

The ICTR's Significant Contribution
to the Law of Disclosure
by
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Disclosure is the great equalizer. A fair and expeditious trial is only possible when the prosecution's advantage in time, opportunity, and resources is offset by its duty to disclose the pertinent fruits of its investigation to the defence.

The ICTR developed a rich body of jurisprudence during its existence on issues related to the prosecution's duty of disclosure, and the defence's duty of reciprocal disclosure.

Disclosure at the ICTR is governed by one Article in its Statute and three of its Rules of Procedure and Evidence.

Article 20

Article 20 of the ICTR Statute provides that:

1. All persons shall be equal before the International Tribunal for Rwanda.
2. 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 Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. 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:
 - (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - (c) To be tried without undue delay;
 - (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - (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;
 - (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
 - (g) Not to be compelled to testify against himself or herself or to confess guilt.

The Appeals Chamber strictly interpreted Article 20(4)(a)'s guarantee of the right of an accused to be informed of the nature and cause of the charge. It set a high standard for disclosure in indictments. As a result, indictments at the ICTR were much more akin to charging instruments in civil law jurisdictions than the bare-bones indictments prevalent in common law practice.

The Appeals Chamber held that an indictment that fails to set forth material facts in sufficient detail is defective.¹ It found a defect in virtually every indictment issued by the prosecution at the ICTR. In many cases, it held that the defect was cured by timely disclosure by the prosecution in its Pre-Trial Brief,² witness statements or summaries annexed to the Pre-Trial Brief,³ or the prosecution's opening statement.⁴ However, in several other cases, the defects in the indictment proved fatal. Some accused were acquitted in large part because the evidence against them was based on material facts and theories of liability not adequately charged in the indictment.

In the *Ntagerura* case,⁵ for example, involving events in Cyangugu prefecture, the Appeals Chamber affirmed that Minister of Transportation Andre Ntagerura and Prefet Emmanuel Bagambiki could not be convicted under a theory of joint criminal enterprise when it was not specified in the indictment and only mentioned for the first time after the trial had commenced.

Because the indictment is the first port-of-call for the defence to understand the prosecution's case, the Appeals Chamber's insistence on a detailed and specific indictment greatly improved the information the defence received about the case it had to meet at trial. The Appeals Chamber's holding that adequate notice in the prosecution's Pre-Trial Brief might cure defects in an indictment also promoted disclosure as the prosecution scrambled to fill the holes in its existing indictments by providing comprehensive pre-trial briefs, often including detailed summaries of witness testimony.

The high standards for indictments at the ICTR also carried over to the Appeals Chamber's interpretation of the disclosure provisions in the Rules of Procedure and

¹ *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 172; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 322

² i.e. *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2014) at para. 124

³ i.e. *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 121

⁴ *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 44

⁵ *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at paras. 21-165

Evidence.

Rule 66

Rule 66 provides that:

Subject to the provisions of Rules 53 and 69;

(A) The Prosecutor shall disclose to the Defence:

(i) Within 30 days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

(ii) No later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; upon good cause shown a Trial Chamber may order that copies of the statements of additional prosecution witnesses be made available to the Defence within a prescribed time.

(B) At the request of the Defence, the Prosecutor shall, subject to Sub-Rule (C), permit the Defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

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

Rule 66(A)(i), which requires disclosure of the supporting material submitted to the ICTR Judge confirming the indictment as well as statements of the accused, proved to be straightforward and without controversy at the ICTR. However a dispute soon arose under Rule 66(A)(ii) as to what constituted a “statement” of a prosecution witness. That dispute was resolved by the Appeals Chamber in the case of former Minister of Information Eliezer Niyitegeka.⁶

Niyitegeka sought to obtain from the prosecution the notes made by the prosecution investigators during their interviews with prosecution witnesses. The prosecution maintained that such notes were its internal work product and exempted from disclosure by Rule 70(A).

⁶ *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at paras. 30-36

After noting that neither the ICTR nor ICTY had yet provided a clear definition of the term “statement” under Rule 66(A)(ii), nor made a clear distinction between “statements” under Rule 66 and “internal documents prepared by a party” under Rule 70, the Appeals Chamber went on to set out guidelines for the taking of witness statements.

The Appeals Chamber said that an interview with a witness should ideally be recorded and transcribed, and the witness should sign the transcript after having the opportunity to make any corrections. The transcript should then be disclosed to the defence, including both the questions and the answers.

The Appeals Chamber held that an accused must have access to the questions put to the witness in order to be able to prepare for cross-examination properly. It said that the probative value and credibility of the witness could well depend on the questions asked as well as the answers given.

The Appeals Chamber rejected the notion that questions put to a witness were part of an internal document of the prosecution. It held that “a question once put to a witness is not an internal note any more; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules.”

The Appeals Chamber encouraged the prosecution to record its interviews with witnesses, saying that while a statement not fulfilling the standard it had set out was not inadmissible as such, failure to comply with that standard could be taken into consideration by a Chamber when assessing the probative value of the statement.

Unfortunately, the prosecution never adopted a practice or policy of recording statements other than from the accused, and Trial Chambers never took the prosecution’s failure to do so into consideration when considering the credibility of prosecution witnesses.

However, the Appeals Chamber’s rejection of the prosecution’s narrow definition of a statement in *Niyitegeka* led Trial Chambers to order disclosure of other records made of contacts between the prosecution and its witnesses, including witness reconfirmation statements,⁷ investigator’s notes of the interview,⁸ and statements taken by Rwandan

⁷ *Prosecutor v Karemera et al.*, No. ICTR-98-44-PT, *Decision on Disclosure of Witness Reconfirmation Statements* (23 February 2005)

⁸ *Prosecutor v Karemera et al.*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera’s Seventeenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (20 February 2008) at para. 10

authorities and made by the witness in Gacaca proceedings.⁹ This had a significant impact on later Trial Chamber judgments at the ICTR, which found many prosecution witnesses not worthy of belief as a result of contradictions between their trial testimony and their prior statements or Gacaca testimony.

Rule 66(B), which requires inspection of items “material to the preparation of the defence” was also broadly interpreted by the Appeals Chamber in the case of General Theoneste Bagosora.¹⁰

In that case, the prosecution obtained immigration records on potential defence witnesses from States in which those witnesses resided. Those records often contained applications for asylum where the witness set forth his or her position and activities during the 1994 Rwandan events, and often minimized or lied about those subjects in order to improve his or her chances for asylum.

The defence argued that it was material to the preparation of the defence to have that information before deciding whether to call the person as a defence witness. The Trial Chamber disagreed and ruled that the prosecution need only disclose this material at the time of cross-examination, as was usually the practice with impeachment material.

The Appeals Chamber sided with the defence. It noted that it had routinely construed the prosecution’s disclosure obligations broadly. It recognised that there were few tasks more relevant to the preparation of the defence case than selecting its witnesses. It held that because the immigration records may improve the defence’s assessment of the potential credibility of its witnesses before making a final selection, they were material to the preparation of the defence and required to be disclosed pursuant to Rule 66(B).

The Appeals Chamber also rejected the prosecution’s argument that the defence could get these records on its own. It held that Rule 66(B) was one of the methods available to the defence for carrying out investigations and that there was no requirement for the defence to have made its own independent efforts to obtain the material.

This decision promoted transparency and avoided sandbagging in the Military I

⁹ *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Declare the Prosecution in Violation of its Disclosure Obligations* (26 April 2012) at para. 42

¹⁰ *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence* (25 September 2006)

trial, as well as in other trials that followed. The rationale of the decision also allowed the defence in other cases to obtain a broader category of material than immigration records, including prior statements and judicial records of potential defence witnesses, by arguing that they were material to its final selection of witnesses.¹¹

Rule 67

The defence's duty of reciprocal disclosure has also been interpreted broadly at the ICTR. This disclosure is required by Rule 67, which provides that:

Subject to the provisions of Rules 53 and 69:

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) The Prosecutor shall notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below;

(ii) The Defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the Defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

(C) If the Defence makes a request pursuant to Rule 66 (B), the Prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the Defence and which it intends to use as evidence at the trial.

(D) If either party discovers additional evidence or information or materials which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.

Rule 67 has most often been applied with respect to the defence of alibi. Over the course of the ICTR's existence, many defence counsel have failed to comply with Rule 67(A)'s requirement of disclosure of evidence concerning the places where the accused claimed to be at the time of the offence. This has cost the accused dearly.

¹¹ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Defence Witness Information* (17 April 2008)

The Appeals Chamber has endorsed the principle that a Trial Chamber could consider the late or incomplete disclosure of alibi witnesses when assessing the reliability of the alibi.¹² Trial Chambers have done so on several occasions. In the *Ngirabatware* case, the Trial Chamber cited the late and piecemeal notice as a reason for disbelieving the alibi.¹³ In the *Kanyarukiga* case, the filing of numerous documents which shifted the list of alibi witnesses, and failure to provide the complete list of names and proposed testimony of alibi witnesses until after prosecution had rested its case, led the Trial Chamber to conclude that the alibi was contrived.¹⁴ In the *Setako* case, the Trial Chamber observed that providing notice of alibi after the prosecution case closed raised the question whether the alibi was recently concocted to fit the evidence against the accused.¹⁵

The lesson learned from these cases, often too late, is that defence counsel needed to be more vigilant in complying with the disclosure requirements of Rule 67.

Rule 68

The last, and most important, rule of disclosure at the ICTR is Rule 68. That Rule provides that:

- (A) The Prosecutor shall, as soon as practicable, disclose to the Defence any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.
- (B) Where possible, and with the agreement of the Defence, and without prejudice to paragraph (A), the Prosecutor shall make available to the Defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the Defence can search such collections electronically.
- (C) The Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (A) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.
- (D) The Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under the Rules to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security

¹² *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 115

¹³ *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Judgement and Sentence* (20 December 2012) at para. 696

¹⁴ *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at paras. 124-25

¹⁵ *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Judgement and Sentence* (12 November 2008) at para. 20

interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

(E) Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (A) above.

While a prosecutor's duty to disclose material that may tend to suggest the innocence of an accused is a widely accepted norm, the prosecution at the ICTR initially adopted a very narrow view of its disclosure requirements under Rule 68. This led to a series of rulings by Trial Chambers that found the prosecution in violation of its disclosure obligations under this Rule.

Trial Chambers were required to remind the prosecution that information that contradicted the prosecution's case,¹⁶ affected the credibility of prosecution witnesses,¹⁷ or was in the possession of the Office of the Prosecutor as a whole, rather than the particular trial team on that case,¹⁸ was also required to be disclosed under Rule 68.

In 2003, the prosecution sought to make exculpatory material available by creating an electronic disclosure suite ("EDS") onto which it placed documents that could be accessed electronically by defence teams. By 2006, the EDS had grown to 34,000 documents. Suddenly, defence teams had the problem of having too much information, rather than too little.

The Appeals Chamber addressed this problem in the *Karemera* case, a prosecution of three leaders of the MRND party. In that case, the accused Joseph Nzirorera contended that the prosecution violated its disclosure obligations under Rule 68 after he located redacted versions of exculpatory material on the EDS. The Trial Chamber agreed, but granted the prosecution an interlocutory appeal.

The Appeals Chamber also agreed. It said that

"...[F]or the Prosecution to seek to satisfy its Rule 68 obligations merely by granting the Defence access to an electronic database containing tens of thousands of documents, only a few of which it knows to be potentially exculpatory, is the

¹⁶ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Disclosure of Information Obtained from Juvenal Uwilingiyimana* (27 April 2006) at para. 9

¹⁷ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decisión on Motion for Disclosure Under Rule 68* (1 March 2004) at fn. 5

¹⁸ *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure of RPF Material and for Sanctions Against the Prosecution* (20 October 2006) at para. 12

equivalent of the Prosecution seeking to satisfy those obligations by giving the Defence a key to a storage closet containing the same tens of thousands of documents in paper form. In both cases, the Prosecution has for all intents and purposes buried the exculpatory materials, at least unless it notifies the Defence of the existence of such materials and provides a means by which the Defence can be reasonably expected to find them. Rule 68(B) was not intended to facilitate this kind of evasion of the Prosecution’s disclosure obligations.”¹⁹

The Appeals Chamber went on to suggest that the prosecution might satisfy its disclosure obligation by making a special file on the EDS for exculpatory material and providing written notice when it placed material in this file. After the Appeals Chamber decision, prosecutors at the ICTR and the ICTY took up the Appeals Chamber’s suggestion and posted exculpatory material to a special file on the EDS.

However, the prosecution was slow to identify exculpatory material, particularly when a witness in one trial provided testimony that was exculpatory in another trial. The Appeals Chamber has recently castigated the prosecution for these violations.²⁰

A particularly contentious issue under Rule 68 at the ICTR involved whether the prosecution was obligated to disclose information in its possession that tended to show that the Rwandan Patriotic Front (“RPF”) may have shot down the plane of President Juvenal Habyarimana, the event which triggered the genocide in Rwanda.

Defence counsel in cases of government ministers, party leaders, and military officers argued that evidence that the RPF may have shot down the plane tended to contradict the allegations of the indictment that the accused had planned the genocide as early as 1992 when they addressed political rallies and created documents assessing the military situation.

The prosecution argued that who shot the plane down was irrelevant since at most it simply accelerated well-laid plans to exterminate the Tutsis.

In the *Karemera* case, the Trial Chamber held that the prosecution was not required to disclose a report by one of its former investigators, Michael Hourigan, that

¹⁹ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.7, *Decision on Interlocutory Appeal Regarding the Role of the Prosecutor’s Electronic Disclosure Suite in Discharging Disclosure Obligations* (30 June 2006) at para. 13

²⁰ *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para. 63; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 40

indicated that confidential informants had reported that the RPF was responsible for the shooting-down of the plane. The Trial Chamber reasoned that since the accused were not specifically charged with taking part of in the assassination of President Habyarimana, records and documents concerning that event were not exculpatory in nature and need not be disclosed pursuant to Rule 68.²¹

After a report blaming the assassination of President Habyarimana on the RPF was issued by French investigative judge Jean-Louis Brugiere, defence teams in the *Bizimungu* case sought disclosure of the report from the prosecution as well as an order to the French government to produce the report.²² The Trial Chamber denied the request, ruling that the identity of those who assassinated President Habyarimana was not relevant to the charges against the four Ministers of the Interim Government.²³

However, the defence in the *Bagosora* case was more successful. The Trial Chamber in that case granted disclosure, finding that information about the assassination of President Habyarimana could provide background and context which could assist in understanding some of the conduct which was the subject of the prosecution's case.²⁴

The Chambers were also split when it came to admitting evidence of the alleged responsibility of the RPF for the assassination of President Habyarimana. The Appeals Chamber in the *Nahimana* case excluded evidence of the assassination,²⁵ while the *Bagosora* and *Bizimungu* Trial Chambers admitted the evidence for background and context.²⁶

In the end, the Trial Chambers in all of these cases decided that the prosecution had failed to prove a pre-existing plan to commit genocide. Therefore, the failure to

²¹ *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion for Disclosure of Exculpatory Evidence* (7 October 2003) at para. 15

²² A later report by French investigative judge Mark Trevidic contradicted these findings.

²³ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Requests for Disclosure of the Brugiere report and the Cooperation of France* (25 September 2006) at para. 20

²⁴ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Defence Witness Statements in the Possession of the Prosecution Pursuant to Rule 68(A)* (8 March 2006) at paras. 6-7

²⁵ *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence Pursuant to Rule 115* (12 January 2007)

²⁶ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motions to Admit Documents Pursuant to Rule 92 bis* (12 April 2007) at para. 9; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Reconsideration of Oral Ruling of 1 June 2005 on Evidence Relating to the Crash of the Plane Carrying President Habyarimana* (23 February 2006)

allow disclosure or to admit evidence of who was responsible for shooting down the plane did not affect the judgments.

No Trial Chamber ever made a factual finding as to who shot down the President's plane. To some, this was a prudent exercise in judicial restraint. To others, the ICTR's failure to resolve the issue contributed to the perception of victor's justice, and the question of who shot down the plane continues to be hotly debated to this day.

Remedies

While often calling the prosecution to task when it was shown to violate its disclosure obligations, ICTR Trial Chambers and the Appeals Chamber were reluctant to impose any remedy or sanction on the prosecution. Trial Chambers occasionally admitted the withheld exculpatory material into evidence,²⁷ or recalled prosecution witnesses whose evidence was affected by the withheld material,²⁸ and once drew an adverse inference against the prosecution,²⁹ but routinely denied requests to exclude evidence³⁰ dismiss any charges,³¹ or sanction the prosecution.³²

The lack of effective remedy or sanction for disclosure violations, while motivated by a legitimate interest in having available all probative evidence for a Chamber's judgment, and avoiding additional delays to already protracted proceedings, has created a form of impunity for the prosecution. Many disclosure violations would likely have been avoided if prosecutors had to be concerned that they would be sanctioned, or lose their case, if they were not diligent in meeting their disclosure obligations. The Appeals Chamber's lofty pronouncement that the duty to disclose exculpatory evidence is as important as the obligation to prosecute³³ has not been put in practice at the ICTR and the many documented breaches of that duty have had no tangible impact on the prosecution.

²⁷ *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 433

²⁸ i.e. *Prosecutor v Nindiliyimana et al*, No. ICTR-00-56-T, *Decision on Defence Motions Alleging Violations of the Prosecution's Disclosure Obligations Pursuant to Rule 68* (22 September 2008) at para. 63

²⁹ *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 174

³⁰ *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 437

³¹ *Nindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 23

³² i.e. *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Eleventh Notice of Rule 68 Violation and Motion for Stay of Proceedings* (11 September 2008) at paras 26-30

³³ *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72

Nevertheless, disclosure at the ICTR did improve dramatically from the selective and heavily redacted material handed out during the early years to the thousands of documents disclosed electronically during the later years. Much of this improvement in the practice resulted from decisions by the Appeals and Trial Chambers.

The final chapter on disclosure at the ICTR will be written by the judges of the Mechanism for International Criminal Tribunals (“MICT”), who will undoubtedly receive requests for review of final judgments in the coming years that allege that unsafe judgments, and indeed, wrongful convictions, were obtained, in part, due to failures to disclose exculpatory evidence.

Lessons Learned

Just as the ICTR made great improvements on the disclosure practices at Nuremberg, and developed an impressive legacy during its own existence, future international criminal Tribunals and the International Criminal Court will need to build on the ICTR’s progress in order to deliver trials that are both fair and expeditious. The conflicts in Rwanda, the former Yugoslavia, and Sierra Leone took place in an era before computers, cell phones, Internet, and social media. Today and tomorrow’s conflicts will produce vast amounts of potential disclosure material exponentially greater and more difficult to manage than that faced by the ICTR.

For example, at the Special Tribunal for Lebanon, the prosecution’s case, built largely on cell phone tracking and records, has resulted in millions of pieces of data being made available to the defence on a shared database.

At the International Criminal Court, the court’s early focus on Africa has delayed the explosion of electronic information that it will undoubtedly encounter in its cases. Its light caseload and heavy personnel complement in its early days has resulted in intense judicial involvement in redactions and other disclosure issues—a practice that the prosecution and Trial Chambers at the ICTR learned was unrealistic as the caseload grew.

The ICTR’s rules of disclosure have stood the test of time. The interpretation of those rules by the ICTR Chambers has promoted fair trials. Prosecutors and defence counsel at future Tribunals, while likely faced with greater technological challenges,

simply need to apply these rules and jurisprudence, and when in doubt, err on the side of disclosure.³⁴

³⁴ Summaries of ICTR decisions, including those interpreting the rules of disclosure, may be found in *Peter Robinson's Summary of Decisions of the International Criminal Tribunal for Rwanda* found at <http://www.peterrobinson.com/Research%20Tools/Research%20Tools.html>