INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND PROBLEMS RELATING TO EVIDENCE – PRIVILEGE FROM TESTIMONY AT THE ICTY AND THE ICTR

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Like any court or tribunal, the International Criminal Tribunals for the former Yugoslavia and Rwanda grant privilege from testimony to certain individuals and classes of people. Some classes of privilege are the same or similar to those granted before domestic courts. However, due to the extreme nature of the crimes before the Tribunals, and due to the extreme circumstances in which potential witnesses to those crimes sometimes operate, the Tribunals have considered creating and granting new and extended forms of privilege.

A. Tribunals’ Power to Order Attendance of Witnesses

The ad hoc Tribunals have powers similar, though given the transnational boundaries in which they operate, not identical to the powers of domestic courts to order the attendance of a witness.¹ The Tribunals’ power to order the attendance of witnesses is set out in the following Articles and Rules of the Tribunals’ Statutes and Rules of Procedure and Evidence:

Article 18(2) of the ICTY Statute and 17(2) of the ICTR Statute provide:

“The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations.”

Article 19(2) of the ICTY Statute and 18(2) of the ICTR Statute provide:

“Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.”

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Rule 54 of the ICTY and ICTR Rules provides:

"At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

Rule 98 of the ICTY Rules and Rule 98 of the ICTR Rules (which is similar in effect but not wording to ICTY Rule 98) provide:

"A Trial Chamber may order either party to produce additional evidence. It may proprio motu summon witnesses and order their attendance."

There is practically little difference with an order requiring the attendance of a witness pursuant to either Rule 54 or Rule 98. As Rule 54 appears in Part 5 of the Rules (Pre-Trial Proceedings) and as Rule 98 appears in Part 6 (Proceedings Before Trial Chambers), it is submitted that it is perhaps appropriate for Rule 54 to be utilized at the pre-trial stage and Rule 98 after trial proceedings have commenced before the Trial Chamber.

In seeking the attendance of a witness, the Tribunals will normally turn to the relevant national authorities of the State in which the witness is located for co-operation in securing the attendance of the witness. The Appeals Chamber stated:

"[...] the implementing legislation of the International Tribunal's Statute enacted by some States provides that any order or request of the International Tribunal should be addressed to a specific body of the country, which then channels it to the relevant prosecutorial or judicial agencies. It may be inferred from this that any order or request should be therefore addressed to that central national authority".  

There are, however, certain situations in which the Tribunals may directly enter into contact with an individual to secure attendance (for example where this is authorized by the State concerned or where the State concerned may seek to prevent the attendance of the witness). The individual whose attendance is sought is considered to be "within the ancillary criminal jurisdiction of the Tribunal" and "duty bound to comply with its orders, requests and summonses".

3 See Blaskic, ibid., paras. 54–59.