

**New England School of Law
Rwanda Genocide Prosecution Project**

Brief on the Power of the
International Criminal Tribunal for Rwanda
to Issue and Enforce Subpoenae to
States, State Officials, Individuals, and
International Organizations, and the Power
to Review State Documents for National
Security Concerns, and the Power to
Protect Victims and Witnesses

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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I. Introduction and Summary of Conclusions

This memorandum will address the powers of the International Criminal Tribunal for Rwanda (hereinafter ICTR) to issue subpoenae and binding orders: to States; State Officials; private individuals; and to review documents regarding national security concerns. Additionally, the power of the ICTR to protect witnesses and victims will be addressed. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) has provided some guidance on these issues. In the *Blaskic* case, the Appeals Chamber decided that the ICTY has the power to: issue subpoena to individuals acting in a private capacity; issue binding orders to States; review documents to determine if national security concerns are valid; but not to authorize binding orders to be addressed to State Officials in their official capacity.¹ Decisions of the Appeals Chamber of the ICTY are important to the ICTR because that body is to serve the dual role of appeals chamber for both the ICTY and ICTR.²

The decisions of the Appeals Chamber are establishing precedent, as the tribunals are the first of their kind. The contours of these decisions will be fleshed out in subsequent cases. What this means is that the decisions on the issues addressed in this memorandum

¹Decision on the interlocutory appeal of the Republic of Croatia, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-Ar 108 *bis*, ("*Interlocutory Decision*").

²Article 12(2) of the Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994).

2. The members of the Appeals Chamber of the International Tribunal for The Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

will be open to interpretation and potential expansion at later dates. The purpose of the arguments herein, therefore are to provide a basis for expanding the subpoenae powers of the tribunals so they can be more effective in pursuing their duties. The Appeals Chamber decision will function as a launching point for discussion of the powers of the ICTR and will be supplemented by other authorities which provide a foundation for reinterpretation and expansion of those powers.

To this end this memorandum concludes:

- The ICTR, regarding States, in the least has the power to issue binding orders.
- The ICTR, in order to competently effect its mandate and duties must have the power to issue subpoenae to States.
- The ICTR, regarding State Officials, currently cannot issue subpoenae or binding orders to State Officials unless they are regarding actions in their capacity as private individuals.
- The ICTR, in order to efficiently adjudicate cases must have the power to issue subpoenae to State Officials, in their official capacity.
- The ICTR, has the power to issue subpoenae to individuals acting in their private capacity.
- The ICTR, has the power to review documents claimed to contain national security concerns.
- The ICTR, has the power to issue subpoenae to international organizations and their staff members.
- The ICTR, has the power to protect victims' and witnesses' identities from the media and the accused.

II. Factual Background

The issues in this memorandum arise from the establishment of the ICTR and its need to fulfill its mission to bring those responsible for the war crimes committed in Rwanda in 1994 to justice. The crisis began with the death of Rwandan President Juvenal Habyarimana when his airplane was shot down.³ This incident sparked widespread and systematic murder of Tutsi and moderate Hutus by Hutu extremists resulting in the slaughter of 500,000 to one million civilians, mostly Tutsi men.⁴ This loss of life was more than three times the rate of loss of Jewish lives during the Holocaust. Now that the hostilities have subsided and the ICTR has been created, the tribunal must have a framework to work within. Establishing the powers to subpoenae documents, officials to explain them, individuals to testify, and the power to protect witnesses and victims is necessary to creating that framework and bringing the war criminals to justice.

The relevant Articles of the Statute dealing with the powers of the Tribunal in this memorandum are:

- Article 1, Competence of The ICTR
- Article 5, Personal Jurisdiction
- Article 6, Individual criminal responsibility
- Article 7, Territorial and Temporal jurisdiction
- Article 8, Concurrent jurisdiction
- Article 12, Qualification and election of Judges
- Article 17, Investigation and preparation of indictment

³Virginia Morris and Michael P. Scharf, *An Insider's Guide to The International Criminal Tribunal for Rwanda*, Transnational Publishers, Advance Copy, Dec. 1997, at 49.

⁴*Id.*, at 49, (U.S. dept of State, Country Reports on Human Rights Practices for 1994, 104th Cong., 1st Sess. (Comm. Print 1995), at 200).

- Article 18, Review of the indictment
- Article 19, Commencement and conduct of trial proceedings
- Article 20, Rights of the accused
- Article 21, Protection of victims and witnesses
- Article 28, Cooperation and judicial assistance
- Article 29, The status, privileges and immunities of the ICTR

Additionally, the relevant Rules of Procedure and Evidence dealing with the powers of the

Tribunal in this memorandum are:

- Rule 11, Non-compliance with a request for deferral
- Rule 13, Non Bis in Idem
- Rule 42, Rights of Suspects during Investigation
- Rule 54, General Rule, of Orders and Warrants
- Rule 59, Failure to Execute a Warrant or Transfer Order
- Rule 61, Procedure in Case of Failure to Execute a Warrant
- Rule 66, Disclosure by the Prosecutor
- Rule 69, Protection of Victims and Witnesses
- Rule 75, Measures for the Protection of Victims and Witnesses
- Rule 77, Contempt of the Tribunal
- Rule 78, Open Sessions
- Rule 79, Closed Sessions
- Rule 89, General Provisions, of Evidence
- Rule 96, Evidence of Cases of Sexual Assault
- Rule 108 *bis*, Notice of Appeal, Appellate Proceedings

III. Legal Discussion

The first issue to be discussed will be the type of orders the tribunal has the power to employ in addressing States and the basis and reasoning for expanding those powers. The next issue is whether or not the tribunal has the power to direct orders to State Officials. The third section focuses on the tribunal's ability to serve orders on individuals that were or are acting in their private capacities. The fourth section analyzes the tribunal's power to review

documents that States claim involve national security concerns. Finally, there will be a discussion on the tribunal's power to protect witnesses and victims to promote their confidence that their safety will be provided for, should they testify.

A. The International Criminal Tribunal for Rwanda's Power over States.

a. The Tribunal has the Power to Issue Binding Orders and Requests to States, with Which They are Obligated to Comply Pursuant to Article 28 of the Statute of the Tribunal.⁵

The Appeals Chamber has determined the way Trial Chambers may invoke a State's obligation to produce documents is through binding orders and requests.⁶ The Appeals Chamber has also decided that subpoenae (in the sense of an injunction accompanied by a threat of penalty) cannot be applied or addressed to States for the following reasons:

- the ICTR lacks the ability to enforce subpoenae;
- only other States or the organized international community can implement enforcement; and
- penalties would not be penal in nature because States cannot be subject to criminal sanctions.⁷

Therefore, only binding orders or requests, as opposed to subpoenae which carry an inherent

⁵*Interlocutory Decision, supra*, n. 1, para. 25.

⁶*Id.*, para. 25.

⁷*Id.*, para. 25.

threat of penalty, can be addressed to States.

The resolution establishing the ICTR and its Statute was created under Chapter VII of the Charter of the United Nations. This chapter contains Articles 39-51 which give the Security Council the power to take action to respond to threats to the peace or breaches of the peace. In order to attain these goals in the context of the Rwandan situation, the Security Council has decided that all States shall cooperate fully with the ICTR,⁸ and that States shall comply without undue delay to an order by a Trial Chamber of the ICTR.⁹ These actions have created the obligation of all members to comply with orders of the Tribunal and Article 28 imposes an obligation on all Member States towards all other Members¹⁰ to meet their obligations to the Tribunal. This creates a community interest in observance of and legal

⁸Resolution of the Security Council establishing the International Criminal Tribunal for Rwanda, S/RES/955 (1994), pg. 2, para 2.

2. *Decides* that all states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and *requests* States to keep the Secretary-General informed of such measures.

⁹Article 28 (2) of the Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), pg. 15.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

- a. The identification and location of persons;
- b. The taking of testimony and the production of evidence;
- c. The service of documents;
- d. The arrest or detention of persons;
- e. The surrender or the transfer of the accused to the International Tribunal for Rwanda.

¹⁰*Interlocutory Decision, supra*, n. 1, para. 26.

interest in the fulfillment of these obligations.¹¹ The ICTR, through the creation of the Statute and the Rules of Procedure and Evidence has established the basis of the Tribunal's power to issue binding orders and Member State's obligation to respond appropriately.

These obligations manifest themselves in two ways. The first is an obligation by the State that can be fulfilled through its organs, such as producing official documents.¹² The second obligation concerns the State's jurisdiction over individuals, for example, where the Tribunal issues an order for arrest to be carried out by the State.¹³ These are the essential obligations that States must meet in order for the ICTR to perform its duties. These obligations are tied directly to the ICTR's jurisdiction. The Tribunal has two types of jurisdiction that it operates under. The first gives the ICTR jurisdiction over the territory of Rwanda and neighboring States where serious violations of international humanitarian law committed by Rwandan citizens occurred from the period of 1 January 1994 through 31 December 1994.¹⁴ The other gives the Tribunal concurrent jurisdiction with and primacy over national courts to prosecute persons for serious violations of international humanitarian law in Rwanda and surrounding States between 1 January 1994 and 31 December 1994.¹⁵

¹¹*Interlocutory Decision, supra*, n. 1, para. 26.

¹²*Id.*, para. 27.

¹³*Id.*, para. 27.

¹⁴Article 7 of the Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994).

¹⁵Article 8 (1) and (2) of the Statute of the International Criminal Tribunal for Rwanda, S/RES/1994 (1994).

The Appeals Chamber has also determined that Article 28 of the Statute extends subject matter jurisdiction to only "natural persons," and that the Tribunal's ancillary jurisdiction over States extends only to issue binding orders or requests.¹⁶ These conditions, regarding obligations and jurisdiction, extend not just to the belligerents, but to all States that may harbor information, persons, or cases-in-controversy that would fall under the Tribunals jurisdiction as established in Article 7 and 8 of the Statute of the ICTR.¹⁷

In effecting binding orders, the Tribunal should first attempt a cooperative process to acquire the documents, persons, or testimony sought.¹⁸ This cooperative process should involve negotiation and discussion between the adversarial parties to resolve what issues, documents, or testimony are crucial before resort to more coercive measures are employed to compel production. Should this approach fail it would then be appropriate to resort to the Tribunals mandatory compliance powers.¹⁹ The binding orders will probably only need to be directed to Rwanda as the home country of the belligerents.²⁰ Since almost of the transgressions occurred and or were planned in Rwanda, it is the most likely location of

¹⁶*Interlocutory Decision, supra*, n. 1, para. 28.

¹⁷*Id.*, para. 29.

¹⁸*Id.*, para. 31.

¹⁹Article 28 (1) and (2) of the Statute of the International Criminal Tribunal for Rwanda, S/RES/1994 (1994).

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. Reproduce at FN. 9.

²⁰*Interlocutory Decision, supra*, n. 1, para. 30.

necessary documents and individuals to be produced for and before the ICTR. Third-party States will probably need not have binding orders issued to them because of this practical difference between them and Rwanda.²¹

The Appeals Chamber has determined that the binding orders issued to States cannot be as broad as in the United States - style discovery process,²² where the parties can request information in broad categories that many uncomfortable with this method refer to as "fishing expeditions". The Chamber has established a set of guidelines that any order or request must meet before they can be issued. Those guidelines are as follows:

- the order must identify specific documents and not broad categories;
- the order must set out succinctly the reasons why such are deemed relevant to the trial;
- the order must not be unduly onerous; and
- the order must give the requested State sufficient time for compliance.²³

Ultimately, using the above guidelines, it is for the Judge or Trial Chamber to make a preliminary determination as to whether the items requested appear relevant, admissible, and are identified with sufficient specificity²⁴. If the Judge or Trial Chamber decides the

²¹*Interlocutory Decision, supra*, n. 1, para 30.

²²*Id.*, para. 32, (Brief on appeal of the Republic of Croatia in opposition to subpoenae duces tecum, 18 August 1997, pp. 5-14).

²³*Id.*, para. 32.

²⁴Decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum, Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-PT, T. Ch. II, 18 July 1997 (*Subpoenae Decision*), pg. 36, para. 105.

guidelines are sufficiently met, the order or request will be issued and the State is required to comply²⁵.

Should the State not comply with a binding order or request, the Appeals Chamber has decided the appropriate remedy is to make a report to the Security Council since the ICTR lacks enforcement or sanctioning powers.²⁶ The power to make a judicial finding of non-compliance is inherent because the Tribunal must possess the power to make all determinations necessary for the exercise of its primary function.²⁷ Additionally, the Tribunal's power to report directly to the Security Council is derived from the relationship between the two institutions, that being that the ICTR was created by the Security Council through its Chapter VII enforcement powers.²⁸ The power to report non-compliant States to the Security Council were incorporated by the Tribunal into the rules by Rule 7 *bis*. The ICTR cannot encroach on the sanctioning powers of the Security Council but has created guidelines for how the United Nation's Members may act to bring a State into compliance:

- action may only be taken after a judicial finding of non-compliance has been made by the Tribunal; and
- action may take various forms, such as political or moral condemnation, or collective request to cease breach, or economic or diplomatic sanctions.²⁹

Apart from Rule 7 *bis* the President of the Tribunal simply has the role of transmitting to the

²⁵*Interlocutory Decision, supra*, n.1, para. 32.

²⁶*Id.*, para. 33.

²⁷*Id.*, para. 33.

²⁸*Id.*, para. 33.

²⁹*Id.*, para. 36.

Security Council the judicial finding.³⁰ Thus the ICTR has the power to issue binding orders and requests to states and should they not comply the Tribunal only has the recourse of reporting the non-compliance to the Security Council.

**b. The International Criminal Tribunal for Rwanda
Must Have the Power to Issue Subpoenae
to States.**

It would be meaningless to create an international tribunal without the power to command the production of necessary evidence.³¹ To help put this in perspective, these tribunals are the first of their kind since the historic Nuremberg and Tokyo Tribunals following World War II. There exists a significant difference though between those tribunals following World War II and the ICTR and ICTY of today, that being that the World War II victors conducted the trials at Nuremberg and Tokyo with documents they had captured.³² The ICTR, in contrast, is being conducted at the request of the Government of Rwanda.³³ This fundamental difference creates a situation where the ICTR should have the power to issue subpoenae, at least with respect to Rwanda.

There are certain limitations on the power to issue subpoenae, cooperative efforts must first be attempted, pursuant to Articles 17 (2) and 28 (1). These Articles envision a

³⁰*Interlocutory Decision, supra*, n. 1, para. 37.

³¹See *amicus curiae* brief by R. Wedgwood, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-AR 108 *bis*, 15 Sept. 1997 ("*amicus curiae, R. Wedgwood*"), pg. 2.

³²*amicus curiae, R. Wedgwood*, pg. 3.

³³Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), pg. 2, para. 2, (reproduced, *supra*, at n. 8).

cooperative relationship between the prosecutor and the State in attempting to gather information for the preparation of an indictment and prosecution of individual alleged to have committed serious violations of international humanitarian law.³⁴ Next, the articles contain an express mandatory compliance power in Article 29 (2) that should only be relied upon in cases where it is really necessary.³⁵ This authority is critical to compel States to comply with orders issued by the Tribunal. Third, this power of mandatory compliance should rarely, if ever, be used in relation to third States that may have documents, indictees, or witnesses.³⁶ These third-party States have probably enacted implementing legislation and in all likelihood will respond to requests without the need for the implied penalty of a subpoenae. Fourth, the need for the use of this power should only arise in the post-indictment phase because pre-indictment powers are dealt with in Article 17 (2).³⁷ Finally, the most important limitation is that a subpoenae can only be issued after due cause has been shown by the proposing party to the Tribunal, since the Tribunal issues them.³⁸ It is this final step that will ensure that the issuance of a subpoenae by the Tribunal is for a reason critical to the Tribunal in pursuing its mission.

Article 28 (1) expressly obligates States to "cooperate with the Tribunal in the

³⁴Prosecutor's Brief in response to the brief of the Republic of Croatia in opposition to subpoenae duces tecum, 8 Sept. 1997, (*Prosecutor's Brief*), para. 27 (i).

³⁵*Id.*, para. 27 (i).

³⁶*Id.*, para. 27(ii).

³⁷*Id.*, para. 27(iii).

³⁸*Id.*, para. 27(iv).

investigation and prosecution of persons accused of committing serious violations of international humanitarian law." Sub-paragraph (2) of Article 28 requires States to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber." Article 18 (2) states that a Judge may issue . . . orders as may be required for the conduct of the trial." Rule 54 provides that "a Judge or a Trial Chamber may issue such orders, summons, subpoenae, warrants, and transfer orders as may be necessary for the purposes of the investigation or for the preparation or conduct of the trial." Thus, the power of the Tribunal to issue orders to States is set out expressly and with full clarity.³⁹ Furthermore, under Article 25 of the United Nations Charter, States are obligated to abide by decisions of the Security Council duly taken under Chapter VII. Therefore, since the ICTR was established by the Security Council pursuant to Chapter VII, and the Security Council has delegated the power to issue specific orders that are binding to the Tribunal through the Article of the ICTR, and States are obligated to abide by decisions of the Security Council under Chapter VII, it is only reasonable to conclude that the Tribunal has the power to issue subpoenae.⁴⁰ The ability to issue subpoenae is necessary to the Tribunal's ability to effect its duties to procure documents and testimony.⁴¹ Finally, this power must be available to the Tribunal to ensure a fair trial for both the prosecution and defense, for without this power

³⁹*Prosecutor's Brief, supra*, n. 34, para. 29.

⁴⁰*Id.*, para. 29-31, (Case concerning Reparation for Injuries Suffered in the service of the United Nations, I.C.J. Rep 1949 p 149 at 182).

⁴¹*Id.*, para. 32.

critical documents or testimony may not be made available.⁴²

The President of the ICTY in various statements to the Security Council has affirmed the obligation of States to comply with binding and enforceable orders of the Tribunal, and has advised the Security Council of States not in compliance.⁴³ The Security Council has responded to these statements by reiterating the State's obligation to be in compliance and has condemned any attempt to challenge the authority of the Tribunal.⁴⁴ Additionally, there are a number of rules which further reinforce the power to compel compliance with Tribunal orders such as: Rule 11 [Non-compliance with a Request for Deferral]; Rule 13 [Non Bis in Idem]; Rule 59 [Failure to Execute a Warrant or Transfer Order]; Rule 61 [Procedure in Case of Failure to Execute a Warrant]; and Rule 108 *bis* which is an example of the Tribunal's auxiliary jurisdiction that allows an interlocutory review of Trial Chamber decisions.⁴⁵ It is wrong to assume the creation of the Tribunal constituted the enforcement measure under Chapter VII, and all further decisions and orders of the Tribunal lack authority under Chapter VII.⁴⁶ Finally, the Security Council in establishing the Tribunal under Chapter VII expressly

⁴²*Prosecutor's Brief, supra*, n. 34, para. 32-33.

⁴³*Id.*, para. 36, (Letter dated 24 April 1996 of the President of the Tribunal to the President of the Security Council concerning the Rule 61 decision in the "Vukovar Hospital," Letter dated 16 September 1996 from the President of the Tribunal addressed to the President of the Security Council, (S/1996/763)).

⁴⁴*Id.*, para. 37, (Statement by the President of the Security Council, 8 August 1996, (S/PRST/1996/34)).

⁴⁵*Id.*, para. 41.

⁴⁶*Id.*, para. 42.

endowed it with all the necessary powers to function as an effective criminal tribunal.⁴⁷

The Tribunal is unique in history and was the first international tribunal established with the following combination of features:

- it is established by the Security Council as an enforcement measure under Chapter VII of the Charter;
- its jurisdiction is compulsory, without the need for acceptance by any State;
- it has territorial jurisdiction;
- it has primacy over national courts;
- it is a criminal court, trying charges of the most heinous of all offenses, in which liberty and reputations of individuals are at stake; and
- its Statute contains express provisions requiring States to comply with its orders.⁴⁸

It would not be surprising that a court had never exercised such unique powers with respect to a State before.⁴⁹ Therefore, it would be a specious argument at best that because no Tribunal had these powers in the past this Tribunal does not. This is especially true after the comprehensive and express method with which the Security Council established the Tribunal and the volunteer nature of Rwanda's request that the Tribunal be created.

Should the issue of Sovereign Immunity arise it would at best be a fallacious argument. First, the claim would be a *non sequitur*, because this doctrine developed for

⁴⁷*Prosecutor's Brief, supra*, n. 34, para. 42.

⁴⁸*Prosecutor's Brief, supra*, n. 36, para. 44, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v, Tadic*, 2 Oct. 1995, p. 19, para. 40).

⁴⁹*Id.*, para. 44.

proceedings in domestic courts and the ICTR is not a domestic court.⁵⁰ Secondly, since Rwanda expressly and specifically requested establishment of the tribunal,⁵¹ and Rwanda is a member of the United Nations, it is both morally and legally obligated to comply with subpoenae and should be estopped from raising a question regarding Sovereign Immunity. Finally, these same arguments apply to all member States of the United Nations as the Tribunal was created as an enforcement mechanism under the Chapter VII authority of the Security Council.

Should a State be in non-compliance with a subpoenae issued by a Trial Chamber, the Tribunal can find that State in contempt of the ICTR. Rule 77, Contempt of the Tribunal, subsection (A) states that a witness who refuses to answer a question relevant to the issue before a Chamber may be found in contempt of the Tribunal, and that a fine or jail term can be imposed. In the most general terms a subpoenae is an inquiry in regard to information necessary for one side or the other in a case-in-controversy. Therefore, documents subpoenaed from States would be questions relevant to an issue before a Chamber, and in this instance as the provider of the documents the State would be the defacto "witness". The State would serve as a "witness" through the delivery by and testimony of the State Official

⁵⁰*amicus curiae*, R. Wedgwood, *supra*, n. 31, pg. 10.

⁵¹The Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), pg. 2, para. 1.

Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

who would come before the tribunal to authenticate and explain the appropriate documents. While a jail term would be inappropriate as well as impractical, without some way to enforce an order issued, States, particularly former belligerents, may be convinced they can ignore orders with impunity.⁵² Mere reference to the Security Council regarding non-compliance is insufficient. The Tribunal is not the only item on the Security Council's agenda. Providing that resorting to the Council on occasions of non-compliance would undermine the World community's confidence that the ICTR can fulfill its mandate free from political manipulation and in an independent judicial manner.

Should the Tribunal decide that a State is in contempt, it can fine the State U.S. \$10,000.00. While Rule 77 does not specifically provide how to implement this fine, in the case of a non-compliant State it would seem that the fine amount could be on a per day basis. This may seem harsh to some, but the idea behind a penalty is to convince the transgressors to comply with the Tribunal. Since the Rules expressly indicate in other places that a "natural person" is the subject of their operation and effect, and this Rule does not so specify, it is reasonable to interpret that this Rule also extends to States. Furthermore, when the Security Council created the Articles of the Statute of the ICTR, it included language in the strongest possible terms requiring States to cooperate with the Tribunal.⁵³ Article 28 of the Statute talks of how the State "shall cooperate with the ICTR," and "shall comply without undue delay with any request for assistance or an **ORDER** by a Trial Chamber." This language should leave no doubt that the Security Council intended States to be held

⁵²*amicus curiae*, R. Wedgwood, *supra*, n. 31, pg 33.

⁵³*Id.*, pg. 33.

accountable for their actions or inactions. Additionally, the Tribunal would be entitled to seek execution of the fine in any State in which assets of the contemnor are located.⁵⁴ This should be aided by the implementing legislation the Security Council required its members to enact domestically⁵⁵ and the primacy the Tribunal enjoys over domestic courts regarding questions raised under its jurisdiction.⁵⁶ For the ICTR to fulfill its mandate and duties, it must have the opportunity to utilize the power given it by the Security Council, and that includes the power to issue Subpoenae to States.

B. The International Criminal Tribunal for Rwanda's Power to Issue Binding Orders to State Officials.

a. The Tribunal Does Not Have the Power to Issue Binding Orders to State Officials.⁵⁷

The Appeals Chamber dismissed the argument that the Tribunal has the power to issue binding orders to State Officials, because they are mere instruments of a State and their actions are attributable to the State.⁵⁸ Therefore, if the State Official is acting on the behalf

⁵⁴*amicus curiae*, R. Wedgwood, *supra*, n. 31, pg 33.

⁵⁵Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), pg. 2, para. (2). (Reproduced *supra*, at n. 8).

⁵⁶Article 8(1) and (2) of the Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994).

⁵⁷*Interlocutory Decision*, *supra*, n. 1, para. 38.

⁵⁸*Id.*, para. 38, (J.B. Moore, A Digest of International Law, 1906, vol II, p. 23; Rainbow Warrior case, Ruling of 6 July 1986 of the United Nations Secretary-General, in

of the State, that official enjoys a "functional immunity."⁵⁹ While in States like the United States, it is completely normal for domestic courts to subpoenae specific government officials, the Tribunal is operating in an international context. Thus, the Appeals Chamber in effect has adopted the concept of the theory of "Act of State" which in essence treats the acts of a State Official as an organ of the State whether that official is the Head of State or another responsible official acting in accordance with Government orders as though that act was committed by the State itself. The importance of this, is that these matters must be resolved between States directly and with few exceptions (ie: war crimes, commercial acts, torts, etc.) cannot be litigated in domestic courts. This being the case, as long as a government official is acting on behalf or at the direction of their government, they cannot be issued a subpoenae or other binding order.⁶⁰

Customary international law protects the internal organization of each sovereign State: each State determines its own internal structure; designates individuals to act as State agents or organs; has the right to issue instructions to those organs, both those operating domestically and internationally; and the power for sanctions or other remedies in the case of non-compliance with those instructions.⁶¹ The corollary is that States are allowed to claim acts by those organs in their official capacity are acts of the State so the individual may not

United Nations Reports of International Arbitral Awards, vol XIX, p. 213).

⁵⁹*Interlocutory Decision, supra*, n. 1, para. 38.

⁶⁰Brief on appeal of the Republic of Croatia in opposition to *subpoena duces tecum*, Case No. IT-95-14-AR 108 *bis*, 18 Aug. 1997, (*Croatia's Brief*), pgs. 5-14.

⁶¹*Interlocutory Decision, supra*, n. 1., para 41.

be held accountable.⁶² This general rule is well established in international law and few exceptions are allowed to violate it. The exceptions are violations of international criminal law prohibiting war crimes, crimes against humanity, and genocide. State Officials cannot claim immunity if charged with violations of these laws, even if they were committed while acting under orders from other State officials. Essentially, excluding the above exceptions, a State Official cannot be directly addressed with a subpoenae, binding order or request from the Tribunal.⁶³ The traditional method of issuing a recommendation, decision, or judicial order to the State as a whole or to its authorities must be followed.⁶⁴

Articles 6 (2) and (4) and 17 (2) clearly envisage criminal responsibility of State Officials thus confirming the exception mentioned above.⁶⁵ Should there be no questions regarding violations of international criminal law however, these Articles merely provide that State Officials should render assistance to the tribunal, prosecutor, and defendant as they are so designated to do, by their State.⁶⁶ Therefore, no State Official has an obligation to provide assistance to the ICTR, that obligation falls to the State. Furthermore, the language of the Articles is not phrased in mandatory terms and was conceived with the perspective of cooperation between the Tribunal and those entities that would be the subject of the

⁶²*Interlocutory Decision, supra*, n. 1, para. 41.

⁶³*Id.*, para. 43.

⁶⁴See *amicus curiae* brief by Luigi Condorelli, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-PT, 11 Apr. 1997, ("*amicus curiae*, L. Condorelli"), para. 4.

⁶⁵*Interlocutory Decision, supra*, n. 1, para. 42.

⁶⁶*Id.*, para. 42.

Tribunal's orders and requests.⁶⁷ Ultimately, under both general international law and the Statute itself, the ICTR cannot issue binding orders to State Officials.⁶⁸ Finally, the Appeals Chamber has decided that from a practical point of procedure, notifying the appropriate State Official might prove useful in expediting the process of producing documents.⁶⁹

**b. The International Criminal Tribunal for Rwanda
Must Have the Power to Issue Subpoenae
to State Officials.**

The inability to issue subpoenae and or binding orders requiring the appearance of a State Official, as custodian of documents, will substantially hinder the Tribunal's adjudicative efficacy.⁷⁰ Therefore, it is necessary for the ICTR to have the power to Subpoenae State Officials to properly be able to dispense their responsibilities. To reiterate, from the Appeal Chamber's perspective, a binding order from the Tribunal has no implicit penalty, as opposed to a subpoenae which by its nature has an implied threat of penalty within. A custodian of documents who is familiar with their creation and preservation is the proper person to testify to the authentication, admissibility, and interpretation of those documents.⁷¹ Additionally, documents often cannot be properly authenticated or evaluated without testimony of the

⁶⁷*Interlocutory Decision, supra*, n. 1, para. 42.

⁶⁸*Id.*, para. 43.

⁶⁹*Id.*, para. 45.

⁷⁰*amicus curiae, R. Wedgwood, supra*, n. 31, pg. 30.

⁷¹*Id.*, pg. 30.

effective custodian.⁷² To allow a former belligerent or other State to select who will prepare and present requested documents, would provide the opportunity for the creation of obstructionist decisions and statutes which would substantially impair the functioning of the ICTR.⁷³ Thus, since States are not legally immune from the issuance of orders from the Tribunal, by virtue of some doctrine of "State Immunity," the argument that State Officials have any immunity disappears.⁷⁴

The Articles of the Statute of the ICTR make it clear that State Officials acting in their official capacity may be bound by decisions, determinations, and orders of the Tribunal.⁷⁵ State Officials are subject to prosecution and, if the evidence justifies it, conviction, for acts committed in their official capacity under Article 6 (2) and (4).⁷⁶ In fact Article 20 (4) (g) and Rule 42 (A) (iii) provide for the right against self-incrimination for State Officials, a right not needed if they were immune from orders of the Tribunal.⁷⁷ The legal position can be presented schematically as follows:

⁷²*amicus curiae*, R. Wedgwood, *supra*, n. 33, pg. 32, (Braswell v. United States, 487 U.S. at 31).

⁷³*Id.*, pg. 31.

⁷⁴*Prosecutor's Brief*, *supra*, n. 34, para. 55.

⁷⁵*Id.*, para. 56.

⁷⁶*Id.*, para. 56.

⁷⁷*Id.*, para. 56.

	<u>Liability to prosecution</u>	<u>Liability to order to produce</u>
The State:	No (Statute, Art. 5)	Yes (Statute, Art. 28; Rule 54)
Natural Persons:	Yes (Statute, Art. 5)	Yes (Statute, Art. 1(2), 19(1); Rule 54)
State Officials:	Yes (Statute, Art. 6(2))	Yes (Statute, Art. 18(2), 19(1); Rule 54) ⁷⁸

Within this matrix, the contention that State Officials may be immune from orders to produce evidence makes no sense at all.⁷⁹ Finally, Article 17 (2) gives the Prosecutor express authority to deal with State "authorities" as opposed to the abstract entity "the State" which demonstrates the Tribunal can approach those directly responsible for compliance.⁸⁰

The ICTR as a Chapter VII enforcement mechanism as well as a criminal body is not required to conform to standard methods of inter-State cooperation, whereby individual officials may not be addressed.⁸¹ It must have powers that are both practical and effective.⁸² As a criminal institution, this dictates that it seek the most direct route to any evidence which may have a bearing on the finding of guilt or innocence of the accused.⁸³ Any competent court must have the power to access evidence and the ability to discharge its essential

⁷⁸*Prosecutor's Brief, supra*, n. 34, para 57.

⁷⁹*Id.*, para 57.

⁸⁰*Id.*, para. 58.

⁸¹*Subpoenae Decision, supra*, n. 24, para. 69, (*amicus curiae* brief by Mr. Gaja and Ms. Annalisa Ciampi, 11 April 1997, p. 2)

⁸²*Id.*, para. 69.

⁸³*Id.*, para. 69.

function of adjudication.⁸⁴ The power of the ICTR to address State Officials is a reflection of the authority of the Security Council itself, which established the Tribunal to carry out its enforcement functions pursuant to Chapter VII of the Charter of the United Nations.⁸⁵ A recent example of the Security Council delegating its Chapter VII enforcement powers is the UNSCOM body currently working to locate, identify, and destroy Iraq's weapons of mass destruction.

Should the Tribunal find a State Official in contempt it must have the power to implement Rule 77 of the Rules of Procedure and Evidence and effect the appropriate penalty. This idea is based on the same premise argued above regarding how a State should be able to be held in contempt of the Tribunal. There is one difference in that an individual official who is in non-compliance, in addition to being able to be fined, can practically be jailed for the allowable period of time (not to exceed six months) called for in the rules.⁸⁶ The imposition of these penalties is not automatic, they are discretionary and likely only used in the most egregious of cases.⁸⁷ Thus, in order that the ICTR be able to meet its duty under the Statute, to prosecute persons accused of serious violations of international humanitarian law,⁸⁸ and meet the Article 20 rights of the accused for a for a fair and timely trial,⁸⁹ the

⁸⁴*Prosecutor's Brief, supra*, n. 34, pg 31, para. 59, (Subpoenae Decision, *supra*, n. 24, para 69).

⁸⁵*Id.*, pg. 31, para. 60.

⁸⁶*amicus curiae, R. Wedgwood*, n. 31, pg 33.

⁸⁷*Id.*, pg. 34.

⁸⁸Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994), pg. 2, para. (1), (reproduced, *supra*, n. 51).

Tribunal must have the power to subpoenae State Officials.

**C. The International Criminal Tribunal for Rwanda
has the Power to Issue Subpoenae to Individuals
Acting in Their Private Capacity.**

The Appeals Chamber has determined that the spirit of the Statute, as well as the purposes pursued by the Security Council when it established the ICTR, demonstrate that a Judge or a Chamber is vested with the authority to summon witnesses and to compel production of documents.⁹⁰ The Tribunal's authority to issue binding orders to individuals derives from the general object and purpose of the Statute, as well as the role the Tribunal is called to play thereunder.⁹¹ If a national court intends to bring to trial an individual subject to the jurisdiction of another State, as a rule it relies on treaties of judicial cooperation or, if such treaties are not available, on voluntary interstate cooperation.⁹² The relationship between courts of different States is therefore "horizontal."⁹³ The Statute of the ICTR, created under the Security Council's Chapter VII authority, granted the power to address to States binding

⁸⁹Article 20 (4) (a)-(g) of the Statute of the International Criminal Tribunal for Rwanda, S/RES/955 (1994).

⁹⁰*Interlocutory Decision, supra*, n. 1, para. 47.

⁹¹*Id.*, para. 47.

⁹²*Id.*, para. 47.

⁹³*Id.*, para. 47.

orders concerning a broad variety of judicial matters.⁹⁴ Thus, a "vertical" relationship was formed as far as judicial and injunctive powers of the ICTR are concerned *vis-à-vis* States.⁹⁵ Additionally, this power is spelled out in the Statute in such Articles as 17 (2) and 18 (2) which talk of some of the powers of the Prosecutor and Judges, respectively.⁹⁶ Furthermore, Article 28 requires States to take action regarding obligations to the ICTR concerning individuals subject to its jurisdiction.⁹⁷ Finally, the Statute confers on the Tribunal incidental or ancillary jurisdiction over individuals who may be of assistance in the task of dispensing criminal justice entrusted to the ICTR.⁹⁸

The class of individuals acting in their private capacity also includes State agents.⁹⁹ Individuals who witnessed a crime before taking office, or handled evidentiary material of relevance to Tribunal proceedings prior to initiating their official duties, can legitimately be addressees of subpoenae.¹⁰⁰ This is because their role before the Tribunal would be unrelated to their current Official duties.¹⁰¹ The same may hold true for a government official who, while engaged on Official business, witnesses a crime within the ICTR's jurisdiction

⁹⁴*Interlocutory Decision, supra*, n. 1, para. 47.

⁹⁵*Id.*, para. 47.

⁹⁶*Id.*, para. 47.

⁹⁷*Id.*, para. 48.

⁹⁸*Id.*, para. 48.

⁹⁹*Id.*, para. 49.

¹⁰⁰*Id.*, para. 49.

¹⁰¹*Id.*, para. 49.

committed by a superior.¹⁰² The individual was undoubtedly present at the event in his Official capacity, but arguably saw the event *qua* a private person.¹⁰³ This part of the Appeals Chamber decision is likely to raise criticism, it is essentially saying that an official is responsible for the transgressions of their superiors and will be held accountable for their own acts of omission for not reporting these transgressions by their superiors. Therefore, it cannot be argued the Official concerned is immune from orders to testify to what was seen.¹⁰⁴ By contrast, if the Official witnessed the crime in their Official capacity, such as a military officer overhearing an order, he was acting as a State organ and cannot be subpoenaed.¹⁰⁵

Another category of individuals that can be reached by subpoenae are State Officials who act as members of an international peace-keeping force or peace-enforcement unit.¹⁰⁶ If he should witness a crime while performing his official functions, he should be treated by the Tribunal *qua* an individual.¹⁰⁷ Such an individual is there to enforce or maintain peace and not *qua* a member of the military structure of his own country.¹⁰⁸ This individual's mandate stems from the same as that of the ICTR, a Security Council resolution, and therefore he

¹⁰²*Prosecutor's Brief, supra*, n. 34, pg. 32, para. 63.

¹⁰³*Interlocutory Decision, supra*, n. 1, para. 50.

¹⁰⁴*Prosecutor's Brief, supra*, n. 34, pg. 32, para. 63.

¹⁰⁵*Interlocutory Decision, supra*, n. 1, para. 50.

¹⁰⁶*Id.*, para. 50.

¹⁰⁷*Id.*, para. 50.

¹⁰⁸*Id.*, para. 50.

must testify within the Rules.¹⁰⁹

The last category of individuals acting in their private capacity identified by the Appeals Chamber, is the State Official who holds evidence in his official capacity, requested by his authorities to surrender it to the Tribunal, refuses to do so, and the State authorities may not have the legal or factual capacity to enforce the Tribunal's request.¹¹⁰ In this instance the State Official is not acting within his official capacity as an instrumentality of the State¹¹¹. Under these circumstances, the State Official would be "downgraded" to the status of acting as a private individual and all remedies and sanctions would be available to be used against him to bring him into compliance.¹¹² This type of individual is directly obstructing the Tribunal's proceedings, and thus jeopardizing the essential function of the tribunal.¹¹³ Finally, it will be up to the Trial Chamber to decide whether or not to make a judicial finding against the State for failure to comply under Article 28.¹¹⁴

The Appeals Chamber has determined that there should be two models for making contact with individuals, one for the belligerent State and one for third-party States.¹¹⁵ The first class encompasses: the territory where crimes may have been perpetrated; and some

¹⁰⁹*Interlocutory Decision, supra*, n. 1, para. 50.

¹¹⁰*Id.*, para. 51.

¹¹¹*Id.*, para. 51.

¹¹²*Id.*, para. 51.

¹¹³*Id.*, para. 51.

¹¹⁴*Id.*, para. 51.

¹¹⁵*Id.*, para. 53.

authorities which might be implicated in the commission of these crimes.¹¹⁶ This raises the specter of State Officials attending hearings to dissuade individuals from testifying.¹¹⁷

Therefore, prosecutors and defendants need not go through the State to find individuals in Rwanda for the safety of those witnesses or victims.¹¹⁸ Rwanda is obliged to cooperate with the ICTR in such a manner as to enable the tribunal to carry out its functions.¹¹⁹ Finally, this requires Rwanda to allow the Prosecutor and Defendant to fulfill their tasks free from any possible impediment.¹²⁰

The second class of States were to enact the implementing legislation of the ICTR's Statute which provides that orders from the Tribunal will be directed to a central authority which then channels the request to the appropriate State Official.¹²¹ This legislation would normally be created through treaties, thus creating a "horizontal" relationship between State's domestic prosecutorial and judicial functions.¹²² Despite the primacy accruing to the ICTR under the Statute, the "horizontal" relationship has been adopted by States regarding the

¹¹⁶*Interlocutory Decision, supra*, n. 1, para. 53.

¹¹⁷*Id.*, para. 53.

¹¹⁸*Id.*, para. 53.

¹¹⁹*Id.*, para. 53.

¹²⁰*Id.*, para. 53.

¹²¹*Id.*, para. 54, (Section 7(1) of the Australian International War Crimes Act of 1995; Article 5 of the Belgian Law on the Recognition of the ICTY and ICTR of 1996).

¹²²*Id.*, para. 54.

Tribunal making contact with individuals acting in their private capacity.¹²³ Since these enactments were created pursuant to the Security Council Chapter VII mandate creating the ICTR any blocking statutes would be able to be overcome because a party may not avoid its treaty obligations via internal law.¹²⁴

The Appeals Chamber has decided there are two distinct classes of acts or transactions. First, those which may require the cooperation of the prosecutorial or judicial organs of the State where the individual is located.¹²⁵ For this group, unless direct access is allowed by legislation, the Tribunal must turn to the relevant national authorities.¹²⁶ There are exceptions for Rwanda, such as on-site investigations.¹²⁷

The other class is those which may be carried out by the private individual who is the addressee of a subpoenae or order.¹²⁸ Normally, the Tribunal will first turn to the relevant national authorities.¹²⁹ There are two situations where the ICTR can direct contact the private

¹²³See *amicus curiae* brief submitted by J. A. Frowein *et al.* on behalf of the Max-Planck-Institute for Comparative Public Law and International Law, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-PT, (*Frowein Brief*), 15 Sep. 1997, pg. 11.

¹²⁴See Article 27 of the 1969 Vienna Convention on the Law of Treaties.

A party may not invoke the provisions of its internal law as justification for its failure to perform a Treaty. This rule is without prejudice to article 46.

¹²⁵*Interlocutory Decision, supra*, n. 1, para. 55, (Section 9, para. 1 of the Austrian Federal Law of 1996; Section 7 of the Finnish Act of 1994).

¹²⁶*Id.*, para. 55.

¹²⁷*Id.*, para. 55.

¹²⁸*Id.*, para. 55.

¹²⁹*Id.*, para. 55.

individual:

- when this is authorized by the legislation of the State concerned; and
- when the authorities of the State or Entity concerned, having been requested to comply with an order of the ICTR, prevent the Tribunal from fulfilling its functions.¹³⁰

Since this may impair the Tribunal's ability to perform its duties, it is to the advantage of the Tribunal that it has the inherent power to reach these individuals directly.¹³¹ Were it not for this power the ICTR would not be able to guarantee fair trials to the accused.

Should the issue of non-compliance with an order from the ICTR by an individual acting in their private capacity the Appeals Chamber has determined there are two distinct methods to pursue legal remedies.¹³² The first set of remedies are sanctions or penalties that can be imposed by the authorities of the State where the individual is located.¹³³ These remedies have been established by individual States in their enacted implementing legislation creating remedies equal to that for non-compliance with domestic court orders.¹³⁴ Since most States provide for enforcement of court orders, it is plausible to turn to the relevant State authorities for enforcement of ICTR orders.¹³⁵ There may be times when resorting to national

¹³⁰*Interlocutory Decision, supra*, n. 1, para. 55.

¹³¹*Id.*, para. 55.

¹³²*Id.*, para. 57.

¹³³*Id.*, para. 57.

¹³⁴*Id.*, para. 57, (Laws of Finland, Section 8, para 3.; Germany, Section 4, paras 2 and 4).

¹³⁵*Frowein Brief, supra*, n. 123, pgs. 3-10.

authorities will not prove workable, in these cases turning to those authorities would prove fruitless.¹³⁶

The second set of remedies are those that can be imposed by the ICTR.¹³⁷ The power to hold individuals in contempt of the Tribunal is provided for by Rule 77 of the Rules of Procedure and Evidence of the ICTR. Additionally, while it may be speculative and extreme to try someone *in absentia* for non-compliance, such proceedings should not be ruled out.¹³⁸ While these proceedings are inappropriate for persons accused of Crimes under the Tribunal's jurisdiction and would prove extremely difficult in determining a finding of guilt or innocence, they may still be warranted to avoid obstruction of the administration of justice.¹³⁹ Since the Statute requires one accused of a war crime be able to confront their accuser, *in absentia* proceedings against a criminal defendant would be inappropriate. These types of proceedings would most likely be used in situations of contempt of the Tribunal. A Trial Chamber would hold a hearing to determine if someone is in contempt where the proponent and opponent of the charges could be present to argue the validity of the contempt charge. If such proceedings are deemed necessary by the Tribunal, they must be conducted in a way that maintains the individual's fundamental rights, and as determined by the Appeals Chamber, meets the guarantees of the European Convention on Human Rights¹⁴⁰ which has

¹³⁶*Interlocutory Decision, supra*, n. 1, para. 58.

¹³⁷*Id.*, para. 57.

¹³⁸*Id.*, para. 59.

¹³⁹*Id.*, para. 59.

¹⁴⁰*Id.*, para. 59.

ruled against *in absentia* trials.

**D. The International Criminal Tribunal for Rwanda
has the Power to Review Documents Alleged
to Contain National Security Concerns.**

The Appeals Chamber has determined that there are three grounds for dismissing any claim that documents containing national security information are immune from dissemination to the ICTR:

- international case law;
- Article 28 of the Statute of the International Criminal Tribunal for Rwanda; and
- a blanket right to withhold documents for security purposes might jeopardize the very functioning of the Tribunal.¹⁴¹

The international case law precedents on this question date back to the so-called *Sabotage* cases brought before the United States - German Mixed Claims Commission in the 1930's.¹⁴² Additionally, more recent cases include: *Ballo v. UNESCO* decided by the Administrative Tribunal of the International Labor Organization in 1972,¹⁴³ *Cyprus v. Turkey* decided by the

¹⁴¹*Interlocutory Decision, supra*, n. 1, para. 62-65.

¹⁴²*Id.*, para. 62, (Sandifer, *Evidence Before International Tribunals*, (1st ed., 1939), p. 266).

¹⁴³*Id.*, para. 62, (I.L.O. Administrative Tribunal, *Ballo v. UNESCO*, Judgement No. 191, 15 May 1972, in International Labour Office, *Official Bulletin*, vol. LV, Nos. 2,3 and 4, 1972 p. 224ff, at 227)

European Commission on Human Rights in 1976,¹⁴⁴ and the *Godinez Cruz* case decided by the Inter-American Court on Human Rights in 1989.¹⁴⁵ All of these cases are examples of instances where States have complied with judicial requests for the production of sensitive documents.¹⁴⁶ In each case the documents were reviewed *in camera*, except for the *Cyprus v. Turkey* case where the documents were not produced and the proper political body was notified because the European Commission on Human Rights lacked the power to enforce the order to produce the documents.¹⁴⁷ Finally, the Appeals Chamber has also determined that after reviewing documents *in camera*, the Tribunal can withhold the documents from the Defense if necessary.

The second ground for denying immunity for documents based on national security concerns is that Article 28 of the Statute makes it clear that no such exception exists.¹⁴⁸ Whenever the Statute intends to place a limitation on the ICTR's powers it does so explicitly.¹⁴⁹ Article 20 (g) demonstrates this by barring the accused from testifying against himself. Customary international law normally would provide a shield for a State, but Article 2 (7) of the United Nations Charter pierces that shield in respect to Chapter VII

¹⁴⁴*Interlocutory Decision, supra*, n. 1, para. 62, (Committee of Minister of the Council of Europe, Application 6780/74, Report of 10 July 1976, pp. 21-24)

¹⁴⁵*Id.*, para. 62, (Organization of American States, Inter-American Court of Human Rights, Series C, No. 5, *Godinez Cruz* case, Judgement of 20 Jan. 1989, pp. 96-97).

¹⁴⁶*Id.*, para. 62.

¹⁴⁷*Id.*, para. 62.

¹⁴⁸*Id.*, para. 63.

¹⁴⁹*Id.*, para. 62.

enforcement measures.¹⁵⁰ Since the Statute of the ICTR was created pursuant to that Chapter it can pierce the shield also.¹⁵¹ Furthermore, the rules of customary international law may become relevant where the Statute is silent on a particular point, such as the "Act of State" doctrine, but, when as here the Statute is explicit there is no need to resort to these rules¹⁵². Finally, had the Security Council intended there be restrictions on the obligation to produce documents it would have included them in the Statute of the Tribunal.¹⁵³

The last basis for the lack of immunity for documents with alleged national security concerns is, that to withhold these documents might jeopardize the very function of the ICTR and defeat its essential object and purpose.¹⁵⁴ A State invoking a claim of national security as a basis for non-production of evidence requested by the Tribunal may not be exonerated from its obligation by a blanket assertion that its security is at stake.¹⁵⁵ In fact, since the crimes being prosecuted are war crimes, crimes against humanity and genocide, and governments conduct wars, most of the document that will either inculpate or exculpate an accused are in all likelihood in the possession of the government.¹⁵⁶ Thus, the State has the onus to prove its

¹⁵⁰*Interlocutory Decision, supra*, n. 1, para. 64.

¹⁵¹*Id.*, para. 64.

¹⁵²*Id.*, para. 64.

¹⁵³*Id.*, para. 64.

¹⁵⁴*Prosecutor's Brief, supra*, n. 34, paras. 67-73.

¹⁵⁵*Subpoenae Decision, supra*, n. 24, para. 147.

¹⁵⁶*Interlocutory Decision, supra*, n. 1, para. 65.

objection.¹⁵⁷

That the ICTR has the power to compel production of these documents and take security concerns into account with Rules 66 (C) and 77 (B)¹⁵⁸ is not enough, the Tribunal must be constantly mindful of legitimate security concerns.¹⁵⁹ Pursuant to the general guidelines provided by Rule 89 (B) and (D), regarding how to obtain State documents, *in camera*, *ex parte* hearings should be held to determine the validity of the national security claims.¹⁶⁰ The Appeals Chamber has designed a set of practical methods and procedures for Trial Chambers to handle these hearings:

- A - account must be taken of whether the State concerned has acted and is acting bona fide:
 - i - the degree of bona fide cooperation and assistance lent by the State must be considered; and
 - ii - the general attitude of the State *vis-à-vis* the ICTR must be considered;
- B - one Judge of the Trial Chamber will review the relevant documents to increase the confidence of the State that their security concerns will not become public;
- C - the States should provide translations of the documents so third-party translators are not necessary;
- D - the documents should be reviewed in *in camera*, *ex parte* proceedings and no transcripts should be made;

¹⁵⁷*Subpoenae Decision, supra*, n. 24, para. 147, (Government of the United States of America in its Suggestions for Rules of Procedure and Evidence, Proposed Rule 8.2).

¹⁵⁸*Id.*, paras. 113-115.

¹⁵⁹*Interlocutory Decision, supra*, n. 1, para. 67, (*Subpoenae Decision, supra*, n. 24, paras. 113-115).

¹⁶⁰*Subpoenae Decision, supra*, n. 26, para. 148, (See, brief *amicus curiae* of Professor R. Wedgwood, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, 7 April 1997, pp. 24-25).

- E - those documents determined irrelevant, or the relevance is outweighed by valid security concerns should be returned directly to the State;
- F - redaction will be allowed if accompanied with an affidavit signed by the appropriate authority with reasoning explained;
- G - in exceptional instances a State may avoid submission of documents as long as the following caveats for an affidavit are met:
 - i - be prepared by the responsible Minister stating he has personally examined the document;
 - ii - summarily describing the content of the documents;
 - iii - setting out precisely the grounds on which the State considers that the document is not of great relevance to the trial proceedings;
 - iv - precisely indicating the principle reasons for the desire of the State to withhold those documents;
- H - the Judge will review the grounds offered for withholding the documents and determine if any further proceedings in accordance with the above procedures need be conducted.¹⁶¹

The Trial Chamber will decide whether to adopt any of the above methods or procedures.¹⁶² Finally, these arrangements will be made by the Trial Chamber in a practical way to assure the proper protective measures are in place to safeguard a State's legitimate and bona fide security concerns.¹⁶³

¹⁶¹*Interlocutory Decision, supra*, n. 1, para. 68.

¹⁶²*Id.*, para. 69.

¹⁶³*Id.*, para. 69.

**E. The International Criminal Tribunal for Rwanda
has the Power to Issue Orders to
International Organizations.**

There are essentially three types of International Organizations: United Nations bodies; independent international organizations; and private or public corporations involved in international trade. None of these types of organizations should be immune from orders of the ICTR. Additionally, since each of these types of organizations is unique, each will have to be treated in accordance with those differences under guidelines designed by the Appeals Chamber for similarly situated entities. The first of these groups, United Nations based organizations, are probably the least difficult group to issue orders too. These entities would be formed under either similar Chapter VII enforcement Articles or some other power of the Security Council or General Assembly. Examples of these organizations would be UNPROFOR, UNSCOM, and the United Nations Human Rights Commission. The mandate for these types of organizations stems from the same or similar source as the ICTR, a resolution by the Security Council, the General Assembly, or Economic and Social Council.¹⁶⁴ Therefore, since these organizations fall under the umbrella of the United Nations they would be subject to the requirements set out in the Articles of the Statute and Rules of Procedure and Evidence of the Tribunal¹⁶⁵ and would be compelled to respond to orders or requests from the Tribunal.

The second group of organizations are independent international organizations like the

¹⁶⁴*Interlocutory Decision, supra*, n. 1, para. 50.

¹⁶⁵*Id.*, para. 50.

International Committee on the Red Cross and Red Crescent (ICRC) or Lawyers Without Borders. These groups, while headquartered in a specific given State, are by their nature independent from their host/home country and they operate on their own independent policies. It would probably be best to treat each of these entities as "States" because of their unique "personalty." Treating these organizations like "States" is appropriate in the context that they are not domestic organizations with international aspects, but are truly international entities whose reason for existence is to serve the world community. This should not make them immune from Tribunal orders. Representatives from these types of organizations may in some cases make the best witnesses. They are independent of the policies and hostilities that lead to the crimes against humanity that occurred. This independence also is likely to make them more reliable witnesses. While these groups are truly independent of State and United Nations controls, they are nevertheless important on a wide international basis. This importance is enhanced here because their representatives were probably the only individuals on the ground when the crimes occurred. Since they are independent, they are compelled morally to respond to orders from the Tribunal. Additionally, they are subject to the laws of the States their headquarters are located in, and puts the additional responsibility of answering to those domestic courts, should the Tribunal utilize them. Finally, because of their unique international position to not participate upon request or order of the Tribunal, this could be damaging to their reputations and credibility internationally.

To further examine the issue of immunity for this second group a closer look at immunity in the context of the ICRC will be discussed. Because of the unique on location status of the ICRC, and its probable involvement with the traumatizing events that took place

in Rwanda, the ICRC will more than likely be a subject of subpoenae from the Tribunal.

The ICRC has several sources to make claims of immunity, each will be presented and briefly addressed, ultimately though any claim of immunity by the ICRC will probably fail.

The ICRC was granted a functional international legal personality by Article 126 of the Third Geneva Convention.¹⁶⁶ While establishing a critical role for the ICRC, the Geneva Conventions do not specifically grant the ICRC immunity.¹⁶⁷ The ICRC claims that having been granted Observer status with the United Nations confirms their immunity.¹⁶⁸ The ICRC's United Nations Observer status, however, does not expressly grant the ICRC any immunity, and observer status is not interpreted as implying any immunity beyond that necessary to attend United Nations meetings.¹⁶⁹ Additionally, the ICRC may try to claim that it has immunity granted by a host State pursuant to a contract to be present in the State to conduct its Humanitarian mission.¹⁷⁰ While these agreements expressly grant immunity to the ICRC in the given State, since the ICRC is an Observer member this immunity would fail if

¹⁶⁶Mona MacDonald, *Legal Analysis and Policy Considerations of the Legal Immunity Held By the International Committee on the Red Cross*, New England International and Comparative Law Annual, Vol. 2, 1996, (*MacDonald article*), at 80. (Final Declaration of the Conference Report on the Protection of War Victims, 377, 396 (Sep-Oct 1993)).

¹⁶⁷*Id.*, pg. 81.

¹⁶⁸*Id.*, pg. 77, (Maria Teresa Dutli & Christina Pellandini, *The International Committee of the Red Cross and the Implementation of a System to Repress Breaches of International Humanitarian Law*, 300 Int'l Rev. of the Red Cross 240, 246-247 (1994)).

¹⁶⁹*Id.*, pg. 81, (U.N. GAOR, 31st plen. mtg., at 1, U.N. Doc. A/RES/45/6 (1990)).

¹⁷⁰*Id.*, pg. 82, (Agreement between the ICRC and the Federal Republic of Yugoslavia, Statutes of Members of the Delegation, art. 10).

the contracting State were also member of the United Nations.¹⁷¹ This is because Article 103 of the U.N. Charter requires U.N. obligations to override all others, and since the ICTR is a U.N. created body established to punish violations of international humanitarian law, the claim of immunity would fail.¹⁷² Ultimately, the ICRC cannot avail itself of the benefits of its unique international status and at the same time chose to hide behind a shield of immunity.

The last organizations are private and State owned corporations engaged in the international marketplace. These groups are important because they are the organizations who may have records of the purchase of weapons and other implements used to perpetrate the crimes being prosecuted. The records of these purchases could be critical in demonstrating the guilt or innocence of an accused. Since these transactions were commercial in nature, immunity should not be extended to State-owned corporations under a concept similar to the United States Foreign Sovereign Immunity Act exceptions, where participation in the marketplace makes a foreign corporation subject to the laws of the host State.¹⁷³ Additionally, private corporations which have relevant documents should be treated as individuals acting in their private capacity. These entities have enjoyed the fruits of the international marketplace and should be compelled, if need be, through their home State's courts via the implementing legislation to produce any requested or ordered relevant documents.

Should any of these international organizations raise questions of security concerns

¹⁷¹*MacDonald article, supra*, n. 166, pg. 84.

¹⁷²*Id.*, pg. 85, (Case Concerning Military and Paramilitary In And Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. P107 (Nov. 26)).

¹⁷³United States Foreign Sovereign Immunities Act, 28 U.S.C. section 1605, (1976).

regarding their internal documents, they should be handled in a similar way that States concerns would be dealt with. A Trial Chamber judge should review the documents in an *in camera*, *ex parte* hearing to determine the validity of the concerns. Additionally, the other safeguards enumerated above should also be implemented to protect the concerns raised by these groups. Finally, in order to assure a timely and fair trial to both the prosecutor and the defense it is critical all relevant evidence be available, this means that these international organizations must be subject to subpoenas by the Tribunal, while also taking into account their security concerns.

F. The International Criminal Tribunal for Rwanda has the Power to Protect Witnesses and Victims.

A witness's involvement with the Tribunal should not amount to a second round of victimization as the witness "runs the gauntlet" of reliving a painful experience by testifying before an indifferent bureaucracy, an assaultive defense team, or an unsympathetic media.¹⁷⁴ The Tribunal's own credibility and the Security Council's objective in establishing the Tribunal will both be severely undermined by the harm occurring to those who testify before the Tribunal, or by refusals to testify through fear of harm.¹⁷⁵ At the same time the rights of the defendant must be protected as required by Article 20 of the Statute of the ICTR.

¹⁷⁴Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants Rights*, *Hastings Law Journal*, 46 *Hastings L.J.* 909, March 1995, (*Lakatos article*), at 911.

¹⁷⁵See *amicus curiae* brief by Christine Chinkin, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, 10 Aug. 1995, (*amicus curiae*, C. Chinkin), pg. 8, para. 2.

Therefore, a balance must be struck between security for a party's witness and fairness for the opposition.¹⁷⁶ Furthermore, the burden falls to the party claiming a need for witness protection to demonstrate that need.¹⁷⁷ It is within this general framework that the following discussion of the Tribunal's power to protect witnesses and victims will be conducted.

The power to grant measures for the protection of victims and witnesses arises from the provisions of the Statute under Article 19 and 21, and the Rules of Procedure and Evidence under Rules 69, 75, 79, and 89. Article 19 provides that the trial should be fair and expeditious with regard for the protection of witnesses and victims, and Article 21 requires the Tribunal to establish procedures for the protection of witnesses and victims. The rules established by the Tribunal have created an elaborate system for the protection of witnesses and victims. The main provision being Rule 75 the Measures for the Protection of Witnesses and Victims. This rule is buttressed by Rules: 69, Protection of Victims and Witnesses at the pre-trial stage; 79, Closed Sessions to protect identities; and 89, General Provisions which allows for the admittance of relevant evidence while protecting its source. These Articles and Rules will provide the guidelines determining how witness and victim safety concerns will be juxtaposed with fairness concerns for the accused.

The benefits of a public hearing are well known.¹⁷⁸ The principle advantage of the

¹⁷⁶Decision of Trial Chamber I on the Protection of Witnesses and Start of the Trial, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-13-T, 2 Oct. 1996, (*Blaskic witness decision*), pg. 5, para. 4.

¹⁷⁷*Id.*, pg. 5, para. 4.

¹⁷⁸Decision by the Trial Chamber on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, 10 Aug. 1995, (*Tadic Decision*), pg. 9., para. 32.

press and public access is that it helps to ensure that a trial is fair.¹⁷⁹ This preference is evident in Article 19 (4) of the Statute which requires hearings in public unless the Trial Chamber determines otherwise, and Rule 78 which requires proceedings in public except deliberations, unless otherwise provided. Nevertheless, this position must be balanced with the mandated interest to protect witnesses and victims.¹⁸⁰ The Articles and Rules provide that the protection of victims and witnesses is an acceptable reason to limit the accused's right to public trial.¹⁸¹

Measures to prevent disclosure of the identities of victims and witnesses to the public are also compatible with principles of criminal procedure in domestic courts.¹⁸² The United Kingdom prohibits disclosure of a complainant's name in sexual assault cases,¹⁸³ Australia allows additional protection of a "special witness",¹⁸⁴ and South Africa provides non-disclosure if the witness could be harmed.¹⁸⁵ Even the United States with its Constitutionally guaranteed right of public trial and free speech has become more amenable to victim and

¹⁷⁹*Tadic Decision, supra*, n. 178, pg. 9, para. 32 (Sutter v. Switzerland, European Court of Human Rights, decision of 22 Feb. 1984, Series A, no. 74, para. 26).

¹⁸⁰*Id.*, pg. 9, para. 33.

¹⁸¹*Id.*, pg. 9, para. 36.

¹⁸²*Id.*, pg. 11, para. 39.

¹⁸³*Id.*, n. 178, pg. 11, para. 39, (Sexual Offences(Amendment) Act, 1976, Section 4).

¹⁸⁴*Id.*, pg. 11, para. 39, (Evidence Act (Amendment), 1989)

¹⁸⁵*Id.*, n. 178, pg. 11, para. 39, (Criminal Procedure Act, No. 51/1977, Section 153(2)9b)).

witness protection.¹⁸⁶ The United States Supreme Court has upheld a law that would penalize newspapers for publishing names of sexual assault victims,¹⁸⁷ and in other courts: to protect the dignity of an adult witness during a rape trial;¹⁸⁸ to preserve the confidentiality of undercover agents in a narcotics case;¹⁸⁹ and to protect disclosure of trade secrets.¹⁹⁰ Civil Law States also provide measures to prevent disclosure of the identity of victims and witnesses.¹⁹¹ Swiss law provides in cases of sex crimes, that disclosure of the victim's identity is prohibited; in Denmark in cases of sexual assault, the proceedings are held *in camera*; and in Germany publicity can be restricted or excluded to protect the witness or victim.¹⁹² Therefore, there is a wide body of domestic law supporting the protection of witnesses and victims from public scrutiny. Finally, in the context of the conflict in Rwanda, even in cases not involving sexual assault, sufficient consideration to justify confidentiality may be found in the fear of reprisals, particularly given the mandated duty of the ICTR to guarantee the safety of the victim and witness due to a lack of a fully-funded and operational

¹⁸⁶*Tadic Decision, supra*, pg. 11, para. 40.

¹⁸⁷*Id.*, pg. 11, para. 40, (*Florida Star v. B.J.F.*, 491 U.S. 524, (1989)).

¹⁸⁸*Id.*, pg. 11, para. 40, (*United States ex rel. Latimore v. Seilaff*, 561 F2d. 691 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978)).

¹⁸⁹*Id.*, pg. 12, para. 40, (*United States ex rel. Lloyd v. Vincent*, 520 F2d. 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975)).

¹⁹⁰*Id.*, pg. 12, para. 40, (*Stamicarbon N.V. v. American Cyanamid Co.*, 506 F2d. 532 (2d Cir. 1974)).

¹⁹¹*Id.*, pg. 12, para. 41.

¹⁹²*Id.*, pg. 12, para. 41.

witness protection program.¹⁹³

The existence of special concerns for victims and witnesses of sexual assault is evident in the Report of the Secretary General, which states that protection for the victims and witnesses should be granted, "especially in cases of rape or sexual assault."¹⁹⁴ The reason for this is the particularly devastating consequences rape or sexual assault have on the victim.¹⁹⁵ Furthermore, testifying can be just as traumatizing because the victim must relive the event, as well as deal with the possibility of being shunned by family or friends because of the culture's view of rape.¹⁹⁶ The need to show special consideration for victims of rape and sexual assault has been recognized in domestic courts.¹⁹⁷ A number of methods to protect these kinds of victims has been developed: full or partial closure of the courtroom when the victim testifies; use of one-way closed circuit television; depositions and video conferences; and image or voice altering devices, screens and one-way mirrors.¹⁹⁸ Finally, Rule 96 provides corroboration of the victim's testimony is not required, and the victim's prior sexual conduct is inadmissible.

The *Tadic* court decided that for witness protection, resorting to closed circuit television is appropriate. Alternative methods such as screening where a monitor would be

¹⁹³*Tadic Decision supra*, n. 178, pg. 12, para. 42.

¹⁹⁴*Id.*, pg. 12, para. 46.

¹⁹⁵*Id.*, pg. 13, para. 46, (P. Marcus and T. McMahon, Limiting Disclosure of Rape Victims' Identities, 64 S. Cal. L. Rev. 1020 (1991)).

¹⁹⁶*Id.*, pg. 13, para. 46, (*amicus curiae*, C. Chinkin, *supra*, n. 175, at 4).

¹⁹⁷*amicus curiae*, C. Chinkin, *supra*, n. 175, pgs. 5-6.

¹⁹⁸*Tadic Decision, supra*, n. 178, pg. 13, para. 48-49.

provided for the defense in the event that the witness is not afforded full anonymity, may also be employed.¹⁹⁹ These are some of the measures that have been determined to be allowable to this point for the protection of witnesses. Other methods are determinable by individual Trial Chambers. Therefore, in cases where rape and sexual assault are the charges against the accused, because of the nature of the crimes, and the devastating consequences to the victim, non-disclosure of the witness's or victims's name is appropriate.

The general rule is that the identity of a witness must be disclosed, because all the evidence must be produced in the presence of the accused, at a public hearing with a view to adversarial argument and a fair trial for both the prosecution and defendant.²⁰⁰ However, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness.²⁰¹ The balancing of these interests is inherent in the notion of a "fair trial."²⁰² In balancing these interests the court must identify any infringement on the rights of the accused and consider whether that infringement is necessary and appropriate in the circumstances of the case.²⁰³ The balancing interest is reflected in the Articles of the Statute of the ICTR. Article 19 requires full respect for the rights of the accused and due regard for the protection of victims and witnesses. Article 20 requires the accused is entitled to a fair and public hearing subject to Article 21, which requires provisions for the victims'

¹⁹⁹*Tadic Decision, supra*, n. 178, pg 14, para. 51.

²⁰⁰*Id.*, pg. 14, para. 54, (Kostovski, European Court of Human Rights, decision of 23 May 1989, Series A, No. 66, para. 42).

²⁰¹*Id.*, pg. 14, para. 55.

²⁰²*Id.*, pg. 14, para. 55.

²⁰³*Id.*, pg. 15, para. 56, (Kostovski decision, paras. 43, 45).

and witnesses' protection be made. Rule 75 allows granting of anonymity as long as it is consistent with the rights of the accused. Also, the right of the accused to learn the identities of witnesses against him is made subject to the witness protection language of Rule 75. Such discretion must be exercised fairly, and only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined the witnesses against him.²⁰⁴

The situation of armed conflict that existed in the area where the alleged atrocities were committed is an exceptional circumstance par excellence, and it is this kind of situation where international human rights instruments allow some derogation from recognized procedural guarantees.²⁰⁵ The fact that derogation is allowed shows that rights of the accused are not wholly without qualification.²⁰⁶ Domestic law can be reviewed to find guidelines to determine how to balance these interests.²⁰⁷ First, there must be a real fear for the safety of the witness and her or his family.²⁰⁸ Second, the testimony of the witness must be important to the advocating party's case.²⁰⁹ In this respect it should be pointed out that the ICTR will be heavily dependent on eyewitness testimony and those individuals' willingness to appear

²⁰⁴*Tadic Decision, supra*, n. 178, pg. 15, para. 60, (R. v. Taylor, English Court of Appeal, decision of 22 July 1994, transcript at 17).

²⁰⁵*Id.*, pg. 15, para. 61, (See European Commission on Human Rights, article 15; American Convention on Human Rights article 27).

²⁰⁶*Id.*, pg. 15, para. 61.

²⁰⁷*Id.*, pg. 15, para. 61.

²⁰⁸*Id.*, pg. 15, para. 62, (R. v. Taylor, *supra*, at 17-18).

²⁰⁹*Id.*, pg. 15, para. 63, (R. v. Taylor, *supra*, at 18).

before the Tribunal.²¹⁰ Next, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy.²¹¹ To accomplish this, the prosecution must examine the background of the witness thoroughly to assure the witness is impartial and does not have a criminal history.²¹² Additionally, the prosecutor must disclose to the defense this report.²¹³ Fourth, the non-existence of a witness protection program and police to implement and enforce it must bear on any decision to grant anonymity.²¹⁴ Finally, any measures taken should be strictly necessary, if a less restrictive measure can be implemented it should be.²¹⁵

Anonymity does not necessarily violate the Article 20 right of the accused to examine a witness against him as long as the defendant has the opportunity to question the witness.²¹⁶ Witness anonymity only restricts the right in that certain questions, like name, nickname, and address cannot be asked.²¹⁷ When granting anonymity the Tribunal must be especially careful in protecting the right of the accused to a fair trial. The *Tadic* court has established a set of guidelines to achieve this purpose. First, Judges must be able to observe the demeanor of the

²¹⁰*Tadic Decision, supra*, n. 178, pg. 16, para. 63.

²¹¹*Id.*, pg. 16, para. 64.

²¹²*Id.*, pg. 16, para. 64.

²¹³*Id.*, pg. 16, para. 64, (R. v. Taylor, *supra*, at 19).

²¹⁴*Id.*, pg. 16, para. 65, (Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others, Supreme Court of Victoria, Australia, [1994] V.R. 84,88).

²¹⁵*Id.*, pg. 16, para. 66, (R. v. Taylor, *supra*, at 19).

²¹⁶*Id.*, pg. 16, para. 67.

²¹⁷*Id.*, pg. 16, para. 67.

witness to assess credibility.²¹⁸ Second, the Judges must be aware of the identity of the witnesses to test his/hers reliability.²¹⁹ Third, the defense must be allowed to question the witnesses on issues unrelated to his/hers identity or current whereabouts, to determine how the witnesses acquired his/hers incriminating evidence.²²⁰ Fourth, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness.²²¹ Furthermore, questions relating to the reliability and the relationship of the witness to the accused or the victim, by the defense must be permitted.²²² Finally, the balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it, rather a fair trial means it is free from possible detriment or disadvantage of any kind or degree to the accused.²²³

The Rules, especially Rule 89, give the Tribunal wide latitude with respect to the receipt of evidence.²²⁴ Rule 89 (C) and (D) provide that the relevant evidence only need be probative and not be substantially outweighed by the need to provide a fair trial.²²⁵

²¹⁸*Tadic Decision, supra*, n. 178, pg. 17, para. 71, (Kostovski decision, *supra*, at para. 43).

²¹⁹*Id.*, pg. 17, para. 71, (Id., para. 43).

²²⁰*Id.*, pg. 17, para. 71, (Id., para 43).

²²¹*Id.*, pg. 17, para. 71, (Id., para. 43).

²²²*Id.*, pg. 17, para. 72, (Jarvie decision, *supra*, at 90).

²²³*Id.*, pg. 17, para. 72, (Id., at 90).

²²⁴*Id.*, pg. 17, para. 74.

²²⁵*Id.*, pg. 18, para. 74.

Anonymous testimony may be relevant and probative.²²⁶ Limiting the accused's rights to examine an anonymous witness, does not alone violate his right to a fair trial.²²⁷ If the party offering anonymous testimony is able to meet the guidelines established, the testimony should be allowed.²²⁸

The public has the right to learn about the administration of justice by the ICTR.²²⁹ That right is based on the fact that the Tribunal was established to prosecute serious violations of international humanitarian law in which the World community has a special interest.²³⁰ After review and proper editing, for the protection of victims and witnesses, by the Victims and Witnesses Unit, recordings and transcripts of the proceedings should be made available to the media.²³¹

Protection of victims and witnesses is critical for the success of the Tribunal. These are the first international criminal proceedings since World War II, but, in that instance the victors conducted the trials and had all the documentary evidence in their control. Today, in Rwanda, the situation is not so tidy. The Tribunal will have to largely rely on witnesses and victims so it is critical that the Tribunal exercise its power to protect them to its fullest extent. While the *Tadic* decision has engendered more criticism than any other of the

²²⁶*Tadic Decision, supra*, n. 178, pg. 18, para. 74.

²²⁷*Id.*, pg. 18, para. 75.

²²⁸*Id.*, pg. 18, para. 75.

²²⁹*Id.*, pg. 20, para. 87.

²³⁰*Id.*, pg. 20, para. 87.

²³¹*Id.*, pg. 20, para. 87.

Tribunal, the legitimacy of the Tribunal in the eyes of the world, will turn in part on the Tribunal's ability to protect its witnesses.²³²

IV. CONCLUSION

The issues involved herein are unique and just beginning to be addressed. The Appeals Chamber for the Tribunal has answered some questions. It has also left much room for the growth of the power of the Tribunal, so it can more adequately meet the difficult challenges it faces in fulfilling its mandate. The Tribunal is unique in international law, and has little precedent to guide it.²³³ It was recognized, that ensuring that the proceedings before the International Tribunal were conducted in accordance with international standards of fair trial and due process was important not only to ensure respect for the individual rights of the accused, but also to ensure the legitimacy of the proceedings and to set a standard for proceedings before other ad hoc tribunals or a permanent international criminal court of the future.²³⁴ Effective operation of the Tribunal is critical to the perception of its success or failure. This includes the Tribunal's ability to use its powers effectively and in a non-timid manner.

²³²*Latakos article, supra*, n. 174, pg. 6., para. 3.

²³³*Tadic Decision, supra*, n. 178, pg. 6, para. 20.

²³⁴Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1995, at 175.

To accomplish these goals under the circumstances involved, it is critical that the ICTR have the power to issue subpoenae to States to produce documents. While the Appeals Chamber decided that the ICTY could not issue Subpoenae, Rwanda is different. The Rwandan government specifically requested the establishment of the ICTR. Additionally, while they voted against it in the Security Council, the Rwandan representative made it clear his country wanted the creation of the Tribunal to move forward. This should be juxtaposed against the Yugoslav situation, where the different entities fought the creation of the ICTY and were essentially forced to accept it. Without this power the Tribunal cannot effectively and expeditiously carry out its mandate to provide fair and timely trials for the accused. The Tribunal must also have the power to subpoenae specific State Officials for the same reason in addition to the fact they may be the single best source for authentication of documents. The ICTR must maintain the power to subpoenae individuals acting in a private capacity and must continue to use the power to deny a State a blanket claim of national security concern regarding documents. Furthermore, the Tribunal must develop the power, from already inherent and express powers, to issue subpoenae to international organizations. These organizations may have documents or employees which could prove critical in demonstrating the guilt or innocence of an accused. The Tribunal must also perfect the power to protect and provide for the security of the witnesses and victims involved. These individuals are critical to finding the truth, since in all likelihood they will possess most if not all of the information available in many instances. Finally, the world's eyes are on the Tribunal to see if it can achieve its mandate and avoid political manipulations. The Tribunal must avoid making decisions out of a desire to placate any former belligerent and thus make them "feel

more like cooperating". The Security Council gave the Tribunal its powers under the most powerful international legal device ever known to mankind, Chapter VII of the Charter of the United Nations. This gives unique authority to the Tribunal that it should employ in a vigorous and robust way to fulfill its mandate.