

JUSTICE OBSCURED: THE NON-DISCLOSURE OF WITNESSES' IDENTITIES IN ICTR TRIALS

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I. INTRODUCTION

Unlike the first international criminal tribunals in Nuremberg and Tokyo, which relied almost exclusively on documentary evidence, the International Criminal Tribunal for Rwanda (ICTR) relies primarily on witness testimonies to render judgments.¹ Thus, the accuracy of ICTR judgments and the credibility of the Tribunal depend on the veracity of these testimonies. However, the Tribunal has significantly impeded the truth-gathering process by failing to develop rules of evidence that are internally consistent and customized to the Rwandan situation. The existing rules purport to guarantee a fair trial for the accused by allowing for the cross-examination of witnesses as well as for the right of witnesses to conceal their identities if necessary to prevent them from harm.² The rules of evidence for the ICTR's sister Tribunal, the International Criminal Tribunal for the Former Yugoslavia (ICTY),

1. See Richard May, *The Collection and Admissibility of Evidence and the Rights of the Accused*, in JUSTICE FOR CRIMES AGAINST HUMANITY 161, 165 (Mark Lattimer & Philippe Sands eds., 2003) ("Whereas the historical tribunals were able to rely largely on documentary evidence, the modern tribunals [the ICTR and the ICTY] have to rely (primarily) on the evidence of live witnesses . . .").

2. Rule 75, "Measures for the Protection of Victims and Witnesses" provides: "A Judge or Chamber may *proprio motu* or at the request of either party . . . order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused." International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence, Rule 75, U.N. Doc. ITR/3/Rev.1 (1995) [hereinafter ICTR Rules]. Compare "Rights of the Accused" in Statute of the International Criminal Tribunal for Rwanda art. 20(2), Nov. 8, 1994, S.C. Res. 955, U.N. Doc. S/RES/955 [hereinafter ICTR Statute] ("In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the ICTR statute.") with "Protection of Victims and Witnesses," *id.* art. 21 (setting forth that the Tribunal "shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.").

contain similar language. Judges at the ICTY recognized the conflict between an accused's right to public confrontation of witnesses against them and a witness's right to protection. The problem was acute because of the security threat to ICTY witnesses posed by the ongoing war in the former Yugoslavia. Rather than customize the ICTY's rules in the context of post-genocide Rwanda, judges at the Rwandan tribunal adopted the ICTY's rules with almost no modifications despite the fact that the Rwandan conflict had ended.³

Although the international legal community tends to disfavor anonymous testimony because it undermines the effectiveness of cross-examination—and thus the reliability of the testimony⁴—the Yugoslav tribunal in its first case *Prosecutor v. Tadic* decided, in light of the “unique” context of the ongoing war, to allow three witnesses to shield their identity from the defense, and many more to shield their identity from the public.⁵ The Yugoslav Tribunal's reliance on the ongoing war as a justification for allowing anonymous witnesses is not directly applicable to the Rwandan Tribunal, which was established a year after the end of the genocide, in 1995. Nevertheless, the Rwandan Tribunal has mechanically applied the *Tadic* court's

3. Catherine Cissé, *The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103, 116 (1997) (noting that in formulating the Rules of Procedure and Evidence for the ICTR, judges at the Tribunal adopted most Rules from the Yugoslav Tribunal without any major changes).

4. Under the International Convention on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR), the requirements of a fair trial generally include a public hearing, in which the accused has the opportunity “[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.” International Covenant on Civil and Political Rights art. 14(3)(3), Dec. 16, 1966, 999 U.N.T.S. 171, 177 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(d), Nov. 4, 1950, 213 U.N.T.S. 228 [hereinafter ECHR]. See also Monroe Leigh, *Witness Anonymity is Inconsistent with Due Process*, 91 *AM. J. INT'L L.* 80 (1997) (“Every trial lawyer knows that effective cross-examination depends in major part on careful advance preparation. And this in turn depends on knowing the identity of accusing witnesses.”).

5. See *Prosecutor v. Tadic*, Case No. IT-94-I, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶¶ 27, 44, 84 (Aug. 10, 1995) [hereinafter *Tadic Prosecutor's Motion Requesting Protective Measures*], available at <http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.htm>.

reasoning without addressing the different contexts in which the two tribunals operate.⁶ Post-genocide Rwanda might still present some risk for a witness at the Rwandan Tribunal. However, testifying at the Rwandan Tribunal, established one year after the genocide, arguably presents a different level of risk of bodily harm than testifying at the ICTY during an ongoing war.

Another important difference is the Rwandan government's use of *Gacaca*-type hearings, which are based on a local model of dispute resolution.⁷ These hearings involve full disclosure of the identities of both witnesses and victims to everyone in the community.⁸ In light of this traditional *Gacaca* practice, the ICTR's decision to shield the identity of witnesses makes little sense. Indeed, any threat of bodily harm to the

6. The ICTR first ordered protective measures for witnesses in its first case, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses (Sept. 26, 1996). The Trial Chamber based its decision on the *Tadic* decision. The opinion begins, "Taking into consideration the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, notably its decisions of 10 August 1995 and 14 November 1995 . . ." The Trial Chamber in *Rutaganda* ultimately granted a range of protective measures for witnesses stopping short of full anonymity. However, rather than compel the prosecution to disclose the identities of the witnesses prior to the commencement of the trial, the identities of the witnesses were not to be disclosed to the defense "until such person[s are] brought under the protection of the tribunal" (quoting ICTR Rules, *supra* note 2, Rule 69). More recently, in *Prosecutor v. Bagosora, Kabiligi, Ntabakuze & Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001 (July 18, 2003) [hereinafter *Bagosora II*], the ICTR forced the Prosecution to disclose the identities of witnesses prior to trial, but only on the specific facts of that case. This decision, which reversed an earlier decision that allowed the Prosecution significant leeway in deciding when to disclose witnesses' identities to the defense on the basis of *Tadic*, failed to either analyze the earlier decision's reliance on *Tadic* or suggest an alternative standard for disclosure in ICTR cases. *Id.* at 6. Rather, the decision was grounded specifically on the facts that the pace of the trial had hastened and that fewer Prosecution witnesses were to testify than had been anticipated at the time of the first decision. *Id.*

7. See Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 356 (2002).

8. *Id.* at 376.

witnesses is probably greater in their local communities than in the relatively remote ICTR in Tanzania.⁹

Moreover, the use of anonymous witnesses is particularly troublesome in light of Rwandan oral culture. Instead of describing an experience that was conveyed to her by another person as second-hand information, a Rwandan will frequently recount the experience as if she had been an eyewitness to the event.¹⁰ To sort out credibility issues raised by this cultural practice, cross-examination is particularly important in ICTR trials. However, the ICTR's practice of granting Prosecution motions to shield witnesses' identities after the commencement of the trial in certain cases thwarts the defendant's ability to prepare an adequate defense.¹¹

Between April of 1996 and January of 1997, Monroe Leigh and Christine Chinkin debated the merits of the Yugoslav Tribunal's *Tadic* decision in the Editorial comments section of the *American Journal of International Law* (AM. J. INT'L L.).¹² Leigh contended that without cross-examination, the testimony of anonymous witnesses interferes with fundamental due process rights afforded to the accused by both the ICTY's own Statute and other international conventions.¹³ Chinkin

9. See Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219, 226 (2003) (explaining that *Gacaca* hearings take place near the places where perpetrators, survivors and witnesses live).

10. The Rwandan Tribunal itself expressly recognized this cultural tendency in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 155 (Sept. 2, 1998).

11. See *Prosecutor v. Bagosora*, Case No. ICTR-96-7-1, Decision on the Prosecutor's Motion for the Protection of Victims and Witnesses (Oct. 31, 1997). However, this has not been universally applied; rather, the ICTR has required the Prosecutor to disclose to the defense the identity of witnesses before the commencement of the trial in other cases. This can be seen as a lack of coherence across cases. See, e.g., *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Decision on the Preliminary Motion Submitted by the Prosecutor for Protective Measures for Witnesses (Sept. 26, 1996); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Decision on the Motion Filed by the Prosecutor on the Protection of Victims and Witnesses (Nov. 6, 1996); *Prosecutor v. Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Motion Filed by the Prosecutor for the Protection of Victims and Witnesses (Mar. 11, 1997).

12. Compare Leigh, *supra* note 4, with Christine Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L L. 75 (1997).

13. Article 21(4) (e) of the ICTY Statute states that the accused shall be entitled "to examine, or have examined, the witnesses against him." The

criticized Leigh for failing to account for the particular context of the ICTY, which gave rise to heightened concerns of safety for witnesses.¹⁴ This debate led to similar articles in other journals.¹⁵

By contrast, the Rwandan Tribunal's subsequent application of *Tadic* has gone virtually unnoticed by legal scholarship. The only literature to acknowledge the Rwandan Tribunal's application of *Tadic* does so without inquiring whether this is appropriate.¹⁶ Instead, ICTR decisions on non-disclosure of witnesses' identities have primarily gained recognition in the context of discussions of other problems, such as the Tribunal's failure to provide asylum for refugee witnesses.¹⁷

This Note is divided into five parts. Part I analyzes *Tadic* in light of international precedent for the use of anonymous witnesses in criminal trials as well as the Yugoslav Tribunal's subsequent decisions. Part II critiques the Rwandan Tribunal's application of *Tadic*, in terms of two main cases: *Prosecutor v. Bagosora* and *Prosecutor v. Musema*. Part III offers a cultural critique of the ICTR's practice of non-disclosure of the identi-

Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, p. 55, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter *1993 Sec. Gen. Report*]. Article 21(2) of the same Statute directs that the accused "shall be entitled to a fair and public hearing." *Id.* at art. 21(2). This language replicates provisions already in existence from the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. ICCPR, *supra* note 4, art. 14(3)(e); ECHR, *supra* note 4, art. 6(3)(d).

14. See Chinkin, *supra* note 12, at 75.

15. See, e.g., Michael P. Scharf, *The Prosecutor v. Duocko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 871 (1997); Natasha A. Affolder, *Tadic, The Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT'L L. 445 (1998).

16. In fact, some commentators have ignored the fact that the ICTR often cites to *Tadic* in decisions on issues of witness protection. See Michael Sharf, Commentary, in ANNOTATED LEADING CASES OF INTERNATIONAL TRIBUNALS, VOLUME II: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994 – 1999, 249, 249 (André Klip & Göran Sluiter eds., 2001) ("In light of the widespread criticism of the decision of the ICTY to permit anonymous testimony as a protective measure in the *Tadic* case, the Rwanda Tribunal has consistently required the Prosecutor to disclose to the defense the identity of witnesses before the commencement of trial . . .").

17. See, e.g., Mohamed Othman, *The 'Protection' of Refugee Witnesses by the International Criminal Tribunal for Rwanda*, 14 (4) INT'L J. REFUGEE L. 495 (2002).

ties of witnesses, focusing on the problems posed to Western trial frameworks by traditional Rwandan usage of the first-person voice and the traditionally open procedures of the *Gacaca* courts. Part IV discusses the ICTR's credibility problems both in Rwanda and in the international community. Finally, Part V offers two main recommendations: First, it recommends a more appropriate procedure for balancing the interests of witnesses against those of defendants. Second, it argues that the Security Council should tailor the governing statutes of international tribunals to better correspond to the local contexts in which they operate.

This is a particularly timely issue because of the newly established International Criminal Court. The Rules of Procedure and Evidence in the draft statute of the Court, conceived of as a more generalized and larger scale ICTR or ICTY, contain similar language to the governing rules of the Yugoslav and Rwandan tribunals on issues of witness protection and the rights of the accused.¹⁸ Thus, the same tension between the

18. Rules 87 ("Protective measures") and 88 ("Special measures") for the ICC are similar, although not identical, to Rule 75 ("Measures for the Protection of Victims and Witnesses") for the ICTY and the ICTR. Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (pt. 11-A), Rule 87 (Sept. 9, 2002) [hereinafter ICC Rules] ("Upon the motion of the Prosecutor or the defence or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness. . ."); *id.* Rule 88 ("Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative. . . a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness. . ."); International Criminal Tribunal for the Former Yugoslavia: Rules of Procedure and Evidence, Rule 75, U.N. Doc. IT/32/Rev.20 (2001) [hereinafter ICTY Rules] ("(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (B) A Chamber may hold an in camera proceeding to determine whether to order: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (a) expunging names and identifying information from the Tribunal's public records; (b) non-disclosure to the public of any records identifying the victim; (c) giving of testimony through image- or voice- altering devices or

rights of defendants and witness anonymity is likely to emerge.¹⁹

II. THE *TADIC* PRECEDENT

A. *Tadic* Analysis

The Yugoslav Tribunal (ICTY) confronted the issue of anonymous witnesses head-on in its first case, *Prosecutor v. Tadic*.²⁰ In this case, the Trial Chamber allowed the testimony of three anonymous witnesses.²¹ In explaining its decision, the Tribunal outlined five conditions for anonymity. First, “there must be real fear for the safety of the witness or his or her family.”²² Second, “the testimony of the particular witness must be important to the Prosecution’s case.”²³ Third, the Chamber “must be satisfied that there is no *prima facie* evidence that the witness is untrustworthy.”²⁴ Fourth, the Chamber must evaluate the existence and effectiveness of any witness protection program.²⁵ Fifth, measures taken must be “strictly necessary.”²⁶

Applying these five factors, the majority opinion in *Tadic*, concludes that the use of anonymous testimony is consistent with the ICTY’s statute and Rules of Procedure and Evi-

closed circuit television; and (d) assignment of a pseudonym; (ii) closed sessions, in accordance with Rule 79; (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.”); ICTR Rules, *supra* note 2, Rule 75 (relevant provisions identical to ICTY Rule 75).

19. There was considerable debate on the issue of anonymous witnesses among members of the Preparatory Commission on the ICC’s Rules of Evidence and Procedure. Ultimately, Commission members reconciled competing views by agreeing to not include in the Rules a specific provision in favor of or against the use of anonymous witnesses. See THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, 453 (Roy S. Lee ed., 2001).

20. *Tadic Prosecutor’s Motion Requesting Protective Measures*, *supra* note 5, ¶ 3.

21. See *id.* at Disposition 11 (“[T]he Prosecutor may withhold from the Defense and the accused. . .the names of, and other identifying data concerning witnesses H, J and K.”).

22. *Id.* ¶ 62.

23. *Id.* ¶ 63.

24. *Id.* ¶ 64.

25. *Id.* ¶ 65.

26. *Id.* ¶ 66.

dence.²⁷ Judge Stephen's dissent challenges this conclusion and rejects the use of anonymous witnesses as contrary to the Tribunal's Statute and "internationally recognized standards of the rights of the accused."²⁸ The majority opinion justified its departure from international standards by insisting on its ability to determine relevant procedural rules based on its own "unique requirements."²⁹ Judge McDonald's majority opinion identified two such requirements: One, that the Yugoslav tribunal is operating amidst an ongoing war; and two, that it is operating without a witness protection program. Thus, the "unique" context of the Yugoslav Tribunal was the driving force behind the McDonald judgment's deviation from the international norm of full disclosure of witnesses' identities to the defense.

The governing statute of the ICTY does not contain a provision that specifically allows for withholding witnesses' identities from the defense. Article 21(2) of the Statute provides that the accused "shall be entitled to a fair and public hearing."³⁰ This language replicates provisions already in existence from the International Covenant on Civil and Political Rights (ICCPR) and the European Convention of Human Rights (ECHR).³¹ However, unlike the latter two conventions,

27. See *id.* ¶¶ 57-59.

28. Prosecutor v. Tadic, Case No. ICTY-94-1, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (Aug. 10, 1995) (Stephen, J., dissenting) [hereinafter *Tadic, Stephen Dissent*].

29. *Id.* ¶ 17.

30. 1993 *Sec. Gen. Report*, *supra* note 13, at 55 (reporting ICTY Article 21, "Rights of the accused").

31. Article 10 of the Universal Declaration of Human Rights states, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal." Universal Declaration of Human Rights, art. 10, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948). Article 14(1) of the ICCPR states that "everyone shall be entitled to a fair and public hearing." ICCPR, *supra* note 4, art. 14(1). It then qualifies this clause with the following statement: "The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security . . . or when the interest of private lives of the parties so requires." *Id.* Whereas, unlike the Universal Declaration, the ICCPR does qualify a defendant's right to a public trial, the latter only contemplates non-disclosure of the identities of witnesses to the public, not to the defendant. Similarly, Article 6(1) of the ECHR specifies that "the press and public may be excluded from all or part of the trial in the

the ICTY qualifies the accused's right to a fair and public hearing with an open-ended provision: this right is subject to Article 22 of the Statute. Article 22 states that the Tribunal shall provide for protection of victims and witnesses with measures that "shall include, *but shall not be limited to*, the conducting of *in camera* proceedings and the protection of the victim's identity."³² The addition of the affirmative obligation to protect witnesses and victims in the statute for the Yugoslav Tribunal indicates its drafters recognized unique concerns in the Yugoslavia context.³³ By drafting the statute to allow for balancing of the accused's rights with those of the witnesses, the ICTY statute gives greater weight to concerns about witness protection than do most international human rights treaties.³⁴

Although the ICTY statute uniquely recognizes the need to balance the rights of the accused to a fair and public trial

interest of morals, public order or national security in a democratic society;" it does not contemplate non-disclosure to the Defense. ECHR, *supra* note 4, art. 6(1).

32. 1993 *Sec. Gen. Report*, *supra* note 13, at 55 (reporting ICTY Article 22, "Protection of Victims and Witnesses") (emphasis added). Rule 69 of the ICTY's Rules of Procedure and Evidence echoes Article 22's concern for witness safety. Section (a) of that rule reads: "In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal." ICTY Rules, *supra* note 18, Rule 69.

33. This is Judge McDonald's argument in the majority opinion—the fact that the Secretary General's Report containing the ICTY statute and commentary's includes the "affirmative obligation to protect victims and witnesses," indicates the drafters' recognition of the "unique" context of the ICTY, sitting during an ongoing war. *Tadic Prosecutor's Motion Requesting Protective Measures*, *supra* note 5, ¶ 26 ("Although Article 14 of the ICCPR was the source for Article 21 of the Statute, the terms of that provision must be interpreted within the context of the 'object and purpose' and unique characteristics of the Statute. Among those unique considerations is the affirmative obligation to protect victims and witnesses. Article 22 provides that such measures shall include the protection of the victim's identity. Article 20 (1) of the Statute requires: 'full respect for the rights of the accused and due regard for the protection of victims and witnesses.' Further, Article 21 states that the right of an accused to a fair and public hearing is subject to Article 22. Pursuant to those mandates, Rules were promulgated which relate to the protection of victims and witnesses, as referred to above.").

34. *See id.* ¶¶ 26-27. Whereas the source for Article 21's articulation of a defendant's right to a fair and public hearing was Article 14 of the ICCPR, this article does not proffer any affirmative obligation to protect victims and witnesses.

against those of the witness to identity concealment from the defense, the statute offers little guidance as to how to evaluate these competing interests. The only guidance given in the statute is in Article 20, which provides that the rights of accused are to be given “full respect,” while those of witnesses are to be given “due regard.” The McDonald judgment points to the “exceptional circumstances” surrounding the Yugoslav tribunal as tipping the scale in favor of protection of witnesses: “The fact that some derogation is allowed in [the ICTY Statute and Rules of Procedure and Evidence] in cases of national emergency shows the rights of the accused, guaranteed under the principle of the right to a fair trial, are not wholly without qualification.”³⁵ In his dissent, Judge Stephen also weighed the competing rights of the accused and of the witnesses, but reached the opposite conclusion of the majority. He ultimately privileges the rights of the accused because he considers the use of anonymous witnesses “likely to interfere with the doing of justice.”³⁶ His conclusion that the Tribunal’s statute forbids the use of anonymous witnesses in trials is based on the belief that although the statute guarantees protection to victims and witnesses to some extent in Article 22, it “certainly does not contemplate unfair hearings.”³⁷

The argument that the use of anonymous witnesses infringes upon the accused’s right to a fair hearing presumes that the accused’s right to cross-examination of a witness is absolutely indispensable to a fair criminal trial. The right to cross-examination is arguably required by both the Tribunal’s Statute as well as international law. Article 21(4)(e) of the ICTY Statute states that the accused shall be entitled “to examine, or have examined, the witnesses against him.” Although this Statute does not extend a right of “confrontation” in the sense of the right guaranteed by the Sixth Amendment of the United States Constitution,³⁸ Article 21(2) of the ICTY’s Statute states that the accused “shall be entitled to a fair and public hearing.” The *Tadic* dissent referred to the European Court of Human Rights’ decision in *Kostovski v. The*

35. *Id.* ¶ 61.

36. *Tadic, Stephen Dissent, supra* note 28.

37. *Id.*

38. The Sixth Amendment to the United States Constitution provides that “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” U.S. CONST. amend. VI.

*Netherlands*³⁹ to support the position that allowing anonymous witnesses to testify violates a defendant's procedural rights. The Court in *Kostovski* rejected the prosecution's request for anonymous witnesses to testify because such testimony "involved limitations on the rights of the defense which were irreconcilable with the guarantees contained in Article 6 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms]."⁴⁰ That Article of the European Convention directs that "everyone is entitled to a fair and public hearing."⁴¹ The two first international criminal tribunals, the International Military Tribunal (IMT) at Nuremberg, and the International Military Tribunal for the Far East in Tokyo, were public trials, although their respective statutes contained few rules of procedure and no rules of evidence.⁴²

Apart from the issue of witness anonymity, the *Tadic* decision also addressed the issue of public disclosure of a witness's identity.⁴³ While non-disclosure of witness identities to the public does not threaten the accused's right of cross-examination, closed examinations prevent the public from scrutinizing witnesses' testimonies. Thus, while failure to disclose witnesses' identities to the public does not necessarily infringe the right of the accused to a fair trial, in practice the lack of public scrutiny resulting from this non-disclosure can allow witnesses to give false or misleading testimony that can prejudice the outcome of a trial. The need for public scrutiny of trial testimony is a key reason that the accused's right to a public trial is a fundamental safeguard of criminal procedure.

39. *Kostovski v. Netherlands*, 166 Eur. Ct. H.R. (ser. A) at 6 (1989).

40. *See id.* ¶ 44.

41. In *Kostovski*, the Court explicitly relied on the earlier case of *Unterpertinger v. Austria*, 110 Eur. Ct. H.R. (ser. A) at 5 (1987). In that case, the Court had held that the accused's inability to confront the prosecution witnesses infringed upon his rights in violation of Article 6 of the European Convention. *Kostovski*, *supra* note 39, ¶ 41 (quoting the *Unterpertinger* judgment of 24 November 1986, Series A no. 110, at 14-15, § 31) ("As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.").

42. RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 14 (2002).

43. *See Tadic Prosecutor's Motion Requesting Protective Measures*, *supra* note 5, ¶¶ 31-44.

The European Court of Human Rights in *Werner v. Austria* explained:

[The] public character [of a trial] protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 (1) [of the European Convention], namely a fair trial.⁴⁴

The accused's right to a public trial deserves special protection both because of a court's specific interest in producing just outcomes, and because of its more general interest in legitimacy as an institution. Indeed, this preference for public hearings appears very clearly in the Yugoslav Tribunal's Statute—Article 20(4) of that statute requires that “hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with the rules of procedure and evidence.” In addition, Rule 78 of the Rules of Procedure and Evidence provides that “[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.”

The statute's preference for public trials, as expressed in Article 20(4), is difficult to reconcile with its language on witness protection. The *Tadic* case set forth a balancing test between the right of the accused to a public trial and the need to protect witnesses; these judge-made guidelines were necessary because of the failure of the Yugoslav Statute and Rules to provide for guidance as to how to weigh these two interests. The *Tadic* judgment explained that “any curtailment of the accused's right to a public hearing is justified by a genuine fear for the safety of [the] witness.”⁴⁵ Rather than base the assessment of “genuine fear” on the witness's subjective perception

44. *Werner v. Austria* (No. 56), 1997-VII Eur. Ct. H.R. at 2510, ¶ 45; see also *Sutter v. Switzerland*, 74 Eur. Ct. H.R. (ser. A) at 12, ¶ 26 (“By rendering the administration of justice visible, publicity contributes to the achievement of the aim . . . [of] a fair trial, the guarantee of which is one the fundamental principles of any democratic society.”).

45. *Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R, ¶ 6 (July 31, 1996) [hereinafter *Tadic III*].

of the extent of the threat, *Tadic* required that this fear be “objectively” grounded: “[F]or a witness to qualify for protection of his identity from disclosure to the public and the media, this fear must be . . . based on circumstances which can objectively be seen to cause fear.”⁴⁶ This emphasis on objectivity for evaluating the threat posed by a witness testifying in open session indicates the court’s hesitance to close trials to the public. Similarly, in response to a subsequent request for a prosecution witness to testify in closed sessions, the *Tadic* court added that it would adopt the practice of granting protective measures only on a case-by-case basis, rather than by “blanket measures.”⁴⁷

B. ICTY’s Departure from *Tadic*

The Yugoslav Tribunal’s subsequent jurisprudence has indicated discomfort with extending *Tadic*’s allowance of anonymous witnesses to other trials. The Trial Chamber in *Tadic* is the only ICTY Chamber to have granted full anonymity to witnesses.⁴⁸ The Trial Chamber in *Blaskic*, a later case, re-struck the *Tadic* balance between the right of the accused to a fair trial and the right of the witness to protective measures by explicitly favoring the rights of the accused over those of the witness.⁴⁹ In striking this balance, the *Blaskic* Chamber distinguished the periods before and after the commencement of a trial: During preliminary proceedings and continuing for “a

46. *Prosecutor v. Tadic*, Decision on the Defense Motion to Summon and Protect Defense Witnesses, and on the Giving of Evidence by Video-Link, Case No. IT-94-I-T, 25 June 1996, ¶ 35. With respect to another motion for protective measures for witnesses in the *Tadic* case, Judge Mumba in a partial dissent objected to the majority’s requirement that fear on the part of a witness must be objectively grounded. However, her objection was based specifically on the ongoing war in the former Yugoslavia in June of 1996: “[D]ue to the situation in the former Yugoslavia, there should be no need for witnesses who testify before the Tribunal to justify their fear or provide evidence of the dangers they face by testifying.”

47. *Id.* ¶ 4.

48. See Patricia M. Wald, *Dealing with Witnesses in War Crimes Trials: Lessons From the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 223 (2002) (“[N]o other ICTY Chamber has since invoked such stringent safeguards [as the *Tadic* decision on permitting anonymous witnesses to testify.]”).

49. *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Decision on the Application of the Prosecutor Dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses (Nov. 5, 1996) [hereinafter *Blaskic II*].

reasonable time” before the start of the trial, “victims and witnesses merit protection, even from the accused.”⁵⁰ However, “from that time forth . . . the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.”⁵¹ By differentiating between pre-trial and trial rights of the accused relative to those of the witness, the *Blaskic* ruling lifted the “veil of anonymity” in time for the defense to adequately prepare for cross-examination. Indeed, *Blaskic* suggests that the ICTY has changed directions on the use of anonymous witnesses since *Tadic*: *Blaskic* specifically acknowledged the interdependence of the accused’s right to “reasonable time” for preparation of his or her case and the time when witnesses must disclose their identities to the defense.⁵²

Thus, the *Blaskic* court refused to force the defense to forgo sufficient cross-examination preparation in order to provide protection for a witness through shielding his or her identity from the accused after the commencement of the trial. This makes sense in light of the development of the Tribunal’s witness protection program; the *Tadic* judgment pointed to the absence of such a program as one of the underlying justifications for granting anonymity to witnesses. This shift in ICTY jurisprudence is important in examining the Rwandan Tribunal’s case law because the ICTR has continued to rely on *Tadic* despite the contrary approach in *Blaskic* and the growth of its own witness protection program.⁵³

C. *International Precedent*

The jurisprudence of the Yugoslav Tribunal is the most relevant case law when examining the Rwandan Tribunal’s jurisprudence. Comparisons with the first international tribunal, the International Military Tribunal at Nuremburg for Ger-

50. *Id.* ¶ 24.

51. *Id.*

52. Prosecutor v. Blaskic, Case No. IT-94-1, Decision of Trial Chamber I on the Applications of the Prosecutor Dated 24 June and 30 August 1996 in Respect of the Protection of Witnesses, ¶ 5 (Oct. 2, 1996), available at <http://www.un.org/icty/blaskic/trialc1/decisions-e/61002ND113279.htm>.

53. Indeed, the *Blaskic* Chamber specifically noted that the Yugoslav Tribunal had refused to grant anonymity to witnesses since the creation of that Tribunal’s witness relocation program. *Blaskic II*, *supra* note 49, ¶ 43.

man war criminals, and the International Military Tribunal in Tokyo for Japanese war criminals, are inappropriate. First, those were military courts established by the Allied Powers after the Second World War, whereas the ICTY and ICTR are non-military courts established by the Security Council under Chapter VII of the United Nations Charter as subsidiary organs of the UN.⁵⁴ When crafting evidentiary guidelines, the Committee of Experts for the former Yugoslavia acknowledged that “[t]he approach to evidentiary and procedural issues taken at Nuremburg, where there was an extremely high degree of reliance on documentary evidence and relatively little emphasis placed on the accused’s right to full answer and defence, would not be acceptable today because of post-World War II developments in international human rights law.”⁵⁵ Likewise, contemporary international and regional tribunals, such as the International Court of Justice and the European Court of Human Rights, do not have the jurisdiction to prosecute individuals for criminal offenses, and so these tribunals are also inappropriate points of reference for the ICTR.

This paper does not promote the ICTY’s jurisprudence on witness protection issues as an ideal to which the ICTR should unquestioningly adhere. Rather, the paper compares ICTR case law to that of the ICTY because the Rwandan Tribunal has itself repeatedly invoked the ICTY’s jurisprudence in order to justify its expansive practice of shielding witnesses’ identities from the public and delayed disclosure of witnesses’ identities to the defense. In addition, ICTY case law on witness protection is a useful tool for comparison because the rules of procedure and evidence for the two tribunals are virtually identical.

III. APPLICATION OF *TADIC* IN ICTR JURISPRUDENCE

Although the Yugoslav Tribunal has substantially departed from *Tadic* in its subsequent jurisprudence, the Rwandan Tribunal has continued to apply the *Tadic* framework and has granted protective measures to witnesses practically as a matter of course. However, the “unique” context of an ongoing war and a lack of a witness protection program, on which the ICTY based its grant of anonymity to certain wit-

54. See May, *supra* note 1, at 164.

55. W.J. Fenrick, *In the Field with UNCOE: Investigating Atrocities in the Territory of Former Yugoslavia*, 34 MIL. L. & L. WAR REV. 35, 36 (1995).

nesses in *Tadic* distinguishes it from the context in which the ICTR operates. First, there is no ongoing war in Rwanda. Second, the ICTR has a fully functioning Victim and Witness Protection unit. Third, the Rwandan government has established *Gacaca* tribunals to try crimes committed during the 1994 genocide. These trials take place near the places where perpetrators and witnesses live and with full disclosure of witnesses' identities.⁵⁶ Thus, the public nature of the *Gacaca* process is at odds with the *Tadic* court's emphasis on witness protection issues.

The majority of ICTR witnesses seeking protective measures from the Tribunal are Rwandans who reside in Rwanda, although a few live abroad.⁵⁷ The Tribunal's statute requires the ICTR to provide measures for the protection of victims and witnesses in its Rules of Procedure and Evidence.⁵⁸ Of the witnesses that come to testify at the ICTR, a large number invoke this statutory provision and request protection.⁵⁹ Granting these requests often conflicts with an accused's statutory right to a "fair and public hearing," because some forms of witness protection restrict the defense's ability to cross-examine.⁶⁰ However, the Rwandan statute provides no guidance for judges on how to resolve this tension between the rights of the accused and the safety of the witness.

As noted above, in *Tadic*, and then in *Blaskic*, the Yugoslav Tribunal set forth guidelines as to how to assess these competing rights. By contrast, the Rwandan Tribunal has failed to

56. See Uvin & Mironko, *supra* note 9, at 226.

57. Prosecutor v. Niyitega, Case No. ICTR-96-14-I, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (July, 12 2000); Prosecutor v. Mugiraneza, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Protective Measures for Witnesses (July 12, 2000).

58. ICTR Statute, *supra* note 2, art. 21(4).

59. The ICTR's official website compares the number of witnesses testifying at the Tribunal with those requesting protective measures up through 2000. In 1997, there were 82 witnesses, and 71 requested protective measures (apart from relocation requests). In 1998, there were 65 witnesses, 32 requested protective measures, and so on. In 2000, there were 79 witnesses, and 24 requested protective measures. (The statistics for 1999 appear to be incomplete or wrongly reported, as the numbers do not properly add up.) See figures listed in "Witness and Victim Support Section," linked to from the ICTR website, <http://www.ictt.org> (last visited January 1, 2005). The exact url is <http://69.94.11.53/default.htm>.

60. ICTR Statute, *supra* note 2, art. 20.

offer a coherent set of guidelines on how to balance the rights of the accused against the safety of the witness. For this reason, much of the ICTR jurisprudence on this issue proceeds without strict standards or even basic guidelines. The ICTR's somewhat blunt method of resolving cases raises questions of both the fairness and the accuracy of ICTR trials.

A. *Non-Disclosure to the Defense*

The notion of equality of arms between the prosecution and the defense is laid down in Article 20 of the Rwandan Tribunal's governing statute. Specifically, the statute states that "the accused shall be entitled to a fair and public hearing."⁶¹ The statute then explains that a fair and public hearing is contingent on the right of the accused "to examine, or have examined, the witness against him or her and to obtain the attendance and examination of witnesses."⁶² Rule 69(a) of the Tribunal's Rules of Procedure and Evidence provides that only in "exceptional circumstances" may the prosecutor request the Chamber to order the non-disclosure of the identity of a witness. In any event, Rule 69(c) requires that the prosecutor disclose the identity of a witness to the defense prior to trial "to allow adequate time for the preparation of the case." This right of adequate preparation is echoed in Article 20(4) of the Tribunal's statute: "In the determination of any charge against the accused . . . the accused shall be entitled to . . . have adequate time and facilities for the preparation of his or her defence."

In practice, the ICTR has compromised defendants' Rule 69(c) and Article 20(4) rights to "adequate . . . preparation" by permitting the prosecution to delay disclosure to the defense of the witnesses' identities until after the commencement of the trial in a number of cases.⁶³ For example, in a December

61. *Id.*

62. *Id.* art. 20(4)(e) ("Rights of the Accused") ("In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . .

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.").

63. *See, e.g. Kabiligi, supra* note 11, ¶ 7 (disclosure "not later than twenty-one days before the protected witness is to testify at trial"); *see also Niyitegeka, supra* note 11, ¶ 16 (July 12, 2000).

5, 2001 decision on protective measures for prosecution witnesses in the *Bagosora* case, Trial Chamber III of the Tribunal abrogated the accused's statutory right to adequate preparation in favor of witness protection without any compelling justification. In effect, the Trial Chamber allowed the prosecutor to disclose the identities of witnesses to the defense after the commencement of the trial on a "rolling basis" from the anticipated date of testimony.⁶⁴ With this decision, the Chamber expressly recognized "that it ha[d] departed from the strict letter of Rule 69(c)," which requires that the Prosecution disclose the identities of witnesses to the defense prior to the start of the trial.⁶⁵ Rule 69(c) was instituted in recognition of the importance of the timing of the prosecutor's disclosure of the identities of witnesses to the defense. Disclosure prior to trial is necessary to allow the defense adequate time to prepare for cross-examination of witnesses. The Chamber defended this radical departure from the plain meaning of Rule 69(c) by relying on the conjecture that forcing witnesses to disclose their identities prior to trial would have resulted in a situation "repugnant to the intent of providing meaningful protection for victims and witnesses."⁶⁶ However, the Chamber provided no evidence of potential bodily harm if the identities of these witnesses were released to the defense in advance of trial proceedings. Instead, to justify its departure from the plain text of the statute, the Rwandan Tribunal blindly relied on *Tadic*. Specifically, the Trial Chamber in *Bagosora* cited *Tadic* to demonstrate ICTY and ICTR judges' concern for the protection of victims and witnesses when drafting the Yugoslav and Rwandan Tribunals' statutes. The Chamber quoted the following lines from *Tadic*:

In drafting the Rules of Procedure and Evidence . . . the Judges of the International Tribunal [for Yugoslavia] endeavored to incorporate rules that addressed issues of particular concern, such as the protection of victims and witnesses [One measure of] protection is that arrangements are made for the identity of

64. Prosecutor v. Bagosora, Case No. ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, ¶¶ 23, 25 (Dec. 5, 2001).

65. *Id.* ¶ 25.

66. *Id.*

witnesses who may be at risk not to be disclosed to the accused until such time as the witness is brought under the protection of the International Tribunal.⁶⁷

However, this quotation from *Tadic* is unhelpful in striking a balance between the rights of the accused and those of the witness. Although it mentions statutory provisions for protective measures for witnesses, it says nothing about the competing rights of the accused. The irrelevance of this quotation for determining the balance between the accused's rights to a fair trial and the witness's rights to protective measures is even more striking because this is the only passage from *Tadic* quoted by the *Bagosora* Chamber. The *Bagosora* Chamber failed to examine the relevant and lengthy portions of the *Tadic* judgment that dealt with guidelines for balancing the rights of the accused against those of the witness.

Moreover, by selectively relying on *Tadic*, and ignoring the ICTY's subsequent jurisprudence on disclosure of witnesses' identities, the Rwandan Chamber in *Bagosora* ignored the Yugoslav Chamber in *Blaskic*. As noted above, the Yugoslav Tribunal in *Blaskic* made clear that during pre-trial proceedings, and continuing for "a reasonable time" before the start of the trial, "victims and witnesses merit protection, even from the accused."⁶⁸ However, "from that time forth . . . the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour."⁶⁹ Despite this precedent in ICTY jurisprudence, the Rwandan Tribunal in *Bagosora* allowed the Prosecution to continue to veil the identities of witnesses to the defense after the commencement of the trial. The Chamber decided to lift this veil only on a "rolling basis" throughout the course of the trial. While the ICTR is not bound by ICTY jurisprudence, the *Bagosora* Chamber failed to offer any analysis of why the Rwandan Tribunal continued to rely on *Tadic* rather than on *Blaskic*, the more recent case. By continuing to cite to *Tadic* without reference to subsequent decisions by the ICTY on the issue of witness protection, the Rwandan Tribunal based its judgment on an outdated authority.

67. *Tadic Prosecutor's Motion Requesting Protective Measures*, *supra* note 5, ¶ 24.

68. *Blaskic II*, *supra* note 49, ¶ 24.

69. *Id.*

In fact, although the *Bagosora* Chamber cited to *Tadic*, the *Bagosora* Chamber backtracked from the *Tadic* opinion. As opposed to the *Tadic* majority opinion, which acknowledged that granting anonymity to certain prosecution witnesses conflicted with the defense's right to a fair trial,⁷⁰ the *Bagosora* Chamber failed to recognize the inherent tension between a witness's right to shield his or her identity from the defense, and the defense's right to a fair trial in the Tribunal's Rules of Evidence and Procedure. Instead, the Chamber in *Bagosora* simply denied that the two rights conflict with one another:

There is nothing within the Statute that indicates that an accused's right to a fair trial is somehow hampered or compromised in service of witness protection. The concepts of protective measures for witnesses, including delayed disclosure of identity, did not streak like a meteor across the existing statutory and regulatory landscape of the accused's right to a fair trial and cross-examination.⁷¹

The *Bagosora* Chamber's assertion that delayed disclosure to the defense of the identities of witnesses poses no potential for infringement of the rights of the accused to a fair trial is inconsistent with the Statute itself and with international criminal legal norms. As noted above, Article 20(4) of the ICTR's statute makes clear that the Prosecution must disclose the identities of witnesses prior to trial so as to allow the defense "adequate time for the preparation of the case."⁷² Likewise, the international legal community has recognized that disclosure of the identity of a witness after the commencement of the trial materially impairs the defense's ability to prepare for cross-examination of that witness.⁷³ Moreover, there is an in-

70. *Tadic III*, *supra* note 45, ¶ 60.

71. *Bagosora*, *supra* note 64, ¶ 16.

72. The Yugoslav Tribunal has similarly emphasized that the identities of witnesses must be revealed "*before trial commences rather than before the witness gives evidence*" (emphasis in original) in considering when applications should be made for protective measures for witnesses. See Prosecutor v. Milosevic, Case No. IT-02-54, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, ¶ 26 (Feb. 19, 2002), available at <http://www.un.org/icty/milosevic/trialc/decision-e/20219PM517175.htm>.

73. See Monroe Leigh, *Witness Anonymity Is Inconsistent With Due Process*, *supra* note 4, at 80 ("Every trial lawyer knows that effective cross-examination

creased need for cross-examination in ICTR trials because the Office of the Prosecution chooses to call many of its witnesses on the basis of their pre-trial statements given to prosecution's field investigators.⁷⁴ The Rwandan Tribunal has noted a great number of inconsistencies between these statements and in-court testimonies.⁷⁵ The Tribunal attributes these differences to translation issues from Kinyarwanda to English and to the fact that these statements were neither made under solemn declaration nor taken by judicial officers.⁷⁶ In any event, the substantial differences between pre-trial statements and in-court testimonies of numerous witnesses reinforce the importance of allowing the defense adequate preparation time for cross-examination.

Since the 2001 *Bagosora* decision, the Rwandan Tribunal has taken on a slightly more nuanced approach to disclosure of prosecution witnesses' identities to the defense. First, in July of 2002, the judges at the Rwandan Tribunal elected to amend Rule 69(c) of its Rules of Procedure and Evidence, which had originally required disclosure 60 days prior to the commencement of trial.⁷⁷ This amendment reworded the Rule's provision that the identity of a witness "shall be disclosed in sufficient time prior to the trial" with the provision that the identity of a witness "shall be disclosed within such a time as determined by the Trial Chamber to allow adequate

depends in major part on careful advance preparation. And this in turn depends on knowing the identity of accusing witnesses."); *see also* Prosecutor v. Delalic et al., Case No. IT-96-21-T, Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses, ¶ 19 (Mar. 18, 1997) ("[t]he basic right of the accused to examine witnesses, read in conjunction with the right to have adequate time for the preparation of his defence, therefore envisages more than a blind confrontation in the courtroom. A proper in-court examination depends upon a prior out of court investigation.").

74. *Akayesu*, *supra* note 10, ¶ 137.

75. *Id.*

76. *Id.*

77. Rule 69(c) had formerly read: "Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence." ICTR Rules, *supra* note 2, Rule 69. The Rule now reads, "Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by the Trial Chamber to allow adequate time for the preparation of the prosecution and the defence." ICTR Rules of Evidence, Rule 69(c) (2002).

time for preparation of the prosecution and the defence.” The modification of this rule provides judges with virtually unlimited discretion when deciding the timeline for disclosure of witnesses’ identities to the defense. However, this amendment to Rule 69(c) merely codifies the Tribunal’s preexisting tendency, as discussed above with respect to *Bagosora*, to allow rolling disclosure after the commencement of a trial. More fundamentally, ICTR Judges failed to offer any guidelines on the proper administration of the modified Rule. Thus, the rewording of Rule 69(c) only brought to the fore, rather than resolved, the tension between a system of rolling disclosure and the accused’s right to adequate preparation time for cross-examination.

Second, in 2003, the ICTY reversed its earlier *Bagosora* decision, discussed above, which allowed for rolling disclosure of prosecution witnesses’ identities to the defense even after the commencement of the trial.⁷⁸ Instead, this new decision directed the prosecution to immediately disclose the identities of its witnesses. However, by the time of this, second decision, the *Bagosora* trial had already begun. Moreover, this new holding was on extremely narrow grounds. The Chamber reversed its former decision only on the basis of two changes in factual circumstances. First, by 2003, the number of prosecution witnesses who requested protection had dropped from 200 to less than 100.⁷⁹ This reduction was significant because it substantially alleviated the burden on the Witness Protection program. Therefore, the Chamber found that the Program’s task of protecting witnesses whose identities were to be disclosed to the defense had become more manageable.⁸⁰ Second, by that time, the prosecution had declared its intent to accelerate the pace of the trial. Thus, witnesses’ identities would be known to the defense for a reduced amount of time before testifying

78. The *Bagosora* case, originally adjudicated by Trial Chamber III, was reassigned to Trial Chamber I in June of 2003. After this transfer, the Defence requested that Trial Chamber I review the 2001 Trial Chamber III order on protective measures, which allowed for disclosure of witnesses’ identities after the commencement of the trial. See *Bagosora II*, *supra* note 6, at 2.

79. *Id.* at 6.

80. *Id.*

than had been anticipated.⁸¹ Therefore, the Chamber recognized the need for increased disclosure with the accelerated trial in order for the defense to have adequate time to prepare its case.

On the one hand, by taking into account the specific circumstances of the trial and its implications for witness protection on the ground, this second *Bagosora* decision is a step forward in the ICTR's jurisprudence on this issue—in the first *Bagosora* decision, the Chamber issued protective measures to prosecution witnesses without this kind of individualized determination. On the other hand, this second *Bagosora* decision represents a missed opportunity for the Tribunal to have established clear and relevant guidelines on disclosure of witnesses' identities to the defense. For example, the decision fails to address the issue of who has the burden of proving a certain level of fear of bodily harm, as well as the appropriate standard of proof to be applied in these cases. In addition, since the trial had already begun by the time of the second *Bagosora* decision, the Chamber was able to avoid the issue of whether a system of rolling disclosure would be acceptable in future cases. By failing to establish a clear methodology for addressing the timing of disclosure of witnesses' identities to the defense, the second *Bagosora* decision left open the question of how the Tribunal will handle this issue in the future.

B. *Non-Disclosure to the Public*

The Rwandan Tribunal has failed to analyze the differences between the security situation in post-genocide Rwanda and that in the former Yugoslavia in its treatment of disclosure of witnesses' identities. Instead, the ICTR has relied on *Tadic* to justify its practice of regularly shielding witnesses' testimonies from the public without sufficient analysis of the relevance of that decision's application to the current security situation in Rwanda. One example of the Rwandan Tribunal's inappropriate reliance on *Tadic* appears in the case *Prosecutor v.*

81. *Id.* (“[t]he Prosecution’s stated aspiration to complete [the trial] rapidly (possibly by the end of 2003, if there were not a significant break during the second half of the year) substantially reduces the period during which the protected witnesses’ identity would be known by the Defense before testimony.”).

Musema.⁸² On appeal, Musema alleged that the Trial Chamber erred by failing to give special consideration to the fact that all of the Prosecution witnesses testified in sessions closed to the public: “There is a special need for caution when testimony is given by witnesses who will not do so under their own name.”⁸³ Counsel for *Musema* was particularly concerned that a witness whose identity is unknown to the public “can show disregard for the truth with all impunity,” knowing that his or her testimony will not come under public scrutiny.⁸⁴ The Appeals Chamber rejected Musema’s challenge to Trial Chamber practice. Instead, the Appeals Chamber responded that the Trial Chamber was “bound to consider the testimony of these witnesses in the same way as that of witnesses who are not afforded protective measures.”⁸⁵ While the Appeals Chamber acknowledged that the Trial Chamber “may” consider a witness’s insistence on closed session testimony as relevant in assessing that witness’s credibility, it rejected Musema’s contention that the Trial Chamber “must” afford such testimony lesser weight in determining the guilt or innocence of the accused.⁸⁶ The Appeals Chamber justified this decision by quoting from the Yugoslav Tribunal’s *Tadic* judgment. Specifically, the *Musema* Chamber pointed to the *Tadic* majority’s statement that a court has to “interpret [its] provisions within the context of its own unique legal framework in determining where the balance lies between the accused’s rights to a fair and public trial, the right of the public to access information, and the protection of victims and witnesses.”⁸⁷ The *Musema* Chamber offered this quote, without any further analysis, as proof-positive evidence for rebutting Musema’s claim that the Chamber should differentiate between open and closed session testimony when assessing the probative value of witnesses’ statements.

The Appeals Chamber’s application of *Tadic* to the Rwandan Tribunal is unconvincing for two reasons. First,

82. Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeals Chamber Judgment (Nov. 16, 2001).

83. *Id.* ¶ 64.

84. *Id.*

85. *Id.* ¶ 71.

86. *Id.*

87. *Id.* ¶ 68 (quoting *Tadic Prosecutor’s Motion Requesting Protective Measures*, *supra* note 5, ¶ 4).

Judge McDonald in *Tadic* explained that the “unique” framework in which the Yugoslav Tribunal operated was the ongoing war in the former Yugoslavia, and the absence of a Witness Program at that time.⁸⁸ Judge McDonald specifically relied on the combination of the ongoing war and the lack of a viable witness protection program to justify balancing the rights of witnesses over that of the accused in terms of non-disclosure of the identities of witnesses to the public. Nevertheless, the *Musema* Appeals Chamber cited to *Tadic* in order to justify treating open and closed testimony as identical in probative weight without examining how the “unique” context of the former Yugoslavia compared with that of post-genocide Rwanda. It seems implausible that testifying at the Rwandan Tribunal several years after the end of the Rwandan genocide, and after the implementation of a witness protection program, would pose the same risk of bodily harm as testifying at the ICTY at the time of the *Tadic* decision.

Second, the *Tadic* judgment provided that “any curtailment of the accused’s right to a public hearing is justified by a genuine fear for the safety of [the] witness.”⁸⁹ The *Tadic* court required that this fear be assessed on “objective” grounds and that protective measures be assessed on a case-by-case basis.⁹⁰ The Yugoslav Tribunal has elaborated on the importance of individualized determinations of protection for witnesses in the face of a “volatile” security situation of “ethnic tension and hatred” in the former Yugoslavia.⁹¹ Even considering such a climate, in which witnesses “have more to fear for their own safety and that of their family than in countries where peace and stability prevail . . . [t]his does not mean that every similar case merits the granting of protective measures.” Rather, the Court noted that “such measures should *only* be granted in ex-

88. *Tadic Prosecutor’s Motion Requesting Protective Measures*, *supra* note 5, ¶ 27.

89. *Prosecutor v. Tadic*, Decision on the Defense Motion to Summon and Protect Defense Witnesses, and on the Giving of Evidence by Video-Link, Case No. IT-94-I-T, *supra* note 46, ¶ 35.

90. *Id.* (explicitly rejecting awarding “blanket measures” of protection).

91. *See Prosecutor v. Furund_ija*, Decision on Prosecutor’s Motion Requesting Protective Measures for Witnesses ‘A’ and ‘D’ at Trial, (June 11, 1998), ¶ 7.

ceptional circumstances.”⁹² The Yugoslav Tribunal’s emphasis on individualized analysis when deciding whether to grant protective measures despite precarious security conditions in the former Yugoslavia is important because the Rwandan Tribunal has relied on similar security concerns in Rwanda to justify granting blanket measures of protection to witnesses in certain cases.

For example, although the Rwandan Tribunal in *Musema* cited to *Tadic* to support its decision to shield witnesses’ identities from the public, it failed to make any inquiry into the objective justification for the fear surrounding each witness’s request to testify on an individualized basis. Instead, while the Chamber cited to objective sources—in this case, United Nations reports—to evaluate the general security situation in Rwanda, the Chamber granted all prosecution witnesses blanket protection from public disclosure without any attempt at case-by-case analysis.⁹³ The Rwandan Tribunal’s failure to take into consideration the extent of the threat to each witness posed by public testimony not only goes against international precedent, but also might have led to inaccurate assessments of the credibility of witnesses’ testimonies. At the minimum, the *Musema* Chamber should have checked with sources in Rwanda and in the Witness Protection Program to obtain some objective assessment of the risk of bodily harm to each witness requesting anonymity.

The lack of individualized analysis in the *Musema* case typifies the Rwandan Tribunal’s decisions on the disclosure of wit-

92. *Prosecutor v. Brdanin & Talic*, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, ¶ 11, available at <http://www.un.org/icty/brdjanin/trialc/decision-e/00703PM213035.htm>. The Trial Chamber justified granting protective measures in this circumstance because the “allegations concern[ed], *inter alia*, a serious case of rape.”

93. See *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor’s Motion for Witness Protection, ¶12 (Nov. 20, 1998) (“In this case, notice is taken of the annexures presented by the Prosecutor in support of her motion, namely the United Nations High Commissioner for Human Rights Field Operation in Rwanda (HRFOR) Status Report (HRFOR/STRPT/33/1/24 January 1997/E) and the HRFOR Summary Report on the Human Rights Situation in Rwanda (HRFOR UPD 11 September 1996 E). Judicial notice is also taken of the HRFOR Report on the Human Rights Situation in Rwanda and of the activities of HRFOR (HRFOR/RPT/13/May-June 1997/E) and of the HRFOR Status Report (HRFOR/STRPT/56/1/28 August 1997/E).”).

nesses' identities to the public. For example, in both the *Bagosora* case and the more recent case *Prosecutor v. Renzaho*,⁹⁴ the Tribunal has issued blanket measures of protection for witnesses without sufficient scrutiny of the extent of threat of bodily harm to each witness. In *Bagosora*, the Tribunal granted the prosecution's request for protection from the public for two categories of witnesses: "Category A: Any person residing in Rwanda who may be called as a Prosecution witness during the trial of the accused unless he waives the application of the protective measures available;" and "Category B: Any person residing outside Rwandan who may be called as a prosecution witness during the trial of the accused, who express [sic] fear for his or her safety."⁹⁵ Although the Chamber divided the witnesses into two categories, reason dictates that all witnesses are either persons residing in or outside of Rwanda. Rather than evaluate the potential threat to each witness of openly testifying, the *Bagosora* Chamber allowed all of the prosecution's witnesses the option of closed-session testimony without any further analysis.

Similarly, the Chamber in the *Renzaho* case justified its failure to scrutinize the security threat to each witness on the basis of the format of the prosecution's motion for protective measures. The Chamber stipulated that "[s]ince the Motion requests blanket protection for all victims and potential witnesses to crimes alleged in the Indictment, the Chamber is not in a position to evaluate the relevance of the testimony of individual witnesses."⁹⁶ Rather than reject or remand the motion, the Chamber ultimately decided to grant the Prosecutor's request without any attempt at case-by-case analysis. Thus, compared with the Yugoslav's Tribunal individualized approach to granting protective measures to witnesses, the Rwandan Tribunal's blanket grant of protection to Prosecution witnesses in *Musema*, *Bagosora*, and *Renzaho* appears jurisprudentially unsophisticated and haphazard.

94. See *Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, (Aug. 17, 2005), available at <http://196.45.185.38/ENGLISH/cases/Kabiligi/decisions/dcs190500.htm>.

95. See *Bagosora*, *supra* note 11, ¶ i(b).

96. *Renzaho*, *supra* note 94, ¶ 9.

IV. CULTURAL CRITIQUE

Although the Tribunal has expressly recognized the implications of Rwandan oral traditions for the cross-examination process, it has failed to evaluate the implications of these traditions in deciding upon witnesses' requests for anonymity before and during the trial.⁹⁷ While the Tribunal has been made aware of the existence of *Gacaca* in Rwanda, it has ignored the implications of this system on its own policy of shielding the identities of witnesses from the public.

A. *Cultural Factors Affecting Witness Testimony*

The defense's right to cross-examine prosecution witnesses is particularly important in the Rwandan context because of viewpoint inconsistencies in Rwandan oral culture—the majority of Rwandans transmit information as if they were an eyewitness to an event even when information is learned second- or third-hand.⁹⁸ The Court in *Prosecutor v. Akayesu* explicitly noted this discrepancy by referring to the testimony of an expert witness, Dr. Mathias Ruzindana: “Dr. Mathias Ruzindana noted that most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else.”⁹⁹ The Rwandan tendency to narrate in the first person brings into relief the importance of cross-examination to correctly identify the relationship of a witness to an event.¹⁰⁰ The Court further cited Dr. Ruzindana for the contention that cross-examination is an effective means to differentiate between first and second hand witnesses: “Dr. Ruzindana noted that when questioned, a clear distinction could be articulated by the [Rwandan] witnesses between what they had heard and what they had seen.”¹⁰¹ On account of this expert testimony, the ICTR in the *Akayesu* case

97. *Id.*

98. *Akayesu*, *supra* note 10, ¶ 155.

99. *Id.*

100. Indeed, there is some evidence that a number of witnesses were exposed to distorted information. *Id.* (“Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener.”).

101. *Id.*

recognized the importance of cross-examination in sorting out eyewitness from second-hand witness testimony: “[Cross-] examination at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed.”¹⁰² In addition, the *Akayesu* Chamber noted that it is often difficult to decipher testimony from Rwandans because of a cultural tendency to avoid direct answers: “It is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly.”¹⁰³ Therefore, the process of cross-examination becomes crucial in order to “decode” indirect answers to potentially every issue that a witness finds sensitive in a case. Although a witness still may not decode his or her prior statements when cross-examined by defense counsel, the process of cross-examination will likely expose whether a witness’s statement can be taken at face value. Thus, when the Tribunal delays the revelation of witnesses’ identities to the defense until after the commencement of the trial, it severely hinders a complicated process of preparing to cross-examine a witness not only on the facts, but also on the manner in which a particular witness might respond to questioning.

Of course, cross-examination is not the only mechanism of evaluating a witness’s credibility. Comparing pre-trial and trial statements is another means by which a court can assess the credibility of a witness’s statement. However, in light of considerable doubts about the techniques employed by field investigators in gathering the pre-trial statements in Rwanda,¹⁰⁴ the adversarial questioning of the witness through the cross-examination process is arguably a more direct way to expose the inconsistencies between pre-trial and trial statements. The cultural tendency for viewpoint inconsistency in relating events and for indirect answers to questions increases the potential for inaccuracies in pre-trial statements. Since the prosecution’s case against an accused is almost solely based on

102. *Id.*

103. *Id.* ¶ 156.

104. The Rwandan Tribunal has noted the great number of inconsistencies between these statements and in-court testimonies. *Id.* ¶ 137.

witness testimonies,¹⁰⁵ the credibility of these testimonies is essential to accurately assess the guilt or innocence of a defendant. Thus, the ICTR has recognized that each witness's performance under cross examination is a key factor in assessing the credibility of that witness.¹⁰⁶

B. *Gacaca*—Full Disclosure in Another Venue

The above discussion demonstrates why the ICTR should take account of Rwandan cultural tendencies when deciding whether to shield a witness's identity from the defense. Similarly, the ICTR should take account of *Gacaca*, the form of judicial process currently in place in Rwanda, when deciding whether to shield a witness's identity from the public. The public nature of the Rwandan *Gacaca* suggests full disclosure of the identities of witnesses would be appropriate at the UN Tribunal.

In 2001, in response to a backlog of court cases against more than 100,000 Rwandans (lower in rank than those persons tried at the ICTR), the Rwandan government established a novel mechanism of dispute resolution known as *Gacaca*.¹⁰⁷ The *Gacaca* process has been described as a "participatory and communal enterprise."¹⁰⁸ The participatory process of the *Ga-*

105. See May, *supra* note 1, at 165.

106. See Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgement and Sentence, ¶¶ 607-54 (June 7, 2001).

107. Organic Law No. 08/96, dated August 30, 1996, categorizes those persons accused of crimes relating to genocide into four categories based on the seriousness of the charges against these person. The four categories are: 1) Those who planned, organized, and led the genocide, along with mass murderers, rapists, and torturers. The jurisdiction to try these persons is listed as the ordinary judicial system in Rwanda. Notably, the ICTR is not listed. 2) Those who did not take part in the planning of the genocide, but acted in furtherance of the genocide by committing murder on the basis of ethnicity. These persons will be judged by *Gacaca* on the municipality level and may be sentenced to life in prison. 3) Those who participated in serious infringements against persons based on ethnic violence, but without killing. The *Gacaca* trials on sector-level will have jurisdiction over these cases, which will be punished with a shorter sentence than those persons under category two. 4) Those who participated in the destruction or plundering of property. These cases will be treated by the lowest *Gacaca* tribunal at a cell-level and may be punished by compensating the victim(s). The Norwegian Helsinki Committee, *Prosecuting Genocide in Rwanda: The Gacaca System and the International Criminal Tribunal for Rwanda*, 14-15, Report II (Sept. 2002).

108. Daly, *supra* note 7, at 376.

caca relies on the local community as a whole to serve as witness to the 1994 events—community members openly raise objections to defendants’ and witnesses’ testimonies, which are given in front of anyone who wishes to attend the hearing.¹⁰⁹ This system of full disclosure without any witness protection is done in the local communities, rather than far away in Tanzania. Because the vast majority of Rwandans were affected—“[t]he indirect or direct participation of so many people in the Rwandan genocide blurs the line between guilt and innocence”¹¹⁰—*Gacaca* involves open sessions before community members who have a stake in the revelation of the identities of witnesses and their testimony. For this reason, some commentators have applauded *Gacaca*’s emphasis on full disclosure in the communities because this localized mechanism makes sure that the process of “justice” is visible to those involved in the genocide.¹¹¹

Compared with the full visibility of *Gacaca*’s rendering of justice, the closed sessions and pseudonyms for witnesses’ names at the Rwanda Tribunal obscure the Tribunal’s process of rendering justice. The Rwandan Tribunal’s refusal to disclose the identities of certain witnesses to the public is incongruent with the public *Gacaca* trials in Rwanda. Indeed, a witness who testifies in closed session before the Rwandan Tribunal could potentially be subjected the very next month to the public sentencing of the *Gacaca* process.

An argument can be made that the lack of protective measures for witnesses at the *Gacaca* brings into relief the Witness Protection program at the ICTR as a particularly important forum for those witnesses who might be reluctant to testify publicly in the *Gacaca*. This argument overstates the relevant objection. This paper does not argue that the ICTR should drop its system of witness protection all together; rather, it suggests that the ICTR needs to engage in a more careful and individu-

109. See *id.* See also Eugenia Zorbas, *Reconciliation in Post-Genocide Rwanda*, 1 AFR. J. LEGAL STUD. 29, 36 (2004) (“*Gacaca*. . . encourag[es] acknowledgements and apologies from the perpetrators, and facilitat[es] the coming together of both victims and perpetrators every week, on the grass.”).

110. See Mark A. Drumbl, *Punishment, Post genocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1250 (2000).

111. See Daly, *supra* note 7, at 377. See generally the Rwandan official publication on “Genocide & Justice” as appears at <http://www.gov.rw/government/genociddef.html> (last visited January 1, 2005).

alized analysis so that judges do not arbitrarily sacrifice a defendant's right to a fair trial in favor of protection for witnesses. In light of *Gacaca*'s public hearings, the ICTR should investigate whether the *Gacaca* process has already disclosed a particular witness's identity when evaluating the necessity for protective measures. This kind of individualized analysis by ICTR judges would provide a more meaningful counter-weight to the lack of protection at *Gacaca* than the kind of blind protection measures often issued by the Tribunal. Rather than needlessly closing sessions at the ICTR to the Rwandan public, individualized analysis would provide protection to those witnesses whose identities had not been revealed in *Gacaca*.

V. CREDIBILITY IMPLICATIONS

The ICTR's practice of allowing witnesses to remain anonymous to the public, and in some circumstances to the defense until after the commencement of the trial, threatens the legitimacy and credibility of the Tribunal among both Rwandans and the international community.

A. *Local Credibility*

In establishing the ICTR system to prosecute crimes based on the 1994 genocide, the Commission of experts convened by the Secretary-General believed that an international tribunal was better suited than a domestic court to achieve justice in an objective, impartial, and fair manner.¹¹² The Secretary-General's recommendation to the Security Council that the seat of the ICTR be in Tanzania, rather than in Rwanda, was based on a similar concern for "justice and fairness" in a "neutral territory."¹¹³ Therefore, the Council assigned to the ICTR jurisdiction over trials of high-level *génocidaires* under international law. The Council assigned to Rwandan national courts con-

112. The Secretary General, *Letter Dated 1 October 1994 From the Secretary-General Addressed to the President of the Security Council*, Annex ¶¶ 136-8, *delivered to Security Council*, U.N. Doc. S/1994/1125 (Oct. 1, 1994).

113. *See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994)*, ¶¶ 41-5, *delivered to Security Council*, U.N. Doc. S/1995/134 (Feb. 13, 1995).

current jurisdiction to prosecute lesser crimes charged against more minor accomplices under Rwandan law.¹¹⁴

However, the prevalent use of witnesses anonymous to the public and to the defense in ICTR trials calls into question the Security Council's rationale for using an international tribunal based in Tanzania rather than a domestic court. The ICTR's practice of non-disclosure of witnesses' identities makes it impossible for Rwandans to assess whether the Tribunal is in fact objective and fair. Since trials occur in Tanzania, and the average Rwandan cannot afford the cost of travel, Rwandans are unable to make a first-hand evaluation of the fairness of trials.¹¹⁵ Access to media accounts of ICTR trials is similarly limited—most Rwandans do not own a radio or television set and there are few newspapers.¹¹⁶ Instead, those Rwandans who are literate are forced to rely on trial transcripts with many redacted sentences and pseudonyms in the place of witnesses' names.

Despite the recommendations of the Security Council, Rwandans in fact have created their own mechanism, *Gacaca*, to render justice based on their experience with property disputes. Thus, the ICTR must make special efforts to convince the Rwandan people of its legitimacy relative to *Gacaca*. However, the dissemination of fragmentary trial transcripts—which are marred by redacted passages, allusions to closed sessions, and the use of pseudonyms to protect witness identities—rein-

114. S.C. Res. 955, Annex art. 8.1-2, U.N. Doc. S/RES/955 (Nov. 8, 1994) (providing for the Statute for the International Tribunal for Rwanda”).

115. See Samantha Power, *Rwanda: The Two Faces of Justice*, THE NEW YORK REVIEW OF BOOKS, Jan. 16, 2003, at 47 (“The UN court is a world away from the people whom international justice claims to serve. The rare Rwandan who tries to visit the UN court must take a bus through four countries to get there – from Kigali, Rwanda, to Kampala, Uganda, to Nairobi, Kenya, to Arusha, Tanzania. The journey takes two days, and costs around \$40 for the bus ticket and \$20 for a Kenyan transit visa. This is more than most Rwandans earn in a month.”).

116. See *Akayesu*, *supra* note 10, ¶ 155 (testimony of Dr. Ruzindana); see also The Norwegian Helsinki Committee, *supra* note 107, at 22 (“There are no daily newspapers, but two papers are published two to three times a week, one of them (The New Times) only in English. These are mainly distributed in the cities. In the real countryside there are no papers at all, and illiteracy is widespread. Rwanda has no national network of television, and television sets are found only in larger cities. In addition, the countryside is suffering from a poor and unstable power supply; this is of course also making it impossible to use TV to inform the people.”).

forces the Rwandan perception of the ICTR as excluding the local populace from the judicial process.¹¹⁷ This lack of transparency may be especially troublesome for Rwandans because they are accustomed to the *Gacaca* process with full disclosure of witnesses' identities. In the *Gacaca* system, Rwandans rely on their own experiences to confirm or challenge testimonies from witnesses in the full purview of the community.¹¹⁸ By contrast, the ICTR's reliance on closed sessions prevents the Rwandan community from adequately assessing the fairness of the proceedings. Because witnesses' identities are not revealed, Rwandans cannot evaluate the relative validity of different accounts of events.

Members of the Rwandan community have expressed dissatisfaction with the ICTR's current system of witness protection. This dissatisfaction stems not from the quantity of protection in terms of the number of witnesses to whom the Tribunal offers protection, but from the quality of protection offered to witnesses. Martin Ngoga, Rwanda's Representative to the ICTR, has commented that the identities of witnesses are often well known in their communities, despite their involvement in the Tribunal's witness protection program.¹¹⁹ Ngoga has attributed this exposure to the fact that the ICTR's protection measures are limited to offering physical security to witnesses while they are testifying in Arusha; the ICTR fails to offer protection to witnesses once they have returned to their communities.¹²⁰ If the ICTR took a more careful approach in

117. In fact, Rwandans have felt excluded from the U.N. process of prosecuting war crimes from the Tribunal's inception. Rather than locate the Tribunal in Arusha, Tanzania, the Rwandan government argued that a Tribunal in Rwanda was more likely to achieve accountability and national reconciliation in that country. *Cf.* S.C. Res. 977, ¶¶ 3-5, U.N. Doc. S/RES/977 (Feb. 22, 1995) (determining Arusha as the seat of the ICTR). Moreover, for the first six years of its existence, the ICTR did little in terms of outreach to Rwanda. *See* SAMANTHA POWER, 'A PROBLEM FROM HELL': AMERICA AND THE AGE OF GENOCIDE, 496 (Harper Collins 2002). Only in 2000, when an American NGO prepared a documentary in Kinya-Rwanda on the UN trials in Arusha, and screened the film throughout Rwanda, did Rwandans have the opportunity to see what actually happened at the trials. *Id.* at 499.

118. *See* Daly, *supra* note 7.

119. Mary Kimani, *Rethink Witness Protection, Rwandan Envoy Urges ICTR*, INTERNEWS June 19, 2002, available at http://www.internews.org/activities/ICTR_reports/ICTRnewsJun02.html#0619c.

120. *See id.*

awarding protection to witnesses by assessing first, whether the witness had already been exposed through the *Gacaca* process, and second, what the objective level of risk of bodily threat posed by testifying at the Tribunal was for each witness, the number of witnesses who would be found to be deserving of protection would likely decrease. Such an approach would thus make available greater resources for those witnesses most in need of protection.¹²¹ The same resources spent on a smaller group of witnesses could translate into augmented protection for ICTR witnesses in the form of post-testimony protection in Rwanda.

In addition, focusing the Witness Protection program's resources on a smaller group of witnesses might allow that program to offer more innovative psychological protections in addition to physical protections for certain witnesses. Ngoga and others have commented on the lack of psychological counselors available to witnesses upon arrival in Arusha.¹²² Thus, when lawyers cross-examine witnesses they often suffer psychologically: "It is not enough for you to just get someone from the village, bring them to the [airplane], fly them to Arusha, put them in a safe house and then bring them to court."¹²³ The need for psychological assistance is most apparent in survivors of sexual assault who testify at the Tribunal. The process of cross-examination on the details of the event is often emotionally traumatic for these victims.¹²⁴ The ICTR should make special efforts to provide these witnesses with emotional support prior to and after testifying to make sure that this type of witness continues to testify. If not, then such testimony will be underrepresented in the historical record of the genocide. A more individualized approach by the Tribunal to witness protection issues, presumably leading to a decreased number of witnesses to whom protection is offered, is one potential means of freeing resources in the Witness Protection program

121. *Id.* Indeed, the ICTR has pointed to limited economic resources as the reason for its failure to expand the scope of protection for witnesses.

122. *See id.*

123. *Id.*

124. Samantha Power has discussed the phenomenon of "tribunal survivors"—a term a number of victims of sexual assault during the genocide have created to describe their experiences being cross-examined by defense lawyers after giving testimony at the ICTR. *See Power, supra* note 115, at 48.

to provide for psychological counselors for witnesses who are victims of sexual violence.

B. *International Credibility*

The right to a public hearing in criminal trials is considered a fundamental procedural safeguard by the international community.¹²⁵ However, the ICTR's governing statute does not mandate a public hearing for defendants.¹²⁶ Rather, it leaves Tribunal judges to their own discretion in interpreting the conflicting rules of evidence that protect the rights of both the accused and witnesses. The ambiguity in the rules gives ICTR judges considerable leeway in determining whether a hearing should be open to the public. This system, in turn, creates the opportunity for inconsistency across the Tribunal's three trial chambers. Although certain international human rights instruments, such as the International Covenant on Civil and Political Rights, acknowledge the need for closed trials in exceptional cases where there is an immediate threat to the safety of witnesses, the ICTR regularly close their trials to the public without a serious assessment of the bodily threat to the testifying witnesses.¹²⁷

Similarly, the ICTR takes a blunt approach to protecting witnesses' identities from the defense, in contrast to the more

125. See *Werner*, *supra* note 44, ¶ 45 (“[The] public character [of a trial] protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained.”).

126. Article 20(2) of the ICTR Statute subjects the accused's right to “a fair and public hearing” to Article 21 of the Statute. ICTR Statute, *supra* note 2, art. 20(2) (“The International Tribunal for Rwanda shall provide . . . protection measures [which] shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.”).

127. Certain international human rights instruments do allow some measure of non-disclosure of the identity of witnesses to the public. However, these instruments condition this non-disclosure on a tangible threat to the security of the country or the witness. See ICCPR, *supra* note 4, art. 14(I) (“[T]he Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the interests of the private lives of the parties so requires.”); see also ECHR, *supra* note 4, art. 6(1) (“[T]he press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the . . . protection of the private life of the parties so require.”).

nuanced approach of the Yugoslavian tribunal.¹²⁸ There was a heated debate in the ICTY after *Tadic* about how to balance the interests of the accused against those of the witness. The Court in *Blaskic* subsequently assuaged international concern about the rights of the accused by allowing the defense (but not the public) to know the identity of all witnesses at the commencement of the trial.¹²⁹

By contrast, the ICTR has mechanically approached *Tadic* in its judgments and ignored the subsequent developments in the Yugoslavian Tribunal. Instead of taking a careful and balanced approach, the ICTR has continued to favor the rights of witnesses over the rights of the accused. Thus, the ICTR has reinforced its image, as described by some international media, as an untrustworthy tribunal in distant Africa, operating outside of Western judicial norms.¹³⁰

The second *Bagosora* decision, which called for immediate disclosure to the defense of the identities of prosecution witnesses, was a step in the right direction. However, the holding in that case was narrow because the Chamber limited its rejection of a system of rolling disclosure of witnesses' identities to the defense on circumstantial changes in that case. The Chamber failed to establish clear guidelines for judges to analyze this issue in the future. If the Tribunal were to formulate such guidelines, it would increase its international credibility both specifically in the area of witness protection and, more generally, as a serious international court. Rather than continue to rely inappropriately on *Tadic* on issues of witness protection, the ICTR would help to establish its identity as a well-functioning Tribunal, independent of the ICTY.

128. See generally *supra* note 11.

129. *Blaskic II*, *supra* note 49, ¶ 5.

130. See Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perception of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 35 (2002) ("Perhaps because of its African affiliation, the ICTR has not escaped the well-known prejudice that attaches to the continent in general. . . . There is a clear double standard in the reporting and assessments of the ICTR vis-à-vis the ICTY not only in the media, but also in other important stakeholders of international criminal justice such as some private international organizations.").

VI. CONCLUSIONS AND RECOMMENDATIONS

Placing greater value on protecting witnesses than on guaranteeing the minimum rights of the accused to a fair trial, deemed by one commentator on the *Tadic* case as a “radical proposition,”¹³¹ has become the norm at the Rwanda Tribunal. The ardent defenders of the accused’s right to a fair trial in *Tadic* have put up no resistance to the ICTR’s continuing practice of allowing for delayed disclosure of witnesses’ identities to the defense even after the commencement of trials. This lack of response from the international community may be attributed to ignorance of ICTR jurisprudence.¹³² Alternatively, it may instead reinforce preexisting general perceptions of the Tribunal as incompetent and unprofessional.¹³³ If this latter proposition is true, then the Rwandan Tribunal’s less than full regard for the rights of the accused fits nicely into this preconceived model of the ICTY’s African sister as incompetent. For the Rwandan Tribunal to gain international and local credibility, it must reform its evidentiary rules in light of the basic rights of the accused to a fair trial and of the cultural context in which the Tribunal operates.

A. *Specific Suggestions for the ICTR*

The ICTR should renounce *Tadic* by refusing to allow prosecutorial motions to shield witnesses’ identities from the defense. Instead, the ICTR should look to the Yugoslavian tribunal’s subsequent *Blaskic* decision, which holds in favor of full disclosure of witnesses’ identities to the defense at the commencement of the trial.

131. See Leigh, *supra* note 4, at 81.

132. The ICTR has received far less coverage in the global media than the ICTY. For example, more than 500 international journalists were present at the ICTY to cover the commencement of the trial against Slobodan Milosevic in February 2002, as compared with 80 journalists present at the ICTR to cover the tribunal’s verdict in its first case in September 1998. See Moghalu, *supra* note 130, at 25.

133. See, e.g., Zorbas, *supra* note 109, at 34 (“It is nearly impossible to overstate the bitter disappointment and ill will the ICTR’s alleged rampant corruption, bureaucracy, incompetence and above all, its meagre results – ten convictions in nearly ten years—all on a multi-million dollar annual budget, has generated with the RPF government, the Rwandan people and internationally.”).

The ICTR should only use closed sessions in limited cases. The Court should allow for a witness to testify without revealing his or her identity to the public only if it has gone through the process of assessing the actual extent of the threat to a particular witness's safety, rather than just relying on the Prosecution's contention that a threat to every witness exists. If the Tribunal finds that there are serious threats to a witness, it should instruct the Witness Protection program to increase protection for that witness, rather than automatically delay disclosure of that witness's identity to the defense.¹³⁴

For the ICTR, there should be a presumption of public testimony both because there is no ongoing war in Rwanda and because the *Gacaca* system already necessitates full disclosure of many witnesses' identities. In any event, the Prosecution should have the burden of proving the existence of a real safety threat and of checking whether the *Gacaca* process has already revealed the identity of the witness. Even if the Prosecution meets this burden, the Tribunal should take more seriously the defense's contention in *Musema* that testimony given in closed sessions should be awarded lesser probative weight in assessing guilt.

B. *General Implications of Non-Disclosure of Witnesses' Identities*

Ultimately, the practice of shielding the identities of witnesses from the defense and the public raises the question of what the objective of an international criminal tribunal such as the ICTR is. If an underlying purpose of the Tribunal is to establish a historical record of the 1994 genocide and provide a forum for justice for its victims, then non-disclosure of witnesses' identities is antithetical to this purpose: First, non-disclosure impedes truth-gathering by adversely affecting cross-examination of witnesses. As noted above, cross-examination

134. This is the approach the ICTY took in *Kuprešić*. In that case, on the basis of allegations of witness intimidation, the prosecution applied to delay disclosure of witnesses' identity until eight days before each witness was scheduled to testify. The court denied the prosecutor's request, and instead sought the assistance of local government authorities and the International Police Task Force to investigate these complaints and provided increased protection to these witnesses if necessary. See *Prosecutor v. Kuprešić*, Case No. IT-95-16, Decision on the Prosecution Motion to Delay Disclosure of Witness Statements (May 21, 1998), available at <http://www.un.org/icty/kupreskic/trialc2/decision-e/80521WS2.htm>.

of witnesses is particularly important for the chamber to make accurate conclusions in light of the Rwandan cultural tendency of explaining events in all cases as if they were observed first hand.¹³⁵ Second, trial transcripts and judgments filled with pseudonyms and redacted paragraphs create a record of events that is difficult to parse and lacks specificity.¹³⁶

At present, there is little consensus among Rwandans as to what actually happened between April and July 1994.¹³⁷ Unlike the Nazis, who kept records of their actions against the Jews, Hutus did not document their assaults against the Tutsis.¹³⁸ By clouding the historical record with undisclosed names and witness testimonies given without meaningful cross-examination, the ICTR undermines its function of providing a comprehensible and accurate historical record of the events of the 1994 genocide.

From a different perspective, the purpose of international criminal tribunals is to determine the guilt or innocence of military and government leaders. However, by preventing informed cross-examination of witnesses, the ICTR's practice of hiding the identities of witnesses makes it virtually impossible to reach the level of certainty usually required to assess guilt in a criminal trial for murder—in this case, mass murder.

C. *Implications for the ICC*

Apart from implications for Rwandans, the ICTR's practice of non-disclosure of witnesses' identities has broader potential implications for the International Criminal Court. The Rules of Procedure and Evidence for the International Criminal Court contain similar language on witness protection and the rights of the accused as the Rules of the ICTY and ICTR.¹³⁹ Consequently, there is likely to be the same ambiguity about

135. *Akayesu*, *supra* note 10, ¶ 155.

136. Patricia Wald has made this point in the context of the ICTY. Wald, *supra* note 48, at 223 ("Pseudonyms and closed sessions also complicate the reading of ICTY judgments, which are supposed to be a record of history, but are often so peppered with concealed identities of key witnesses that their historical usefulness may be questionable.").

137. *See Drumbl*, *supra* note 110, at 1270.

138. *See May*, *supra* note 1, at 165.

139. *Compare* ICC Rules, *supra* note 18, Rule 87 ("Protective measures"), *and id.* Rule 88 ("Special measures"), *with* ICTY Rules, *supra* note 18, Rule 75, *and* ICTR Rules, *supra* note 2, Rule 75.

the rights of the accused as compared to those of the witness. Currently, on the issue of anonymous witnesses, the draft Rules for the ICC allow judges considerable discretion in balancing these competing rights.¹⁴⁰ As a practical matter, it may be too difficult to amend these rules at this time. But the rules could be supplemented by official commentaries providing specific guidance as to how to effectively balance these competing rights.

D. *Specific Guidance for the ICC*

The ICC must assess the factual context that the tribunal is addressing in light of four factors. First, the ICC should assess whether there is an ongoing war or conflict. If there is, then the ICC should assess whether there is a viable witness protection program in existence. In the early stages of the development of such a program, the presumption should be for closed sessions. Second, once a program is in place, then the Court should assess the extent of the potential threat of bodily harm to each testifying witness. The prosecution should bear the burden of proving this threat, based at least partly on objective third-party sources. Third, the ICC should look at cultural issues specific to the population involved in the trial. In the unusual case where there exists a parallel domestic tribunal adjudicating the same issues, such as the *Gacaca*, the ICC should be heavily influenced by the practices of that tribunal with respect to the identities of witnesses. Fourth, the ICC should consider, to the extent feasible, the particular aspects of a culture's traditions of oral communication in determining the relative importance of cross-examination. The need is obviously greater in cultures like that of Rwanda, where there is less concern typically paid to separating out firsthand experiences from reported experiences in recounting past events.

If the ICC could successfully adapt its general norms of evidence and procedure to local cultures in Africa, Asia, and Latin America, it would take a giant step forward in overcoming a central criticism of international human rights law—that

140. There was considerable debate on the issue of anonymous witnesses during the Preparatory Commission on the ICC's Rules of Evidence and Procedure. Ultimately, the Committee agreed to not include a specific rule for or against the use of anonymous witnesses. See *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 19, at 453.

it is a Western-centric approach to justice.¹⁴¹ To quote one commentator on the Rwandan situation, Professor Marc Drumbl: “In the end, the globalitarianism of retributive justice . . . [in] its indiscriminate and decontextualized application to non-Western societies may result in a disconnect between the imperative of enforcing justice and the effects of that enforcement on local communities.¹⁴²

This critique of the international legal community’s “indiscriminate” and “decontextualized” approach to international criminal justice has particular resonance when examining the disconnect between the ICTR’s jurisprudence on the disclosure of witnesses’ identities and the public nature of both the Rwandan genocide and the *Gacaca* system. By taking into account the mistakes of the ICTR in this area, the ICC could start to form more meaningful connections with the local communities where prosecuted crimes have occurred.

141. See Zorbas, *supra* note 109, at 36 (“There was . . . [amongst Rwandans] a noticeable hostility towards ‘White People’s’, or Western, justice.” (quoting Noah Weisbord, “The Law and Ethics of *Gacaca*,” 49 (Fall 2002) (Law/MSW Thesis, McGill University))).

142. See Drumbl, *supra* note 110, at 1314.