

## Memorandum of Law

To: Mohamed C. Othman, Senior Legal Advisor  
Office of the Prosecutor, International Criminal Tribunal for Rwanda

From: Scott E. Powers, New England School of Law *(SEP)*  
Boston, Massachusetts, United States of America

Re: Use of Anonymous Witnesses

Date: December 18, 1998

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### **I. Introduction and Summary of Conclusions**

#### **A. Questions Presented: The Use of Anonymous Witnesses**

- 1) What are the possibilities under international law for using anonymous witnesses?
- 2) If anonymous witnesses can be used, what procedural rules apply?

#### **B. Conclusions Based on Research**

Anonymous witnesses may be allowed considering the ultimate goal of the Tribunal under Chapter VII of the UN Charter; the extraordinary circumstances in which it must operate; and the interpretation of the rules of procedures and evidence through the

use of modern legal analysis in the recent precedent setting case of the *Prosecutor v. Tadic*.<sup>1</sup>

The significance of the decision in the *Tadic* case regarding the use of anonymous witnesses is derived from its precedent-setting ruling to allow the use of anonymous witnesses and the legal analysis that carried the Chamber to the decision. Since the justification for the use of anonymous witnesses was subject to modern legal analysis more than predecessor tribunals such as Nuremberg,<sup>2</sup> it may be opined that the decision is instrumental in setting procedural evidentiary standards in international criminal judiciary proceedings. The differences between the majority and the dissent in *Tadic* revolved around the interpretation of the rules of evidence and procedures of the Yugoslavia Tribunal.

The majority, in a 2 to 1 decision, concluded that the Statute and Rules permit the use of anonymous witnesses. The majority relied on the fact that the Tribunal operates in a unique context. Due to the particular context of the Tribunal, interpretations of similar rules by other international tribunals were considered almost irrelevant.

The dissent argued that the rules should be interpreted by "internationally recognized standards," and that any other international tribunal would consider the use of anonymous witnesses a violation of the accused's right to a fair trial.

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<sup>1</sup> *Prosecutor v. Tadic*, No. IT-94-1-T (May 7, 1997) (Opinion and Judgment). The full text of the judgment is available at the Yugoslavia Tribunal's Internet Home Page: (Oct. 29, 1998) <<http://www.un.org/icty>> (At the time of this writing, the *Tadic* case was pending appeal on the issue of the use of anonymous witnesses.) [hereinafter *Tadic Judgment*].

<sup>2</sup> Nuremberg's Prosecution was allowed to introduce *ex parte* affidavits against the objections of the defense attorneys. See generally, TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS 174 AND 241 (1992) (criticizing the Nuremberg Trial's liberal rules of judicial discretion regarding the admission of evidence and the compromising of the rights of the accused.).

It is significant that the majority and the dissent generally relied on the same sources (the Tribunal rules and procedures), but differed in their scope of interpretation.

The European courts and the laws of other civilized nations have allowed derogation of the rights of the accused in times of national emergency and officially declared national crisis with respect to the state's other international obligations.

## **II. Factual Background**

The 1994 genocide in the country of Rwanda began on April 6, 1994 after the airplane of President Juvenal Habyarimana of Rwanda was shot down by a surface-to-air missile killing all aboard.<sup>3</sup> Hutu extremists blamed the Tutsi-composed Rwandan Patriotic Front for the assassination.<sup>4</sup> Following the accusations, Hutu extremists unleashed a bloody nationwide campaign of destruction aided by military and paramilitary units killing Tutsis and moderate Hutus.<sup>5</sup> Many politicians and their families were executed by elements of the military.<sup>6</sup> The killing of Tutsis by Hutus spread throughout Rwanda.

The mass killings of Tutsi civilians were incited by local radio broadcasts encouraging listeners to "fill half empty graves."<sup>7</sup> The widespread killings were systematically planned and coordinated. The slaughter finally ended in July 18, 1994 when the Rwandan Patriotic Front established military superiority in Rwanda and forced

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<sup>3</sup> See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998) at 53[hereinafter 1 MORRIS & SCHARF, ICTR].

<sup>4</sup> See 1 MORRIS & SCHARF, ICTR at 53.

<sup>5</sup> See *id.*

<sup>6</sup> See *id.* at 54.

<sup>7</sup> *Id.* at 54-55.

the Hutu-dominated Rwandan government to flee the country.<sup>8</sup> The final casualties are estimated at between five hundred thousand and one million Tutsis.<sup>9</sup>

The United Nations Security Council then agreed to establish an International Criminal Tribunal to prosecute the persons responsible for the Rwandan genocide at the request of the new government established by the Rwandan Patriotic Front.<sup>10</sup>

### III. Legal Discussion

#### A. Limited Disclosure of Tribunal Proceedings

As a general rule, all proceedings before the Tribunal are to be held in public.<sup>11</sup>

However, the Chamber may limit disclosure of proceedings to the public and the press if they state the reasons for the order to do so.<sup>12</sup> Specifically, under Rule 79 (A)(ii) and

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<sup>8</sup> See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994, 104<sup>th</sup> CONG., 1<sup>st</sup> SESS. (Comm. Print 1995), at 200; U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1995, 104<sup>th</sup> CONG., 2<sup>nd</sup> SESS. (Comm. Print 1996), at 211, *available in the Federal Depository Library Program / Department of State Electronic Research Collection at the U.S. Department of State Home Page* <<http://dosfan.lib.uic.edu/>>.

<sup>9</sup> See 1 MORRIS & SCHARF, ICTR, at 58.

<sup>10</sup> The Security Council received the request to establish an International Tribunal (S/1994/115) and responded by the adoption of S/RES/955 (Nov. 11, 1998) <<http://www.un.org/Docs/sc.htm>>.

<sup>11</sup> See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), Rule 78 *Open Sessions*.

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

<sup>12</sup> See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), Rule 79 *Closed Sessions*

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

- (i) public order or morality;
- (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
- (iii) the protection of the interests of justice

(B) The Trial Chamber shall make public the reasons for its order.

(A)(iii),<sup>13</sup> the Trial Chamber may limit public disclosure of the identities of victims or witnesses for their protection and pursuant to "the interests of justice."<sup>14</sup>

### ***B. Protection of Witnesses to Testify without Danger***

The Prosecutor may request special protection measures before or after the beginning of the trial under rules 69<sup>15</sup> and 75.<sup>16</sup>

The protection of victims and witnesses must constitute one of the fundamental preoccupations of the international Tribunal because it is only their participation, in the widest sense of the term, which will give

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<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> *See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), Rule 69 Protection of Victims and Witnesses.*

(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

<sup>16</sup> *See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), Rule 75 Measures for the Protection of Victims and Witnesses.*

(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

- a) expunging names and identifying information from the Chamber's public records;
- b) non-disclosure to the public of any records identifying the victim;
- c) giving of testimony through image- or voice- altering devices or closed circuit television; and
- d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

the necessary impetus to the commitment to pursue criminal prosecutions against the authors of the serious breaches of international humanitarian law and trying those responsible.<sup>17</sup>

Under the rules of the tribunal, the prosecutor may ask for various levels of witness protection: (1) No identification of witnesses or victims to the public or media; (2) No identification of witnesses or victims by the accused; (3) No identification of witnesses or victims by defense lawyers and accused; (4) Miscellaneous measures for individual witnesses or victims; or (5) General requests to prevent photographs and drawings of witnesses or victims when leaving court buildings.<sup>18</sup>

### ***C. Power of Tribunal Judges to Rule on Anonymity***

The Chamber may take any "necessary measure" to protect the accused, a witness or the victim,<sup>19</sup> as long as the protective measures are "consistent with the primary obligation of the court to ensure full respect for the right of the accused to receive a fair trial."<sup>20</sup> Rule 75 provides that "[a] judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witnesses concerned, or of the Victims and

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<sup>17</sup> KARIN LES CURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 43 (1996) (writing about the lack of adequate protection for victims and witnesses provided in Yugoslavia.).

<sup>18</sup> See Rule 75 *Measures for the Protection of Victims and Witnesses*, *supra* note 16.

<sup>19</sup> See 1 MORRIS & SCHARF, ICTR, at 26.

<sup>20</sup> *Id.*

Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses."<sup>21</sup>

#### ***D. The Compatibility of Anonymity and the Accused's Right to a Fair Trial***

The Statute of the Tribunal, Art. 21, recognizes that in all instances the right of the accused to a fair trial must be guaranteed.<sup>22</sup> The right to a fair trial is included in major human rights treaties.<sup>23</sup> To address this issue and to further the credibility of the tribunals in former Yugoslavia and Rwanda, the rules and procedures are designed to protect rights of the accused and to improve credibility of the tribunal.<sup>24</sup> Despite the rules and procedural safeguards for the defense, a decision for the use of anonymous witnesses, as in the *Prosecutor v. Tadic*,<sup>25</sup> may be close to denying an accused a fair trial.<sup>26</sup> The *Tadic* ruling has been criticized for denying the defense the opportunity to adequately confront

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<sup>21</sup> Rule 75 *Measures for the Protection of Victims and Witnesses*, *supra* note 16.

<sup>22</sup> See Rules of Procedure and Evidence of the International Tribunal, art. 20-21, reprinted in JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1998). at 100.

<sup>23</sup> See European Convention on Human Rights and Fundamental Freedoms (Art. 6, 1950); the International Covenant on Civil and Political Rights (Art. 14, 1966); American Convention on Human Rights (Art. 8, 1969).

<sup>24</sup> See Rules of Procedure and Evidence of the International Tribunal, art. 20-21 (for the Yugoslavian Tribunal) & art. 21-22 (for the Rwandan Tribunal) reprinted in JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1998). at 98-105.

<sup>25</sup> *Tadic Judgment*, No. IT-94-1-T, available at the Yugoslavia Tribunal's Internet Home Page: (Oct. 29, 1998) <<http://www.un.org/icty>>.

<sup>26</sup> See MONROE LEIGH, *YUGOSLAVIA TRIBUNAL: USE OF UNNAMED WITNESSES AGAINST ACCUSED*, 40 *Am. J. Int'l L.* 235 (1996) (Monroe Leigh is a former United States Department of State Legal Advisor argued that the Chamber struck the wrong balance between the protection of witnesses and the rights of the accused.).

witnesses.<sup>27</sup> In an interview, Michail Wladimiroff (the defense lawyer for Dusko Tadic) stated to Professor Michael P. Scharf,<sup>28</sup> “[f]or those who would respond to criticisms of the Tribunal by saying that you have to start somewhere,” (speaking about the fairness in the *Tadic* trial) “I say that’s not good enough when you’re dealing with a person whose life and liberty are at stake.”<sup>29</sup> Even Deputy-Prosecutor Graham Blewitt, admitted that he was “personally very uncomfortable with the notion of going forward with witnesses whose identities are not disclosed to the accused.”<sup>30</sup> The problem of witness accountability and creditability are manifested by the presence of false testimony by witnesses in past tribunals,<sup>31</sup> as well as in *Tadic* where to the embarrassment of the prosecution, the testimony of “Witness L” had to be withdrawn.<sup>32</sup>

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<sup>27</sup> See generally Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INTL L. & POL. 101, 109 (1998); see also Monroe Leigh, *Yugoslavia Tribunal: Use Of Unnamed Witnesses Against Accused*, 40 AM. J. INT’L L. 235 (1996).

<sup>28</sup> Professor of Law and Director of the Center for International Law and Policy at New England School of Law, Boston Massachusetts; formerly Attorney-Advisor, Office of the Legal Adviser, U.S. Department of State 1989-1993 . J.D., Duke University School of Law, 1988; A.B., Duke University, 1985.

<sup>29</sup> Interview with Michail Wladimiroff, part-time Professor of Economic Criminal Law at the University of Utrecht and Senior partner in Wladimiroff & Spong, in The Hague, Netherlands (July 26, 1996) (notes on file with Michael P. Scharf); see also MICHAEL P. SCHARF, *THE PROSECUTOR v. DUSKO TADIC: AN APPEAL OF THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG*, 60 Alb. L. Rev. 861, 867 (1997).

<sup>30</sup> Interview with Graham Blewitt, Deputy-Prosecutor in the *Tadic* Trial, in the Hague, Netherlands by Professor Michael P. Scharf (July 26, 1996) (notes on file with Michael P. Scharf); see also MICHAEL P. SCHARF, *THE PROSECUTOR v. DUSKO TADIC: AN APPEAL OF THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG*, 60 Alb. L. Rev. 861, 867 (1997).

<sup>31</sup> See *Witness Says Bosnia Forced Him to Lie*, N.Y. TIMES, Oct. 26, 1996, at 7 (reporting that the prosecutors of the Yugoslavian Tribunal had to withdraw the testimony of “Witness L” (Dragan Opacic) because he had been ordered by the Bosnian government to lie to the Chamber about Tadic’s involvement in the crimes at a Serb-run concentration camps).

<sup>32</sup> Interview with Michael P. Scharf, Professor of Law at New England School of Law at New England School of Law, Boston Massachusetts (November 23, 1998) (notes on file with author).

## **E. The Facts of Tadic**

Dusko Tadic<sup>33</sup> was the first defendant extradited by the International Tribunal from the jurisdiction of the German courts.<sup>34</sup> Human rights organizations placed pressure on the German government to investigate alleged sightings of Tadic which eventually led to his arrest and extradition to the Tribunal's jurisdiction.<sup>35</sup> Tadic was charged with breaching the Geneva Conventions of 1949, violating the laws of war, and committing crimes against humanity. These crimes included rape, murder, torture, and other inhumane acts.<sup>36</sup> The charges arose from incidents occurring in and outside a Bosnian Serb camp. In *Tadic*, the Trial Chamber granted the prosecutor's motion request for anonymity from the accused with respect to four witnesses.<sup>37</sup> On May 7, 1997, the Trial Chamber rendered its Opinion and Judgment finding Dusko Tadic guilty of eleven of the thirty-one charges against him.<sup>38</sup> The case is still pending appeal by the defense at the time of this writing.

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<sup>33</sup> A citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes.

<sup>34</sup> See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* (1997) [hereinafter *BALKAN JUSTICE*] at 96-98.

<sup>35</sup> See *id.*

<sup>36</sup> See *Tadic Judgment*, No. IT-94-1-T, available at the Yugoslavia Tribunal's Internet Home Page: (Oct. 29, 1998) <<http://www.un.org/icty>>.

<sup>37</sup> See *Prosecutor v. Tadic*, No. IT-94-1-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 Aug. 1995).

<sup>38</sup> See *Tadic Judgment*, No. IT-94-1-T at 17400-17384, available at the Yugoslavia Tribunal's Internet Home Page: (Oct. 29, 1998) <<http://www.un.org/icty>>.

## ***F. Reasoning in Tadic (Majority Opinion)***

In the Majority opinion, Judge Gabrielle K. McDonald decided that the power of the Chamber to rule on anonymity of a witness is derived from the Tribunal's similarity "to a military Tribunal" having "limited right of due process and more lenient rules of evidence" than an ordinary criminal court.<sup>39</sup> Judge McDonald admitted that "weigh[ing] the rights of the witnesses against the rights of the accused" was one of the toughest decisions in her career.<sup>40</sup> She used the Nuremberg Tribunal<sup>41</sup> as precedent on this point,<sup>42</sup> compared the Yugoslavia Tribunal, and discussed that Nuremberg admitted *hearsay evidence* and *ex parte* affidavits more frequently than would Courts of the United States due to the nature of the international proceeding.<sup>43</sup> Despite the introduction of this evidence, the evidence of guilt at Nuremberg appeared to be so overwhelming that the affidavits played a relatively small role in the convictions compared with other tangible evidence.<sup>44</sup>

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<sup>39</sup> Prosecutor v. Tadic, No. IT-94-1-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 Aug. 1995), at 15.

<sup>40</sup> BALKAN JUSTICE at 108.

<sup>41</sup> See AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 27 (1993) (Nuremberg has been severely criticized for allowing the admittance of *ex parte* affidavits against the accused despite the objections of their attorneys.).

<sup>42</sup> See Prosecutor v. Tadic, No. IT-94-1-T (Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 10 Aug. 1995), at 15.

<sup>43</sup> See *id.*

<sup>44</sup> See 1 MORRIS & SCHARF, AN INSIDER'S GUIDE TO THE ICTR, at 42.

*Prosecutor v. Jean-Paul Akayesu*<sup>45</sup> also allowed lenient evidentiary military-tribunal like standards. In *Akayesu*, the Rwandan Tribunal judges in accordance with the application of the Statutes and Rules of Procedure and Evidence, stated that they should apply the rule: (1) "which in its view best favour a fair determination of the matter before it,"<sup>46</sup> and (2) "are consonant with the spirit and general principles of law."<sup>47</sup> When only one witness's testimony is presented on a fact, the Chamber is not bound to apply the adage of "*Unus Testis, Nullus Testis*."<sup>48</sup> The Chamber also added that they could freely assess the probative value of all relevant evidence, "determin[ing] that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, subject to it being in accordance with the requisites of a fair trial."<sup>49</sup> Finally, the Chamber in *Akayesu*, decided that hearsay evidence is not *per se* inadmissible, but such

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<sup>45</sup> See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) para 24 webpage (visited Sept. 4, 1998) <<http://www.un.org/ictt/english/pressrel/PR138.htm>>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *id.* (The courts explained that it did not need to apply *Unus Testis, Nullus Testis*, the doctrine associated with a need for corroboration of all evidence admitted).

<sup>49</sup> See *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) para 24 webpage (visited Sept. 4, 1998) <<http://www.un.org/ictt/english/pressrel/PR138.htm>>

Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 89, UN Doc. ITR/3/REV.2

*General Provisions*

- (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.
- (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may request verification of the authenticity of evidence obtained out of court;

evidence should be considered with caution."<sup>50</sup> Judge McDonald, in *Tadic*, stressed the "uniqueness" of the conflict surrounding the operation of the tribunal and its requirements to rectify the injustices that occurred during the conflict.

The International Tribunal therefore decided, when preparing its Rules, to take into account the most conspicuous aspects of the armed conflict in the former Yugoslavia. Among these is the fact that the abuses perpetuated in the region have spread terror and anguish among the civilian population. The Judges feared that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences that their testimony could have for themselves or their relatives.<sup>51</sup>

This was particularly troubling given that, unlike Nuremberg, prosecutions would, to a considerable degree, be dependent on eyewitness testimony.<sup>52</sup>

The presence of a unique atmosphere, to which Judge McDonald alluded, is also present in Rwanda. For example, in *Akayesu*,<sup>53</sup> expert witness Alison DesForges (a specialist historian on Rwanda) testified that "on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that- as they said on certain occasions- their children, later on, should not know what a Tutsi looked like, unless they referred to

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<sup>50</sup> Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) para 24 webpage (visited Sept. 4, 1998) <<http://www.un.org/ictt/english/pressrel/PR138.htm>>.

<sup>51</sup> *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139 (1996).

<sup>52</sup> See VIRGINIA MORRIS AND MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 242 (1995).

<sup>53</sup> Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) para 16 webpage (visited Sept. 4, 1998) <<http://www.un.org/ictt/english/pressrel/PR138.htm>>.

history books."<sup>54</sup> This expert testimony exemplifies the context in which the crimes had been committed. Also, the presence of genocide and other heinous *jus cogens* crimes manifests the uniqueness of the Rwandan situation. The situation of armed conflict that existed and endures in Rwanda are exceptional circumstance. In such conflict, most major international human rights instruments allow some derogation from recognized procedural guarantees.<sup>55</sup> The fact that there is some derogation allowed in cases of

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<sup>54</sup> *Id.*

<sup>55</sup> See European Court of Human Rights, art. 15 – **Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed. (Nov. 11, 1998) <<http://www.coe.fr/eng/legaltxt/5e.htm>>.

See also, International Covenant on Civil and Political Rights, art. 4:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex language, religion or social origin. (Reprinted in, IAN BROWNLIE, BASIC DOCUMENTS IN INTERNATIONAL LAW 278 (1995).

See also, American Convention on Human Rights, art. 27 – **Suspension of Guarantees**

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights. Any State Party availing itself of the right of suspension shall immediately inform the other States

national emergency demonstrate that the rights of the accused guaranteed under the principle of the right to a fair trial are not wholly without qualification.

Guidance in balancing factors relevant to granting anonymity can be found in domestic law. First, "[t]here must be real grounds for being fearful of the consequences if the evidence is given and the identity of the witness is revealed."<sup>56</sup> As mentioned above, the real grounds for the fearful consequences of victim and witness to give testimony can be demonstrated by the account give by Rwandan historian, Alison DesForges.<sup>57</sup>

Secondly, "the evidence must be sufficiently relevant and important to make it unfair to the prosecution to compel the prosecutor to proceed without it."<sup>58</sup> Unlike, Nuremberg where the crimes of the Nazi's were documented well beyond the testimony of eyewitnesses,<sup>59</sup> such records are not available to aid the prosecution in Rwanda. Therefore, there is a need for this testimony to allow the Tribunal to effectively operate.

Third, the Trial Chamber must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy.<sup>60</sup> There should be no grounds to suppose that the witness is

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Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension. (Nov. 11, 1998) < <http://www.oas.org/en/prog/pg25-52.htm>>.

<sup>56</sup> *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139, 165 (1996) (quoting *R. v. Taylor*, at 17-18.).

<sup>57</sup> *See Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) para 16 webpage (visited Sept. 4, 1998) <<http://www.un.org/ict/english/pressrel/PR138.htm>>.

<sup>58</sup> *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139, 165 (1996) (quoting *R. v. Taylor*, at 18.).

<sup>59</sup> *See* 1 MORRIS & SCHARF, ICTR at 42.

<sup>60</sup> *See Decision On The Prosecutor's Motion Requesting Protective Measures For*

impartial in any way. A witness who has an extensive criminal background would be disqualified for consideration for anonymity. In *Akayesu*,<sup>61</sup> the evidence produced for the case against the defendant was mainly testimonial.<sup>62</sup> The Chamber noted the fragility and the fallibility of human testimony.<sup>63</sup> To assess the credibility and recognize the weaknesses of such testimony, the court considered

that most of the witnesses directly experienced the terrible events they were narrating, and that such trauma could have an impact on their testimonies; secondly, the impact of cultural and social factors on communication with the witnesses; and thirdly, the difficulties in interpreting the statements made by the witnesses, most of whom spoke in Kinyarwanda."<sup>64</sup>

However, the Chamber thanked each witness for their participation and noted the courage it took to narrate the "extremely traumatic experiences."<sup>65</sup> The testimonies were deemed by the Chamber as "invaluable to the Tribunal in its search for the truth on the events that happened in Taba commune in 1994."<sup>66</sup>

Fourth, the ineffectiveness or non-existence of an adequate witness protection

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*Victims And Witnesses*, 7 Crim. L.F. 139, 165 (1996) (quoting *R. v. Taylor*, at 19.) (There should be no grounds for supposing that the witness is not impartial.).

<sup>61</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) Para 23 webpage (visited Sept. 4, 1998) <<http://www.un.org/ict/english/pressrel/PR138.htm>>.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

program.<sup>67</sup> The ability of the Rwandan Tribunal and the Yugoslavian Tribunal to protect witnesses are effectively the same due to the analogous conflicts in the two areas, the type of crimes and suspects of those crimes, and because the rules allowing for these protections are identical.<sup>68</sup>

In Tuzla, Bosnia-Herzegovina, key witness Mevludin Oric, in the case against the Bosnian Serb military commander General Ratko Mladic, said that because he had not been given protection by the tribunal or the Bosnian government, he might not testify out of fear that he or a member of his family would be killed by Serbian assassins.<sup>69</sup> The witness was prepared to support allegations of the prosecution.<sup>70</sup> "He fu[r]ther stated that he has lost faith in the tribunal's interest in protecting him."<sup>71</sup> UN officials expressed shock regarding the predicament of witnesses such as Oric, but they noted their inability to solve the problem.<sup>72</sup> "'This is unspeakable,' said James Lyons, deputy director of the UN police monitors for northeast Bosnia. 'I can't understand how the tribunal would leave them so exposed,' he said. 'Not only to people from the outside, but they are surrounded by desperate refugees who might do anything to get a little extra food for their families.'"<sup>73</sup>

Finally, if any other less restrictive measures could be taken *in lieu* of anonymity, it

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<sup>67</sup> See *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others*, V.R. 84, 88 [1994].

<sup>68</sup> See Rule 69 *Protection of Victims and Witnesses*, *supra* note 15.

<sup>69</sup> See Mike O'Connor, *War Crimes Witness May Refuse to Testify*, (visited Nov. 15, 1998) <<http://www.nytimes.com/specials/bosnia/context/0530yugo-warcrimes.html>>.

<sup>70</sup> See *id.*

<sup>71</sup> *Id.*

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

should not be granted.<sup>74</sup> For example, if the prosecution is able to gather information elsewhere in the form of physical evidence or testimony from witnesses that are willing and able to be identified. There is a lack of physical evidence in Rwanda, therefore the Chamber is dependent on witness testimony. Post-Nuremberg genocide criminals learned from the mistakes of Adolph Hitler, who documented the killing of the Jews with great detail.

### **G. Reasoning in Tadic (Dissenting Opinion)**

Judge Stephens differs from the Majority in the interpretation of the relative sources to the Statute and the Rules of the Tribunal. The Yugoslavian Tribunal Statute "does not authorise anonymity of witnesses where this would in a real sense affect the rights of the accused...".<sup>75</sup> The Secretary General's Report "fully respect internationally recognized standards regarding the rights of the accused."<sup>76</sup> Article 22 only contemplates traditional protection of witnesses, not total anonymity.<sup>77</sup> Article 18(1) of the Yugoslavian Tribunal Statute requires that the proceeding be conducted with "*full respect*" [emphasis added] for the rights of the accused, as opposed to the "*due regard*" [emphasis added] standard for protection of witnesses and victims.<sup>78</sup> It is illogical that Rule 75(B)(iii)<sup>79</sup> includes the use

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<sup>74</sup> See *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139, 166 (1996) (quoting *R. v. Taylor*, at 19).

<sup>75</sup> *Prosecutor v. Tadic*, No. IT-94-1-T (Aug. 10, 1995) (Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses).

<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

of anonymous witnesses. It would not introduce so radical a concept by indirect and ambiguous wording.<sup>80</sup> Judge Stephen relied on the statement of Lord Simon of Glaisdale in *D. v. National Society for the Prevention of Cruelty to Children*<sup>81</sup> as an appropriate starting point for considering witness anonymity. "The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged." Judge Stephens also relied a case from The European Court of Human Rights -- *Kostovski*.<sup>82</sup>

If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.<sup>83</sup>

#### **H. Factors to Consider in Deciding the Use of Anonymous Witnesses**

If the defense is unaware of the identity of a witness or a victim, they are not adequately enabled to demonstrate that he or she is prejudiced, hostile, or unreliable.<sup>84</sup>

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<sup>79</sup> See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), Rule 75 *Measures for the Protection of Victims and Witnesses*, *supra* note 16.

<sup>80</sup> Prosecutor v. Tadic, No. IT-94-1-T (Aug. 10, 1995) (Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses).

<sup>81</sup> See *id.* (quoting *D. v. National Society for the Prevention of Cruelty to Children*, 1978 AC at p. 232).

<sup>82</sup> *Kostovski v. Netherlands*, 12 Eur. Ct. H.R. (ser. A) at 20 (1989).

<sup>83</sup> *Id.*

<sup>84</sup> See *id.*

"In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument."<sup>85</sup> However, the interests of the defendant to cross-examine must be balanced against the interest in the anonymity of witnesses. The balance of these interests is inherent in the notion of a "fair trial."<sup>86</sup> In a case before the Supreme Court of Victoria, Australia, *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others*,<sup>87</sup> Judge Brooking, discussing the anonymity of a witnesses with respect to the principle of a fair trial, stated:

The "balancing exercise" now so familiar in this and other fields of the law must be undertaken. On the one hand, there is the public interest in the preservation of anonymity . . . On the other hand, there is the public interest that . . . the defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to credit, as may assist in securing a favorable outcome to the proceedings. There is also the public interest in the conduct by the courts of their proceedings in public.<sup>88</sup>

In *R. v. Taylor*,<sup>89</sup> Lord Justice Evans ruled that the ultimate decision, used fairly and only in exceptional circumstance, of whether the defendant should see and know the

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<sup>85</sup> *Id.*

<sup>86</sup> *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139 at 163 (1996).

<sup>87</sup> *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others*, V.R. 84 [1994].

<sup>88</sup> *Id.* at 88.

<sup>89</sup> *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139 at 163 (1996) (quoting *R. v. Taylor*, a leading opinion before the English Court of Appeal (decision of 22 July 1994, transcript at 17).

identity of his accusers, including witness for the prosecution against him, is preeminently a matter of discretion by the trial judge.<sup>90</sup>

[I]t would be pointless to withhold the identity of the witnesses or the means by which they could be identified if at the same time the circumstances in which they gave evidence were such that they could by other means, either because of their appearance, or because of the sound of their voices, easily be identified.<sup>91</sup>

The picture painted in Rwanda is one of unique desperation that requires interpretations of the Rules and Procedures of the Tribunal to allow all relevant evidence to be considered by well-trained judges who are empowered to do so by the same rules and procedures.

### ***I. Victim and Witness Protection in National Jurisdictions***

In France, according to the New Code of Criminal Procedure (N.C.P.), the act of committing murder<sup>92</sup>, to submit a person to acts of torture or barbarism,<sup>93</sup> to cause unintentional death by assault,<sup>94</sup> resulting in permanent<sup>95</sup> or temporary<sup>96</sup> incapacity" on a

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<sup>90</sup> *See id.*

<sup>91</sup> *Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses*, 7 Crim. L.F. 139 at 163 (1996) (quoting Lord Justice Beldam in *R. v. Watford Magistrates' Court*, T.L.R. 285 [1992]).

<sup>92</sup> *See* C. PÉN., Art. 221-4, (Nov. 17, 1998) <<http://www.rabenou.org/penal/>>.

<sup>93</sup> *See* C. PÉN., Art. 222-3, (Nov. 17, 1998) <<http://www.rabenou.org/penal/>>.

<sup>94</sup> *See* C. PÉN., Art. 222-8, (Nov. 17, 1998) <<http://www.rabenou.org/penal/>>.

<sup>95</sup> *See* C. PÉN., Art. 222-10, (Nov. 17, 1998) <<http://www.rabenou.org/penal/>>.

<sup>96</sup> *See* C. PÉN., Art. 222-12 and 222-13, (Nov. 17, 1998) <<http://www.rabenou.org/penal/>>.

witness, victim or civil party, either to prevent him or her from denouncing actions, or from lodging a complaint or deposition", constitutes "grounds for aggravation of the penalty involved."<sup>97</sup>

In Germany it has been accepted that the identity of a witness need not be divulged at any stage of the criminal process. The court may compile a list of questions it wishes to ask the witness, the answers can then be presented to the court. While it is recognized that this provides no opportunity for the defendant to assess the credibility of the witness, the court is able to make that evaluation.<sup>98</sup>

In some United States cases, where the witness' personal safety was deemed to be at risk, they were able to testify without disclosing facts bearing on the identity, past or present, or whereabouts without infringing the defendant's rights under the Sixth Amendment.<sup>99</sup> Even when the accused is still in custody, to protect the victim from

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<sup>97</sup> C. PÉN., Art. 434-15, (Nov. 17, 1998) <<http://www.rabenou.org/penal/>>. ("*[T]he fact of using promises, offers, presents, pressure, threats, actions, manoeuvres or ruses during proceedings or with a view to an application to the courts or by the defence in order to force another person to either make or produce a mendacious deposition, statement or evidence (...) constitutes an offence in itself: stubborning of witnesses.*") KARIN LES CURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 49 (1996).

<sup>98</sup> See KARIN LES CURE & FLORENCE TRINTIGNAC, INTERNATIONAL JUSTICE FOR FORMER YUGOSLAVIA: THE WORKING OF THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE HAGUE 49 (1996).

<sup>99</sup> See *United States v. Crovedi* 467 F.2d 1032 (7th Cir. 1972), cert. denied, 410 U.S. 990 (1973) (where there was testimony describing statements by defendants or others indicating that accomplices would have reason to fear for their lives if they cooperated with the government and evidence that two other participants in the interstate freight hijacking at issue had met violent deaths, there was no abuse of discretion in refusing, on ground that accomplice witnesses had reason to fear that disclosure of their present identities would endanger themselves and their families, to require such witnesses to give their present names, addresses and employment); *United States v. Ellis* 468 F.2d 638 (9th Cir. 1972) (The Court of Appeals held that where defendant allegedly sold marijuana to undercover agent in presence of concealed police officers, refusal to permit defendant, on cross-examination, to elicit correct name, residence and occupation of the agent-purchaser, on representation of prosecution that withholding information would protect agent from harm, was not prejudicial to defendant.); *United States v. Rangel* 534 F.2d 147 (9th Cir.), cert. denied, 429 U.S. 854 (1976) (The Court of Appeals, Wong, J., held that trial court properly refused to require government informant to divulge his true name, home address, and phone number on witness stand, and that whether informant had entrapped defendant was question for jury.); *Clark v. Ricketts* 958 F.2d 851 (9th Cir.) (The Court of Appeals granted rehearing. David R. Thompson, Circuit Judge, held that petitioner's Sixth Amendment right of confrontation was not violated when he was

further attack, information about the address of a rape victim may be held from the defendant,<sup>100</sup> because the accused might have accomplices or might subsequently be acquitted and thus endangers the victim.<sup>101</sup>

### **J. Policy Reasons For Anonymity in Rape Cases**

Rape during conflict distinguished from domestic acts of rape as a tool for war as defined by international law.

[A] physical invasion of a sexual nature, committed on a person under circumstances which are coercive... ..the central elements of which cannot be captured in a mechanical description of objects and body parts... . Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.<sup>102</sup>

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not permitted to elicit, on cross-examination, name and address of prosecution's "John Doe" witness.); and *Siegfriedt v. Fair* 982 F.2d 14 (1st Cir. 1992) (upheld the refusal to reveal the witness's name; and cases from state courts, including *People v. Stanard* 365 N.E.2d 857 (N.Y.), cert. denied, 434 U.S. 986 (1977); *Castle v. State* 748 S.W.2d 230 (Tex. Crim. App. 1988) (The Court of Criminal Appeals, Onion, P.J., held that order limiting narcotics defendant's cross-examination of government informant, by preventing him from inquiring as to informant's aliases while he was ward of federal witness protection program, was not abuse of discretion.); and *Jackson v. State* 544 N.E.2d 853 (Ind. 1989), where the identity of relocated witnesses was withheld. (To reveal such identity would undermine the effectiveness of state witness protection programs, which would be contrary to the public interest in the effectiveness of these programs.).

<sup>100</sup> See *McGrath v. Vinzant* 528 F.2d 681 (1st Cir.), cert. dismissed, 426 U.S. 902 (1976) (The [United States] Court of Appeals, Levin H. Campbell, Circuit Judge, held that petitioner's constitutional rights were not violated during state trial when judge, without any showing by defendant of particularized need, refused to order rape victim, then on stand, to reveal her current home address to which she had moved shortly after she had been attacked, where there was no other restrictions on her cross-examination including her place of employment.) *Id.*

<sup>101</sup> See *id.*

<sup>102</sup> *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, September 2, 1998 (Summary of the Judgment in Jean-Paul Akayesu Case) para 38 webpage (Sept. 4, 1998) <<http://www.un.org/ictt/english/pressrel/PR138.htm>> (Trial Chamber I in the trial of Jean-Paul Akayesu, former Bourgmestre (mayor) of Taba, where he was convicted of rape as well as other acts of Genocide, Crime Against Humanity and Violations of Article 3 Common to the Geneva Conventions. ) ("Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.") *Id.*

In *Prosecutor v. Jean-Paul Akayesu*, the Chamber also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of the sexual violence they endured.<sup>103</sup> Other important considerations noted by the Chamber are the equal treatment of parties, the protection of witnesses and families of unborn children, and effects of disclosure on third parties.<sup>104</sup> The Chamber concluded that the objective of the tribunal Chapter VII would be hindered by the lack of witnesses willing to testify.<sup>105</sup> The Security Council created the Yugoslavian Tribunal "to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them."<sup>106</sup> This would result in effective humanitarian law and reciprocity for citizens of all states during conflict.

Finally, the Rules make special provisions as to the standard of evidence and matters of credibility of the witness which may be raised by the defense in cases of sexual assault.<sup>107</sup> Even in the United States, the use of closed circuit television in the courtroom

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<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> United Nations Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia, S.C. Res. 827, UN SCOR, 48th Sess., 3217th mtg. at 1, UN Doc. S/RES/827 (1993) [hereinafter S.C. Res. 827] (Nov. 17, 1998) <<http://www.un.org/Docs/sc.htm>>.

<sup>107</sup> *See International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), Rule 96, Evidence in Cases of Sexual Assault*

In cases of sexual assault:

- (i) Notwithstanding Rule 90(C), no corroboration of the victim's testimony) shall be required;
- (ii) consent shall not be allowed as a defence if the victim a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

can be allowed without violating the Sixth Amendment Rights of confrontation when a court finds it necessary to protect a child witness from further psychological harm.<sup>108</sup> In conclusion, in the instances of rape defined by the Chamber in *Akayesu*, the court should keep the broad scope of the use of anonymous witnesses in rape crimes.

#### **IV. Conclusion**

In the interest of justice and where there are limited alternatives of other forms of evidence, the use of anonymous witnesses should be allowed after weighing the rights of all parties. The reputation for legitimacy of the court depends on this analysis. The exigent circumstance in which the court operates should allow for flexibility of its procedural rules. The use of anonymous witnesses do not *per se* deprive an accused of the right of a *fair* trial. A defendant's right to a fair trial does not necessarily depend on the divulging of witness and victim identity. Often the accounts of these victims and witnesses are the only evidence to document and prosecute the aforementioned atrocities, and the only means of preventing similar crimes from occurring in the future. Anonymous witness testimony should, therefore, be considered.

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- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
  - (iv) prior sexual conduct of the victim shall not be admitted in evidence.

<sup>108</sup> See *Maryland v. Craig*, 497 U.S. 836 (1990) (The Supreme Court, Justice O'Connor, held that: (1) confrontation clause did not categorically prohibit child witness in child abuse case from testifying against defendant at trial, outside defendant's physical presence, by one-way closed circuit television; (2) finding of necessity for use of one-way closed circuit television procedure had to be made on case specific basis; but (3) observation of child's behavior in defendant's presence and exploration of less restrictive alternatives to use of one-way closed circuit television procedure were not categorical prerequisites to use of one-way television procedure as a matter of federal constitutional law.) *id.*