes and what happened to us. I would have felt good about being able to express what happened, and really to point at the perpetrator in the court, but I was not given the opportunity to do so ...⁵²

As a result, some scholars question whether victim-witnesses should be part of the trial process at all. As noted by Dembour and Haslam, if testifying is 'an ordeal rather than an empowering process' then it becomes questionable whether relying on victim-witnesses is the 'most efficient and *morally justifiable* way to establish judicial facts'.⁵³

The problem with this assertion, however, is that for many victims, the two are not necessarily mutually exclusive: what is painful (and an ordeal) can also be extremely empowering. From a broader policy perspective, extricating victim-witnesses from the process altogether may leave many of them asking whose justice is being administered, and for whom? In this instance, by choosing to allow the victim-witness to tell some parts of her story and not others, the Chamber risked both diminishing the significance of the experiences she was asked to keep silent about, and reinforcing the silencing impact of the rape itself. Yet, if the Chamber had extricated her from the proceedings entirely at that point, the witness would have been rendered entirely voiceless at a critical juncture in her journey towards justice.

The Chamber, therefore, seemingly needed to balance the harm done to the victim-witness in being precluded from giving the evidence against the harm done to the accused in having the evidence heard. As will be shown, time and time again, no such balancing act seemed to occur. In this, as in several other instances, the psychological impact on the witness has been significant. She herself was unable to grasp the basis for the ruling and interpreted it as indicating that the Court thought the rape unimportant, despite several attempts from the Court's psychosocial staff to assure her that this was not the case: 'Up till now, that causes me pain, because I know what I went through, and to tell me it's not important – that hurts me and causes me pain'.⁵⁴

⁵¹ Boutet J.'s Dissenting Opinion annexed to 'Admissibility Decision,' supra n 5 at para 33.

⁵² Interview with TF2-187, supra n 3.

⁵³ Marie Benedicte Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials,' *European Journal of International Law* 15(1) (2004): 158 [emphasis added].

⁵⁴ Brett Sander, 'Results of Post-Trial Interviews with Four Witnesses and Two Dropped Witnesses From the CDF Prosecution Case at the Special Court for Sierra Leone' (Unpublished manuscript, 2007).

Trouble in the Transcripts: Where Does 'Forced Marriage' End and Violence Begin?

In the second instance, TF2-188 and TF2-189 were each silenced as soon as they mentioned their marital status as 'wives' to the Kamajors. The majority of judges only later revealed that this testimony was excluded because the prosecution was attempting to elicit evidence about forced marriage, a novel charge being tried for the first time at the Special Court.⁵⁵ The charge had not as yet been clearly defined. The justification given for excluding this testimony was that any evidence of acts of violence within an enforced 'marital' relationship would amount to acts occurring within a forced marriage, and therefore, should not be admitted, even if it were about nonsexual acts.

The problem with applying this blanket prohibition, however, was that it misconstrued the Court's record as to what both these women actually experienced. Hence, not only were the witnesses both asked to tell an incomplete narrative, the transcripts themselves are to some extent inaccurate. In the case of TF2-188, the witness was able to explain how she had seen one of the accused order that her mother be killed, but when the witness began to explain that immediately after the murder the same individual forced her to become his wife, her statements alluding to the forced marriage were immediately expunged, after objections were raised to this effect by the defence.⁵⁶

A particularly surreal quality arises when reviewing the transcript of the testimony of TF2-189. The witness testified that she was captured at gunpoint by a Kamajor named Nulele who murdered her husband when the latter approached him, asking for her return. From that point on in her testimony, she refers to Nulele as her 'husband,' without being able to explain that Nulele raped her or to explicitly construe the so-called 'conjugal relationship' as one of forced marriage.⁵⁷ This has the curious result of completely neutralizing the effect of the testimony – a consequence the prosecution presumably accepted in order to be able to lead the evidence. However, perhaps even more curiously, when asked by the prosecuting attorney, 'During the time that you were with Nulele Kamajor, did you suffer any injury?' the majority of the bench ruled that she must not even be permitted to answer the question.⁵⁸ They took the view that any answer about injury after that point could have the potential to be linked to sexual violence, and therefore, the Court should not risk hearing it. As was stated in the transcripts:

Prosecuting Attorney: I asked the question, 'Did she suffer any physical injury?' There's no suggestion she's going to talk about sexual violence. I don't see where my learned friend is coming from.

⁵⁵ 'Admissibility Decision,' supra n 5 at para 14.

⁵⁶ Transcript, 31 May 2005. In particular, see p. 18, line 20 (where the sentence, 'He made me into his wife' has been expunged from the record, as described by the presiding judge, beginning at p. 23, line 29).

⁵⁷ Transcript, 3 June 2005, p. 14, lines 3–5.

⁵⁸ This occurred after the defence objected stating that the prosecution was 'stealthily attempting to lead evidence which was inadmissible.' Transcript, 3 June 2005, p. 14, lines 27–28.

Justice Itoe: Supposing she does. If she does –
 Prosecuting Attorney: Your Honours, this is our case.
 Justice Itoe: I'm not saying that she would, necessarily. *But supposing she does.*⁵⁹

Why the Chamber would need to go to such lengths seemed somewhat inexplicable at the time, given that this was not a trial-by-jury. However, as Justice Itoe later revealed in his separate and concurring opinion, prejudicial evidence, if indeed that was how this evidence was construed, had the potential of:

staining mind [sic] of the Judges with an impression that *adversely affects his clean conscience* towards all parties, and particularly, towards *the victim of that evidence which is tendered*, to the extent that it leaves in the mind of the Judge, *an indelible scar of bias which could make him ill-disposed to the cause of the victim of the said evidence* as a result of which an injustice could be occasioned to that party who after all, may be innocent or have a just cause, and who but for the admission of that contested evidence, should ordinarily have had the benefit of the judicial balance tilting in his favour.⁶⁰

To return to the issue of harm then, his Honour reveals himself to believe that the harm to the accused, by allowing the judges to hear the evidence, is the only consideration the judges should take into account. In fact, in this instance, the accused is construed as the victim. It is fair to say that there is some support for this position in legal scholarship, with some scholars arguing that judges should be vigilant about the kinds of evidence they seek to admit.⁶¹ However, with due respect, one hopes that professionally trained judges at war crimes trials are able to be more discerning and rather less impressionable regarding the subject matter of the evidence than these sentiments would seem to suggest. This is especially so, given that so much of the evidence presented has a tendency to be emotionally charged, horrifying and often gruesome.

To this day, TF2-189 seems confused as to the basis for the evidence's exclusion. She assumed it meant the Court thought she was lying. At the end of a post-trial interview, when asked whether she had any questions for the interviewer, she asked:

There is only one thing that is still not clear to me, although everybody tried to give me reasons, but I am not satisfied with the reasons they gave: Why was I not allowed to talk about my rape? Or why, when I said I was being raped, did they think I was not telling the truth? I would not lie.⁶²

'Their Boss Man is Coming': Command Responsibility for Sexual Violence

We were all captured by the Kamajors, and ... one of them ... came and took me from the others, took me to a house I'd never been to before and forced me and raped me.

⁵⁹ Transcript, 3 June 2005, p. 16, lines 26–29; and p. 17 lines 17–24 [emphasis added].

⁶⁰ Itoe J.'s Concurring Opinion annexed to the 'Admissibility Decision,' supra n 5 at para 64 [emphasis added].

⁶¹ Cryer, supra n 10.

⁶² Interview with TF2-189, supra n 3.

My father took the complaint to Kondewa – at that time Kondewa was in charge. But he [Kondewa] did not take any action, because he said, ‘It’s wartime.’ So we just went back to our house.⁶³

In the third instance, TF2-109, TF2-134 and TF2-135 were to testify regarding the accused’s knowledge of rapes committed by their subordinates. In a novel argument, the prosecution sought to defend the position that the women should be allowed to testify on the grounds that the accused were liable for *any* criminal acts committed by their subordinates under the Statute.⁶⁴ Had they been able to admit evidence in this manner, the resulting testimony could have been admitted:

One morning, my friends and I travelled to [redacted] ... Then my friends and I were tied, and they also covered our faces with cloth ... I was with a group of Kamajors called the [redacted] group. At that time, I was one month pregnant by my husband. The area they took me to, they kept me there for two weeks, and they raped me continuously for the two weeks ... During that time, as a result of the raping, I had a miscarriage ... Then I escaped, but after I escaped ... I was captured by a different group of Kamajors called the [redacted] group ... They kept me there for a week, during which time they raped me and used me as their wife. At that time, I was powerless, but nevertheless I complained to Fofana, who was their boss, and he told me that I should just bear it, because I am not the only one who’s been raped.⁶⁵

There seems very little (if any) case law at the international level to support the proposition the prosecution was advancing. Allowing the prosecution to admit evidence regarding the accused’s culpability for crimes that were reported, but for which he is not charged, could have the impact of severely undermining the rights of the accused to know the case against her/him. Yet, had the prosecution considered arguing (as it had done previously) that the evidence corroborated an intention to perform other acts of violence charged under the indictment, the Chamber may have been led to think differently. In the case of Witness TF2-134, there appeared to be a credible argument in support of this, because the rapes were so close in time to the other events charged, that the evidence would need to be admissible in order for her evidence to remain coherent. As the witness herself later recalled:

I went to a village called [redacted], and they followed me, and I was captured and taken back to Base Zero, tied up and put in detention. When I was tied up and beaten, I started vomiting blood. Some of them came and untied me, and they took me into one of those huts, and for three days I was in that hut, and I was sick from having been tied, beaten and raped ... I was raped by three of these Kamajors, one after the other ... I was shouting, I was crying. Someone else said, ‘Their boss man is coming,’ that was Kondewa. When he came, he stood by the door and said nothing – he simply walked by.⁶⁶

⁶³ Interview with TF2-109, *supra* n 3.

⁶⁴ The prosecution argued that the accused could be held liable under Article 6(3) of the Statute for their failure to prevent or punish *any* crimes committed by their subordinates, not only those charged under the indictment.

⁶⁵ Interview with TF2-135, *supra* n 3.

⁶⁶ Interview with TF2-134, *supra* n 3.

Here, it seems clear that the rapes are so much woven into the thread of the witness's story so as to make it impossible for her to implicate the accused's knowledge of other events – her captivity, the fact that she was beaten – without describing them. Instead, the witness was only permitted to state that she had been 'beaten' and 'suffered blows to her chest,' hence losing much of the *context* within which these events took place. During her testimony in court, she identifies Kondewa as the 'boss man,' but does not implicate him at all in the events relating to her injuries.⁶⁷ Again, the witness herself seems to put it most succinctly:

I felt bad, and I felt I was not able to tell the *entire truth* – they stopped me from talking about my rape ... The only thing I didn't like was being prevented from telling about my rape.⁶⁸

We accept that the Special Court, like any international criminal tribunal, to some extent constructs its own legal truth. Yet what seems most problematic about the majority judges' actions in all these instances is not only the inadmissibility of the evidence, but that in rendering it inadmissible, no consideration was given to balancing: (i) the harm done to the witnesses in asking them to tell incomplete narratives; (ii) the harm done if the witnesses were told they could not testify; and (iii) the harm done to the accused from solely having the testimony heard, given the evidence could later be completely discounted by the judges. In fact, at no point in the proceedings, either during or after the witnesses testified, did the majority judges seem to consider the potential harm the witnesses may have suffered. The focus was solely upon the potential for harm to the accused.

Despite numerous calls throughout the Rules to balance the protection of witnesses against the rights of the accused, nowhere in the proceedings nor in the majority judges' decision did this 'protection' figure as protection from the psychological or emotional harm that could be suffered as a result of victim-witnesses testifying in this manner. Hence, compounding the effect of precluding the testimony of these victim-witnesses was the way in which the women who suffered these harms were treated as a result: seemingly without due regard for the full extent of their suffering, despite there being ample grounds for them to expect this as a minimum guarantee of their involvement in the trial process.⁶⁹

Silencing and Grief

Finally, in this section, we consider the unheard testimony of Witness TF2-133, who in addition to wanting to testify about her own experience of being captured, raped, sexually enslaved and impregnated by Kamajors, had also expected to give the following evidence about her parents:

⁶⁷ Transcript, 3 June 2005, TF2-134, p. 28, line 28 and then later describing her physical injury at p. 33, lines 7–8.

⁶⁸ *Ibid* [emphasis added].

⁶⁹ Aldana notes the challenges associated with this well. See, Raquel Aldana, 'A Victim-Centered Reflection on Truth Commissions and Prosecutions as a Response to Mass Atrocities,' *Journal of Human Rights* 5 (2006): 107–126.

I wanted to tell them the way that my mother was raped ... It was Moinina Fofana's group that raped her, and they inserted sticks into her vagina until she died. They were more than ten in number that raped her ... My father was present too. My father was crying, saying, 'She's my wife, she's my wife.' Because he was saying, 'She's my wife,' he was beaten to death right there on the spot by the same group ...⁷⁰

On the witness stand, the witness was asked 'Where is your mother today?' to which she responded 'My mother is no longer alive; she is deceased,' and when asked subsequently, 'What happened to your mother?' she replied 'The time when the Kamajors entered, that's the time she was killed.' She went on to state that her mother was killed on a palm oil plantation and named its location. She was not asked about her father's murder at all.⁷¹

Sadly, this may have been the one instance in which the prosecution could have proved that the story she wanted to tell should be admitted. Despite the evidence clearly being about sexual violence against the witness' mother, the Chamber had already admitted evidence of this nature in an earlier trial session, when Witness TF2-159 testified: 'They killed them with a stick: they put the stick into their female genitals and the stick came out through their mouths.'⁷² The argument that such evidence had already been heard, however, was never made, and as a result, the witness was unable to give voice to her grief.

Some Further Evidentiary Considerations

Ultimately, the evidentiary distinctions related to all these victim-witnesses' testimonies were given almost no consideration. As was noted in the majority decision issued after the witnesses testified, the question of whether, as a matter of international criminal law, any of the evidence of sexual violence *could* in fact be characterized as physical harm and mental suffering under Counts 3 and 4 was a 'non-issue.'⁷³ What *was* at stake was: (i) ensuring that the Chamber's determination accorded with the legislative intent behind the Statute; and (ii) ensuring that the statutory due process rights of the accused, as enshrined under Article 17, were respected.⁷⁴ In what seems like an ironic twist of fate, the very fact that the framers of the Special Court's Statute so clearly defined crimes of sexual violence as a separate category would ultimately come to mean that they would be completely precluded from the CDF case.⁷⁵

The judgment issued in the CDF trial reflects the ultimate silencing of sexual violence in the case, with the absence of any discussion of the crimes seemingly

⁷⁰ Interview with TF2-133, *supra* n 3.

⁷¹ Transcript, 6 June 2005, p. 4, lines 27-29 and p. 5, line 1.

⁷² Transcript, 9 September 2004, p. 37, lines 20-23.

⁷³ 'Admissibility Decision,' *supra* n 5 at IV(B) (above para 17).

⁷⁴ Statute, *supra* n 12 at art 2.

⁷⁵ The Statute was framed as such in large part due to the Secretary General's Report, which included an emphasis on the egregious nature of sexual violence during the conflict. See, *Report of the Secretary General on the Establishment of the Special Court for Sierra Leone*, S/2000/915 (4 October 2000), para 12.

inevitable, due to the decisions made during the proceedings. Although all seven witnesses' testimonies of violence of a non-sexual nature are included in the Chamber's factual findings, none of it is used in the Chamber's assessment of the culpability of the accused. This is because, in some instances, no nexus existed between the acts of the Kamajors and the accused persons; and in others, the time frame in which the acts took place was not clearly established.⁷⁶ The fact that the victim-witnesses in question could not speak and be cross-examined on the entirety of their experiences at Base Zero is an important factor to consider in this outcome.

The resulting judgment is yet another addition to the international criminal legal precedents which completely fail to consider violence against women in any real depth, and sexual violence at all. It also marks an opportunity missed by the Special Court to lead by example on an important issue that deserves further consideration in Sierra Leone's domestic legal sector.⁷⁷

The Psychological Impact of Silencing: Some Final Observations

Finally, we wish to make some brief observations regarding the psychological consequences for the victim-witnesses who were prevented from testifying about their sexual victimization. These women express feelings of intense disappointment at being silenced with regard to speaking about sexual violence. In the follow-up interviews, when the women were asked, 'If you had been permitted to testify about whatever you wished, what would you have chosen to testify about?', six of the ten women offered detailed accounts of their sexual victimization. This was particularly striking in light of the fact that the question had purposely been left open-ended, without any reference to sexual violence or gender-based violence, in order to elicit a response free from undue interviewer influence. Moreover, when asked a broad, non-directive question about their experience with the Court, six of the seven women who took the stand expressed considerable psychological distress regarding the silencing. Witness TF2-189 stated, 'I felt sad and disappointed when I was not allowed to talk about my rape. Apart from that, I didn't have any problem.'⁷⁸ Similarly, Witness TF2-109 said:

The Court did not allow me to explain about my rape. That hurts me a lot ... because the Court had said whatever the Kamajors had done to us, we ... should go and explain in the Court, but when we wanted to talk about rape, they stopped us and ... prevented us from talking about it.⁷⁹

⁷⁶ See, *Norman et al.*, supra n 7 at paras 565, 619–621, 624–628, but then dismissed at paras 923, 930 and 932.

⁷⁷ There have been recent reforms in the domestic sector in this regard to which the Special Court's recent judgments could have been able to play some part. See, 'Sierra Leone Parliament Passes Gender Bills Into Law,' 15 June 2007, Sierra Leone Court Monitoring Programme, available at http://www.slcmp.org/drwebsite/local/Sierra_Leone_Parliament_Passes_the_Gender_Bills_into_Law.shtml.

⁷⁸ Interview with TF2-189, supra n 3.

⁷⁹ Interview with TF2-109, supra n 3.

Consistent with the above mentioned remarks by witnesses who were permitted to take the stand, two of the three witnesses who had expected to testify, but were dropped from the witness list, also expressed distress. Witness TF2-135 stated:

I felt bad that day, and I wished I were dead, because I was not permitted to express myself in the court ... Let me tell you a parable: let's say you have a painful boil on your skin ... and the boil on your skin is causing you a lot of pain ... and then it happens some day that somebody comes to you and tells you, 'Today, I would like to open up this boil so that the pus can come out' – how would you feel about the pain of opening that boil? It would hurt, but then later ... you would feel better ... I mean to say that if the court had allowed me to testify and express all the pain, it would have reduced my anger ... And so, this pain has been with me since then, waiting for these people to call me to testify ...⁸⁰

Witness TF2-128 described a similarly negative emotional response:

I felt bad when, for no reason, I was not allowed to testify in the Special Court ... On the day I was told I couldn't testify, I couldn't even bring myself to eat anything the whole rest of the day. I felt discouraged and worried, I cried a lot ... I was taken to the Court to explain what happened, and then I was not allowed to testify.⁸¹

Thus, it is clear that the majority judges' determinations and the silencing that followed resulted in significant psychological distress for the witnesses. This finding is consistent with observations made by the Witness and Victim Section's supervising psychologist as well as the psychosocial counsellors who worked closely with the women during their two-week stay in Freetown.

Conclusion

In this article, we have sought to present empirical findings regarding the impact that precluding the evidence of victim-witnesses can have, both on the trial and on the victim-witnesses themselves. In particular, we have sought to examine what these findings suggest about the proper care and consideration needed, regarding both: (i) the admissibility of the evidence given by victim-witnesses of sexual violence; and (ii) the treatment of sexual violence victim-witnesses during international criminal trial proceedings. From the legal perspective, we have endeavoured to show both that crimes of sexual violence require rigorous investigation and prosecution at all stages of the proceedings, and that rethinking traditional legal arguments about violence against women generally, and sexual violence in particular, may be required in order to ensure that these crimes continue to be given the recognition they deserve. Secondly, and perhaps more importantly, we have hoped to show that silencing victim-witnesses of sexual violence has a negative psychological impact upon them and has the potential to undermine the integrity of an international court's more general intention to deliver justice to the victims of the conflict.

⁸⁰ Interview with TF2-135, *supra* n 3.

⁸¹ Interview with TF2-128, *supra* n 3.

While the primary focus of the trial – as with all international and domestic criminal trials – is to determine the guilt or innocence of the accused person(s), secondary and yet significant functions of the process at the international level should be: (i) to ensure, insofar as possible, that the trials generate a historical record, through both the transcripts and the judgment, that presents an accurate reflection of witnesses' experiences during the conflict; and (ii) to consider the needs of victim-witnesses as an integral part of the trial process. At all stages of the proceedings, the potential for harm to the witnesses has to be balanced against the rights of the accused. In this regard, we argue that notions of 'protection' and 'harm' must come to mean more than just ensuring the physical safety of witnesses: psychological safety must figure in the equation as well. Although these secondary functions of the trial should not be overemphasized in light of the need to ensure the fair trial rights of the accused, neither should they be made ancillary to the proceedings. This is particularly so in light of the systematic biases against victim-witnesses of sexual violence in the adversarial system, and the possibility that they may suffer emotional harm during the trial. Unless we endeavour to consider seriously the preferences and needs of victim-witnesses, we risk exacerbating the psychological scars they carry in the aftermath of war. Furthermore, the history surrounding the silencing of sexual violence as a crime must be taken into account when victim-witnesses come forth to testify. Otherwise, we will only further entrench that silencing, both for the women as individuals and as a matter of precedent in international criminal law.