

The International Criminal Tribunal for Rwanda: The General Principles
of The Rules of Evidence and Procedure

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I. Introduction and Summary of Conclusions

A. Issues:

The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda only contain rather limited Rules of evidence, the same is the case with Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia. The law made to deal with the crimes committed during the Second World War contained no Rules at all. However, all Tribunals have developed certain Rules of evidence. What Rules of evidence can be distilled out of international practice?¹

B. Summary of Conclusions

The International Criminal Tribunal for Rwanda's Rules of evidence and procedure were created to put the prosecution and the defense on equal footing, so no party has an advantage over the other.² Evidentiary Rules of the ICTR are flexible and seek to allow all relevant

¹ See Memorandum, To: Students enrolled in the International War Crimes Project, (August 26, 1998). (List of topics distributed to students enrolled in class).

² See Lawyers Committee on Human Rights, *Prosecuting Genocide in Rwanda: A lawyers Committee Report on the ICTR and National Trials* (visited October 28, 1998) <<http://www.wideopen.igc.org/lchr/pubs/rwnada.htm>>

evidence.³ Nevertheless, evidence seized using methods that undermine its reliability or would damage the “integrity of the proceedings” is not admissible.⁴

Prior to the advent of the International Criminal Tribunal for Yugoslavia, there existed no set of international Rules of evidence, for an International Criminal Court. Yet, there are numerous other sources from which to derive guidance, such as the Rules and practice of other legal systems around the world and past International Criminal Tribunals.⁵

In addition, the United Nations has set out an extensive list of the Rules of Procedure and Evidence to be used for a future International Criminal Court.⁶ These Rules deal with every aspect of the case from organization of the Tribunal to exhaustion of appeals.⁷

The Rules of the ICTR have deviated from “common law” Rules in certain instances. Hearsay, for example has been allowed, as it was in the Nuremberg trials.⁸ Also, evidence can be ordered to be produced by the Tribunal to ensure an accurate decision.⁹ Other differences

³See *infra* note 29.

⁴Rule 95: *Exclusion of Certain Evidence* states: No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

⁵See Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *Transnat'l L. & Contemp. Prob.*, 81, 82 (1997).(explaining the overview of the origins of the ICTR).

⁶See United Nations, *Daily Summary* (visited October 28, 1998)
<<http://www.un.org/icc/pressrel/summary.htm>>

⁷See *id.*

⁸See *Nuremberg Charter*

⁹See *infra* note 29.

include the absence of plea-bargaining and the fact that immunity cannot be granted for any defendant, rather a cooperative witness/defendant would have their willingness to help taken into account when sentenced.

Similarly, the Yugoslavia and Rwanda Tribunals themselves have deviated from the earlier Nuremberg rulings. New Tribunals seem to be more fair and less like a witch hunt. For instance, in the Nuremberg trials a defendant did not have to be present at trial as long as a three judge panel agrees that there is a *prima facie* case against that defendant.¹⁰ The Yugoslavia Tribunal prohibited trials *in absentia*, since they could be seen as empty gestures.¹¹ Likewise, in the Nuremberg trials those acquitted were later tried in state courts. The new Yugoslavia Tribunal, however, prohibited double jeopardy.

Throughout the international community there exists an enormous amount of information, including complete sets of Rules of Evidence and Procedure.¹² Supposing that some of these Rules should be used in interpreting the Tribunal's jurisprudence, deciding which Rules are fair and which Rules should be used, is a difficult task. Accordingly, the Tribunal should be thorough and accurate in their investigation of which Rules to explore. Certain Rules, if incorporated into the Tribunal, may be adverse to a party waiting for their day in court.¹³

¹⁰Known as trial *in absentia*

¹¹Edward A. Amley, Jr., *Proceeding To Justice And Accountability In The Balkans: The International Criminal Tribunal For The Former Yugoslavia And Rule 61*, 23 Yale J. Int'l L. 231, 241 (1998).

¹²See Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 Transnational Law & Contemporary Problems, 81, 82 (1997).

¹³See *id.*

The intentional generality of the Rules is a concern. These general Rules seek to allow all relevant evidence, but at the same time may be too broad and infringe on a suspect's rights. In piecing together standard Rules of evidence and procedure, the Rwanda Tribunal should embrace many different suggestions.

Several times the United Nations Security Council has set up Tribunals to deal with war crimes and crimes against humanity. The Rwanda Tribunal and the Yugoslavia Tribunal have, and continue to, work closely together in interpreting the Rules.¹⁴ In fact, one of the best places for Prosecutors and Judges to look to supplement the "General Rules" is other active Tribunals.

The Rules of procedure and evidence of the International Criminal Tribunal for Rwanda apply to all cases heard before the Tribunal. These Rules do an adequate job of ensuring a fair trial. Nonetheless, most of the Rules need attention, either because they are too vague, or because they may infringe on a suspect's or victim's rights. There does, however, seem to be several individual Rules that deserve more attention than others.

First, the general nature of the Rules of Evidence and Procedure place too much discretion in the Trial Chamber. This discretion hinders the administration of fair and accurate trials of all the accused. Second, the Rule on sexual assault is similar to that of many other nations. The Rule is clear, concise, and affords protection to victims of sexual assault. In fact,

¹⁴See *supra* note 5. See also Rule 6: *Amendment to the Rules* states: (A) Proposals for amendment of the Rules may be made by a Judge the Prosecutor or the Registrar and shall be adopted if agreed to by not less than seven Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges. (B) An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by any appropriate means either done in writing or confirmed in writing. (C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

the clarity and explanation of the Rule on sexual assault make it a model for other Rules in need of supplementation. Third, hearsay has always presented problems for Tribunals. The current Tribunal's Rules on admissibility of hearsay actually conflict with other Tribunal Rules, making it one of the more difficult to interpret. Last, if a decision is made to supplement the Rules, parties should look to the Trial Chamber's views, if any, and all other relevant outside material in creating proper Rules.

II. Factual Background

Rwanda was involved in a horrific period of violence and genocide. As a result of this, the United Nations established a new Tribunal to deal specifically with war crimes committed in Rwanda.¹⁵

The United Nations Security Council established the International Criminal Tribunal for Rwanda by passing Resolution 955 on November 8, 1994. Resolution 955 established the ICTR's jurisdiction, the types of crimes to be investigated and prosecuted, the Tribunal's relationship with national courts, the organization of the Tribunal and its Prosecutor's and registrar's offices, the conduct of investigators, rights of accused, witness protection, Rules of procedure, appeals and enforcement of sentences.¹⁶ Though largely modeled after the International Criminal Tribunal for Yugoslavia, there are several differences between the two Tribunals.¹⁷

¹⁵See *Rwanda* (visited October 28, 1998)
<<http://www.odci.gov/cia/publications/factbook/rw.html>>

¹⁶See *infra* note 36 at 2.

¹⁷See *Id.* at 3.

The ICTR is looked at as a “poor cousin” of the ICTY.¹⁸ Numerous people have been indicted and several are in custody.¹⁹ However, the ICTR will continue to need effective protection of witnesses, adequate translation and interpretation facilities, and assistance concerning the large amount of publicity these trials are attracting. The ICTR has been successful to this point in controlling the proceedings. In fact, as a direct result of the success and professionalism that has been exhibited in the ICTR, the United Nations was able to establish the International Criminal Court in Rome.²⁰

III. Legal Discussion

A. General Provisions

1) *The General Nature of the Rules*

“When a lawyer in any domestic system has to present evidence to prove factual allegations in a case, a comprehensive body of rules and practice, developed and refined over hundreds of years, directs and controls the judicial process”.²¹ Most criminal trials operate under systems predominantly composed of common law rules and practices, with their own national

¹⁸ See Catherine Cisse, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *Transnational & Contemporary Problems*, 103 at 116 (1997).

¹⁹ See United Nations, *List and Status of ICTR-Detainees*, (visited October 28, 1998) <<http://un.org/ictt/english/factsheets/detainees.html>>

²⁰ See *supra* note 5 at 83.

²¹ See *id.*

rules of evidence and procedure constituting the backbone of daily practice.²²

Unfortunately, the security and certainty that comes from these national systems does not exist in the context of the Rwanda Tribunal.²³ The reason for this is that no national Rules are binding on the Tribunal.²⁴ Nor does looking at past criminal Tribunals provide much help in constructing a cure for problems present in the newly established Tribunals. For example, Nuremberg and Tokyo were “once off” proceedings before military Tribunals.²⁵ Most of the facts and circumstances surrounding these Tribunals were different than what is faced today in Rwanda.²⁶

The approach to evidentiary and procedural issues taken at Nuremberg, where there was an extremely high degree of reliance on documentary evidence and relatively little emphasis placed on the accused rights to a full answer and defense, would not be acceptable today because of post-World War Two developments in international human rights law.²⁷ After the Nuremberg trials, most other Tribunals have likewise not aided in revealing to present prosecutors the interpretation of certain evidentiary rules.

²²*See id.*

²³*See* The ICTR Governing Bodies, *Introduction*, (visited October 28, 1998) <<http://www.un.org/ictt/english/factsheets/intro.html>

²⁴*See supra* note 29.

²⁵*See Supra* note 5.

²⁶*See id.* at 83.

²⁷*See* W.J. Fenrick, *In the Field with UNCOE: Investigating Atrocities in the Territory of Former Yugoslavia*, 34 *Mil. L. & L. War Rev.* 33, 36 (1995). *See also* Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *Transnational Law & Contemporary Problems*, 81, 83 (1997).

Although the present Rules of Evidence and Procedure have secured the detention and punishment of numerous defendants, they are brief and can be described as skeletal.²⁸ The ICTR and all other Tribunals follow Rules of evidence that are very general. Similarly, very little commentary is available to assist the Prosecutor in the interpretation of the different Rules.

2) Rule 89

Rule 89 is a basis for understanding the different Rules of evidence. It is entitled, “General Provisions,” and acts as a guideline for Prosecutors, defense counsel and Judges.²⁹ The purpose of these general Rules is to ensure a fair trial.

Genocide and other crimes committed during violent periods of war are sometimes difficult to prove. There are several reasons for this including a lack of substantial evidence, lack of cooperation by witnesses and defendants, and a need to keep the Rules as clear as possible due to the many different nationalities that may be present at the Tribunal.³⁰

The general nature of the Rules serves an important purpose. If the Rules were strictly constructed for the Tribunal, they would require frequent revision. Further, the general nature of the Rules allows Prosecutors to sometimes convict a person responsible for horrific crimes that

²⁸*See id.* at 84.

²⁹Rule 89: *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 favor 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 exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. (e) A Chamber may request verification of the authenticity of evidence obtained out of court.

³⁰*See infra* note 53.

may otherwise have gone unpunished due to a “technicality.” For example, a suspect on trial for sexual assault in the Rwanda Tribunal will have an even greater chance of being convicted than if the trial were being held in the United States using the Federal Rules of Evidence.³¹

One provision within Rule 89 creates the most opportunity for discretion. Rule 89(c), allows the Trial Chamber to admit any relevant evidence it deems to have probative value.³²

Although this makes sense, there is no annotation or explanation given within the Rule. Without any direction from the rule-makers, it is difficult for an attorney presenting evidence before the

³¹Federal Rules of Evidence, Rule 412: *Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior Or Alleged Sexual Predisposition* states: (a) *Evidence generally admissible.* The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c): (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim's sexual predisposition. (b) *Exceptions.* In a criminal case, the following is admissible, if otherwise admissible under these rules: (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and (C) evidence the exclusion of which would violate the constitutional rights of the defendant. (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim. (c) *Procedure to determine admissibility.* (1) A party intending to offer evidence under subdivision (b) must— (A) file written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative. (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

³²*See supra* note 29.

Tribunal to ascertain the probability of certain evidence being admitted. Rule 89 differs from many, including the United States, which has several Rules dedicated solely to the admissibility of evidence. Further, like many other countries the U.S. Rules contain explanations to help any attorney interpret the rules.³³

3) *Discretion of the Tribunal*

Although the Rules of Evidence and Procedure are limited, and leave a lot of discretion in the Tribunal, there are a number of Rules that are easy to understand and interpret. For example, the Tribunal uses English and French as its working languages, however, an accused has a right to speak in their native tongue along with their counsel.³⁴ The Tribunal bears the cost of providing interpreters.³⁵ For the ICTR this is big concern because almost all of the accused will speak Kinyarwanda and translation will be necessary at a large cost to the Tribunal .³⁶

³³See United States Federal Rules of Evidence

³⁴See Rule 3: *Languages* states:(A) The working languages of the Tribunal shall be English and French. (B) An accused shall have the right to use his or her own language. (C) Other persons appearing before the Tribunal, other than as counsel, who do not have sufficient knowledge of either of the two working languages, may use their own language. (D) Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the defence and the interests of justice. (E) The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages. (F) If: (i) a party is required to take any action within a specified time after the filing or service of a document by another party; and (ii) pursuant to the Rules, that document is filed in a language other than one of the working languages of the Tribunal, time shall not run until the party required to take action has received from the Registrar a translation of the document into one of the working languages of the Tribunal.

³⁵*Id.*

³⁶See Lawyers Committee on Human Rights, *Prosecuting Genocide in Rwanda: A lawyers Committee Report on the ICTR and National Trials* (visited October 28, 1998)

Similarly, the ICTR prohibits trials *in absentia* and provides solid rules concerning an accused right to counsel. Rule 42 establishes that a suspect has a right to counsel paid for by the Tribunal if he cannot afford one, a right to an interpreter, and a right to remain silent.³⁷

One of the goals of the Tribunal is to be fair. However, the Rules give the Trial Chamber too much discretion in interpreting evidentiary issues. Through this discretion the Chamber has created a system with little guidance available to the attorneys. The Rules should clearly enunciate standards and tests to determine the admissibility of evidence. The decision on admitting evidence, should not be one made at trial in every case, attorneys should know the power and weight of their evidence before they get to trial.

4) Concern Over the General Nature of the Rules

A concern has emerged out of the general Rules of evidence and procedure that the ICTR uses. These general Rules, developed from a cross section of national systems, tend to be undefined and so unclear that they seldom help clarify the dispute at hand.³⁸ This ambiguity can

<<http://www.wideopen.igc.org/lchr/pubs/rwnada.htm>>

³⁷See Rule 42: *Rights of Suspects during Investigation* states: (A) A suspect who is questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in language the suspect speaks and understands: (i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (ii) the right to have free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence. (B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

³⁸See *supra* note 5 at 98.

be clearly seen in Rule 89(B) which encourages “common sense” and “reasonable” approaches to the application of the rules “that best favor a fair determination of the matter” and “are consonant with the spirit of the Statute.”³⁹

Many scholars and Prosecutors are perplexed by these Rules, and have become very frustrated with their application.⁴⁰ Moreover, the Tribunal must make some very difficult decisions with little guidance from the Rules themselves. In interpreting the Rules of evidence and procedure the Tribunal must first look at Rules and precedents of World War II trials, bearing in mind the distinctions between the circumstances of the different Tribunals.⁴¹ Second, they must consider the Rules of other international and regional Tribunals, like the proposed International Criminal Court and other human rights Tribunals.⁴²

Once all of these diverse court systems are examined, the need to piece together a common system is imperative to a fair and just prosecution in an international context. International Tribunals are a unique form of justice. They strive to be as fair as possible by loosely defining Rules of evidence and procedure. However, in the process of being as fair and flexible as they can, the international community has left many in the dark as to what the Rules are actually expressing.⁴³

While it is possible that both the prosecution and defense are familiar with similar legal

³⁹*See supra* note 29.

⁴⁰*See supra* note 5 at 98.

⁴¹Herbert Wechsler, *Principles, Politics, and Fundamental Law; Selected Essays*, 1961.

⁴² *See supra* note 5 at 92.

⁴³*See id.*

systems it is very unlikely that they actually are. International Tribunals Rules of procedure and evidence vary dramatically from nationality to nationality. The Tribunals Rules are a composite of several nations rules and are tailored to meet the Tribunals needs.⁴⁴

B. “Equality at Arms”

1) *Discovery*

The fundamental principle of the ICTR’s Rules of procedure and evidence is “equality at arms” which is the effort to put the prosecution and the defense on equal footing as much as possible and to remove any inherent advantages one side may have over the other.⁴⁵ Rule 66 is an example of the fairness that was intended when the Rules were drafted.⁴⁶ Rule 66 requires the Prosecutor to turn over to the defense, as soon as practicable after the initial appearance of the accused, “copies of supporting materials which supported the indictment.”⁴⁷ If the defense

⁴⁴See Howard S. Levine, *Prosecuting War Crimes Before an International Tribunal*, 28 Akron L. Rev., 429, 434 (1995).

⁴⁵See Lawyers Committee on Human Rights, *Prosecuting Genocide in Rwanda: A lawyers Committee Report on the ICTR and National Trials* (visited October 28, 1998) <<http://www.wideopen.igc.org/lchr/pubs/rwnada.htm>>

⁴⁶See *id.*

⁴⁷Rule 66: *Disclosure by the Prosecutor* states: (A) Subject to the provisions of Rule 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as prior statements obtained by the Prosecutor from the accused, and (ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses. (B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or where from or

requests, and subject to some restrictions, the Prosecutor must allow the defense to inspect “any books, documents, photographs, and tangible objects in his custody or control, which are material to the preparation of a defense” or that the Prosecutor intends to introduce into evidence or were obtained from the accused.⁴⁸ The only exception is if the information would prejudice further investigations or the security interests of any State.⁴⁹

Rules 67 and 68⁵⁰ also create the feeling of “equality of arms” by requiring the Prosecutor to notify the defense as early as possible of the names of the prosecution witnesses to be called. The prosecution also must disclose any evidence that may exculpate the accused, mitigate their guilt or undermine the credibility of the prosecution’s evidence.⁵¹ Likewise, the defense must also inform the prosecution of certain aspects of their case. The defense must notify the prosecution if it intends to use the following defenses: alibi, the accused claims not to be present

belonged to the accused. (C) Where information in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from the obligation to disclose pursuant to Sub-rule (B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

⁴⁸*See id.*

⁴⁹*See id.*

⁵⁰*See infra* note 51.

⁵¹*See* Rule 68: *Disclosure of Exculpatory Evidence* states: The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

at the time of the alleged incident; or, special defenses such as “diminished capacity”.⁵² The defense must also provide names of witnesses who support the accused’s version of events.⁵³

As much as the Tribunal strives for fairness, there are instances where one side does gain an advantage over the other. In the *Tadic* case from the ICTY, the Trial Chamber ruled that the Defense didn’t have to provide certain witness statements to the Prosecution, while requiring the Prosecution to provide witness statements to the Defense. The ultimate goals of any Criminal Tribunal should be fairness and justice. The decision by the Trial Chamber to create a higher standard for the Prosecution, does however, go against the intrinsic fairness created by the Rules.

The Trial Chamber has made it more difficult for the Prosecution than the Defense to obtain similar information. Although this seems unfair, it is one of only a few ways a Defendant has to clear their name. If a defendant is trying to prove a witness to the crime is not trustworthy, they will want to examine several of the witness statements. Although the Prosecution has a similar desire to find out which Defense witnesses are untrustworthy, it is not the Prosecutor’s liberty at stake during the course of the trial. A defendant may face life in prison, thus the Trial Chamber must have felt that in allowing the Defendant to inspect witness statements they were preserving a fair trial.

2) *Relevance*

The Tribunal’s Rules of evidence are adaptable and strive to allow all relevant evidence.

⁵²See *supra* note 5 at 86.

⁵³See Lawyers Committee on Human Rights, *Prosecuting Genocide in Rwanda: A lawyers Committee Report on the ICTR and National Trials* (visited October 28, 1998) <<http://www.widopen.igc.org/lchr/pubs/rwnada.htm>>

In spite of this, evidence that is obtained using methods that undermine its reliability or would damage the “integrity of the proceedings” is not admissible.⁵⁴ Consequently confessions are admissible, provided that the rules governing questioning of suspects have been followed. Confessions are deemed to be voluntary unless otherwise shown by the defense.⁵⁵

Courts around the globe have different rules of evidence and procedure. Nevertheless, they all have one similarity, before any piece of evidence is admitted, it must be relevant. The United States is no different, and in the case of U.S. v. Ives, 609 F. 2d 930 (9th Cir. 1979), the relevancy of evidence was an issue. The court held: “Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable”.”⁵⁶

Relevant evidence is usually admissible unless otherwise provided, or if its probative value is substantially outweighed by prejudice.⁵⁷ For instance, in U.S. v. Kilbourne, 559 F. 2d 1263, (4th Cir. 1977), photographs of the homicide victim’s body were properly admitted in evidence during a first-degree murder trial, despite contention that the probative value was outweighed by danger of prejudice, where such photographs showed proximity of body to certain items linked to murder suspect and showed wounds which indicated that killer had acted

⁵⁴See Rule 95: *Exclusion of Certain Evidence* states: No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

⁵⁵See Rule 92: *Confessions* states: A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

⁵⁶U.S. v. Ives F. 2d 930, 933 (9th Cir. 1979).

⁵⁷See United States Federal Rules of Evidence, Rule 401, 402, 403.

deliberately and with premeditation.⁵⁸

The courts enunciations in both aforementioned cases is predictable, the Federal Rules of Evidence, which were applied, are easy to understand and contain meaningful explanations. This is untrue in Rwanda, very few decisions made by the Trial Chamber are predictable. This may be from the scarcity of guidance from the Tribunal's Rules, or the general nature of the Rules themselves.

C. Witness Testimony

1) Rule 90

Following the general Rules set forth by the Tribunal, are a set of minimally more descriptive Rules that lend inadequate help in flushing out the true intent of the Tribunal. For example, Rule 90 places the emphasis of evidentiary provisions on witness testimony, but fails to clarify what relevant evidence is admissible.⁵⁹ Contained in Rule 90 are several provisions similar to the United States Federal Rules of Evidence.⁶⁰ Yet there is one clear difference, in the

⁵⁸*See U.S. v. Kilbourne, 559 F. 2d 1263, (4th Cir. 1977).*

⁵⁹*See infra* at note 60.

⁶⁰*See* Rule 90: Testimony of Witnesses states: (A) Witnesses shall in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided in Rule 71 or where, in exceptional circumstances and in the interests of justice, a Chamber has authorized the receipt of testimony via video-conference link. (B) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth". (C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without the formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone. (D) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who heard the testimony of another

Tribunal, the Trial Chamber controls the mode and order of interrogating witnesses, while in the United States, it is the attorney's who control the order and mode of certain witness testimony.

Although the Judge has a similar duty in both the International Tribunal and in the United States, the Trial Chamber is given much more latitude in deciding which evidence to admit. Additionally, Rule 90 allows the Trial Chamber to exclude certain witness testimony to "avoid needless consumption of time".⁶¹ Nonetheless, there is no clarification of this, and no mention of the relevance of evidence to be admitted.

2) *Sexual Assault*

Likewise, Rules 93,⁶²94⁶³, and 95⁶⁴, which deal with evidence of a consistent pattern of

witness shall not for that reason alone be disqualified from testifying. (E) Notwithstanding Sub-rule (D), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the grounds that he or she has been present in the courtroom during the proceedings. (F) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in subsequent prosecution against the witness for any offense other than perjury. (G) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time. (H) Cross-examination shall be limited to the subject-matter of the direct examination and matters affecting the credibility of the witness. The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters as if on direct examination.

⁶¹*See id.*

⁶²*See Rule 93: Evidence of Consistent Pattern of Conduct* states: (A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible in the interests of justice; (B) Acts tending to show such a pattern of conduct shall be disclosed by the prosecutor to the defense pursuant to Rule 66.

⁶³*See Rule 94: Judicial Notice* states: A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof. (B) At the request of a party or proprio

conduct are equally unclear. The only Rule to include specific Sub-rules that are descriptive is Rule 96, covering sexual assault.⁶⁵

Rule 96 is different than many other civilized or uncivilized nations when it comes to crimes of a sexual nature.⁶⁶ The Tribunal's Rule on sexual assault is relaxed when compared to Rules from other Nations.⁶⁷ Mass killings and rapes were not uncommon occurrences in Rwanda. Therefore, the need to ensure that persons responsible for rape do not go unpunished is extreme. As well, the Tribunal did not want to make it easy for the accused to drag the victim's past and present sex life into the case. This is evident by the fact that the Tribunal places very high credibility with the victim, and requires a great deal from the accused before they can even claim "consent" as a defense.⁶⁸

The United States has similar provisions concerning sexual assault. The victim's past sex

motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

⁶⁴See Rule 95.

⁶⁵See *infra* note 66.

⁶⁶See *supra* note 4 at 87.

⁶⁷See Rule 96: *Evidence in Cases of Sexual Assault* states: In cases of sexual assault: (i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defense 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 of the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (iv) prior sexual conduct of the victim shall not be admitted in evidence.

⁶⁸See *supra* note 52. See Also *supra* note 31.

life is not an issue at trial unless the defense can fit one of the exceptions, such as the defendant's past sexual relationship with the victim. The rules protecting a victim in a sexual assault case fall under the province of what is known as the "Rape Shield".⁶⁹ This "shield" protects a victim from having their own sex life on trial while the defendant is being tried.⁷⁰

The "Rape Shield" applies to both civil and criminal proceedings. The Rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders. This objective is accomplished by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.⁷¹

The Tribunal's Rule on sexual assault is similar to the United States in that it is clear and concise. In fact, the Tribunal's Rule on sexual assault is one of the clearest of all the Rules. Because of the completeness and clarity of the Rule on sexual assault attorneys in front of the Tribunal can rely on the Rules themselves to determine what evidence should be admitted. Although the ultimate decision is up to the Trial Chamber, the depth and clarity of the Rule on

⁶⁹See United States Federal Rules of Evidence, Rule 412.

⁷⁰See *id.*

⁷¹See *id.* at 100.

Sexual Assault makes it one of the easier Rules of the Tribunal to interpret.

D. Hearsay Evidence: Does Too Much Get Admitted?

1) Prejudicial Affect

Among all of the variations in Rules of evidence and procedure throughout international Tribunals, the Rule on hearsay evidence, and challenges of hearsay evidence is one of the most pressing concerns of the defense and prosecution. Article 21(4)(e) of the Statute, accords the accused the right to examine witnesses against him.⁷² Therefore many accused, including the *Tadic* case from the ICTY, will argue that no hearsay evidence should be admitted unless its probative value substantially outweighs its prejudicial effect.⁷³ The Tribunal held that it may rule on the hearsay evidence without learning of its content, but by merely looking at the context in which the hearsay was received.⁷⁴ What this means is that the Trial Chamber will not even examine the prejudicial or probative value of a hearsay statement because it won't even know what the statement contains. The only information the Trial Chamber may have is that the statement is hearsay, and the Chamber will make a decision based only on the circumstances

⁷²See Article 21(4)(e), See also Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *Transnational Law & Contemporary Problems*, 81, 92 (1997).

⁷³See Federal Rules of Evidence Rule 404(United States): *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time* states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

⁷⁴See *supra* note 5 at 92.

surrounding the proposed hearsay statement. In comparison, the United States Federal Rules of Evidence require exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Therefore, in the United States, unlike the International Criminal Tribunals, the Judge must know the content of the statement to determine its probative value.

2) Trial Chamber's View

The Trial Chamber “examined the relevant Rules of Evidence in order to ascertain their plain and ordinary meaning, and concluded that “it is clear from these provisions [Rules 89 and 95] that there is no blanket prohibition on the admission of hearsay evidence.”⁷⁵ The Trial Chamber then took on a study of common and civil law systems, in which some national cases were cited. The European Convention on Human Rights and some pertinent decisions of the European Court of Human Rights were also referenced.⁷⁶ The Trial Chambers found that:

In Sum, the prohibition on the admissibility of hearsay that fails to meet a recogni[s]ed exception is a feature of the criminal procedure primarily limited to common law systems. In the civil law system, the judge is responsible for determining the evidence that may be presented during the trial, guided primarily by its relevance and its revelation of the truth.⁷⁷

The Trial Chamber is bound by the Rules, which require reliability of any evidence

⁷⁵*See id.* See also *supra* note 29 and 45 respectively.

⁷⁶*See supra* note 5 at 92.

⁷⁷*In re Dusko Tadic: Decision on Defense Motion on Hearsay* (The Prosecutor v. Dusko Tadic), 1996 I.C.T.Y No. IT-94-1 (Aug. 5), D11613-D11609; *See also* Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *Transnational Law & Contemporary Problems*, 81, 93 (1997).

presented before it. Therefore, if evidence presented before it is unreliable, it certainly would not have probative value and thus would be excluded under Sub-rule 89 (C).⁷⁸ Consequently, even without a distinctive Rule preventing admission of hearsay, the chamber may exclude evidence that lacks probative value because it is unreliable.⁷⁹

3) *Protection of Accused*

Although the study by the Trial Chamber laid some guidelines of reliability by stating that it might be, “voluntary, truthful, and trustworthy”, they did not go into the specific detail of Rule 89.⁸⁰ Sub-rule 89(D) does however provide further protection for an accused against possible prejudices from statements made out of court.⁸¹ If the evidence has been admitted as relevant and having probative value, it may later be excluded.⁸² Trial judges have the opportunity to consider the evidence, place it in the proper context of the trial, and then exclude it if it is substantially outweighed by the need to ensure a fair trial.⁸³

In the context of a prosecution expert witness, Sophie Greve, who planned to testify and

⁷⁸*See supra* note 29.

⁷⁹*See supra* note 5 at 93.

⁸⁰*See id.* at 94.

⁸¹*See infra* note 84..

⁸²*See id.*

⁸³*See In re Dusko Tadic: Decision on Defense Motion on Hearsay* (The Prosecutor v. Dusko Tadic), 1996 I.C.T.Y No. IT-94-1 (Aug. 5), D11613-D11609; *See also* Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 *Transnational Law & Contemporary Problems*, 81, 94 (1997).

enunciate from other reports and witness statements, the Trial Chamber held that⁸⁴:

Rule 89 of our rules of evidence, of course, is the guiding rule. [Rule] 89(C) provides that a chamber may admit any relevant evidence which it deems to have probative value. We consider that, based on the proffer of the prosecution and considering the objections of the defen[c]e, the testimony of Miss Greve certainly is relevant and it appears that it has probative value. Under Rule 89(D), the Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. So that our determination at this time that the testimony is relevant, and that it appears to have probative value, does not in any way bind the Trial Chamber from excluding testimony, should we make such a determination after hearing the context in which it is given. We are very cognizant of the fact that we are judges, experienced judges. We are not a jury. We believe we can listen to this testimony that we consider to be relevant and appears to have probative value, and give it the appropriate weight that is necessary.⁸⁵

4) Case Law

In the United States, hearsay is inadmissible to try and prove what the hearsay statement is asserting.⁸⁶ The American hearsay rule generally disallows a witnesses assertion to be treated equally as a fact, unless the person who made the original assertion is brought into court to testify.⁸⁷ By requiring that the asserter be present in court, opposing counsel may cross-examine

⁸⁴See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the First Yugoslavia War Crimes Tribunal*, 30 NYU J. of Int. L. and Politics, 101, 113, (1998).

⁸⁵*In re Dusko Tadic: Decision on Defense Motion on Hearsay* (The Prosecutor v. Dusko Tadic), 1996 I.C.T.Y No. IT-94-1 (Aug. 5), D11613-D11609; See also Rod Dixon, *Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunals*, 7 Transnational Law & Contemporary Problems, 81, 95 (1997).

⁸⁶See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the First Yugoslavia War Crimes Tribunal*, 30 NYU J. of Int. L. and Politics, 101, 114, (1998).

⁸⁷See Federal Rules of Evidence Rule 802 (United States): *Hearsay Rule* states: Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme

and thereby ascertain the witnesses sincerity and credibility.⁸⁸ The Confrontation Clause of the United States Constitution affords every defendant the right to confront witnesses against them. The American courts rule on hearsay evidence constantly and in Cupit v. Whitley, 28 F. 3d 532,531 (5th Cir. 1994), the court enunciated a test to determine what hearsay evidence is admissible. “(1) [W]hether the hearsay evidence was “crucial” or “devastating;” (2) whether prosecutors misused a confession or otherwise engaged in misconduct; (3) whether a joint trial or the wholesale denial of cross-examination was involved; (4) whether the most important prosecution as well as other prosecution witnesses, was available for cross-examination; and (5) the degree to which the hearsay evidence is supported by “indicia” of reliability”.⁸⁹

Courts other than the United States have also made rulings concerning the admissibility of hearsay evidence. In J.J. Case Company v. The Islamic Republic of Iran, 3 Iran-U.S.C.T.R. 62, (1983), the Iran Claims Tribunal held the Anglo-American technical rules governing the admissibility of hearsay evidence do not apply in proceedings in front of international Tribunals, just as they do not apply under civil law.⁹⁰

The European Union, like most other jurisdictions, has enunciated firm guidelines as to the admissibility of hearsay evidence. In Macarthy plc v. Unichem Limited, ECC 41, (1991), the court ruled that hearsay was properly admitted during interlocutory appeal, but is not admissible

Court pursuant to statutory authority or by Act of Congress.

⁸⁸*See supra* note 74.

⁸⁹ Cupit v. Whitley, 28 F. 3d 532,531 (5th Cir. 1994).

⁹⁰ J.J. Case Company v. The Islamic Republic of Iran, 3 Iran-U.S.C.T.R. 62, (1983).

at trial unless it fits one of the prescribed exceptions.⁹¹ As is seen by the commentary from these courts, the rules that govern the admissibility of evidence is concise, which leads to accurate planning and decisions by courts and attorneys.

5) Federal Rules of Evidence-United States of America

Similar to the Rules of the Tribunal, the American Rule is not steadfast. The U.S. Federal Rules of Evidence contain certain exceptions. These exceptions allow the judge some discretion in determining the admissibility of certain evidence.⁹² The basic Rule in both jurisdictions is parallel, the Rule set forth by the Tribunal relies on a theory of fairness, while in the U.S. the theory relied on is one of “interests of justice”.⁹³ Both jurisdictions allow discretion by the judge of what is admissible and what is not.

6. Contradiction within the Rules

Although these systems operate under different circumstances, the American Rule on hearsay evidence does not generally contradict any other American Rule. The Tribunal’s Rule on evidence does seem to conflict with other provisions set forth by the Tribunal.⁹⁴

Article 21 of the Statute provides the accused the right “to examine or have examined the

⁹¹Macarthy plc v. Unichem Limited, ECC 41, (1991).

⁹²*See supra* note 86.

⁹³*See id.*

⁹⁴*See id.* at 115.

witnesses against him.”⁹⁵ Rule 90 states that “witnesses shall, in principle be heard directly by the Chambers, unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.”⁹⁶ If both of these statements are interpreted together it would seem that the Tribunal should prohibit hearsay testimony.⁹⁷ Similarly, the judges have it within their discretion to allow for other types of testimony, such as a video link or other means of transmission.⁹⁸

The need for in court live testimony is reduced by the ingenuity of the judges and their desire to a fair trial.⁹⁹ There are other options besides either allowing hearsay or disallowing it. The original person who made the statement should be in court, if that is not possible, some other form of live transmission is preferred.¹⁰⁰ One of the basic principles in not allowing hearsay is the fact that the credibility of the person who made the statement does not become an issue. For the trier of fact to have the whole picture including sincerity and credibility of the witness, the

⁹⁵See Article 21, See also Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the First Yugoslavia War Crimes Tribunal*, 30 NYU J. of Int. L. and Politics, 101, 115, (1998).

⁹⁶See Rule 90, See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the First Yugoslavia War Crimes Tribunal*, 30 NYU J. of Int. L. and Politics, 101, 115, (1998).

⁹⁷See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the First Yugoslavia War Crimes Tribunal*, 30 NYU J. of Int. L. and Politics, 101, 115, (1998).

⁹⁸See *id.* at 116

⁹⁹See *id.*

¹⁰⁰Although in past Tribunals video-link technology has proven not be as effective as was hoped, it still may be a better alternative for the Prosecutor than not to hear the testimony at all.

witness must be either in court or live by means of electronic transmission.¹⁰¹

E. Supplementation

Trial Judges of the Rwanda Tribunal have a similar role as those Judges who preside over the Yugoslavia Tribunal. In both circumstances judges are empowered with the difficult task of developing and shaping more detailed Rules than those enunciated by the general principles.¹⁰²

There has been several reasons suggested for allowing justices of the tribunals to shape the Rules of evidence and procedure, including:

(1) the time constraints for the adoption of the Rwanda Tribunal Statute in the light of the urgent need to establish the Rwanda Tribunal in order to bring to justice the major offenders and thereby break the cycle of violence and retribution; (2) the absence of any detailed proposals for rules of procedure and evidence by the sponsors of the draft Statute for the Rwanda Tribunal; (3) the highly technical nature of criminal procedure and evidence rules which vary in different legal systems; (4) the advantage of having rules of evidence and procedure drafted by judges who possessed the necessary expertise and practical experience to formulate such rules, as compared to the members of the security council, with a view to ensuring fair and efficient procedures. Moreover, the judges are not required to submit their draft Rules to the Security Council for approval under the Rwanda Tribunal Statute, as suggested by some States with respect to the Yugoslavia Tribunal. The review by the Security Council of the rules elaborated by the judges of the Rwanda Tribunal would constitute an unacceptable encroachment on the independent performance of its judicial functions notwithstanding its status as a subsidiary organ of the

¹⁰¹See Howard S. Levine, *Prosecuting War Crimes Before an International Tribunal*, 28 Akron L. Rev., 429, 434 (1995).

¹⁰²See Virginia Morris & Michael Scharf, *An Insiders Guide to the International Criminal Tribunal for Rwanda*, Advanced Copy, Transnational Publishers, 416 (Dec. 1997). See also *supra* note 30.

Security Council.¹⁰³

Trial Judges for the Rwanda Tribunal adopted Rules of evidence and procedure that are almost interchangeable with the Rules that were adopted by the Yugoslavia Tribunal.¹⁰⁴ The Yugoslavia Tribunal in majority followed common law, adversarial systems of law. This was formulated in part because of:

(1) the Nuremberg Tribunal and the Tokyo Tribunal precedents which followed a predominantly adversarial common law approach notwithstanding the adoption of some elements of the inquisitorial civil law approach; (2) the general procedures outlined in the Yugoslavia Tribunal Statute and the roles envisaged for the judiciary and the Prosecutor; and (3) the influence of the detailed and comprehensive United States proposal for the rules.¹⁰⁵

The President of the Yugoslavia Tribunal explained the reasons for the adoption of this general approach to the Rules and the main exceptions:¹⁰⁶

Based on limited precedent of the Nuremberg and Tokyo Trials, and in order for us, us judges, to remain as impartial as possible, we have adopted a largely adversarial approach to our procedures, rather than the inquisitorial approach found in continental Europe and elsewhere. The task of investigating allegations of offenses and obtaining the necessary evidence will fall mostly on the Prosecutor. He is the one who will submit indictments to us for confirmation and he is the one who will argue the case before us. We have made considerable efforts to put both the prosecution and the defense on the same footing, with full disclosure of documents and witnesses by both sides, so as to safeguard the rights of the accused and ensure a fair trial. In this respect we have made a

¹⁰³Virginia Morris & Michael Scharf, *An Insiders Guide to the International Criminal Tribunal for Rwanda*, Advanced Copy, Transnational Publishers,417 (Dec. 1997).

¹⁰⁴*See id.* at 424.

¹⁰⁵*See id.*

¹⁰⁶*See id.*

conscious effort to make good the flaws of Nuremberg and Tokyo.

However, there are two important adaptations to the general adversarial system. The first is that, as at Nuremberg and Tokyo, we have not laid down technical rules for the admissibility of evidence...[T]his Tribunal does not need to shackle itself to restrictive rules which have developed out of the ancient trial by jury system. There will be no jury sitting at the Tribunal, needing to be shielded from irrelevancies or given guidance as to the weight of the evidence they have heard. We, as judges, will be solely responsible for weighing the probative value of the evidence before us. *All* relevant evidence may be admitted to this Tribunal unless its probative value is substantially outweighed by the need to ensure a fair and expeditious trial. An example of this would be where the evidence was obtained by a serious violation of human rights.

Secondly, the Tribunal may order the production of additional or new evidence proprio motu. This will enable us to ensure that we are fully satisfied with the evidence on which we base our final decisions and to ensure that the charge has been proved beyond a reasonable doubt. It will also minimize the possibility of a charge being dismissed on technical grounds for lack of evidence. We feel that, in the international sphere, the interests of justice are best served such a provision and the diminution, if any, of the accused's rights is minimal by comparison.¹⁰⁷

If the Tribunals seeks to be as fair and accurate as possible, supplementation of the Rules is an excellent measure to ensure this goal. As Rules are found in need of supplementation the Tribunal should look to other sources, such as the Federal Rules of Evidence, for guidance. Although many other nations Rules are available, the Federal Rules do an excellent job of explaining each Rule.

¹⁰⁷Virginia Morris & Michael Scharf, *An Insiders Guide to the International Criminal Tribunal for Rwanda*, Advanced Copy, Transnational Publishers, 424,425 (Dec. 1997).*See also* Statement by the President of the International Tribunal, U.N. Doc. IT/29 (1994), reprinted in 2 Morris & Scharf, 649, 651.

There is, however a problem, the Trial Chamber controls the proceeding and just because a party has found a meaningful interpretation of a Rule it doesn't mean the Tribunal will apply it. The only way to ensure that a new interpretation would be followed is to amend the Rules. Short of amending, parties to a Tribunal Proceeding should explore outside sources and use them in formulating an explanation of certain unexplained areas of the Tribunal's Rules.

IV. Conclusion

The United Nations formulated a complete set of Rules for the International Criminal Tribunal for Rwanda to follow.¹⁰⁸ Although these Rules provide a sturdy foundation for Prosecutors to embark on any criminal prosecution, the Rules are notably absent of meaningful commentary and guidance.

Prosecutors may supplement the Rules, if necessary. However, that may not be as effective a tool as needed. The Rules are general and flexible, and thus allow Prosecutors to present evidence that might otherwise be excluded in other jurisdictions. An excellent example of this is Rule 96, Sexual Assault.¹⁰⁹ Rule 96 places the Prosecution in a better position than the Defense. This is done by lending complete credibility to the victim's accusations, and not allowing evidence of the victim's prior sexual conduct.¹¹⁰

Many evidentiary problems can be removed by selecting the best evidence to present at trial. The Rules are set up so that in most instances they provide for quick, simple, and fair

¹⁰⁸See International Criminal Tribunal for Rwanda Rules of Evidence of Procedure

¹⁰⁹See *supra* note 5 at 97.

¹¹⁰See *id.*

trials.¹¹¹ The Rules in the Tribunal follow the same principles that many other civilized nations do, they balance the interests of the community with rights of the accused.¹¹²

Prosecutors should always be looking for ways to make the Rules more clear and uniform. In the interests of fairness, Rules should be easily interpreted, thus ensuring accuracy in every trial.

¹¹¹*See supra* note 5 at 101.

¹¹²*See Id.*

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