

Access

Victims' rights before the International Criminal Court

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A FOCUS ON PROTECTION

Two important decisions in the Lubanga and Kony cases

Lubanga case

On 21 October 2008, the Appeals Chamber of the ICC found that the Trial Chamber in the *Lubanga* case did not err in staying (stopping) the proceedings against the accused. However, the Appeals Chamber held that the Trial Chamber should not have ordered the release of Lubanga, as this was not the only possible consequence of the stay of proceedings, and as the Trial Chamber had omitted to consider all relevant factors (such as the possibility that the trial would resume and the issue of ensuring the presence of the accused at trial). The Appeals Chamber therefore overturned that decision.¹

The case is now before the Trial Chamber again, who has to re-decide whether Lubanga should be released or maintained in detention. The Trial Chamber is likely to take into account that the Prosecutor now has the consent of the United Nations and NGO's to disclose certain evidence they provided. The Trial Chamber will have to examine whether the release of the accused would be justified in these circumstances, or whether a fair trial can now be foreseen.

Case of Kony et al.

Regarding the situation in Northern Uganda, on 21 October 2008 Pre-Trial Chamber II decided to initiate proceedings to determine the admissibility of the case of the *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* under article 19 (1) of the Rome Statute.²

In other words, the Chamber will examine whether the ICC is still competent to judge this case, looking in particular at whether the conditions can be said to have changed as a result of the plans of Uganda to try certain crimes locally. The Pre-Trial Chamber said that it was going to examine this question in light of the Juba Peace Agreement and its Annexure, and the creation in Uganda of a Special Division of the High Court pursuant to this Annexure, with competence over certain crimes coming within the jurisdiction of the Rome Statute.

The Pre-Trial Chamber ordered the Registrar to inform those victims - or their legal representatives - who have already communicated with the Court with respect to the case, as well as the State of Uganda, about this decision.

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Night commuters, Northern Uganda, 2006; Fearing abduction by the Lord's Resistance Army (LRA), tens of thousands of children flee their villages to town centres to seek safety at night. © Manoocher Deghati / IRIN

The Prosecutor, the Defence as well as the victims are allowed to submit their observations. It should be noted that in this instance, the Chamber authorised both victim participants and victims applicants to file observations. The Chamber will thus examine its competence, on its own initiative. If the Chamber decides that the ICC is no longer competent, that could mean the end of this case before the ICC.

The Uganda Victims' Foundation and REDRESS were given permission by the Chamber to file observations on the experiences of victims of crimes within the jurisdiction of the Court in seeking justice from Ugandan courts.●

¹ www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf, and www.icc-cpi.int/library/cases/ICC-01-04-01-06-1487-ENG.pdf

² www.icc-cpi.int/library/cases/ICC-02-04-01-05-320-ENG.pdf

Victims and participants: what protection before the ICC?

Anne Althaus, REDRESS*

The protection of witnesses and victims is paramount for the proper functioning of the International Criminal Court (ICC) and the attainment of its objectives. This overview focuses on the scope of victims' entitlements to protection, regardless of their possible role as witnesses.¹

Who are the "victims" entitled to protection?

Article 68(1) of the ICC Statute imposes a fundamental duty upon the entire Court to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" at each stage of the proceedings.² Article 43(6) of the Statute, which speaks of the provision of protective measures to "victims appearing before the Court" has now been clarified by the jurisprudence: Victims at risk may be entitled to some measure of protection as soon as their *completed application* to participate has been received by the Court.³

What type of protection is available for victims?

Human Rights Watch (HRW) reports that "[f]ollowing a recent decision of Trial Chamber I⁴ interpreting the [Victims and Witness Unit] VWU's man-

date to extend [protection] to victim applicants as well as to participants, the VWU has begun to develop new plans for protection of victims at this earlier point in their interaction with the court".⁵ However, at the time of writing, it is unclear what the VWU has put in place to implement the obligation that the decision of 18 January 2008 has clarified.

The Public Information section of the ICC has confirmed that it does not have materials explaining this to victims, and that the outreach section only explains the general mandate of the Court in protection matters and doesn't cover the practice of the Court with regard to victims, in particular. Consequently, victims who apply to participate face difficulties in understanding what they should do if they feel threatened as a consequence of their application. NGOs assisting them are equally at a loss when it comes to explaining this issue.

Trial Chamber I has indicated that the obligation to victim applicants is to be carried out where "protection can realistically be provided by the Court during the application process".⁶ Thus, while it is clear that each and every victim who has submitted a complete application to participate in a proceeding (be it a situation or a case) is not *necessarily*

entitled to *all* protective measures such as relocation, it appears that such victims are entitled to *some* protection where they are at risk.

Generally speaking, victims may be entitled to two types of protective measures. Firstly, there are those specifically related to the proceedings.⁷ These include the assignment of pseudonyms (usually a number) to victims to avoid the use of their name in the proceedings. In addition, victim's applications are "redacted" so that any element that could identify them is concealed from the public and, if requested by the victim, potentially from the Prosecutor, and even the accused (the Defense).⁸ Victims can indeed request to be anonymous to ensure their safety.⁹ Another example of such protective measures is the alteration of pictures.

Secondly, victims may be entitled to protection as necessary outside the proceedings. The Court has developed a series of protective measures in this regard. It is not clear, however, to what extent these measures have applied to victims who are not also appearing before the court as witnesses:

▲ **The emergency hotline—the Initial Response System (IRS):** as reported by HRW "the system allows individuals to seek assistance at any time should their security be threatened".¹⁰ HRW also reports that "[a] call to the hotline activates a network of local partners with the capacity to intervene and extract an individual to a safe location in case of an urgent threat; that risk is subsequently assessed by VWU protection officers to determine whether extended protection measures are required."¹¹

* Thanks to Dadimos Haile, Head of the Thematic and International Justice Department, Avocats Sans Frontières (ASF) for his comments and Natacha Middleton (ASF) for her research.



Child in Oromi Camp, Kitgum District, Northern Uganda, May 2007, © Manoocher Deghati/IRIN

The ICC provisions indicate that¹² victims should have round-the-clock telephone access to officers of the Court and legal representatives for the purpose of initiating applications for protection and for making enquiries about their safety. However, at the time of writing, it is unclear if and how the ICC has implemented these obligations for victims who are not also witnesses.

▲ **The ICC Protection Program:** details regarding this programme as well as the precise criteria for admission are confidential.¹³ HRW indicates in this regard that “[t]he VWU requires ‘a high likelihood that the witness will be harmed or killed unless action is taken’ for ICCPP admission and it considers ‘that the obligation to provide protection only relates to risks arising out of interaction with the Court’.”¹⁴ HRW adds that the ICCP is “onerous” in that participation in the programme “ordinarily entails relocation, either in country or, much less commonly, abroad... The assessment for participation in the ICCPP is triggered by a referral of the prosecution, counsel, or, in the case of victims, of their legal representative(s).”¹⁵

Conclusion

In situation countries, victim participants have faced threats.¹⁶ Therefore Court agents or any person interacting with victims must be very cautious.¹⁷ The jurisprudence has now established that victims whose complete application has been received by the Court are entitled to adequate protection. As found by HRW “[w]here victims face serious threats based on their interaction with the court, they should be eligible for court-provided protection”.¹⁸ Resources should therefore be directed to improve victim protection. The current situation of protection of victims is unclear, and the Court should remedy this. ●

¹*Prosecutor v. Lubanga, ICC, Case N° ICC-01/04-01/06-1119, Decision on victims’ participation, January 18, 2008, para. 132. “Whether or not victims appearing before the Court have the status of witnesses will depend on whether they are called as*

¹⁰Human Rights Watch Report, pp. 153.

¹¹*Ibid.*

¹²Regulation 95 of the Regulations of the Registry; Regulations 80 and 96 of the Regulations of the Registry.



A Sudanese woman who escaped atrocities committed by the Lord’s Resistance Army (LRA) in southern Sudan arrives with her children at Imvepi refugee camp in Arua, northern Uganda, April 2005 © IRIN.

witnesses during the proceedings”.

²Article 68 (1) of the Rome Statute.

³ *Prosecutor v. Lubanga, ICC, Case N° ICC-01/04-01/06-1119, Decision on victims’ participation, January 18, 2008, para. 137: “In the view of the Chamber, the process of ‘appearing before the Court’ is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of ‘appearing before the Court’, regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, ‘an appearance’ for the purposes of this provision has occurred.”*

⁴*Ibid.*

⁵Human Rights Watch, *Courting History, The Landmark International Criminal Court’s First Years*, July 2008, available at www.hrw.org/reports/2008/icc0708/p.166 (Human Rights Watch Report).

⁶*Prosecutor v. Lubanga, ICC, Case N° ICC-01/04-01/06-1119, Decision on victims’ participation, January 18, 2008, para. 137 (stated above).*

⁷Article 87 of the Statute.

⁸*Prosecutor v. Katanga, ICC, Case N° ICC-01/04-01/07-628, Decision on victim’s request for anonymity at the Pre-Trial Stage of the Case.*

⁹The jurisprudence so far, however, places certain limitations to the rights of completely anonymous victims to participate, which do not apply to non-anonymous victims do not have. This could be problematic in the future for the safety of victims.

¹³Human Rights Watch Report, pp. 153.

¹⁴*Ibid.*; *Prosecutor v. Lubanga, ICC, Case N° ICC-01/04-01/06, Decision on disclosure issues, responsibilities for protective measures and other procedural matters, April 24, 2008, para. 38, 43, annex 2 to Decision issuing a confidential and a public redacted version of “Decision on disclosure issues, responsibilities for protective measures and other procedural matters,” May 8, 2008 (“Decision on Disclosure Issues”).*

¹⁵Human Rights Watch Report, pp. 153.

¹⁶Human Rights Watch Report, pp. 153: “Human Rights Watch’s research in situation countries indicates that real threats have been made against victim participants and against the intermediaries who help to facilitate their interaction with the court”.

¹⁷*Ibid.*

¹⁸*Ibid.*

Time for the ICC to take on protection of intermediaries* and lawyers

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The International Criminal Court (ICC) is for most -if not all- victims of the crimes within its jurisdiction a distant institution. Their accessing the Court would be impossible if it were not for the work of "intermediaries", i.e. individuals and organisations who facilitate contact between the ICC and affected populations.

While this phenomenon developed naturally because those organisations were already working with victims of conflicts in the relevant areas as part of their mandate, the Court's practice of using intermediaries as a way to reach out to the affected communities was soon institutionalised.

The ICC has actually been criticised for over-relying on intermediaries. Many policies are focused on training intermediaries or on channelling any contact with victims through them. Indeed, much is expected from these local non-governmental organisations: to inform victims of the activities of the Court and of their rights, to assist victims to fill out forms for participation, to keep victims informed of the procedures, to collect missing information or documentation and to forward it to the Court, among other tasks.

The work performed by intermediaries is thus essential, as they contribute greatly to the success of the Court's mandate in relation to victim participation. Their situation is, however, extremely precarious. They get limited recognition and the activities they undertake imply major risks for their safety. They are often attacked, threatened or subjected to intimidation, as a consequence of their relationship with the ICC. In such situations, they naturally inquire what the ICC can do to protect them. Sadly, the Court turns its back on them.

The explanation the Court gives lies in a restrictive interpretation of the Court's protection mandate. According to Article 43.6, "protective measures and security arrangements, counselling and other appropriate assistance" must be provided to "witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses." It is thus argued that intermediaries are not covered by this provision.

Certain organs and units of the Court are sympathetic with the situation of intermediaries, but, still, they are unable to help them concretely. For example, Pre-trial Chamber I has decided their names could not be "redacted" (i.e. hidden) in the copy of the application forms which is transmitted to the Defence and the Prosecution.¹ In our view, this is a negative decision because redactions have proven to be an effective preventive measure in other cases. The justification given is that they have voluntarily chosen to become intermediaries.

It must be noted, however, that the line between them having voluntarily accepted to become intermediaries and their responding to formal or informal requests coming from the Court can be very fine in many cases.

It is worth clarifying that most intermediaries requiring help or

advice in relation to their safety, are not asking to enter the Court's protection programme or to be relocated. Examples of measures that could be afforded to intermediaries are: to issue a (public) statement from the Court calling for their protection; to support their requests for passports or visas; to be referred to a list of telephones or addresses to which they can resort to in case of emergency.

Victims' legal representatives, especially those coming from the situation countries, are in a similar situation. As in the case of intermediaries, their protection would seem to fall out of the Court's protection mandate as described by the ICC legal texts (see reference to article 43.6 above). Additionally, lawyers have an ethical obligation to remain independent. Some have argued that the Court's facilitation of their protection could undermine that independence.

It is rather illogical, however, that while Court staff (including staff at the Office of the Prosecutor, which also enjoys independence) can benefit from protection measures, no such mechanism is available to those who defend the right of those participating in the proceedings. This is particularly serious in cases where legal representation implies participation in public hearings and a certain level of public exposure.

Time has come for the ICC to make an interpretation of the Rome Statute, which is adapted to the reality of the work of the Court. Although it is true that there is no explicit legal provision which obliges the Court to protect intermediaries or lawyers, there is no provision prohibiting it, either.

We believe that this is not only a legal obligation, but also a moral duty. The legal obligation can be drawn from the spirit of the Rome Statute and an interpretation of the Court's legal texts which is consistent with internationally recognised human rights. It should be recalled that the Court fully relies on intermediaries to perform activities that are inherent to its mandate. As for lawyers, their tasks are essential to the functioning of the Court.

A decision of the Appeals Chamber has acknowledged that there are provisions in the Rome Statute and the Rules of Procedure and Evidence "aimed at ensuring that persons are not put at risk through the activities of the Court and which are not limited to the protection of witnesses and victims and members of their families only."²

Of course, a balance should be struck between the level of exposure and the nature of the risk, on the one hand; and the type of measure available, on the other hand.

It is high time the ICC starts being flexible and creative about these matters. ●

*This article looks into the situation of intermediaries working with victims and on victim participation. It should be noted, however, that intermediaries perform a number of different functions and liaise with various organs and units of the Court.

¹ICC-01/04-374, paras. 30-31

²ICC-01/04-01/07-475, para. 43

What status for intermediaries of the International Criminal Court?

DRC NGO Representative

A member¹ of a local organization in Ituri / Democratic Republic of Congo, who assisted the International Criminal Court (ICC) in its search for the truth in this province, expresses the security concerns of those who significantly help the ICC on the ground - those commonly referred to as "intermediaries".

International criminal justice became permanent with the entry into force of the Rome Statute of the ICC in July 2002. The ICC is competent to judge serious violations of international humanitarian law including war crimes, crimes against humanity and crimes of genocide. To achieve this, according to its Statute, the organs of the court need information about the crimes committed under its jurisdiction. In this context, several local organisations in Ituri / Democratic Republic of Congo, have collaborated with the Office of the Prosecutor (OTP) to enable it to collect the necessary information, and to provide it with guidance as to the conduct of its criminal investigations in this area.

However, the authors of these communications have been identified by some accused before the ICC and their supporters. These intermediaries are regarded as people who actively partici-



Territory of Mahagi/Ituri/Democratic Republic of Congo/© OV 2008

pated in the collection of information that is used by the Office of the Prosecutor to support the accusations. This has contributed to the deterioration of the security of those who supported the work of the ICC as intermediaries on the ground.

Thus, some Congolese NGOs are a target of supporters of the accused before the ICC. **In a context of high insecurity, these intermediaries feel abandoned by the ICC** on the one hand, because the general principle of protection under the ICC set out in the first paragraph of Article 68 (1) of the Statute Rome apparently does not oblige the Court to protect intermediaries. The Statute in this regard seems already obsolete. The organs of the ICC have thus no legal basis that enables them to ensure the protection of intermediaries. On the other hand, the DRC authorities are unable to provide effective security measures that can guarantee the safety of intermediaries at risk.

The contribution of intermediaries seems however essential in advancing the process of pending cases; so the search for solutions to security problems of intermediaries could help to unblock the procedure in the case of Thomas Lubanga, while taking into account rights of the accused and the requirement of a fair and impartial trial.●

¹ Author wishes to remain anonymous for security reasons



Internally displaced people (IDPs) in a camp in Ituri, Democratic Republic of the Congo (DRC), June 2005. The country's five-year civil war ended in 2002, but persistent fighting has continued since © IRIN.

Witness protection at the Special Court of Sierra Leone: an interview with Saleem Vahidy, Head of the Witness and Victims Section

Saleem Vahidy has been the Head of the Witness and Victims Section (WVS) of the Special Court for Sierra Leone (SCSL) since its inception in January 2003. Before that, Mr. Vahidy held a similar position at the International Criminal Tribunal for Rwanda, from 1998 to 2002. He is one of the persons with most experience in the area of protection and support of victims and witnesses in International Tribunals. ACCESS asked him to describe the system put in place at the SCSL and how his unit and the SCSL solved some challenges that the ICC is also facing.

ACCESS: It is often said that protection by an international Court depends on the cooperation of the State(s). What is the link and interaction between WVS and the State of Sierra Leone? Is the protection of witnesses by the Special Court dependant on the State of Sierra Leone?

At the formal and official level there is only a Memorandum of Understanding and Host Country Agreement between the Special Court and the Government of Sierra Leone regarding cooperation and coordination, mutual assistance etc. There is no specific mention of the WVS in terms of actual measures to be undertaken and areas of responsibility of the State, but this is the legal basis of cooperation between the WVS and the Sierra Leonean Government

Technically speaking the Section of WVS is 'self sufficient' and is solely responsible for all its operations; however in practical terms there is considerable coordinated working between the SCSL and the GOSL or rather the WVS and the Sierra Leone Police.

Firstly for the recruitment of staff; a considerable number of the Protection and Security Officers of the WVS are serving members of the Sierra Leone Police Force. The methodology adopted was whenever there was a need for protection staff (vacancies being available), a request was made to the Inspector General of Police for suggesting a panel of names for deputation to the Special Court. After holding interviews the requisite numbers were selected. A number of WVS protection officers are armed and licensed and authorised by the GOSL to use their weapons in accordance with Sierra Leonean laws and procedures regarding use of weapons if the need arises.

Secondly, for assistance in providing security at secure premises/ safe house; although the WVS has its own

complement of armed Protection Officers there is often the need of extra armed police for guard and security duties. This is always provided by the Sierra Leone Police on written request.

Thirdly for Protection and safety of Court witnesses in remote areas of Sierra Leone; assistance is often sought by the WVS from local police units for the protection of witnesses if the need arises. Coordination meetings are held, witnesses are introduced to the local area commanders (of course with the consent of the witness) and in case of an emergency **the police responds quickly**, or even if a witness feels threatened he can go to the local commander for protection.

ACCESS: With the Trial of Charles Taylor, ex-head of State of Liberia, taking place in The Hague, there is surely also cooperation required with the Netherlands?

There is a formalised working relationship with a number of Government agencies in the Netherlands, as well as in Belgium.

The first meeting point is with the Ministry of Foreign Affairs, who at the request of the Special Court provide witnesses from Sierra Leone, Liberia and other countries with visas for purposes of testimony.

Then there are also arrangements with the Dutch Police to completely take care of particularly vulnerable or high profile witnesses.

Coordination with and the assistance of the Dutch and Belgian authorities at Schipol and Brussels airports is always sought at the time of arrival and departure of witnesses, and is provided without demur.

There is also cooperation and agreements with the local police and fire brigades for immediate assistance whenever required.

ACCESS: Relocation is often mentioned as a protective measure. However what other protective measures are available and implemented by WVS?

WVS has a mandate to protect witnesses, unlike the ICC, who also has a mandate to protect victims who are not necessarily testifying. It is important to realise that

generally it is the parties which request the Chambers to issue protection orders for specific witnesses, although according to the rules of evidence and procedure others, such as the WVS or the witnesses themselves, can ask for special protective measures, or the Chambers themselves can order extra measures.

Protective measures are put in place only if there is a Court's Order that instructs the protection of witnesses. In case of emergency, protection measures are put in place before a decision of the Court - to make sure the person is not at risk- but then the Court has to endorse the protection of the witness, otherwise the protection ceases.

Given the fact that the trials are being held in the country where the atrocities were committed, and even for the Taylor trial the perceptions of threat and fear are considerable, the number of protected witnesses is very high compared to the other International Tribunals; perhaps over 90% are protected witnesses.

Next, it is important to distinguish between **'In Court'** and **'other'** protective measures. A witness may testify openly but will continue to be a protected witness, only the 'In court' measures are dropped.

The 'In Court' measures include the use of pseudonym, voice distortion, facial distortion, testimony from behind a screen, so as not to be visible to the public gallery. It also is to be ensured that the witness any inadvertent mention of the witness' name or other identifier is immediately redacted from the record. The witness is not to be photographed or filmed while testifying, entering or leaving the court room. All escorting of witnesses, for purposes of testimony to and from the court is to be done in unmarked vehicles, especially tinted to ensure there is no visibility of the occupants.

For determining 'other' protective measures required for the safety of a witness and his/her dependents it is necessary to do a risk and threat assessment, conducted by WVS. Views of the witness, his perceptions, the views of the investigators and the ground realities all go towards completing the threat assessment. WVS ultimately decides on the threat assessment, and on these bases protective measures are put in place when necessary.

Firstly a witness is briefed on measures they must adopt themselves to ensure their own safety, a comprehensive list of do's and don'ts is provided to them both verbally and in writing. Confidentiality and anonymity being the foremost considerations, and advice on personal behaviour to ensure such a situation is given to witnesses. This also includes advice on measures to make their dwellings places more secure.

However for the safety of a witness and **to enable them to deal with an emergency situation** a number of arrangements can be made. **These could be generally categorised as follows:**

1) Providing witnesses with telephone numbers to call in case there is a need for assistance. Of course telephones or coverage is mostly not available in the country, but **the name and introduction to a nearest contact** person who can get a message to headquarters is provided. Witnesses are also encouraged to provide us with suggestions as to **how we can contact them and vice versa**. This is incorporated in their Personal History Proforma.

2) In case there is a need and the possibility witnesses are provided with cell phones for emergency contact.

3) The Police or even military units or even UN units are alerted to provide help in case of need.

4) There could be provision of temporary watchmen.

5) Depending on the level of the threat, there could be provision of temporary residential guards, and these could be extended for longer periods if necessary.

6) In case a threat is imminent a witness and dependents can be relocated to another city within the country, this could happen a number of times if necessary and a comprehensive report has been prepared for the submission to the Government of Sierra Leone. This includes recommendations giving the requirements for personnel, physical infrastructure, a budget to start off operations, and an annual budget, a draft legislation pertaining to Witness Protection and Witness Assistance Programmes. It also includes concrete suggestions as to where funding will be available to initially start the operation at the national level, and also to continue it for some time, before the Government can take over the financing completely from within the state exchequer.

Essentially what is envisaged is that the national witness protection unit will also take over the additional task of looking after the witnesses who have testified before the Special Court if circumstance arise where assistance is required by them, otherwise will just have more of a monitoring role.

Secondly a study is also being conducted as part of the Residual Issues mechanisms being put in place, where one or more International bodies can again have a focal point and be tasked with looking after Court witnesses. A number of alternatives as to how this can be best achieved are under consideration at the moment.

7) For example in the Freetown area, where a large number of witnesses who are under a degree of degree of threat are temporarily relocated, pending testimony or final settlement, there is always an emergency response vehicle and team available 24/7 to meet any call for assistance.

8) In case the threat is more severe the witness and dependents could be temporarily relocated to WVS operated safe houses, if deemed necessary this could be extended for longer periods, perhaps till they finish testifying, after which a more permanent and satisfactory solution is adopted.

9) Depending on the wishes of the witness and in compliance with the laws relating to movements and residence in neighbouring countries, witnesses can be assisted in relocation to other places within the region.

10) In cases of extreme threat the witness could be relocated to other countries in Europe or North America, such situations would only occur if there are prior agreements between a host country and the SCSL, and of course the willingness of a contracting state to accommodate a particular witness.

ACCESS: So relocation is not the only protective measure, and is actually only a "last resort" measure. There are many other efficient measures that can be put in place before envisaging a relocation, which is also, quite traumatic for the witness being relocated. Would you agree?

It is never easy for a witness to be relocated, a new place without a built in support system of family and friends is extremely difficult, especially for African witnesses who are used to extended families

and a network of friends and relatives. It is also difficult for the children. However the bottom line again is that it is much safer, so all the difficulties and tribulations are often worth it. In any case if the witness eventually decides that it is safe enough for him to return to their own environment there is nothing preventing him from doing so.

ACCESS: What measures do you envisage to be put in place for the continued Safety and Support of witnesses once the Court winds up its operations, and is no longer available on the ground in Sierra Leone?

It is clear that when the Court winds up its operations there will have to be some mechanism put in place to ensure the continued safety and well being of the witnesses who have been deemed as protected, in fact this should extend to all witnesses who have testified before the Court. It is a moral and ethical obligation which the Court must continue to meet.

The SCSL is tackling it in two ways. Firstly there is the Legacy Project of establishing a Witness Protection Unit at the national level in Sierra Leone. To this end a study has been conducted and a comprehensive report has been prepared for the submission to the Government of Sierra Leone. This includes recommendations giving the requirements for personnel, physical infrastructure, a budget to start off operations, and an annual budget, a draft legislation pertaining to Witness Protection and Witness Assistance Programmes. It also includes concrete suggestions as to where funding will be available to initially start the operation at the national level, and also to continue it for some time, before the Government can take over the financing completely from within the state exchequer.

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Victim and Witness Protection before International Human Rights Bodies: The Provision of Interim Measures¹

Paulina Vega-Gonzalez

Persons who file a complaint with regional or international human rights bodies- that is, the bodies created by the human rights treaties- such as the European Court of Human Rights or the Inter-American Court of Human Rights, or the Committee against Torture- or witnesses involved in such cases, are sometimes in danger and threatened as a result of the use of such proceedings.

Regional and international human rights bodies can, in such cases, provide protection to victims and witnesses at risk. Human rights bodies - judicial and quasi-judicial - have thus envisaged interim measures- also

These protective measures can consist of ordering the State to provide personal security to a person that is being threatened, suspending the execution of a sentence such as the death penalty or deportation, or ordering the State to guarantee the physical and psychological integrity of detained persons, among other measures.

For in-court protective measures, despite the adversarial process that most of these bodies have adopted in their proceedings, there is not a great use of protective measures by these bodies; however, most of them envisage closed sessions or the use of anonymity or pseudonyms as a way to protect victims and witnesses.

Interim measures do not prejudice the substance of the proceedings before the relevant body and their protective function is their most important value.³ They are used especially if a state has accepted an individual petition procedure. Therefore, the beneficiaries could be those directly related to the claim -the alleged victims- or indirectly involved - such as witnesses, next in kind of the alleged victims or their legal representatives.

At the European Court, most of the interim measures granted are linked to the existence of an imminent danger to the applicant's life or a risk of torture, inhuman or degrading treatment or punishment.

Therefore, most of them have been granted in cases involving the application of the death penalty and in extradition or expulsion cases⁴ where there was a fear that a person might be subject to torture or inhuman treatment if extradited.⁵

As for the African Regional Protection System, Article 27 of the Optional Protocol envisages the possibility of the future Court to issue provisional measures, while the African Commission

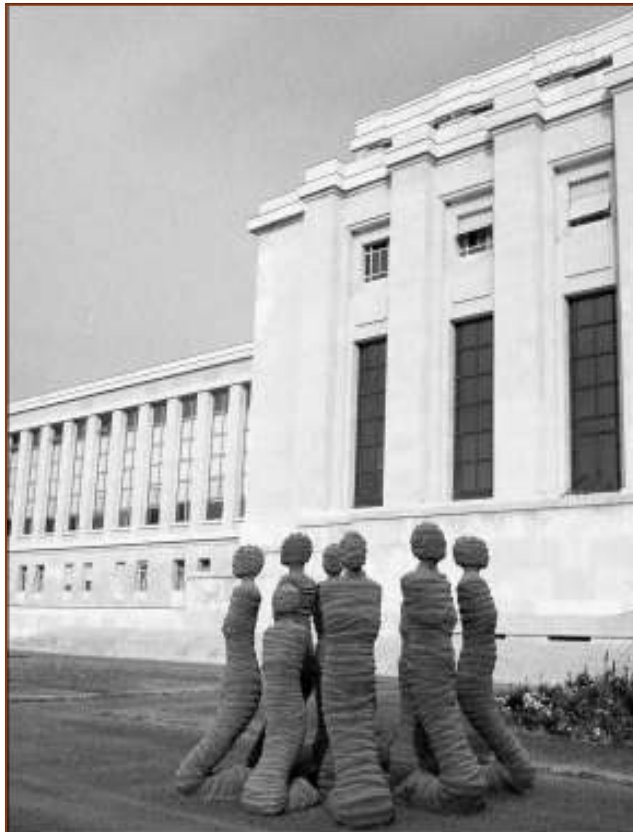
contemplates these measures in its Rules of Procedure.⁶

For the UN treaty-based Committees, four of them currently contemplate the possibility to issue interim measures.⁷

However, out of the three regional systems and the international (UN) system, it is the Inter-American one that has the most evolved jurisprudence on using interim measures to provide protection. The Inter-American Court of Human Rights can issue interim measures based on Article 63.2 of the American Convention.⁸ The most recent case law of the Court acknowledges that these measures effectively protect rights by avoiding an irreparable harm and can also help to prevent the affectation of victims and of those that will or had testified before the Court.⁹

Protection has been extended from the right to life and personal integrity to protect other rights and beneficiaries. Thus, human rights¹⁰ defenders and their organizations,¹¹ as well as judges,¹² have been successfully protected with the issuing of interim measures. Furthermore, the Court has expanded the protection to groups of persons where beneficiaries can be identify but not necessarily individualized.¹³

In some cases, the Court has explicitly indicated the modalities of such protection measures,¹⁴ including the investigation of threats. In practice, although these protection measures are temporary, the Court maintains them if the gravity and emergency situation prevail, as well as the risk of suffering an irreparable harm. The measures issued at the Inter-American System have served to increase the protection and personal security of the beneficiaries¹⁵ by including them in protection programs where personal guards, round-the-clock protection of the residence and work places and an investigation service of the threats¹⁶ have been adopted. Human rights bodies regularly have a follow up mechanism to monitor the risk situation and the effective implementation of the measures.



The United Nations building hosting the Human Rights bodies in Geneva, © A.A. 2007

called *provisional* or *precautionary* measures- as the way to respond to protection claims.² In these cases, the relevant body will have to verify that a situation of gravity, urgency and the risk of suffering an irreparable harm are present in order to issue protective measures.

If a state fails to comply with the interim measures, there are few actions that human rights bodies can take apart from exposing this situation to the international community, for example by reporting to a higher body, such as the Organization of American States' General Assembly and the European Council of Ministers, among others.

The Inter-American Court has developed a follow up mechanism that includes inviting states, the Commission and the beneficiaries to submit information periodically on the matter. In some cases it holds hearings for this purpose. In contrast, the European Court has decided that the failure to comply with these measures amounts to a new violation of article 34 of the Convention containing the right to present individual complaints.¹⁷

Although the collective compliance system currently available to enforce interim measures is still pretty weak, in practice generally states comply with them. Nevertheless, the effectiveness of the interim measures mainly rest on the strength of national protection programs or on any other national mechanism adopted by states to enforce such measures. This includes the provision of necessary resources, both human and financial to adequately provide protection. In this sense, the effectiveness of the interim measures adopted by regional or international human rights bodies largely depends on the good faith and cooperation of the state.

The development of such protective measures by human rights bodies can only be encouraged, and strategies to improve and guarantee their efficiency should be devised by them. These strategies should include the strengthening of national cooperation mechanisms to implement the measures and building states' capacity to provide protection nationally, where victims and witnesses are based.

Furthermore, international criminal tribunals should closely follow the experience of human rights bodies in providing protection to victims and witness, and draw lessons from these experiences. ●

¹⁷These issues and others on protection are explored in greater detail a Report on Protection that REDRESS will be launching shortly.

²For more on Interim Measures see Jo M. Pasqualucci. *Interim Measures in International*

Human Rights: Evolution and Harmonization, 38 Vand. J. Transnat'l L. 1, January, 2005.

³See ICJ *Nicaragua v. United States* 06/27/86; and *Bosnia and Herzegovina v. Yugoslavia*, 09/13/93. The ICJ has issued interim measures to protect the right to life in cases of death penalty eg. ICJ, *Avena and other Mexican nationals*, (Mexico v. U.S.A), 2003 I.C.J. 128, p. 54

⁴E.g., in case of *Shamayev and 10 others v. Georgia and Russia* the Court indicated that it was "desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to extradite the applicants to Russia, until the Chamber had had an opportunity to examine the application".

⁵See *Soering v. UK* 07/07/1989, para. 4 and y para. 77; *Chahal v. UK*, 1996; *HLR v. France*, 1997; *D. v. UK*, 1997 issued by the Court and *Mezher v. Sweden*, No. 25849/94; *Poku v. UK*, No. 26985/95, *Ocalan v. Turkey*, 1999 issued by the Commission.

⁶See Rule 111 of the African Commission.

⁷The Human Rights Committee -Article 86 of the Human Rights Committee Rules of Procedure; the Committee of the Convention against Torture (CAT) -Article 108(9), *Rules of Procedure*; the Committee of the Convention on the Elimination of Racial Discrimination (CERD) - Article 94(3) of the Rules of Procedure; and Committee of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) -Article 5 of the CEDAW and Article 63 of the Rules of Procedure.

⁸The Inter-American Commission (IACHR) has also the possibility to issue precautionary measures based in Article 25 of its Rules of Procedure.

⁹See IACtHR., "*La Nación*" Case (Costa Rica), Provisional Measures, Resolution 6 December 2001, reasoning 4; *Gallardo Rodriguez (Mexico)*, President's Resolution 14 February 2002, reasoning 5; *Community "la Paz de San José de Apartadó" (Colombia)*, Provisional Measures, Resolution 18 June 2002, reasoning 4; *Urso Branco Jail*, Provisional Measures, Resolution 18 June 2002, reasoning 9.

¹⁰E.g., in 2000 the Court for the first time extended the protection in the case of the massive deportation of Haitians and Dominicans protecting the rights to life, personal integrity, freedom of circulation and residence and the especial protection of children within the family, see *Haitians and Dominicans of Haitian Descent in the Dominican*

Republic (Dominican Republic), Provisional Measures, Resolution of 18 August 2000, Consideration 9.

¹¹E.g. IACtHR, *Chunimá Case (Guatemala)*, Provisional Measures, Resolution of 1st August 1991; *Giraldo Cardona (Colombia)*, Provisional Measures, Resolution of 28 October 1996; *Álvarez and others (Colombia)*, Provisional Measures, Resolution of 22 July 1997; *Digna Ochoa Plácido and others (Mexico)*, Provisional Measures, Resolution of 17 November 1999; *Human Rights Centre Miguel Agustín Pro Juárez and others (Mexico)*, Provisional Measures, Resolution of 30 November 2001.

¹²E.g. IACtHR., *Chunimá Case (Guatemala)*, Provisional Measures, Order of the President of 15 July 1991 and Constitutional Court (Peru), Provisional Measures, Order of 14 August 2000.

¹³E.g., in *Community of San José de Apartadó* case, the Court requested to Colombia to provide protection of a community and to provide the necessary measures to allow the return of the inhabitants that were forcibly displaced. In the *Digna Ochoa* case, the Court issued measures to protect those persons working in a NGO in Mexico without naming all the staff members.

¹⁴E.g., in the case *James and others (Trinidad and Tobago)* the Court requested the suspension of the sentence imposing the death penalty against a group of persons in order to avoid the possibility of *restitutio in integrum* of the rights of alleged victims in a case pending before the system, see Resolution of 29 August 1998 and of 16 August 2000, Consideration 9.

¹⁵Mostly to protect human rights defenders, social and trade union leaders and journalists. E.g., *Flórez Schneider et al. and Comisión Intereclesial de Justicia y Paz v. Colombia*, cited in the 2003 Annual Report of the Inter-American Commission on Human Rights, p. 23 and 24.

¹⁶E.g. IACHR *Agustín Jarquín Anaya, Rafael Córdoba Alvarez and Eddy Stubbs Guillén*, 12 February 1999.

¹⁷See *Olaechea Cahuas v Spain*. Judgment of 10 August 2006.



133^o Regular Session of the IACHR: Case 12.519 – Leopoldo García Lucero, Chile © oas.org

Protection in Sri Lanka: Current Developments

Basil Fernando, Executive Director, Asian Human Rights Commission

The recent series of killings of torture victims and attacks on human rights defenders in Sri Lanka is causing increasing



Gerard Perera speaks at a meeting of human rights defenders in 2003 © AHRC

concern over the protection of victims and witnesses and their ability to exercise their rights effectively. Torture and other violations of human rights are ongoing. The overreaching problem that affects the protection and promotion of human rights in this context is that the political process in the country is above the law. The law is not supreme.

Impunity for torture and other violations prevails notwithstanding some isolated judgments to the contrary. The effective implementation of the CAT Act, Act No. 22 of 1994, which stipulates that the criminal offence of torture is subject to a minimum punishment of seven years imprisonment, is adversely affected by the crisis relating to the supremacy of the law. As a matter of fact, in addition to delays in investigations and adjudication of cases, one of the issues affecting these proceedings is the absence of witness protection. This seriously affects the possibilities of redress: Gerard Perera was assassinated on the 24th November 2004, to prevent him from giving evidence regarding his torture by police officers. Sugath Nishanta Fernando, a complainant in a fundamental rights application relating to torture and a bribery case against police officers, was assassinated on the 20th September 2008 after death threats had been made to force him to withdraw his cases. On the 27th September two grenades were thrown at the house of a well-known human rights lawyer, J.C. Weliamuna and this was seen by him and the Bar Association as retaliation for his human rights work. On the 21st October court registrars and many human rights lawyers received a letter from an organisation called Mahason Balakaya (the Battalion of the Ghosts of Death), threatening lawyers with death if they appear for alleged terrorists.

While such threats continue to be proffered, a law is pending before the parliament regarding victims and witness protec-

tion. This law envisages measures such as the setting up of a national authority for the protection of victims of crime and witnesses and the establishment of a victims compensation and victim and witness protection fund. It would have constituted an important first step towards more effective victims and witness protection in Sri Lanka. However, the law, which was expected to be passed in late June, 2008, has now virtually been shelved.

The absence of witness protection has a chilling effect on litigation in all parts of the country. This is more so in the north and the east, where only the most heroic would dare to make complaints of abuse by the military or rebel groups including the LTTE because of the lack of protection and accountability in an environment marked by lawlessness. Undue delay in the administration of justice in torture cases is another major hurdle to effective remedies and the combat against impunity. This was recognised in the UN Human Rights Committee in Communication No. 1250/2004 and several recommendations were made to alter this situation. These recommendations have however not been implemented.

One significant case, newly filed, is by Lalith Rajapakse who complained that due to him being a complainant in a torture case before the High Court and the Supreme Court there was an attempt on his life which he barely escaped.

Meanwhile, there are constant protests by civil society which has begun to express the need for the development of a



Teacher with children in Transit Centre for IDP families in Sri Lanka, Trincomalee District, Sri Lanka, © April 2007 Brennon Jones/IRIN.

widespread movement for the protection of the rule of law and the defence of those who are committed to the protection of human rights and democracy. These developments provide a glimmer of hope in the ongoing struggle for respect of the integrity and rights of individuals against the abuse of power in Sri Lanka. ●

Best-Practice Recommendations for the Protection and Support of Witnesses

S. Charters and S. Vahidy¹

Witnesses of international criminal tribunals feel most supported and protected when receiving clear and consistent levels of service, the Special Court for Sierra Leone (SCSL) concludes. Guidelines on what witnesses of an international criminal tribunal should receive, and close observance of these guidelines can ensure that witnesses' sense of their long-term security is not adversely affected by the process of testifying, and that their levels of anxiety decrease as the testimony process unfolds.

In May 2008, the SCSL published these findings in its 'Best-Practice Recommendations for the Protection and Support of Witnesses: An Evaluation of the Witness and Victims Section'. This followed a series of interviews with 200 SCSL witnesses from both the Prosecution (59%) and Defence (41%) sides, representing both victims (60%) and insiders/perpetrators (31%). A structured questionnaire was developed after an initial series of exploratory interviews, and was administered to each witness by trained interviewers from the SCSL in order to preserve witness identity. In all, 82% of eligible witnesses who had testified at the SCSL participated in the study, representing the first and most exhaustive assessment of witness experiences at an international tribunal.

The objective of the Witness and Victims Section (WVS), as laid out in Rule 34 of the SCSL's Rules of Procedure and Evidence, is to protect, secure and support witnesses in the short and long-term – with the aim of ensuring that no witness is adversely affected by their contact with the SCSL. Throughout the pre-, during and post-testimony process there were no significant differences between witnesses' ratings of their security. This indicates that the process of testifying did not expose witnesses to any danger, and that their identities as witnesses were not revealed to the public. The SCSL's protection procedures were therefore effective. Witnesses can also be vulnerable to psychological change throughout the testifying process. The study concludes, however, that there were significant decreases in witness levels of anxiety, which suggest that the SCSL is achieving its aim of ensuring that witnesses are emotionally prepared to testify.

Witnesses' sense of their own security and wellbeing is affected by the degree of confidence and respect they have for protection and support staff. In order to build a trusting rapport, clarity and consistency on what the witness can and cannot expect to receive is key. Additionally, staff (including lawyers and judges) can help themselves by simply being respectful, encouraging and friendly to witnesses. The level of the rapport built during the testimony period, as well as the amount of communication the witness has with the tribunal once returning home, greatly affects their degree of satisfaction with the post-testimony services.

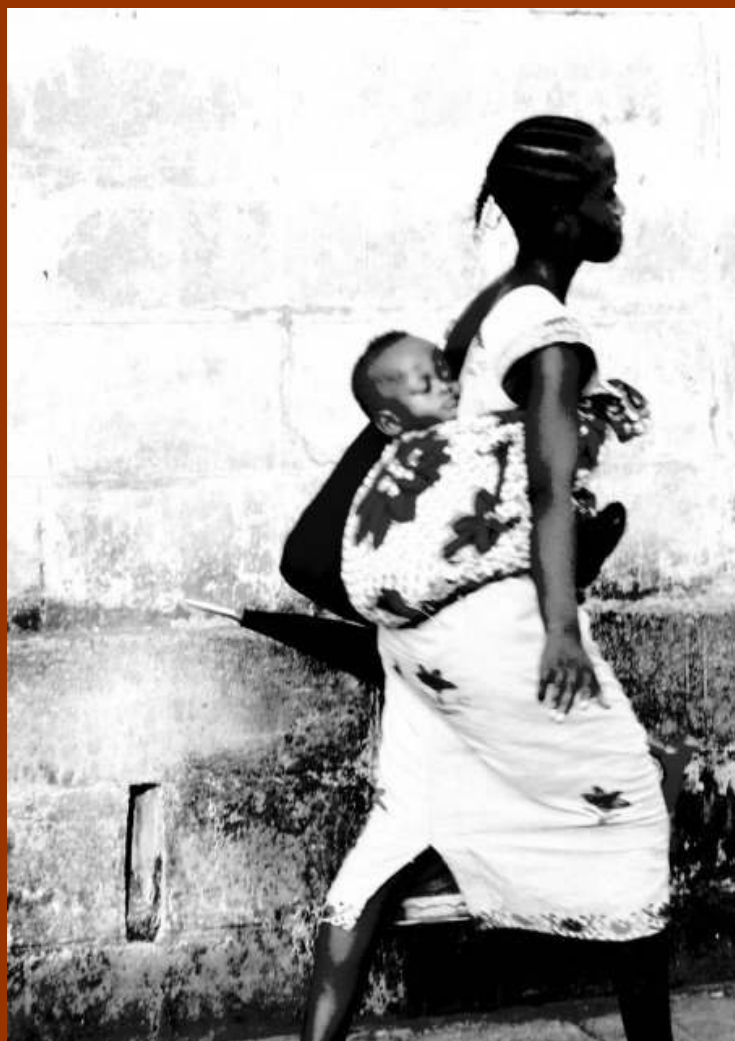
Victim-witnesses are more likely to experience feelings of distress in the trial chamber (especially when seeing the accused), and support staff could usefully teach them ways of managing these feelings so that they are still able to testify. In particular, women, survivors of sexual and gender-based violence and younger witnesses need additional support, as do those required to talk about painful experiences. The

more comfortable that a witness is with the testifying process, the more stable is their wellbeing. Familiarity can be built through briefing sessions on the witnesses' statements, the courtroom and the legal process, as well as thorough preparation for the cross-examination process. The more that testifying is presented as a straightforward information-giving exercise, the less anxious witnesses will be.

The SCSL's recommendations for the protection and support of witnesses are rooted in Sierra Leone's distinct environment, but there remain some key lessons that carry over. Not least, the transparency of the service delivery protocol and the manner of the staff are key concepts which impact witnesses' security and wellbeing, and do not only apply to one environment.●

The full SCSL report can be viewed at <http://www.sc-sl.org/Documents/witnesssupport.pdf>

¹Simon Charters managed the Witness Evaluation and Legacy Project at the Special Court for Sierra Leone in its implementation of this study. He continues to monitor and report on projects from within the Office of the Registrar; Saleem Vahidy has served as Chief of Witness and Victims Support section at the SCSL since 2003, prior to which he held a corresponding role at the International Criminal Tribunal for Rwanda.



Woman with child in Freetown, 2007 © A.A.

Sexual Slavery or “Forced Marriage” in Conflict Zones – A Legal Distinction with Ramifications

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Coalition for Women’s Human Rights in Conflict Situations



Women in Kabala, Sierra Leone, 2007© A.A.

The **Coalition for Women’s Human Rights in Conflict Situations**¹ met in Montreal on October 10-11, 2008. One of the important topics for discussion was the finding of the Appeals Chamber of the Special Court for Sierra Leone in February 2008, that acts of forced marriage amount to a crime against humanity as an “other inhumane act”,² and its implications for women in the Democratic Republic of Congo, Sierra Leone, Uganda, Rwanda, and elsewhere. Learning from the experience of monitoring the prosecution of gender crimes and sexual violence at the ICTR and observing the developments of cases from the ICTY, SCSL and the ICC, it is important for advocates and survivor groups to have an impact on the international jurisprudence in this area. History tells us that gendered violence can be minimized or inappropriately framed in law.

In its decision, the Appeals Chamber stated that forced marriages during the Sierra Leone conflict were “of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, sexual slavery and sexual violence”.³ While the Chamber did not enter new convictions under this ground, its decision recognizes the experiences of survivors of forced marriage as some of the most serious international crimes.

The Appeals Chamber dismissed, however, that forced marriage ought to be subsumed in the crime against humanity of sexual slavery, as the Trial Chamber had found. Here the Appeals Chamber distinguished forced marriage in the Sierra Leone context from sexual slavery: while it “shares certain elements with sexual slav-

ery such as non-consensual sex and deprivation of liberty, there are distinguishing factors [such as] ... forced conjugal association” and an “implied relationship of exclusivity”.⁴ Unexpectedly, the Chamber stated, “forced marriage is not predominantly a sexual crime”.⁵

Because international law does not list forced marriage as a specific crime, the decisions of the Trial and Appeals Chambers of the SCSL are groundbreaking and complicated. Survivors of forced marriage in Sierra Leone and their advocates may or may not agree with the distinctions drawn between sexual slavery and forced marriage. The Special Rapporteur on Contemporary Forms of Slavery, Gay J. McDougall, reported in 1998 that sexual slavery “also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forms of labor that ultimately involves forced sexual activity, including rape by their captors”.⁶

To charge forced marriage as a form of slavery, including sexual slavery, recognizes its gravity for victims. But does it capture the harms and consequences for women? Does a new crime of “Other inhumane act” (forced marriage) marginalize the crime or recognize distinct aspects of forced marriage in war?

In the context of forced marriage within the Lord’s Resistance Army in Uganda, for example, Christopher Carlson and Dyan Mazurana found that “what is often overlooked when forced wives are characterized as solely sexual slaves is a particular quality of injustice they have suffered – the forced imposition of the status of marriage”.⁷ According to Rhonda Copelon, Director of the International Women’s Human Rights Law Clinic (IWHR) and a member of the Coalition, “the designation as ‘marriage’ is problematic because it accepts the definition that the perpetrators want to give to it and this makes female slavery of this kind distinct and therefore at risk of being seen as of secondary importance. I am not sure this helps the women involved and that is crucial.”

And the UN Special Rapporteur on Violence Against Women, Yakin Erturk, reporting on Algeria in February 2008, found: “It

is estimated that several thousand women [and girls] were raped by members of armed Islamist groups ... Grossly abusing the precepts of Islam, perpetrators reportedly sometimes tried to depict their atrocities as ‘religious temporary marriages’”.⁸

Forced marriage is an emerging issue in another legal context as well – that of international human right to consent and choice in marriage. Prosecuting forced marriage as a crime against humanity or as a form of slavery resonates with the debates about early, arranged and forced marriages currently taking place in Pakistan, Bangladesh, England and Canada.⁹ While forced marriage in war is distinct from coerced, arranged marriage, the legal standards and criteria need to be closely examined.

Here Rhonda Copelon states “by creating a separate crime of forced marriage in conflict situations, the Appeals decision potentially raises the bar on forced marriage under human rights law where marriage without consent is a violation whether or not the conditions imposed upon the woman are slavery-like or not – this may let forced conjugal relationships imposed by families and cultures off the hook. This is distinct from arranged marriages where the parties have the right to consent.”¹⁰

The Coalition is working with its partners to respond to the decision from a gender justice perspective. •

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¹The Coalition for Women’s Human Rights in Conflict Situations is coordinated by the Montreal-based Rights & Democracy. For the mandate of the Coalition and related information see: http://www.womensrightsoalition.org/site/main_en.php

²*Brima, Kamara and Kanu*, Case No. SLSL-2004-16-A, 22 February 2008 Appeals Chamber.

³*Ibid.* para 200.

⁴*Ibid.* para 195.

⁵*Ibid.*

⁶E/CN.4Sub.2/1998/13 para 30.

⁷“Forced Marriage within the Lord’s Resistance Army, Uganda” May 2008 report at p. 15. Available at: <https://wikis.uit.tufts.edu/confluence/display/FIC/Women%27s+Rights>.

⁸SRVAW REPORT MISSION TO ALGERIA 2008/A/HRC/7/6/Add.2 (13 February 2008) at para. 82.

⁹See, Submission by INTERIGHTS to “Home Office Working Group – Information Gathering Exercise on Froced Marriage” (March 2000).

¹⁰See the Ouagadougou Declaration on Early and Forced Marriage. Available at <http://www.forwarduk.org.uk/news/events/24>.

Working Group affiliated organisations include:

Amnesty International • Avocats Sans Frontières • Centre for Justice and Reconciliation • Coalition for the International Criminal Court • European Law Student Association • Fédération Internationale des Droits de l’Homme • Human Rights First • Human Rights Watch • International Centre for Transitional Justice • International Society for Traumatic Stress Studies • Justitia et Pax • Medical Foundation for the Care of Victims of Torture • Parliamentarians for Global Action • REDRESS • Women’s Initiatives for Gender Justice

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