
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

MEMORANDUM FOR
THE OFFICE OF THE PROSECUTOR

ISSUE 5:

A COMPARATIVE ANALYSIS OF TWO CRIMINAL
PROCEDURE REGIMES: PROSECUTING GENOCIDE
AT THE ICTR IN RWANDA AND MURDER
IN THE UNITED STATES

Prepared by:
Walter D. Tenney
UCWR
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INTRODUCTION AND SUMMARY OF CONCLUSION

A. ISSUE

This research memorandum examines the following issue:

A comparative analysis of two criminal procedure regimes: Prosecuting genocide at the ICTR in Rwanda and Murder in the United States.

B. Summary of Conclusions

The scope of this memorandum is very broad in its nature. A comparative analysis of two criminal regimes could fill the pages of many books. In an attempt to narrow the scope this memorandum explores four areas of criminal procedure. The areas covered are: (1) The Protection of Victims and Witnesses (2) The Indictment Process (3) Confessions, Guilty Pleas, and Plea Bargaining and (4) The Right to Counsel.

The International Criminal Tribunal for Rwanda (ICTR) is expected to be dependent on eyewitness testimony to bring those accused of genocide to justice.¹ In some instances intimidation, threats, and acts of physical violence have been used to keep victims and witnesses from testifying at trial.² The International Tribunal should use the American Witness Protection

¹See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 535 (1998). (See Appendix, Volume 1 No. 14).

²See *id.* at 535.

Program as a source for the development of safeguards for witnesses who plan to testify at trial and their families.

Both the Rwanda and Yugoslav Tribunals reflect a United States proposed definition of prima facie case in Rule 47(A) of their rules.³ However, the Tribunals have produced indictments which vary in specificity based upon this same definition. In the United States, under Federal Rule of Criminal Procedure 7(c), indictments are scrutinized to protect against double jeopardy and to ensure fair notice.⁴ In Rwanda the indictments for Georges Anderson Rutaganda and Jean-Paul Akayesu have demonstrated a higher level of specificity,⁵ than the Tadic indictment. They illustrate that the Tribunal is capable of producing more specified indictments, which the Tribunal should strive for. Rule 7(c) may prove to be a useful tool for the Tribunal as they search for a common understanding of Rule 47(A).

Both the Rwanda Tribunal and Rwandan government have created judicial measures to prosecute persons accused of genocide. But these two systems are different in that the ICTR does not allow plea-bargaining or the death penalty,⁶ and sees its mandate to be the prosecution

³See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 478 (1998). (See Appendix, Volume 1 No. 14).

⁴Rule 7(c) of the U.S. Federal Rules of Criminal Procedure provides: “the indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c). (See Appendix, Volume 2 No. 23).

⁵*Press Release: Statement of Dr. Andronico O. Dede, Registrar of the International Criminal Tribunal for Rwanda Announcing the Indictments of Georges Andersen Rutaganda and Jean Paul Akayesu*, 19 Feb. 1996.

⁶See S.C. Res. 955, U.N. SCOR, 3453 mtg., Annex, art. 6, U.N. Doc. S/RES/955 (1994). (See Appendix, Volume 2 No 28).

of the top-level leaders of genocide.⁷ The Rwandan government has also pursued the prosecution of genocide and adopted new legislation based upon plea-agreements to deal with over 90,000 criminal cases,⁸ and also employs the death penalty. Therefore, those prosecuted by the International Tribunal will not be subject to the same hardships as those tried by the national judicial system. Such disparity could lead the survivors of genocide to believe those who committed these horrors are not being sufficiently punished.⁹

Article 20 of the Rwanda Tribunal provides an accused with the right to counsel, and Article 17(3) provides the same right to persons who are questioned.¹⁰ Within the United States the right to counsel under the Sixth Amendment is available once adversarial judicial proceedings have been initiated.¹¹ The Supreme Court of the United States in *Miranda v.*

⁷Numerous statements indicate that personnel composing the ICTR (as well as the ICTY) do view the Tribunal's mandates as prosecution of the top-level leaders. Richard Goldstone states, for example, that "I shall remain unpersuaded that there would be any advantage were the ICTR, as a policy, to pursue 'small fish'." Letter from Richard Goldstone, Prosecutor, ICTY/R 1993-96, to Madeline Morris (Dec. 22, 1996) (on file with Madeline Morris). (See Appendix, Volume 1 No. 9).

⁸See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 357 (Spring 1997). (See Appendix, Volume 1 No. 9).

⁹See *id.*

¹⁰See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 520 (1998). (See Appendix, Volume 1 No. 14).

¹¹See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). (See Appendix, Volume 1 No. 29). Despite the Sixth Amendment's broad language, the Amendment has been held to guarantee counsel to defendant's imprisoned as a result of a criminal conviction. *Scott v. Illinois*, 440 U.S. 367 (1979). (See Appendix, Volume 2 No. 7). It guarantees defendant's will not be sentenced to a term of imprisonment unless the government affords appointed counsel for defense. *Argersinger v Hamlin*, 407 U.S. 25 (1972). (See Appendix, Volume 1 No. 16).

*Arizona*¹² also implemented a warning and waiver system based upon the Fifth Amendment right to remain silent.¹³ Comparatively the Rwanda Tribunal attaches the right to counsel along the same lines as the United States, and similarly indigent defendants in either the United States or under the International Tribunal have the right to choose their appointed counsel.

FACTUAL BACKGROUND

On 6 April 1994 President Juvenal Habyarimana and other heads of State died in a plane crash near Kigali airport.¹⁴ The genocide started as the Rwandan army and militia immediately erected roadblocks around the city of Kigali.¹⁵ Before dawn on April 7 throughout various parts of the country, the Presidential Guard and militia began killing Tutsi as well as Hutu known to be in favor of the Arusha Accords and power sharing between Tutsi and Hutu. Consequently, over 500,000 Tutsis were killed before the Rwanda Patriotic Front gained control of the government.¹⁶

By November 1994 the United Nations Security Council established the International Criminal Tribunal for Rwanda.¹⁷ The Rwanda Tribunal was given the authority to investigate

¹²*See* *Miranda v. Arizona*, 384 U.S. 436 (1966). (See Appendix, Volume 2 No. 4).

¹³*See id.* at 444-45, 467-75.

¹⁴*See* *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 25 (2 Sept. 1998). (See Appendix, Volume 2 No. 21).

¹⁵*See id.* at 25.

¹⁶*See* 1 *Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda*, 47 (1998). (See Appendix, Volume 1 No. 14).

¹⁷*See id.*

and prosecute all persons suspected of committing acts of genocide.¹⁸

LEGAL DISCUSSION

A. VICTIM AND WITNESS PROTECTION

The physical safety of victims and witnesses must be balanced with the rights of the accused. The American system of criminal procedure safeguards the rights of the accused at trial under the Sixth Amendment.¹⁹ Therefore, protective measures for victims and witnesses focus on pre and post-trial procedures.²⁰ Both the Yugoslav and Rwandan Tribunals should develop a system similar to the American model to balance these interests.

The Rwanda Tribunal is expected to be dependent on eyewitness testimony to bring those people responsible for genocide and other atrocities to justice.²¹ Intimidation, threats, and acts of

¹⁸*See id.*

¹⁹*See* U.S. Const. amend. VI. (See Appendix, Volume 2 No. 22).

²⁰*See* Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 Am. J. Comp. L. 641, 643 (1998). These protections are designed to guarantee the integrity and effectiveness of the criminal justice process. (See Appendix, Volume 1 No. 2).

²¹*See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 535 (1998). (See Appendix, Volume 1 No. 14).

physical violence have been used to discourage witnesses and victims from testifying at trial.²²

Article 21 of the Rwanda Tribunal Statute provides the Trial Chamber with the authority to order protective measures which are deemed necessary.²³ Broad discretion has been given to judges and the Trial Chamber to protect the privacy and well being of these witnesses and victims.²⁴ But Rule 75 limits the use of these safeguards so that measures taken are consistent with the rights of the accused.²⁵

The Trial Chamber may take many steps to protect a victim or witness. The victim or witness may testify by means which limit direct contact with the accused, as long as the rights of the accused to confront and cross-examine the witness have been preserved.²⁶ However, the Rwanda Tribunal had until the Akayesu decision required disclosure of the identity of victims and witnesses before trial and within a time frame which gave the defense time to prepare for

²²See *id.* at 536. Two witnesses who testified in the *Jean-Paul Akayesu* and *Obed Ruzindana* cases were killed, and death threats, acts of intimidation, and other attacks have been reported to the United Nations Human Rights Field Operation in Rwanda (HRFOR).

²³See *id.* at 536.

Article 21

The International tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protective measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

²⁴See *id.* at 537.

²⁵Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 75. U.N. Doc. ITR/3/Rev.2. (See Appendix, Volume 2 No. 25).

²⁶See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 537 (1998). Other measures of protection include preventing disclosure of the victim or witnesses identity to the press or public, excluding the press and public from the proceedings, preventing harassment and intimidation of a witness during questioning, and using special evidentiary rules in rape and sexual assault cases. (See Appendix, Volume 1 No. 14).

cross-examination.²⁷ This disclosure of identities subjected victims and witnesses to intimidation, threats, and acts of physical violence.²⁸

The Akayesu decision illustrates the Tribunal's recognition of the need to protect and reduce the danger for witnesses coming to testify before the Tribunal.²⁹ To reduce these physical dangers the Tribunal ordered the identities of the witnesses be withheld from the media and public (but not from defense counsel), placed the witnesses in safe-houses while they were attending the trial, and provided medical and psychiatric assistance to the witnesses.³⁰ The published decision is in line with these safeguards and recounts witness testimony, anonymously, by assigning letters of the alphabet to witnesses.³¹

²⁷The prosecution has been authorized to delay information relating to victims and witnesses until these people were brought under the protection of the Rwandan Tribunal. The Registrar provides for the protection of these people before, during, and after, their testimony. The prosecution has been required to disclose the identity and non-redacted statements to the defense at least fifteen to thirty days before trial. *See, e.g.* The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T (Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses, 26 Sept. 1996); The Prosecutor v. Clement Kayishema, Case No. ICTR-95-I-T (Decision on the Motion Filed by the Prosecutor on the Protection of Victims and Witnesses, 6 Nov. 1996).

²⁸*See* 1 Morris & Scharf, *supra* n.2.

²⁹*See* The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 31 (2 Sept. 1998). Many of the eye-witnesses who testified before the Trial Chamber in this case have seen atrocities committed against their family members or close friends, and have themselves been victims of such atrocities. The possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern for the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. *See id.* at 31. (See Appendix, Volume 2 No. 21).

³⁰*See id.* at 31.

³¹*See id.* at 45, Testimony of Witness S.

The International Criminal Tribunal for Yugoslavia (ICTY), did withhold the identity of witnesses on August 10, 1995. In *The Prosecutor vs. Dusko Tadic* the Yugoslav Trial Chamber allowed witnesses to testify on an anonymous basis, withholding their identities from the defense.³² The Trial Chamber was criticized by former Department of State Legal Advisor, Monroe Leigh in an editorial which appeared in the *American Journal of International Law*.³³ He argued the wrong balance was struck between the protection of the witnesses and the rights of the accused.³⁴ The right to examine or cross-examine a witness cannot be effective without the

³²See *The Prosecutor vs. Dusko Tadic*, case No. IT-94-I-T (Aug. 10, 1995) (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses). (See Appendix, Volume 2 No. 21).

The Trial Chamber identified five factors relevant to determining witness anonymity: (1) there must be real fear for the safety of the witness or the witness' family; (2) the testimony must be important to the prosecutor's case; (3) the Trial Chamber must be satisfied there is no prima facie evidence the witness is untrustworthy; (4) the nonexistence of an effective witness protection program; and (5) such measures must be strictly necessary. *See id.*, paras. 62-66.

There are also procedural safeguards which support witness anonymity:

First, the Judges must be able to observe the demeanor of the witness, in order to assess the reliability of the testimony. Second, the Judges must be aware of the identity of the witness, to test the reliability of the witness. Third, the defense must be given ample opportunity to question the witness on issues unrelated to his or her identity or current whereabouts, such as how the witness was able to obtain the incriminating information but still excluding information that would make the true name traceable...Finally, the identity of the witness must be released when there are no longer reasons to fear for the security of the witness. *Id.*, para.71.

³³See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l L. & Pol., 177 (Fall 1997- Winter 1998). (See Appendix, Volume 1 No. 14).

³⁴See *id.* at 177.

right to know the identity of the witness.³⁵ Such a balance would diminish the right of the accused to have a fair trial,³⁶ and abrogate the defense's ability to confront witnesses and conduct skillful cross-examination.³⁷

In America the primary constitutional obstacle to shielding a witness's identity from the defendant at trial is the Sixth Amendment's Confrontation Clause.³⁸ As such, use of anonymous witnesses has been held unconstitutional in American courts.³⁹ The Sixth Amendment states in

³⁵See Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 Am. J. Int'l L. 235 (1996). See also Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 Am. J. Int'l L. 80 (1997); 1 Morris & Scharf, *supra* note 15, at 245. (See Appendix, Volume 1 No. 6).

³⁶See Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 Am. J. Int'l L. 80, 81 (1997). (See Appendix, Volume 1 No. 6).

³⁷See Trial and Error Tribunal, Lawyer, May 20, 1997, available in Lexis, News Library, Lawyer File.

³⁸See Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 Am. J. Comp. L. 641, 645 (1998). It protects the defendant by limiting the admission of hearsay evidence at trial and by allowing for extensive cross-examination. The latter rational applies to the potential testimony of anonymous witnesses since non-disclosure of a witness's identity inevitably limits the breadth of cross-examination, and therefore the defendant's ability to test the witness's veracity adequately. See *id.* (See Appendix, Volume 1 No. 2).

³⁹In *Smith vs Illinois*, 390 U.S. 129(1968), (See Appendix, Volume 2 No. 8), The State's key witness was an informer who testified he had purchased heroin from the defendant. The informant used an alias to identify himself, and defense's questions to elicit his real name were rejected as irrelevant. The Supreme Court held the trial court's ruling violated the defendant's constitutional right to confrontation:

When the credibility of a witness is in issue, the very starting point in exposing falsehood and bringing out the truth through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation.

all criminal prosecutions the accused shall be confronted with the witnesses poised against him.⁴⁰

In *Coy vs Iowa* the United States Supreme Court did not allow child sexual abuse victims to testify anonymously from behind a screen.⁴¹ The Court stated such practice would violate the defendant's right to a face-to-face encounter with his accusers.⁴² In *Lee vs. Illinois* the Supreme Court stressed the right of confrontation produces more trustworthy and reliable results since the jury can observe a witness's demeanor and judge their credibility.⁴³ Justice Brennan wrote the majority opinion and focused on the importance of society's perception that the accused and accuser engage in open and even contest at public trial.⁴⁴

All citizens have a duty to testify on civil or criminal matters when required by law.⁴⁵

⁴⁰See U.S. Const. amend. VI. (See Appendix, Volume 2 No. 22).

⁴¹See *Coy vs. Iowa*, 487 U.S. 1012, 1017 (1988). (See Appendix, Volume 1 No. 23).

⁴²See *Id.* Two years later the Supreme Court decided in *Maryland vs. Craig*, 497 U.S. 836, 855 (1990), whether the right to face-to-face confrontation could give way to other interests. The Court upheld the use of one-way closed circuit television to supply testimony of alleged child abuse victims. A strict showing of necessity where the child witness could not reasonably communicate because of severe emotional trauma was required. (See Appendix, Volume 2 No. 1).

⁴³See *Lee vs. Illinois*, 476 U.S. 530, 540 (1986). (See Appendix, Volume 1 No. 30).

⁴⁴See *id.*

⁴⁵See Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J.Crim. L. & Criminology 208, 208 (Spring, 1985). (See Appendix, Volume 1 No. 7). Courts of justice are entitled to "every man's evidence." 8 J. WIGMORE, EVIDENCE Sec. 2192, at 70 (McNaughton rev. ed. 1961). (See Appendix, Volume 2 No. 31). According to Professor Wigmore, the duty to testify when directed by a court to do so comes as an "indispensable element of civilized life," one necessary for the preservation of law and order. *Id.* at 72-73. Yet historically, fear of reprisal has deterred many would-be informants from providing information to law enforcement authorities. See *United States v. Gravel*, 605 F.2d 750, 752 (5th Cir. 1979) (See Appendix, Volume 2 No. 11), (cocaine dealer refused to tell grand jury of source, for fear of reprisal); *United States v. Patrick*, 542 F.2d

Since 1970 the Justice Department's Witness Protection Program (hereinafter WPP) has provided an important testimonial incentive to persons with knowledge of criminal conduct of interest to the government.⁴⁶ Established by Title V of the Organized Crime Control Act (OCCA) and written to further the fight against organized crime,⁴⁷ the WPP authorizes the Attorney General to provide witnesses with short-term or permanent protections.⁴⁸ The WPP has

381, 388 (7th Cir. 1976), *cert denied*, 430 U.S. 931 (1977) (threatened reprisal did not excuse witness from duty to testify about associate's gambling activities).

⁴⁶See Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J.Crim. L. & Criminology 208, 209 (Spring, 1985). (See Appendix, Volume 1 No. 7).

⁴⁷Pub. L. No. 91-452, Sec's. 501-04, 84 Stat. 922, 933-34, *repealed* by Continuing Appropriations, 1985-Comprehensive Crime Control Act of 1984, Sec's 1207-10, 98 stat. 1837, 2153-63. Title V of the OCCA authorized the Attorney General to "rent, purchase, or construct protected housing facilities and otherwise offer to provide for the health, safety, and welfare" of witnesses. Pub. L. No. 91-452, Sec. 501, 84 Stat. 933. (See Appendix, Volume 2 No. 27).

⁴⁸See Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J.Crim. L. & Criminology 208, 210 (Spring, 1985). (See Appendix, Volume 1 No. 7). Under the program, witnesses and their families have received wholly new identities, credit card and work histories, and indefinite subsistence payments. Between 1970 and 1983, over 4,000 witnesses and 8,000 family members entered the program. COMPTROLLER GENERAL OF THE UNITED STATES, CHANGES NEEDED IN WITNESS SECURITY PROGRAM, 8 (1983), reprinted in *Hearings on H.R. 7039 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 309 (1982), (See Appendix, Volume 2 No. 26).

The 1967 Task Force on Organized Crime urged congress to create "safe houses" for the protection of witnesses; witnesses desiring such protection could live at such a federal residence while the organized crime litigation was pending. U.S. DEPARTMENT OF JUSTICE, REPORT OF THE WITNESS SECURITY PROGRAM REVIEW COMM. DRAFT 3, reprinted in *Witness Protection Program: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Judiciary Comm.*, 95th Cong., 2nd Sess. 276 (1978), (See Appendix, Volume 2 No. 26).

been regarded as an indispensable tool in federal government's efforts against organized crime.⁴⁹

Few administrative procedures were adopted for the WPP,⁵⁰ but those adopted established an admissions process into the program,⁵¹ and standards for measuring the value of a witnesses to the Justice Department.⁵² Persons eligible for protection were those whom the government intended to call as witnesses in proceedings against persons "alleged to have participated in organized criminal activity."⁵³ Both the offer and acceptance of protection was voluntary,⁵⁴ and the only precondition for an offer was the judgment of the Attorney General that the lives "or

⁴⁹H.R. REP. NO. 767, 98th Cong., 2d Sess. 11 n.1 (1984) "In general, the contribution of these [government witnesses] to the war on organized crime cannot be overestimated . . ." *Witness Security Program: Hearings Before the Permanent Subcomm. on Investigation of the Senate Comm. on the Governmental Affairs*, 96th Cong., 2nd Sess. 2 (1980) (opening statement of Sen. Sam Nunn), (See Appendix, Volume 2 No. 26).

⁵⁰U.S. Dept. of Justice, Justice Department Order OBD 2110.2: Witness Protection Maintenance Policy and Procedures (Jan. 10, 1975), *reprinted in 1982 House Hearings, GAO Report*, 284.

⁵¹Authority to request government witness protection was entrusted to one of three persons: the U.S. Attorney for the district in which the witness resided; an Assistant Attorney General from either the criminal or civil division of the Justice Department (depending on the case at trail); and a designee of the Assistant Attorney General. *Id.*, *reprinted in 1982 House Hearings, GAO Report*, 261-63.

⁵²See Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J.Crim. L. & Criminology 208, 215 (Spring, 1985). These standards required a description of the significance of the witness' case, a summary of the testimony; and a listing of other prospective witnesses. (See Appendix, Volume 1 No. 7).

⁵³Pub. L. No. 91-452, Sec. 501, 84 Stat. 933. Families of witnesses also were eligible for protection. See Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J.Crim. L. & Criminology 208, 214 (Spring, 1985). (See Appendix, Volume 2 No. 27).

⁵⁴See *id.* at 215.

person(s) of the witness, witness's family, or household were jeopardized by the witness' willingness to testify."⁵⁵

In 1984 Congress passed legislation which reformed administration of the WPP⁵⁶ The Attorney General now has authorization to protect and relocate witnesses and their families who are threatened with violence, intimidation, or other retaliation.⁵⁷ The WPP may now protect witnesses testifying about organized criminal activity or other serious offences.⁵⁸

Victims and witnesses of genocide are in a comparable position to people in America who are faced with the decision to testify against members of organized crime. The United States Government has been successful against organized crime because of their ability to

⁵⁵Pub. L. No. 91-452, Sec. 501, 84 Stat. 933, Confining the WPP to voluntary participants was the sole recommendation made by commentators in congressional hearings on S. 30. *See Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Committee on the Judiciary*, 91st Cong., 1st Sess. 430 (1970) (statement of Aaron M. Kohn, U.S. Chamber of Commerce). (See Appendix, Volume 2 No. 27).

⁵⁶*See* Joshua M. Levin, *Organized Crime and Insulated Violence: Federal Liability for Illegal Conduct in the Witness Protection Program*, 76 J.Crim. L. & Criminology 208, 241 (Spring, 1985). (See Appendix, Volume 1 No. 7). The Witness Security Reform Act prescribed factors to be weighed prior to the admission of any witness. Pub. L. No. 98-473, Title II, part F., subpart A, Sec's 1207-10, 98 Stat. 2153-63 (creating 18 U.S.C. Sec's. 3521-28)(1984), (See Appendix, Volume 2 No. 27).

⁵⁷The Act permits protection whenever violence, "an offense set forth in Chapt. 73 of [18 U.S.C.]," or a state offense that is similar in nature to either appears likely. Pub. L. No. 98-473, Sec. 1208, 98 Stat. 2153 (1984) (creating 18 U.S.C. 3251 (a)(1)), (See Appendix, Volume 2 No. 27). Chapter 73, which made witness intimidation a federal crime, was enacted in current form in 1982. *See* 18 U.S.C. Sec's. 1503-15 (Supp. 1984). This is an expansion of the WPP's entrance criteria, which required that the life or person of a witness or household be jeopardized. (See Appendix, Volume 2 No. 27).

⁵⁸Pub. L. No. 98-473, Sec. 1208, 98 Stat. 2153 (1984) (creating 18 U.S.C. 3251 (a)(1)). Officially, the WPP previously was confined to testimony on organized crime, but the change in the law may enable victims of violent assaults to receive protection in exchange for testimony. (See Appendix, Volume 2 No. 27).

acquire and provide at trial first-hand testimony of organized criminal activity.⁵⁹ Without the existence of the WPP the witnesses who were willing to testify would not do so out of fear for their and their families' lives. The Rwanda Tribunal's success will depend on this same ability or inability to protect witnesses who can provide first-hand accounts of genocide. By withholding witness identities from the public and providing safe-houses while witnesses testify at trial the International Tribunal has taken affirmative steps to provide for witness protection. Hopefully, the Tribunal will continue to develop more protections and use the WPP developed in the United States as a working model.

B. INDICTMENT PROCESS

Under Article 17(4) of the Rwanda Tribunal Statute the Prosecutor makes an independent assessment after an investigation to determine whether a prima facie case exists and whether an indictment should be issued.⁶⁰ A prima facie case exists, subject to Rule 47, where sufficient evidence provides reasonable grounds to believe a suspect committed a crime within the jurisdiction of the Tribunal.⁶¹ If an indictment is to be issued the Prosecutor includes a concise

⁵⁹See *Hard Days for the Mafia: The Feds Turn the Screws*, TIME, March 4, 1985, at 28 (“mobsters worried about informants who might cooperate with prosecutors to lessen their own penalties”). (See Appendix, Volume 2 No. 29).

⁶⁰See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 477 (1998). (See Appendix, Volume 1 No. 14).

⁶¹Rules of Procedure and Evidence of the Rwandan Tribunal (as amended in January and July 1996), Rule 47, U.N. Doc. ITR/3?Rev.2. (See Appendix, Volume 2 No. 25).

statement of the alleged facts and crimes charged, and the name and last known address of the accused.⁶² The indictment will then be reviewed by the judge of the Trial Chamber to whom the indictment has been transmitted, pursuant to Article 18 of the Rwanda Tribunal Statute.⁶³

The United States proposed a specific definition of prima facie in its draft Rules for the criminal tribunal in Yugoslavia.⁶⁴ The standard proposed is now reflected in Rule 47(A) of the rules of the Yugoslav and Rwandan Tribunals.⁶⁵ This rule is nearly identical to the standard of the United States Federal Rules of Criminal Procedure.⁶⁶

The Fifth Amendment to the United States Constitution⁶⁷ directs that no individual can be held to answer for a felony offense unless an indictment or presentment is rendered by a grand

⁶²See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 479 (1998). (See Appendix, Volume 1 No. 14).

⁶³See *id.* at 479. The indictment review procedure is intended to provide a judicial review of the Prosecutor's initial determination of a prima facie case before formally charging and arresting the accused pursuant to Article 18 of the Rwanda Tribunal Statute. The review procedure is an *ex parte* proceeding where the judge is required to hear the Prosecutor who may present additional supporting material for the indictment. See *id.*

⁶⁴See *Suggestions Made by the Government of the United States of America: Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, Rule 1.7(H), U.N. Doc. IT/14(1993). See also Statement of the United States, defining the term "prima facie case" as used in Statute as "a responsible basis that a crime as defined [in the Statute] has been committed by the person named in the indictment," U.N. SCOR, 48th Sess., 3217th mtg. At 16-17, U.N. Doc. S/PV.3217 (1993).

⁶⁵See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 478 (1998). (See Appendix, Volume 1 No. 14).

⁶⁶Rule 7(c) of the U.S. Federal Rules of Criminal Procedure provides: "the indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). (See Appendix, Volume 2 No. 23).

⁶⁷See U.S. Const. amend. V. (See Appendix, Volume 2 No. 22).

jury.⁶⁸ The grand jury and indictment proceedings have two judicially recognized purposes.⁶⁹ The first, is to protect the innocent from “hasty, malicious, and oppressive persecution.”⁷⁰ The second, purpose is to act as an accusatory body that determines the existence of probable cause to believe an individual committed a crime.⁷¹ Typically, a finding of probable cause is expressed by a corresponding indictment.⁷²

To determine the sufficiency of the indictment United States courts employ the test developed in *Berger v. United States*.⁷³ The fair notice prong of the *Berger* test focused on

⁶⁸A presentment is distinguished from an indictment. When the attorney for the government introduces allegations and evidence against an individual, the grand jury’s determination of probable cause is expressed by an indictment. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 17 (7th ed. 1990). (See Appendix, Volume 2 No. 30). Conversely, a presentment is rendered when the grand jury itself initiates the process against an individual. See *Hale v. Henkel*, 201 U.S. 43 (1906).

⁶⁹See Patrick F. Mastrian, III, *Indianhead Poker in the Grand Jury Room: Prosecutorial Suppression of Exculpatory Evidence*, 28 Val. U.L. Rev. 1377, 1379 (Summer, 1994). (See Appendix, Volume 1 No. 8).

⁷⁰See *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The Court stated that society’s interest in the grand jury indictment process is best served by a “through and extensive investigation” which is impartial and disinterested. See *id* at 392. (See Appendix, Volume 2 No. 20).

⁷¹See *United States v. Williams*, 112 S. Ct. 1735 (1992); *Costello v. United States*, 350 U.S. 359, 362 (1956). (See Appendix, Volume 2 No. 17).

⁷²See Patrick F. Mastrian, III, *Indianhead Poker in the Grand Jury Room: Prosecutorial Suppression of Exculpatory Evidence*, 28 Val. U.L. Rev. 1377, 1379 (Summer, 1994). (See Appendix, Volume 1 No. 8).

⁷³*Berger vs. United States*, 295 U.S. 78, 82 (1935), (See Appendix, Volume 1 No. 18), Justice Sutherland’s opinion stated:

The true inquiry...is not whether there has been a variance in proof, but whether there has been such a variance as to “affect the substantial rights” of the accused. The general rule that allegations and proof must correspond is based upon obvious requirements (1) the accused shall be definitely informed as to the charges against him, so he may be enabled to present his defense

whether the defendant had been misled in the preparation of his defense.⁷⁴ The double jeopardy prong of this test found the establishment of the same crime against the same victim through the use of substantially different means to be a fatal variance to the indictment requirements.⁷⁵

The Yugoslav Tribunal in *The Prosecutor vs. Dusko Tadic* acquitted the defendant of all murder charges specified within his indictment.⁷⁶ But Tadic was convicted of stabbing and cutting the throats of two Muslim policeman, actions not specified in his indictment.⁷⁷ The only charges related to these killings were in the general persecution charge in Count 1, paragraph 4.1 of the indictment.⁷⁸ United States courts under the *Berger* test might have found the Tadic

and not be taken by surprise by the evidence offered at the trial; and (2) he may be protected against another prosecution for the offense.

⁷⁴See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l. L. & Pol., 187 (Fall 1997- Winter 1998). (See Appendix, Volume 1 No. 14).

⁷⁵See Kamisar et al., *supra* note 64, at 1040. Indictments for assault or murder traditionally include the identity of the victim as well as the time and place of the incident. See *Ball vs. United States*, 140 U.S. 118(1891), (See Appendix, Volume 1 No. 17).

⁷⁶See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l. L. & Pol., 183 (Fall 1997- Winter 1998), (See Appendix, Volume 1 No. 14).

⁷⁷See *id.* at 183-84.

⁷⁸*Prosecutor v. Tadic*, No. IT-94-1-T (Dec. 14, 1995) (Amended Indictment), (See Appendix, Volume 2 No. 21), The indictment provided:

Between the dates of 24 to 27 May 1992, Serb forces attacked the village of Kozarac and other villages and hamlets in the surrounding area. Dusko Tadic was actively involved in the attack. His participation included firing flares to illuminate the village at night for shelling by artillery and tanks, and physically assisting in the seizure, collection, segregation, and forced transfer to detention centers of the majority of the non-Serb population of the area during those first days. Dusko Tadic also took part in the killing and beating of a number of the seized persons, including: the killing of an elderly man

indictment defective for failure to sufficiently identify the victim (only former Muslim policemen were mentioned), failure to adequately describe the place the incident occurred (only a road junction in Kozarac was mentioned), and for failure to provide a sufficiently narrow time frame which the alleged acts occurred (a four-day period from May 24-27 was mentioned).⁷⁹

Under the *Berger* test, Tadic would not have known he was accused of slitting the throats of two policeman on May 26, 1992, and his counsel would not have known to investigate this allegation before trial.⁸⁰ Similarly, the stabbing conviction is a far cry from the beating charged in the indictment.⁸¹ However, the Trial Chamber did diminish the prejudicial effect of the indictment by adjourning the proceedings for three weeks.⁸²

The Rwanda Tribunal issued twenty-two indictments against thirty five individuals.⁸³

and women near the cemetery in the area of “old” Kozarac, the acts described in paragraphs 11 and 12 below [the shooting of four Muslims at a street corner in Kozarac on May 27, 1992], the beatings of at least two former policeman from Kozarac at a road junction in the village of Kozarac, and the beating of a number of Muslim males who had been seized and detained at the Prijedor military barracks.

⁷⁹See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l. L. & Pol., 186-87 (Fall 1997- Winter 1998), (See Appendix, Volume 1 No. 14).

⁸⁰See Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l. L. & Pol., 187 (Fall 1997- Winter 1998). (See Appendix, Volume 1 No. 14).

⁸¹See *id.* at 187-88.

⁸²See *id.* at 188.

⁸³See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 484 (1988), (See Appendix, Volume 1 No. 14). See also, John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 348-353 (1998), (See Appendix, Volume 2 No. 24).

Georges Anderson Rutaganda was indicted on February 13, 1996 and charged with genocide, crimes against humanity (extermination and murder) and violations of common Article 3 of the 1949 Geneva Convention (murder).⁸⁴ Allegedly he participated in massacres of Tutsis at the ETO school in Kigali and a gravel pit in Nyanza on or about April 11, 1994.⁸⁵ Jean-Paul Akayesu was also named in the same February indictment for genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity (extermination, murder, and torture) and violations of common Article 3 of the 1949 Geneva Conventions (murder and cruel treatment).⁸⁶ He allegedly gave support to murderers of a teacher in his commune on April 19, 1994, and directly ordered the murders of several people near his office at the Bureau communal.⁸⁷

These indictments are more specific than the indictment used to convict Dusko Tadic. However, since both the Yugoslav and Rwandan Tribunals base their indictments on a definition of prima facie case that is similar to the United States definition it is interesting to see a disparity in the indictments from both tribunals.

The Yugoslav Tribunal convicted Dusko Tadic on charges that only related to a general persecution charged in his indictment.⁸⁸ Such a broad interpretation of an indictment would not

⁸⁴*Press Release: Statement of Dr. Andronico O. Dede, Registrar of the International Criminal Tribunal for Rwanda Announcing the Indictments of Georges Andersen Rutaganda and Jean Paul Akayesu*, 19 Feb. 1996.

⁸⁵*See id.*

⁸⁶*See id.*

⁸⁷*See id.*

⁸⁸*See n.74, supra.*

pass the *Berger* test in a United States Court.⁸⁹ The Rwanda Tribunal, however, in the cases of Georges Rutaganda and Jean-Paul Akayesu issued indictments which were more specific than the Tadic indictment.⁹⁰ The indictment charging Georges Rutaganda described the location of the alleged crime, and a specific date when the alleged crime took place.⁹¹ The indictment charging Jean-Paul Akayesu also specified a date and location for the crimes charged against him.⁹²

The indictments issued against Georges Rutaganda and Jean-Paul Akayesu are more specific than the Tadic indictment. Since both the Yugoslav and Rwandan Tribunals have interpreted the meaning of Rule 47(A) in such a broad fashion Rule 7(c) of the United States Federal Rules of Criminal Procedure may be useful in limiting the Tribunal's interpretation of allowable variance in an indictment. While not all the Rwandan Tribunal's indictments are as detailed or specific as these, they illustrate the Tribunal is capable of issuing more detailed indictments.⁹³

C. CONFESSIONS, GUILTY PLEAS, PLEA BARGAINS

The International Criminal Tribunal for Rwanda has concurrent jurisdiction over

⁸⁹See n.75, supra.

⁹⁰See n.79-83, supra.

⁹¹See n. 80-81, supra.

⁹²See n. 82-83, supra.

⁹³See n. 79, supra, John R.W.D. Jones.

genocide-related crimes with the government of Rwanda.⁹⁴ In early August 1996 the National Assembly of Rwanda adopted legislation to deal with genocide and crimes committed against humanity in Rwanda.⁹⁵ The new legislation defined four categories of offenders,⁹⁶ and set guidelines for confession and guilty plea procedures.⁹⁷

⁹⁴See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 362 (Spring 1997). The International Criminal Tribunal for Rwanda (ICTR) has jurisdiction over actual killings, rapes, and other acts constituting genocide, war crimes, and crimes against humanity only if those acts were committed in 1994. *See id.* at 354. On September 1, 1996, after prolonged debate over the controversial provisions, the "Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990" came into force as the law that will govern national prosecutions for the genocide in Rwanda. *See id.* at 358. (See Appendix, Volume 1 No. 9).

⁹⁵See William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 Rutgers University School of Law Criminal Law Forum 523, 535 (1996), (See Appendix, Volume 1 No. 12). In Rwanda, tens of thousands were arrested in 1994 on suspicion of having taken part in the mass killings and thrown into what were already severely overcrowded prisons. *See id.* at 526. Rwanda thus is faced with the enormous problem of how to handle over 90,000-plus criminal cases arising from the Rwandan genocide. *See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 357 (Spring 1997). (See Appendix, Volume 1 No. 9).

⁹⁶See William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 Rutgers University School of Law Criminal Law Forum 523, 537-38 (1996), (See Appendix, Volume 1 No. 12). The first category includes the organizers or planners of genocide, persons in positions of authority within the military or civil infrastructure who committed or encouraged genocide, and "notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence", and persons who committed "acts of sexual violence". The second category covers individuals not in the first category who committed murder or serious crimes against the persons that led to death. The third category comprises those who committed other serious crimes against the persons. The fourth category includes those who committed crimes against property.

⁹⁷See William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 Rutgers University School of Law Criminal Law Forum 523, 538 (1996), (See Appendix, Volume 1 No.

Plea bargaining has inspired confession and guilty pleas as a pragmatic answer to crowded dockets as a way to streamline judicial procedure.⁹⁸ Offenders prosecuted in Rwanda national courts and listed in Categories II-IV may elect to participate in plea bargaining which may substantially reduce prison terms and possible fines.⁹⁹ However, confession and guilty plea procedures offer no relief to persons identified as Category I offenders.¹⁰⁰ Unfortunately, this prevents the prosecution from obtaining invaluable information from informers within the very heart of the genocide organization.¹⁰¹ The success of the program will depend on the skill of the

12).

⁹⁸See William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 Rutgers Criminal Law Forum 523, 539 (1996). (See Appendix, Volume 1 No. 12).

⁹⁹See *id.* at 541. Category II offenders who elect to plea bargain see their sentences reduced to a maximum of eleven and a minimum of seven years if they enter the program prior to prosecution, and a maximum of twelve to fifteen years if they enter after prosecution (articles 15(a), 16(a)). Category III offenders are subject to a maximum of one-third of the ordinary sentence if they enter the program prior to prosecution, and to one-half if they enter after prosecution (articles 15(b), 16(b)). Category IV offenders are subject only to compensation orders, not to imprisonment (article 14(d)).

¹⁰⁰See William A. Schabas, *Prosecuting International Crime: Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 Rutgers Criminal Law Forum 523, 539 (1996), (See Appendix, Volume 1 no. 12). The new Rwandan legislation declares sentences are to be imposed in accordance with the Rwandan Penal Code. Offenders in Category I are to be sentenced to death (article 14(a)). This sanction goes further than existing Rwandan law, which sets life imprisonment as the maximum sentence for intentional homicide, and the death penalty as the maximum sentence for premeditated murder. See, Penal Code art. 312, J.O., 1978, No. 13 *bis*, at 1 (as amended). As a result, this provision if the new legislation conflicts with the rule against retroactive changes in sentences and is incompatible with article 11(2) of the Universal Declaration of Human Rights.

¹⁰¹See *id.* at 539.

prosecutor, the availability of competent defense counsel,¹⁰² and whether the sentences offered are low enough to motivate participation.¹⁰³

Concurrent jurisdiction raises complex questions regarding the distribution of defendants between the International Tribunal and Rwandan national courts.¹⁰⁴ Tension between the Rwandan government and the ICTR has resulted from a lack of communication and conflict of interests.¹⁰⁵ After the ICTR was established, the Rwandan government adopted an approach to national prosecutions which relies heavily on plea agreements.¹⁰⁶ The plea-agreement program is somewhat incompatible with the operation of the ICTR which views its mandate as prosecuting the top-level leaders of genocide.¹⁰⁷

¹⁰²*See id.* at 542. Counsel who can assist the accused in evaluating the advantages and disadvantages of confessing are needed. Rwanda has never had an independent defense bar, and legislation aimed at creating one has yet to come into force. Such a statute was adopted by the National Assembly in late 1996, but subsequently rejected by the Constitutional Court in January 1997. *id.* at 541.

¹⁰³*See id.* at 541.

¹⁰⁴*See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 362 (Spring 1997). The question of appropriate distribution of defendants has been the cause of uncertainty and tension between the national government of Rwanda and the ICTR. On more than one occasion, the ICTR and the government of Rwanda have sought to obtain custody of the same suspect. (See Appendix, Volume 1 No. 9).

¹⁰⁵*See* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 363 (Spring 1997), (See Appendix, Volume 1 No. 9).

¹⁰⁶*See id.* at 363.

¹⁰⁷Numerous statements indicate that personnel composing the ICTR (as well as the ICTY) do view the Tribunal's mandates as prosecution of the top-level leaders. Richard Goldstone states, for example, that "I shall remain unpersuaded that there would be any advantage were the ICTR, as a policy, to pursue 'small fish'." Letter from Richard Goldstone, Prosecutor, ICTY/R 1993-96, to Madeline Morris (Dec. 22, 1996) (on file with Madeline Morris), (See Appendix, Volume 1 No. 9).

The ICTR has been criticized for providing more favorable treatment to defendants than the national courts of Rwanda.¹⁰⁸ This treatment includes escaping the death penalty, which is not used by the International Tribunal,¹⁰⁹ being imprisoned in more favorable conditions than persons in Rwandan prisons,¹¹⁰ and being guaranteed various due process safeguards.¹¹¹ If the leaders are taken away to receive international justice which is perceived as lenient, and the followers are in Rwanda getting bargains in the national justice system,¹¹² then a perception among the survivor population that no one is being punished for the horrors that were committed,

¹⁰⁸See Interviews with Rwandan Officials and ICTR Personnel (1995-1997) (names withheld)(on file with Madeline Morris). The problem became apparent over time. After the ICTR had been in place for many months, and when ICTR personnel thought the Tribunal was finally showing results and deserved to be congratulated, the Tribunal instead, was incurring the wrath of Rwandans each time it pursued a leader to be prosecuted. See See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int.'l L. 349, 364 (Spring 1997), (See Appendix, Volume 1 No. 9).

¹⁰⁹See S.C. Res. 955, U.N. SCOR, 3453 mtg., Annex, art. 6, U.N. Doc. S/RES/955 (1994)(“A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.”)[hereinafter Statute of the ICTR], (See Appendix, Volume 2 No. 28).

¹¹⁰A prison sentence imposed by the ICTR may be served in Rwanda or in any other State that has “indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda.” Statute of the ICTR, supra note 105, art. 26.

¹¹¹Compare Statute of the ICTR, supra note 105, with Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, Organic Law No. 08/96 (August 30, 1996), in Official Journal of the Republic of Rwanda (Sept. 1, 1996).

¹¹²See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int.'l L. 349, 364 (Spring 1997), (See Appendix, Volume 1 No. 9).

may develop.¹¹³

By not developing guilty plea procedures or granting the prosecutor the power to grant defendants immunity,¹¹⁴ prosecutors were denied the benefits of saving time, resources, and offering agreements where the accused cooperates to help capture larger criminal figures.¹¹⁵ Advantages for the accused where they have the option to negotiate were not available.¹¹⁶ Plea negotiations which could have lead to more suitable sentences,¹¹⁷ and began the process of rehabilitation without the delay of trial were not utilized.¹¹⁸

Plea bargaining has been the primary method of disposing cases within the United

¹¹³See *id.* at 364.

¹¹⁴See Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 Hous. J. Int'l. L., 381, 407 (Winter 1998), (See Appendix, Volume 1 No. 1).

¹¹⁵See *United States v. Kelly*, 18 F.3d 612, 615 (8th Cir. 1994), (See Appendix, Volume 2 No. 12).

¹¹⁶See Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused under the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 Hous. J. Int'l. L., 381, 407 (Winter 1998). One important benefit is finality: the defendant can avoid the expense, humiliation, and uncertainties of trial because the plea bargain is considered a final judgment. (See Appendix, Volume 1 No. 1).

¹¹⁷Arnold N. Enker, *Perspectives on Plea Bargaining*, in *President's Comm'n on Law Enforcement and Admin. Of Justice, Task Force Report: The Courts* 108, 112-14 (1967). This is achieved when the negotiated plea represents the intermediate position between "the extreme alternatives of being guilty of a crime of the highest degree or not guilty of any crime...where an intermediate judgment is the fairest and most 'accurate' (or most congruent)."

¹¹⁸See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977), (See Appendix, Volume 1 No. 19).

States.¹¹⁹ A 1992 survey of the seventy-five most populous counties found guilty pleas accounted for ninety-two percent of all convictions in state courts.¹²⁰ This extraordinary plea rate clearly suggests plea bargaining pervades the American justice system.¹²¹ Therefore, plea bargaining should be viewed as a natural outgrowth of our adversarial criminal justice system.¹²²

The Supreme Court in *Brady vs. United States* recognized the positive aspects of plea bargaining, emphasizing the practice would benefit both the prosecution and defense.¹²³ The Court further justified plea bargaining by noting a guilty plea provides some “hope for success in rehabilitation”.¹²⁴ The Supreme Court later found in *Santobello vs. New York* that plea bargaining was an essential component of the administration of justice.¹²⁵ The Court also

¹¹⁹See Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 Emory L. J., 753 (Spring 1998), (See Appendix, Volume 1 No. 4).

¹²⁰Bureau of Justice Statistics, *Felony Defendants in Large urban Counties, 1992, 29(1992)* (for felony defendants over a one year period), (See Appendix, Volume 2 No. 29).

¹²¹See Herbert S. Miller et al., *Plea Bargaining in the United States* 17 (1978) (stating that “project field research...suggests that the vast majority of guilty pleas are arrived at through bargaining”).

¹²²See Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 Emory Law Journal, 753 (Spring 1998). During the early part of the nineteenth century, many criminal prosecutions occurred without lawyers for the defendant, the prosecution, or both. As the American legal profession grew, and more trials involved lawyers, the length of the jury trial also increased. Correspondingly, guilty plea rates increased. (See Appendix, Volume 1 No. 4).

¹²³See *Brady v. United States*, 397 U.S. 742(1970), (See Appendix, Volume 1 No. 20).

¹²⁴See *id.* at 753.

¹²⁵See *Santobello v. New York*, 404 U.S. 257, 260-61(1971), (See Appendix, Volume 2 No. 6).

stressed in *Bordenkircher vs. Hayes* that both the prosecution and defense possessed relatively equal bargaining power.¹²⁶ Furthermore, the Court found where the defendant was represented by competent counsel procedural safeguards would ensure the fairness of his plea.¹²⁷

Plea bargaining can be beneficial by alleviating congested caseloads and reducing the expense of jury trials.¹²⁸ For district attorneys operating with limited resources plea bargaining provides a quick and efficient method of handling large caseloads.¹²⁹ Quick disposition of cases allows public defenders to give more time and effort to cases they consider more trial-worthy.¹³⁰ Defendants receive sentence-related concessions or dismissal of certain charges.¹³¹ Victims can

¹²⁶See *Bordenkircher v. Hayes*, 434 U.S. 357, 362(1978), (See Appendix, Volume 1 No. 21).

¹²⁷See *id.* at 363. The procedural safeguards that ensure the fairness of the plea that the Court referred to consist of the requirement of counsel during the plea and sentencing, *Moore v. Michigan*, 355 U.S. 155(1957), (See Appendix, Volume 2 No. 15); the requirement in federal courts that the sentencing judge must develop, on the record, the factual basis for the plea, Fed. R. Crim. Pro. 11, (See Appendix, Volume 2 No. 23); the requirement that the plea “be voluntary and knowing and if it was induced by promises, the essence of those promises must be made known,” *Santobello*, 404 U.S. at 261-62; and the right of a judge to reject any plea, *Lynch v. Overholser*, 369 U.S. 705, 719(1962), (See Appendix, Volume 1 No. 31).

¹²⁸See Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 *Emory L. J.*, 753 (Spring 1998), (See Appendix, Volume 1 No. 4).

¹²⁹See *id.*

¹³⁰See National Legal Aid and Defender Assoc., *Indigent Defense Systems Analysis*(1978) (A study of 399 defender agencies revealed that as attorney caseloads increased, so did the guilty plea rates). See generally Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, *supra* note 5, at 1206-1256.

¹³¹See Herbert S. Miller et al., *Plea Bargaining in the United States* 17 (1978) (stating that “project field research...suggests that the vast majority of guilty pleas are arrived at through bargaining”).

also benefit by gaining a sense of closure and the knowledge the defendant will not go unpunished for the crime.¹³²

The ICTR has primacy of jurisdiction over the Rwandan government by way of the authority granted by the UN Security Council Resolution that brought the ICTR into being.¹³³ This means that, where the ICTR and national court of Rwanda each have a legal basis for jurisdiction over a given case, the ICTR is entitled -but not obligated- to exercise jurisdiction to the exclusion of the national body.¹³⁴ A satisfactory basis for consistent decision making regarding the distribution of defendants will have to rest upon a careful analysis of the purposes of the ICTR and of its concurrent jurisdiction with national courts.¹³⁵ This analytic process still remains to be completed.¹³⁶

D. RIGHT TO COUNSEL

Notwithstanding the fact that Jean-Paul Akayesu was granted a change of counsel on

¹³²See Carolyn E. Demarest, Plea Bargaining Can Often Protect the Victim, N.Y. Times, Apr. 15 1994 at A30.

¹³³See Statute of the ICTR, supra, note 105 art. 9(2).

¹³⁴See *id.* But the criteria to be employed in deciding whether to exercise jurisdiction in any particular case have yet to be articulated by the ICTR. See *id.*

¹³⁵See Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 Duke J. Comp. & Int'l L. 349, 366 (Spring 1997), (See Appendix, Volume 1 No. 9).

¹³⁶See *id.* at 366.

November 20, 1996 and was denied a subsequent motion for change of counsel,¹³⁷ Jean-Paul Akayesu has appealed the International Tribunal's judgment against him, basing his appeal on an ineffective assistance of counsel claim.

Article 20 of the Rwanda Tribunal Statute provides an accused the right to obtain counsel or have counsel appointed in the event they cannot afford representation.¹³⁸ A suspect is granted the right to counsel when being questioned during an investigation under Article 17(3) of the Tribunal Statute.¹³⁹ The Registrar is entrusted with the primary responsibility of assigning counsel to those who make such requests.¹⁴⁰ Before granting counsel the Registrar is required to obtain relevant information about the financial status of the person requesting counsel to make an independent determination of indigence.¹⁴¹ This objective standard is intended to ensure all

¹³⁷See *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 11 (2 Sept. 1998), (See Appendix, Volume 2 No. 21).

¹³⁸See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 520 (1988), (See Appendix, Volume 1 No. 14).

¹³⁹See *id.* at 520.

¹⁴⁰See *id.* at 522. Requests should be submitted to the Registrar by the accused or someone authorized by the accused to do so. As a practical matter, these requests may be forwarded to the Registrar by members of the Office of the Prosecutor who may be the first to learn of the inability of a suspect or accused to retain counsel. This may occur after a suspect has been informed of the right to counsel prior to questioning or after an accused has been informed of this right following arrest.

¹⁴¹See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 523 (1988). The Registrar is to request the applicant make a declaration of financial means as a form provided to the applicant. This application is to be certified by the appropriate national authorities. The Registrar may also communicate with the person concerned and request other information and documents which may be relevant to the question of indigence. (See Appendix, Volume 1 No. 14).

persons concerned are treated fairly and equally.¹⁴²

If the applicant meets the criteria for indigence, counsel will be assigned by the Registrar from a list of qualified personnel.¹⁴³ If the request for assignment is denied, the Registrar must issue a reasoned decision.¹⁴⁴ The suspect or accused may also waive the right to counsel by written election, and choose to conduct the defense in person without the assistance of counsel.¹⁴⁵ However, unlike the Yugoslavia Tribunal, the Rwanda Tribunal chose to place the burden to request counsel on the accused (or suspect), and provided that no counsel would be assigned in the absence of a request.¹⁴⁶

If counsel is appointed the Rwanda Tribunal will choose for the suspect or accused the assistance of only one defense counsel.¹⁴⁷ In one of the first cases before the Rwanda Tribunal ,

¹⁴²The Registrar has “established the appropriate mechanism to determine whether the accused is indigent as stipulated in the statute of the Tribunal.” Report of the Secretary-General, *para.* 43, U.N. Doc. A/C.5/51/29/Add.1 (1997).

¹⁴³*See* Articles 10 and 13 of the Directive on Assignment of Defense Counsel, U.N. Doc. ICTR/2/C.2 (adopted 9 January 1996 and amended 6 June 1997)[hereinafter Directive]. The Registrar’s decision takes into account the financial means directly or indirectly available to the applicant, thus financial means of the applicant’s spouse and persons with whom the applicant resides, as well as the applicant’s apparent lifestyle. *See* Directive, art.6. (See Appendix, Volume 2 No. 25).

¹⁴⁴*See* Directive, art.10. (See Appendix, Volume 2 No. 25).

¹⁴⁵Rule of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 45(F), U.N. Doc. ITR/3/Rev.2. (See Appendix, Volume 2 No. 25).

¹⁴⁶*See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 526 (1988), (See Appendix, Volume 1 No. 14).

¹⁴⁷*See Press Release: Akayesu Defense Granted Trial Adjournment to 9 January 1997*, U.N. Doc. ICTR/INFO-9-058, 31 Oct. 1996: “Judge Laity Kama stressed the rights of the defense were sacred and asked for clarification as to who was the defense lawyer since the Rules of Procedure and Evidence make allowance for only one counsel.”

Jean-Paul Akayesu argued denial of his requests for additional legal assistance was a denial of due process.¹⁴⁸ However, in June 1997 the Rwanda Tribunal reconsidered this policy and amended the Directive on the Assignment of Defense Counsel to permit assignment of co-counsel at the request of lead counsel.¹⁴⁹

The Yugoslavia Tribunal Rules¹⁵⁰ and Directive on Assignment of Defense Counsel¹⁵¹ required assignment of counsel to a suspect or accused in the absence of an express waiver.¹⁵²

The Yugoslavia Tribunal provided each indigent defendant with a defense team made up of two

¹⁴⁸See *Prosecutor vs. Akayesu*, Case No. ICTR-96-4-1, Motion to Consider Registrar's Denial of Mr. Akayesu's Request for a Legal Consultant and Investigative Resources, 23 Oct. 1996. Mr. Akayesu's attorney asserted: "Given the resources being afforded Mr. Tadic [who was then being tried before the Yugoslavia Tribunal] versus those being denied Mr. Akayesu, the only conclusion, regrettably, that can be drawn is that White Europeans are more equal, if not superior, than Black Africans." *Prosecutor vs. Akayesu*, Case No. ICTR-96-4-1, Memorandum of Law in Support of Motion to Consider Registrar's Denial of Additional Assistance to Mr. Akayesu, 23 Oct. 1996. (See Appendix, Volume 2 No. 21).

¹⁴⁹See Directive, art. 15. (See Appendix, Volume 2 No. 25).

¹⁵⁰The original version of Rule 45(E) of the Yugoslavia Tribunal provided: "The Registrar shall assign counsel for a suspect or an accused who fails to obtain counsel or to request assignment of counsel, unless the suspect or the accused elects in writing to conduct his own defense." See 1 Morris & Scharf 230-231 n.598. This language was later deleted from the Rules when they were amended on 30 January 1995. (See Appendix, Volume 1 No. 14).

¹⁵¹Article 4(B)(ii) of the Yugoslavia Tribunal's Directive on Assignment of Defense Counsel provides: "If the suspect or accused . . . fails to obtain counsel or to request assignment of counsel, or to elect in writing that he intends to conduct his own defense, the Registrar shall nevertheless assign him counsel in the interests of justice in accordance with Rule 45(E) of the Rules and without prejudice to Article 19." See Directive on Assignment of Defense Counsel (Directive No 1/94), U.N. Doc. IT/73/Rev.1(1994). (See Appendix, Volume 2 No. 25).

¹⁵²See 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 525-26 (1988), (See Appendix, Volume 1 No. 14).

co-counsel, an investigator, a clerk, and a secretary.¹⁵³ However, until the Prosecutor questions a suspect the right to counsel does not take affect.¹⁵⁴ This lack of protection in the Yugoslavia Tribunal posed great problems of fairness and reliability for the accused.¹⁵⁵

The Rwanda Tribunal¹⁵⁶ and Yugoslavian Tribunal's requirements for counsel fail to ensure competent representation. The Statute and Rules draw from both civil and common law jurisprudence.¹⁵⁷ Defense attorneys accustomed to the adversarial system will be uneasy with the lack of technical rules to guide the admission of evidence, lack of plea bargaining, and freedom

¹⁵³See *Report of the Advisory Committee on Administration and Budgetary Questions on Financing the Rwanda Tribunal*, at para. 21, U.N. Doc. A/50/923 (1996).

¹⁵⁴See Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 *Fordham Int'l L.J.* 475, 478 n.10 (1995), (See Appendix, Volume 1 No. 3).

¹⁵⁵As the Statute contemplates that victims will bring allegations of rape and "other inhumane acts" to the Tribunal, the likelihood that a witness-victim will be susceptible to suggestiveness may be magnified. See *United States vs. Wade*, 388 U.S. 218, 230 (1967). This is because these types of prosecutions "present a particular hazard that a victim's understandable outrage may excite vengeful and spiteful motives." *id.* (See Appendix, Volume 2 No. 16).

¹⁵⁶See Article 13 of the Directive on Assignment of Defense Counsel, U.N. Doc. ICTR/2/L.2 (adopted 9 Jan. 1996 and amended 6 June 1997). There are two ways in which a person may qualify to provide legal assistance to an accused (or a suspect), namely by being admitted to practice law in any State or being engaged as a professor of law at a university (or similar situation) under Rule 44. (See Appendix, Volume 2 No. 25).

¹⁵⁷See Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 *Sw. U.L. Rev.* 1161, 1161-62 (1990) (noting that, between the two systems, cultural, economic, and political "factors have created individuals with diverse attitudes and very distinct points of view about the legal norms that should regulate our conduct"). (See Appendix, Volume 1 No. 10).

of the Trial Chamber to order production of new evidence on their own motions.¹⁵⁸ Counsel approval requirements under the Rules should be changed to require counsel to demonstrate some level of expertise in both civil and common law systems.¹⁵⁹

The Sixth Amendment to the United States Constitution provides “in all criminal prosecutions, the accused shall enjoy the right . . .to have the Assistance of Counsel for his defense.”¹⁶⁰ This right attaches automatically at the initiation of adversarial judicial proceedings, whether by way of formal charge, preliminary hearing, indictment, information or arraignment.¹⁶¹ Since assistance by counsel is among the “raw materials integral to the building of an effective defense”,¹⁶² the right to counsel is the right to effective assistance of counsel¹⁶³ which is guaranteed whether counsel is retained or appointed.¹⁶⁴

¹⁵⁸See *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and witnesses, Case No. IT-94-1-T (Aug. 10, 1995), (See Appendix, Volume 2 No. 21).

¹⁵⁹See *id.* at 523.

¹⁶⁰See U.S. Const. Amend. VI. (See Appendix, Volume 2 No. 22).

¹⁶¹See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), (See Appendix, Volume 1 No. 29). Despite the Sixth Amendment’s broad language, the Amendment has been held to guarantee counsel to defendant’s imprisoned as a result of a criminal conviction. *Scott v. Illinois*, 440 U.S. 367 (1979), (See Appendix, Volume 2 No. 7). It guarantees defendant’s will not be sentenced to a term of imprisonment unless the government affords appointed counsel for defense. *Argersinger v Hamlin*, 407 U.S. 25 (1972), (See Appendix 1 No. 16).

¹⁶²See *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), (See Appendix, Volume 1no. 15).

¹⁶³See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), (See Appendix, Volume 2 No. 3); *see also Strickland v. Washington*, 466 U.S. 668 (1984), (See Appendix, Volume 2 No. 9).

¹⁶⁴See *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980). (See Appendix, Volume 1 No. 24).

While the Sixth Amendment right to counsel is absolute,¹⁶⁵ the right to retain counsel of choice is often not.¹⁶⁶ A trial court's authority to appoint competent counsel to an indigent accused without considering the defendant's preference for a particular attorney is well settled - indigent criminal defendants have no recognized right to counsel of their choosing.¹⁶⁷ In fact, the principle that an indigent accused enjoys no "right" to choose his attorney has become well settled such that case law reveals few challenges to its basic operation.¹⁶⁸

The Supreme Court also recognized a need for counsel before commencement of adversarial judicial proceedings. In *Massiah v. United States*¹⁶⁹ the Supreme Court held deliberate elicitation of incriminating statements from an accused after indictment, in the absence

¹⁶⁵See *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993), (See Appendix, Volume 2 No. 14); *Heath v. United States Parole Comm'n*, 788 F.2d 85, 88 (2d Cir. 1986), (See Appendix, Volume 1 No. 28); *United States v. Chatmen*, 584 F.2d 1358, 1360 (4th Cir. 1978), (See Appendix, Volume 2 No. 13); *Gilbert v. California*, 388 U.S. 263, 279 (1967) (Douglas J., concurring in part and dissenting in part), (See Appendix, Volume 1 No. 27).

¹⁶⁶See *Wheat*, 486 U.S. at 159 (See Appendix, Volume 2 No. 18), ("The Sixth Amendment right to choose one's own counsel is circumscribed in several important aspects."); *Fickler v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997), (See Appendix, Volume 1 No. 26), (observing that right to counsel of choice is not absolute); *Nichols*, 841 F.2d at 1502 (same); *United States v. Panzardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987) (same), (See Appendix, Volume 2 No. 18).

¹⁶⁷See, e.g., *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990), (See Appendix, Volume 2 No. 12), ("An indigent defendant has no right to have a particular attorney represent him . . ."); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989), (See Appendix, Volume 1 No. 22), ("Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel."); *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979), (See Appendix, Volume 2 No. 10), ("An indigent has no absolute right to counsel of his choice.").

¹⁶⁸See *Wilson v. United States*, 215 F.Supp. 661, 663 (W.D. Va. 1963), (See Appendix, Volume 2 No. 19).

¹⁶⁹See *Massiah v. United States*, 377 U.S. 201 (1964), (See Appendix, Volume 2 No. 2).

of counsel, and without the accused's knowledge violated the Sixth Amendment right to counsel.¹⁷⁰ But later in *Escobedo v. Illinois*¹⁷¹ a five judge majority for the Supreme Court extended the reach of *Massiah* to custodial interrogation of an unindicted defendant.¹⁷²

The Court in *Miranda v. Arizona*¹⁷³ implemented a warning and waiver system based upon the Fifth Amendment right to remain silent.¹⁷⁴ Custodial interrogation was the event which would trigger these constitutional protections.¹⁷⁵ *Miranda* established that suspects must be adequately informed of their rights and offered a continuous opportunity to enforce those rights.¹⁷⁶

¹⁷⁰See Steven Penny, *Theories of Confession Admissibility: A Historical View*, 25 University of Texas School of Law, American Journal of Criminal Law, 54 (Spring 1998), (See Appendix, Volume 1 No. 11).

¹⁷¹See *Escobedo v. Illinois*, 378 U.S. 478 (1964), Notably, *Escobedo*'s counsel previously advised him to remain silent during any interrogation. *id.* at 485, n.5. (See Appendix, Volume 1 No. 25).

¹⁷²See Steven Penny, *Theories of Confession Admissibility: A Historical View*, 25 University of Texas School of Law, American Journal of Criminal Law, 55 (Spring 1998). The Supreme Court excluded the confession of an unindicted defendant not warned of his rights, interrogated while physically exhausted, and repeatedly denied access to retained counsel. *id.* at 479-83. (See Appendix, Volume 1 No. 11).

¹⁷³See *Miranda v. Arizona*, 384 U.S. 436 (1966), (See Appendix, Volume 2 No. 4).

¹⁷⁴See *id.* at 444-45, 467-75.

¹⁷⁵See Yale Kamisar, "Custodial Interrogation" Within the Meaning of *Miranda*, in *Criminal Law and the Constitution* 335, 339 (1968) (addressing concerns with and doubts regarding custodial interrogation and the effectiveness of *Miranda* warnings). Custodial interrogation was defined in *Miranda* as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

¹⁷⁶See *id.* at 467. Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that

Comparatively the Rwanda Tribunal has provided the right to counsel along the same lines as the United States. In Rwanda the right to counsel attaches when a person is questioned within the bounds of Article 17(3) of the Tribunal Statute.¹⁷⁷ This is equivalent with initiating adversarial judicial proceedings under the auspices of the Sixth Amendment. Assignment of counsel is also similar, in that both the International Tribunal and the United States do not allow indigent defendants the right to choose their counsel, a right Jean-Paul Akayesu wants to base an appeal upon. However, the United States has gone further by implementing a warning and waiver system which allows suspects to invoke and waive their rights, which the International Tribunal may use as a blueprint for future protections.

he has the right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. *id.*

¹⁷⁷*See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 520 (1988), (See Appendix, Volume 1 No. 14).