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# "I BEG YOU, PLEASE COME TESTIFY"—THE PROBLEMATIC ABSENCE OF SUBPOENA POWERS AT THE ICC

Göran Sluiter\*

*The Review Conference on the ICC Statute, which takes place in 2010, offers the first opportunity to repair some of the defects in that instrument. This paper considers the absence of subpoena powers in respect of witnesses as one of the biggest threats to an effective functioning of the ICC. It is demonstrated that the absence of such subpoena powers follows clearly from the ICC Statute and was a deliberate choice during the negotiations, representing a compromise between states against and in favor of a powerful Court. It is submitted that the absence of subpoena powers even entails under the Statute a non-derogable right for witnesses not to appear at the Court. As a result of this, both the quality of fact-finding and the accused's right to a fair trial are seriously jeopardized. The paper proposes as a solution a number of recommendations to the Statute.*

## I. INTRODUCTION

One of the most puzzling aspects of the ICC's legal edifice is the lack of subpoena<sup>1</sup> powers in relation to witnesses. This lack of any such powers is

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1. As a legal notion, "subpoena" can be described as a court order requiring somebody under the threat of penalty to appear in court. The purpose of the appearance may differ. When the purpose is the giving of testimony, this is referred to by the Latin words *subpoena ad testificandum*.

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also referred to as the principle of voluntary appearance. One can indeed wonder how any criminal court could function with a permanent and structural absence of subpoena powers.

The importance of compulsory process in international criminal proceedings has been amply demonstrated by international criminal tribunals with longer experience than the ICC, such as the ICTY. It is as good as certain that the ICC will be highly dependent upon (eye)witnesses giving testimony and it is likely that many witnesses—because of security concerns, for example—will be reluctant to testify. There can be no doubt that legitimate fears must be accommodated, for example by means of protective measures, but any such accommodation must always be understood and approached against the background of a clear duty to give evidence, in the interests of justice. Although initially not used often in practice, the mere availability of subpoena powers at the ICTY and ICTR may have had important effects on a witness's decision to testify. It may be the mere threat of criminal prosecution that may convince witnesses to appear in court. One notices a recent increase in the application of compulsory process; in the *Haradinaj* case no less than eighteen subpoenas were served, of which thirteen were complied with.<sup>2</sup> It illustrates the growing importance of this instrument.

This paper's objective is to challenge the lack of subpoena power in the ICC legal framework and to explore the potential harm this may occasion. The central question is whether under the current circumstances a fair and good-quality trial can be provided to the accused and the international community.

In order to address this issue it is necessary to first explore the legislative history of the ICC Statute on this point; why did the drafters not endow ICC judges with a subpoena power? (See section II.) In section III, the current legal regime will be analyzed, especially the question whether the lack of subpoena powers is absolute and whether witnesses enjoy—under the Statute—a right not to appear before the Court to give testimony. In light of this analysis, in section IV I will address the pivotal question of the consequences for trials at the ICC. The paper ends with a conclusion and recommendations for future reform.

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2. Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Judgement, ¶ 22 (Apr. 3, 2008).

## II. LEGISLATIVE HISTORY

Subpoena powers—in the form of *subpoena ad testificandum*—encompass two vital elements. First, the exercise of subpoena powers should establish a direct obligation for the addressed individual toward the Court making use of these powers; second, failure to fulfill this obligation makes one liable to either (criminal) sanctions or direct enforcement action, consisting of bringing the individual by force before the tribunal. The methods used to enforce subpoenas may vary among criminal jurisdictions. As will be further explored below, international criminal tribunals should have the flexibility either to directly seek to enforce subpoenas themselves or to make use of assistance by states in enforcing subpoenas, either by physically bringing the witness before the Court or by enforcing sanctions imposed on the individual by the Court. The cooperation of states—required to enforce sanctions or to offer more direct assistance—is an additional and complicating dimension to the subpoena powers at international criminal tribunals, when compared to domestic criminal justice systems.

The background against which the drafters of the ICC Statute had to tackle this issue can be explained as follows. In traditional inter-state cooperation law, it has been a long-standing rule that witnesses residing abroad cannot be the object of subpoena powers, in the sense that the subpoena cannot have legal effect outside the state's territory.<sup>3</sup> This tradition finds its basis in protection of a state's nationals and its sovereignty. There is also an important practical side to it. For a subpoena to produce legal effect it needs to be served on the individual concerned, for which the cooperation of foreign authorities may be required.

The freedom of choice for the witness residing abroad can thus be regarded as an important unwritten rule of inter-state cooperation; sometimes it has been codified in legal assistance treaties.<sup>4</sup> Clearly, once a witness enters the trial forum's jurisdiction and is served there he is fully subject to subpoena powers. Exceptions to the territorial limits to subpoena

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3. Andre Klip, *Buitenlandse getuigen in strafzaken* (Foreign Witnesses in Criminal Proceedings) 268 (1994).

4. See, e.g., European Convention on Mutual Assistance in Criminal Matters art. 8, Apr. 20, 1959, E.T.S. 30.

powers exist in a few legal assistance regimes between countries that closely cooperate in other areas as well.<sup>5</sup>

It is general knowledge that a considerable number of negotiating states at the diplomatic conference favored a cooperation regime based on interstate experiences in this field. As commentators and participants in the negotiations observed:

Throughout the negotiations there was a basic opposition between the adherents of a (more) horizontal and the proponents of a (more) vertical approach. The first group of delegations emphasized State sovereignty . . . and often referred to the UN Model Treaties on extradition and mutual assistance in criminal matters. The opposed camp started from the assumption that only a cooperation regime that is essentially distinct from traditional inter-State concepts in that it attaches greater weight to the community interest in an international criminal prosecution, fully corresponded to the specific relationship between States parties and the Court.<sup>6</sup>

The alternative model of cooperation would be the law as developed by the ad hoc Tribunals, especially the ICTY. This law was essentially judge made and highly favored—from the perspective of the ICTY—effective cooperation, without much consideration for national interests and sovereignty.<sup>7</sup> This also directly concerned the ICTY approach toward subpoena powers.

The crucial ICTY Appeals Chamber decision in the *Blaškić* case, dealing with the issuance of a subpoena to a Croatian minister, was handed down at the end of 1997.<sup>8</sup> Bearing in mind the ICTY's aspiration for

5. See Article 34 of the Convention on Extradition and Judicial Assistance in Penal Matters, adopted by Belgium, Luxembourg, and the Netherlands on June 27, 1962, pursuant to which a witness who fails to respond to a summons from the trial forum is, in the requested state, liable to the usual sanctions for noncooperative witnesses in that state; one should also mention the arrangement between the Nordic countries, where a witness who fails to comply with a summons may be fined (example from Klip, *supra* note 3, at 276).

6. Claus Kress, Kimberly Prost & Peter Wilkitzki, Part 9—Preliminary Remarks, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 1507* (Otto Triffterer ed., 2d ed. 2008).

7. See on the differences between the horizontal and vertical cooperation models in more detail Göran Sluiter, *International Criminal Adjudication and the Collection of Evidence—Obligations of States*, ch. 3 (2002).

8. *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108 *bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997).

effective cooperation, the subpoena power was inferred from the ICTY's mandate:

[T]he International Tribunal's power to issue binding orders to individuals derives instead from the general object and purpose of the Statute, as well as the role the International Tribunal is called upon to play thereunder. The International Tribunal is an international criminal court constituting a novelty in the world community. Normally, individuals subject to the sovereign authority of States may only be tried by national courts. If a national court intends to bring to trial an individual subject to the jurisdiction of another State, as a rule it relies on treaties of judicial cooperation or, if such treaties are not available, on voluntary interstate cooperation. Thus, the relation between national courts of different States is "horizontal" in nature. In 1993 the Security Council for the first time established an international criminal court endowed with jurisdiction over individuals living within sovereign States, be they States of the former Yugoslavia or third States, and, in addition, conferred on the International Tribunal primacy over national courts. By the same token, the Statute granted the International Tribunal the power to address to States binding orders concerning a broad variety of judicial matters (including the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest or detention of persons, and the surrender or transfer of indictees to the International Tribunal). Clearly, a "vertical" relationship was thus established, at least as far as the judicial and injunctory powers of the International Tribunal are concerned (whereas in the area of enforcement the International Tribunal is still dependent upon States and the Security Council). In addition, the aforementioned power is spelt out in provisions such as Article 18, paragraph 2, first part, which states: "The Prosecutor shall have *the power to question suspects, victims and witnesses*, to collect evidence and to conduct on-site investigations" (emphasis added); and in Article 19, paragraph 2: "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*" (emphasis added).<sup>9</sup>

It was also established that the ICTY possesses a power to enter directly into contact with witnesses, when necessary under the circumstances.<sup>10</sup>

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9. *Id.*, ¶ 47.

10. *Id.*, ¶ 55:

It is therefore to be assumed that an inherent power to address itself directly to those individuals inures to the advantage of the International Tribunal. Were it not vested with such a

Furthermore, the Appeals Chamber ruled that the ICTY judges were vested with an inherent power to prosecute witnesses who refuse to comply with a subpoena for contempt of court, including holding trials in their absence.<sup>11</sup>

The *Blaškić* subpoena decision was—in the absence of a solid statutory basis—quite revolutionary. Subsequent case law was aimed at consolidating this vertical legal assistance model, which in relation to the U.N. ad hoc Tribunals was never really challenged by states.<sup>12</sup> It is therefore interesting that the vertical model was not fully embraced at the Rome diplomatic conference, as one finds a less effective cooperation model in a number of areas. One factor capable of explaining this discrepancy is timing. The *Blaškić* subpoena decision was handed down at the end of 1997 and its impact and importance for cooperation law regarding international

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power, the International Tribunal would be unable to guarantee a fair trial to persons accused of atrocities in the former Yugoslavia.

Id., ¶ 56:

[T]he International Tribunal may enter into direct contact with an individual subject to the sovereign authority of a State. The individual, being within the ancillary (or incidental) criminal jurisdiction of the International Tribunal, is duty-bound to comply with its orders, requests and summonses.

11. Id., ¶¶ 58 and 59:

The Appeals Chamber holds the view that, normally, the International Tribunal should turn to the relevant national authorities to seek remedies or sanctions for non-compliance by an individual with a subpoena or order issued by a Judge or a Trial Chamber. Legal remedies or sanctions put in place by the national authorities themselves are more likely to work effectively and expeditiously. However, allowance should be made for cases where resort to national remedies or sanctions would not prove workable. This holds true for those cases where, from the outset, the International Tribunal decides to enter into direct contact with individuals, at the request of either the Prosecutor or the defence, on the assumption that the authorities of the State or Entity would either prevent the International Tribunal from fulfilling its mission (*see above*, paragraph 55) or be unable to compel a State official to comply with an order issued under Article 29 (*see above*, the case mentioned in paragraph 51). In these cases, it may prove pointless to request those national authorities to enforce the International Tribunal's order through national means. (. . .) The remedies available to the International Tribunal range from a general power to hold individuals in contempt of the International Tribunal (utilizing the inherent contempt power rightly mentioned by the Trial Chamber) to the specific contempt power provided for in Rule 77.

12. See Göran Sluiter, *Cooperation of States with International Criminal Tribunals*, in *The Oxford Companion to International Criminal Justice* 189 (Antonio Cassese et al. eds., 2009).

criminal tribunals may not have been fully grasped by the (vast) majority of delegations drafting the Rome Statute in the summer of 1998.

The commentaries on the Rome Statute do not inform us much about the nature of the discussions regarding subpoena powers. As with many other matters, the issue was divided over more than one working group. There was the external cooperation dimension of the subpoena power, which was the mandate of the working group on Part 9, and there is the internal aspect, the necessary powers for Chambers to ensure effective and fair trials, covered by the working group on Part 6, the trial. The separate negotiation processes in these working groups explain some inconsistency in the handling of the subpoena powers, which will be further explored in section III.

It was already mentioned that the issue of subpoena powers in international criminal justice implies regulations regarding the power to impose an obligation to appear, regarding the enforcement of this duty via state cooperation, and regarding the direct enforcement of the duty via contempt proceedings.

In the 1994 ILC Draft Statute for the ICC the starting point may seem to have been some duty to appear for witnesses, given the power attributed to the Trial Chamber to require the attendance and testimony of witnesses.<sup>13</sup> This power has not been significantly changed or challenged throughout the negotiating process and appears to have found codification without significant controversy in Article 64(6)(b) of the Statute.<sup>14</sup>

The cooperation Part in the 1994 Draft paid no specific attention to legal assistance by states in enforcing the subpoena power. However, the general draft provision on cooperation and judicial assistance, Article 51, was broad enough in scope to ground a duty to bring witnesses by force to the Court to testify.<sup>15</sup> As to direct enforcement, the 1994 Draft contained

13. Article 38(5)(b) of the 1994 Draft Statute, Report of the International Law Commission on the Work of Its Forty-sixth Session, 2 May–22 July 1994, Supp. No. 10, at 110, U.N. Doc. A/49/10. [hereinafter ILC Report].

14. See for an overview of the evolution of Article 64, M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute 458–474* (2005).

15. ILC Report, *supra* note 13, at 129. The provision was modeled on Article 29 of the ICTY Statute and thus offered a strong basis for a variety of legal assistance requests. The references to “taking of testimony” and “arrest of persons” could be sufficient to oblige states to arrest and transfer witnesses to the seat of the Court.



no provisions on contempt, but one could have regarded this as inherent powers, as was the ruling of the ICTY Appeals Chamber in the *Blaškić* case, cited above.

While the 1994 Draft Statute appears to allow for an approach as adopted by the ICTY in *Blaškić*, this is inspired by a vertical cooperation relationship, the subsequent negotiations revealed significant reservations. Looking at the legislative history regarding cooperation and contempt power (offenses against the administration of justice), one notices an increasing reluctance to impose an obligation to appear on witnesses.

As was already mentioned, the power of the Trial Chamber to require the attendance of witnesses remained unchallenged and unchanged ever since the 1994 ILC Draft until its final adoption as Article 64(6)(b) of the Statute. But the vital developments took place in the Part 9 working group. I had the pleasure and privilege to observe some of the negotiations in that group and could draw no other conclusion than that a hard battle was fought over the permissible degree of interference with national sovereignty. The imposition of an obligation upon citizens to testify at the seat of the Court met with strong opposition. It seems to me—and follows from the official record—that the absence of subpoena powers was easily sacrificed, possibly as a bargaining chip in respect to matters deemed at that time more important by the delegates, such as grounds for refusal, surrender, and on-site investigations.

The essential question, it seems, is how the word “voluntary” came to be inserted in the final text of Article 93(1)(e) and how the detained witness came to have a right to free and informed consent regarding his transfer with a view to taking testimony at the ICC (Article 93(7)). Going through the evolution of Article 93 since the ILC 1994 Draft, one notices that the word “voluntary” did not appear in any draft prior to the Rome Conference, nor was there any provision regarding transfer of detained witnesses to the Court.<sup>16</sup> However, this is not to indicate that an obligation to enforce subpoenas by the Court was strongly envisaged prior to the Rome Conference, because text proposals of Part 9 in its entirety were full of options allowing states to refuse cooperation.<sup>17</sup> No other conclusion can be drawn that subpoena powers had to be sacrificed with a view to significantly eliminate grounds for refusal from Part 9.

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16. Cf. Bassiouni, *supra* note 14, at 680–700.

17. See *id.*

That this was not a highly controversial sacrifice may seem to follow, in my view, from the Report of the Working Group on Part 9 to the Plenary of the Conference.<sup>18</sup> What is clear from this report is that the present Article 93(1)(e)—which refers to “facilitating voluntary appearance”—means exactly this. A footnote to this section reads as follows: “This includes the notion that witnesses or experts may not be compelled to travel to appear before the Court.”<sup>19</sup>

Neither the footnote nor the text of the provision conditions or qualifies in any way this principle of voluntary appearance. The principle of voluntary appearance was further strengthened in Part 9 by the inclusion of Article 93(7), which attributes to the detained person a right to “informed consent” as a condition to transfer with a view to testifying at the ICC. It is not entirely clear to me at what time and under which circumstances this archaic and unnecessary provision was introduced. Participants in the negotiations refer to wording “that was too hastily copied from tradition inter-State vocabulary.”<sup>20</sup>

It thus seems that the principle of voluntary appearance was firmly established relatively early in the diplomatic conference—the report of the Part 9 group was dated July 1 and the final text was adopted July 17—which raises the question as to why the relationship between Part 9 and Part 6 was not clarified. Indeed, the power to require the attendance of witnesses was still there in Part 6. The puzzling thing is that within this same Part 6—thus the same Working Group—provisions regarding offenses against the administration of justice and misconduct were negotiated that are totally silent about sanctions or enforcement measures in case of failure to respond to a summons to appear as a witness. Regarding the evolution of Article 70 of the Rome Statute, the failure to comply with an order by a Trial Chamber to attend hearings as a witness has not really managed to impose itself as a serious option for inclusion in Article 70.<sup>21</sup> However, mention must be made of the draft Article 44 *bis* emerging from

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18. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, 325–26, U.N. Doc. A/CONF.183/13, where the Working Group explains what provisions were amended.

19. *Id.* at 329.

20. Claus Kress & Kimberly Prost, Article 93: Other Forms of Cooperation, in Triffterer, *supra* note 6, at 1576.

21. For an overview, see Bassiouni, *supra* note 14, at 523–29.

the Preparatory Committee at its December 1997 session, which penalizes “obstructing the functions of the Court.”<sup>22</sup> Arguably, this could have been a basis for prosecution of noncompliance with a subpoena, although it is lacking in precision.

The absence of any mechanism to directly enforce an “order to appear as a witness” raises the question as to what should then be understood by the power to require the appearance of witnesses, as contained in Article 64(6)(b) of the Statute. It seems to have essentially—or only—internal effect, namely among parties, when no sanction can be imposed *on the witness* for failure to appear. It should thus be understood as requiring parties to undertake their best efforts to ensure the appearance of witnesses.

### III. NONAPPEARANCE AS A RIGHT?

I have elsewhere submitted that witnesses have a right not to be compelled to testify before the ICC, as regrettable as this may be. This implies that states cannot compel them to appear, even if Part 9 imposes *minimum* obligations upon states only.<sup>23</sup> Others have opposed this interpretation and would favor an interpretation allowing states to bring by force witnesses before the Court, if these states would be prepared to do so.<sup>24</sup> I would be the first to recognize the importance of and need for this possibility, in the interests of justice, but there is no basis for it in the law of the ICC. I therefore maintain that witnesses have a right under the Statute not to be compelled to appear before the ICC, whether this is done by the Court or by national authorities.

The central argument of those in favor of some possibility to compel witnesses to give evidence is the wording of Article 64(6)(b), attributing the power to Chambers to require the attendance of witnesses; it is argued that this inconsistency with Part 9 should not be widened and that Article 64(6)(b) could very well be the basis for an international obligation of

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22. *Id.* at 526.

23. Sluiter, *supra* note 12, at 254.

24. Bruce Broomhall & Claus Kress, Implementing Cooperation Duties under the Rome Statute: A Comparative Synthesis, in *The Rome Statute and Domestic Legal Orders*, Volume II: Constitutional Issues, Cooperation and Enforcement 529 (C. Kress et al. eds., 2005); Kress and Prost, *supra* note 20, at 1576.

witnesses toward the Court to appear.<sup>25</sup> Also by a commentator to this provision it is submitted that Chambers can still summon witnesses, but that it follows from Part 9 simply that a state party is not under an obligation to compel the witness's appearance before the Court.<sup>26</sup>

This is not convincing. First, the language of Article 64(6)(b) is not clear. It does not follow from it that a direct obligation toward witnesses is envisaged. "Requiring the attendance" is not identical to "ordering" or similar language. One must therefore construe this wording in light of other relevant provisions.

Second, this brings us to Part 6 as a whole, still leaving aside the obligation to cooperate under Part 9. It is symptomatic that within Part 6 the provision on offenses against the administration of justice (Article 70) does not include the failure of a witness to respond to a request or summons from a Trial Chamber to appear; nor has there ever since been adopted any enforcement provision in the Rules of Procedure and Evidence. It means nothing else than that the ICC itself has no direct enforcement powers, and while this is not determinative regarding the existence of a direct obligation toward the Court it is nevertheless very strong evidence that simply no obligation was intended at the Rome conference. This makes perfect sense in light of the language of Part 9.

Third, it would be wrong to view Part 9 as merely imposing obligations upon states and therefore as minimum obligations only. There are many aspects of Part 9 that set out procedural arrangements and contain direct obligations for the Court.<sup>27</sup> From the legislative history, as outlined earlier, it follows, in my view, that the reference to voluntary appearance in Article 93(1)(e) entails a general prohibition of compulsion, whether by the ICC or by states. Article 93(7) is a procedural arrangement—which one may dislike very much or think was hastily adopted, but this does not reduce its legal effect—that gives an already detained witness a right not to be brought before the Court. As this is an exclusive arrangement it applies to every detained witness at the national level and precludes more-progressive arrangements. It accords with the apparent wish of the drafters not to compel witnesses in any way to appear before the Court as witnesses.

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25. Kress & Prost, *supra* note 20, at 1576–77.

26. Gilbert Bititi, Article 64: Functions and Powers of the Trial Chamber, in Triffterer, *supra* note 6, at 1213.

27. E.g., Articles 87, 91, 93(8), 96, 98, 99(4), and 100 of the Statute.

*A fortiori*, I maintain my view that witnesses who are not detained have at least the same rights as detained witnesses toward the Court and cannot be compelled in any way to testify.

Fourth, it would be particularly damaging to leave the matter of compulsory process to states. It may very well be the case that one state is more cooperative than another. In principle, there is nothing wrong with this, but there are issues of concern when the liberty of individuals is at stake. Compelling witnesses to testify at the ICC may in practice trigger—temporary—deprivation of liberty as well as criminal sanctions. These invasive and serious consequences of failing to comply with a subpoena should not differ depending upon a state's willingness to cooperate, but should be subject to a uniform regime. This was, in my conviction, also the intention of the drafters, namely to codify a general regime of voluntary appearance, going beyond the mere question of state cooperation. Voluntary appearance can thus not be contravened by “enhanced cooperation,” on the basis of which some states would compel witnesses to appear at the seat of the Court and others would not.<sup>28</sup> There is no basis in the drafting history for this view, whereas there is for the contrary position, as explained above. While it is understandable that supporters of a strong ICC use all creativity to repair in some way aspects of the Statute that are now widely considered as defective, this cannot be done without properly observing the rules and principles of (treaty) interpretation.

#### **IV. POTENTIAL HARM—FAIRNESS AND PROPER ADMINISTRATION OF JUSTICE**

It may seem self-evident that the principle of voluntary appearance negatively affects the functioning of any criminal court. The question needs to be addressed as to how serious this really is in the particular ICC context. It especially needs to be explored whether the lack of subpoena powers could violate the accused's right to a fair trial or damage the proper administration of justice. I will confine myself to a few observations only.

It must be acknowledged that the lack of subpoena powers can hurt both the Prosecutor and the defense side and as such conforms to the principle of equality of arms. Yet, the accused has been granted a number

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28. This is proposed by Kress & Prost, *supra* note 20, at 1577.

of inalienable rights that apply unconditionally and occupy the highest position in the hierarchy of applicable law, as provided for in Article 21(3) of the ICC Statute. Article 67(1)(e) of the Statute is the most important one to examine in the framework of this paper, granting the accused the right

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.

The first part of this provision is an independent right, whereas the second part builds upon the principle of equality of arms, in the sense that in obtaining attendance and examining witnesses the accused should not be in a worse position than the Prosecutor is in relation to his witnesses. The lack of subpoena powers, making no distinction between the parties, does thus not seem to be problematic from this particular perspective.

In respect of the first part, the right to examine or have examined witnesses *à charge*, the absence of subpoena powers may be more problematic. Schabas in this respect has submitted the following:

Nothing in the Statute provides for compellability of witnesses, for example by issuance of subpoenas or similar orders to appear before the Court. Although this may create hardship for the defence, it does not seem that it can argue that the right to a fair trial is being denied because of the impossibility of obtaining witnesses and compelling their attendance in court.<sup>29</sup>

I am not fully convinced. I acknowledge that the right allows for interpretation according to which incriminating witness testimony may also be taken elsewhere than in the courtroom and that in that procedure the accused may be allowed to either examine the witness or have examined—for example, by a national judge—the witness. Case law of human rights courts seems to accept this as an alternative to the examination of witnesses at trial.<sup>30</sup> The ICC Rules furthermore contain an additional safeguard. According to Rule 68 prior recorded testimony is only admissible when

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29. William A. Schabas, Article 67: Rights of the Accused, in Triffterer, *supra* note 6, at 1265.

30. Cf. Stefan Trechsel, Human Rights in Criminal Proceedings 307–08 (2005).

both parties had the opportunity to examine the witness.<sup>31</sup> Consequently, the right seems to be respected as unchallenged evidence cannot be used against the accused.

Yet, I remain in doubt. The absence of any subpoena power is so strikingly peculiar for the ICC, as I know of no system where criminal courts lack this power as a general rule. Of course, domestic courts may be in need of some foreign witnesses in a small number of cases, but they rarely are the only witnesses. Simply, no human rights court has ever been called upon to assess the fairness of a trial where in relation to every witness the court—and thus ultimately the accused—*ab initio* lacked the power to compel attendance of *every* witness. It makes one wonder how human rights courts and organs would respond to this unique situation.

My doubts have gained in strength since ICTR Trial Chamber and Appeals Chamber decisions concerning the transfer of cases from the ICTR to Rwanda.<sup>32</sup> The ICTR Trial Chamber in the case of Mr. Kanyarukiga concluded that his case could not be transferred to Rwanda because it cannot be ensured that he will receive a fair trial in Rwanda. A significant factor was that witnesses residing outside Rwanda could not be compelled to testify before Rwandese courts, given the absence of subpoena powers to that end. This contributed to the situation where he would not be able to call witnesses residing outside Rwanda to the extent and manner that would ensure a fair trial.<sup>33</sup> This was confirmed on appeal:

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31. Rule 68 reads as follows:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

- (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or
- (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

32. Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11 *bis*, Decision on Prosecutor's Request for Referral to the Republic of Rwanda (June 6, 2008) [hereinafter Trial Chamber Decision]; Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-R11 *bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11 *bis* (Oct. 30, 2008) [hereinafter Appeals Chamber Decision].

33. See Trial Chamber Decision, *supra* note 32, ¶¶ 104, 80, 81.

[the accused] would still face significant difficulties in securing the attendance of witnesses who reside outside Rwanda to the extent and in a manner which would jeopardize his right to a fair trial.<sup>34</sup>

How to interpret and apply these findings in relation to the ICC? If the situation in Rwanda may jeopardize the accused's right to a fair trial—because a large number of witnesses residing outside Rwanda cannot be compelled to testify before Rwandese courts—this is even more so the case at the ICC, where *no* witness can be compelled to testify. At least in Rwandese proceedings, witnesses residing in Rwanda can be expected to be compelled to testify without any problem.

These are disconcerting findings, coming from an ICTR Trial Chamber and the ICTR Appeals Chamber, seemingly disqualifying the ICC procedure in fair trial terms. Of course, from the ICC perspective it may be said that these concerns are still premature as they have not (yet) materialized in practice. But a similar argument could be said to apply to the ICTR transfer decisions and prospective proceedings in Rwanda; still, both Trial Chamber and the Appeals Chamber found the mere risk too significant to allow transfer. The situation at the ICC is no different—even worse, raising the legitimate question whether the absence of subpoena powers is not a risk capable of producing similar effects, namely that we should not allow trials to take place under these conditions. There is a precedent at the ICC on staying proceedings because of fair trial concerns, when in the *Lubanga* case the question also arose whether a trial could start under conditions making it impossible to ensure fairness. The Trial Chamber took the courageous and right decision that it could not allow the trial to start under such conditions.<sup>35</sup> A similar question could be raised in respect of

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34. Appeals Chamber Decision, *supra* note 32, ¶ 34.

35. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008 (June 13, 2008); parts of paragraphs 91 and 93 are especially worth quoting: “If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary—indeed, inevitable—that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified.” and “. . . the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.”



the lack of subpoena powers. Of course, a vital difference is that contrary to the *Lubanga* disclosure situation, the Prosecutor cannot be blamed in any way for the lack of subpoena powers and is likely to suffer from it as well. Irrespective of the origin of the problem, it is legitimate, even obligatory, for a Trial Chamber to inquire whether all reasonable conditions allowing a fair trial to be conducted have been satisfied.

The ramifications of the lack of subpoena powers go beyond the strict notion of a fair trial. There are, of course, also the interests of the quality of the administration of justice. The impact of a complete absence of subpoena powers still remains to be properly assessed.

The most obvious concern regarding the lack of subpoena power is that the ICC may not have at its disposition important evidence. Witnesses who do not wish to come to the Court may not always be heard by alternative means, such as taking of testimony by national courts, as provided for in Article 93(t)(b).<sup>36</sup> This may be the case when there is no properly functioning national court structure. Even when witnesses are heard by alternative means, the requirements of the already mentioned Rule 68 may constitute an obstacle to admissibility of the evidence, because it may not always be possible to satisfy in regard to the presence of all parties and allowing for proper cross-examination. Of course, one can argue that in the situation where the national court structure is not available or is defective, it is also not very likely that subpoenas will be properly executed. While I acknowledge that in the “failed state” scenario the issuance of a subpoena is not likely to have great effect, there are at least two distinctive advantages of the subpoena in this regard. First, while a properly functioning national justice system is indispensable for taking testimony in a domestic court, a subpoena could also be enforced by other entities than national law enforcement agencies, such as U.N. peacekeeping forces. Second, a subpoena enables the Court to “get hold” of a witness when he is traveling; this is likely to be less problematic to organize than taking testimony in a domestic court in the country where the witness happens to be present, which must be preceded by a specific cooperation request to that end.

Even when the Court succeeds in taking testimony elsewhere and when this is done in accordance with the requirements of Rule 68, it is submitted

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36. Article 93(t)(b) reads as follows: “The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;”

that the quality of the administration of justice still significantly suffers from the absence of a witness in the courtroom. In any criminal law system, most evidentiary weight is attributed to live testimony in the courtroom. It is regarded of such weight that such “direct evidence” does not require corroboration.<sup>37</sup> Witness testimony taken elsewhere means that the decision-maker is unable to observe the witness, during examination in chief and cross-examination, and to submit questions, either prepared beforehand or in light of the testimony given. The direct perception and interaction between the decision-maker and the witness is in and of itself ground enough to reject the absence of subpoena powers as a ridiculous thought.

In addition to these concerns, there are other negative sides to the absence of subpoena powers, which are likely to jeopardize the quality and accuracy of fact-finding. We have to acknowledge that failing subpoena powers, the witness is in an incredibly strong bargaining position toward the Court. Taking as a starting point that the witness is aware of her right not to appear before the Court—in my view, she should be adequately informed of her legal position—there is an increasing risk that her prospective testimony is used as a bargaining chip in obtaining a variety of benefits, such as financial compensation or (far-reaching) protective measures. The question indeed arises as to what incentive there is for a witness to come testify at the ICC, besides her desire to assist in the administration of justice. Failing any subpoena-threat, it is possible that witnesses try to get the best bargain on their testimony, and regard their testimony as a *quid pro quo*, which may seriously jeopardize that testimony’s credibility. To put it simply, the essential question as to why the witness would accuse or exonerate the suspect may take on a different dimension when one can rule out the giving of testimony in open court out of fear of negative legal consequences.

## V. CONCLUSION AND RECOMMENDATIONS

For a criminal lawyer one of the most puzzling aspects of the ICC Statute is that it rules out the use of compulsory process in respect of witnesses. The analysis of both the legislative history and the final outcome of the

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37. See Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, ¶¶ 62–64 (March 24, 2000).

Rome Statute reveals that this vital tool for fair and effective criminal proceedings was quite easily sacrificed. While we may regret that now very much, I do not see how we can repair it under the Statute in its current form. The power attributed to the Trial Chamber to “require the attendance of witnesses” is severely restricted by the nonavailability of sanctions for witnesses who fail to appear, and the provisions in Part 9 that underline that appearance must be voluntary.

The absence of subpoena powers seriously jeopardizes both the accused’s right to a fair trial and the quality of the administration of justice. The ICTR has recently ruled—in the context of Rule 11 *bis*—that proceedings cannot be fair when courts cannot subpoena a significant number of defense witnesses. This begs a response from the ICC, although this reproach was not immediately directed to it. In addition to these fairness concerns, it must be acknowledged that the quality of fact-finding may be in jeopardy when the decision-maker is not directly confronted with a witness or when testimony becomes too much the subject of negotiations.

I do not claim that the attribution of subpoena powers to ICC judges will solve all problems regarding witness testimony. But these powers should be there to illustrate that the ICC’s mandate is extremely important and cannot be allowed to be frustrated by an individual’s decision to assist the Court or not. I strongly recommend amending the Statute on three points.

First, Article 64 should provide in less ambiguous terms that the Trial Chamber can directly order a witness to appear before it and to give testimony. It should be clear that such an order creates a direct obligation for the witness. This power should be available in the case of a witness present on the territory of a state party and a witness who is the national of a state party or any other state having accepted the jurisdiction of the Court. Hereby the jurisdictional regime of Article 12(2) is followed.

Second, Article 70 should include as an offense against the administration of justice the deliberate noncompliance by a witness with the order to appear.

Third, Article 93 should be amended, to the extent that states must comply with requests relating to compelling the appearance of witnesses, including the use of compulsory process to that end. More concretely, the word “voluntary” must be deleted in Article 93(1)(e), and “facilitating” replaced by “ensuring.”

While these proposed amendments radically abolish the regime of voluntary appearance for witnesses, they are indispensable for a fair and effective Court. It can be expected that among the states parties the importance of these amendments is recognized, especially since the protagonists of the principle of voluntary appearance are no longer (strongly) represented.