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Litigating for Justice: Defense Work at the International Criminal Tribunal for Rwanda (ICTR)

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**LITIGATING FOR JUSTICE: DEFENSE WORK AT THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)***

By Beth S. Lyons¹

Introduction

Almost a decade and one-half ago, my colleague and friend, Peter Robinson, published an article in the December 2000 issue of *The Champion*,¹ entitled “Defending War Criminals in the Hague.” He captured the excitement of criminal defense attorneys who were litigating on the ‘ground floor’ of a new legal system at the ICTY. Both *ad hoc* Security Council-created Tribunals, the ICTY and ICTR were not only elaborating on existing international legal precedents, but also creating new international criminal law. Close to two decades after their inception, the ICTY and ICTR are at the end of their “Completion Strategy,”² and have been replaced by a Mechanism for International Criminal Tribunals (MICT).³

I, too, have been privileged to share this experience of “making law” as a criminal defense attorney at the ICTR in Arusha, Tanzania. Since 2004, I have been a counsel in three cases, and have been involved in ICTR Defense Conferences in Europe and Canada.⁴ Most recently, in February 2014, my Defense team, led by Chief Charles A. Taku, won an acquittal on appeal for our client, Major F.X. Nzuwonemeye, in the high-profile “Military II” case (*Ndindiliyimana et al.*).

Litigating History: Making Law vs. Writing History

Make no mistake, the cases at the international criminal tribunals are political cases. The struggle in the courtroom is as much about the historical narrative as it is about culpability. At the ICTR, its judgments are a historical narrative of the events of 1994. This is the reason that the government of Rwanda has so tenaciously tried to exercise control over the ICTR, especially the Prosecution. As a former ICTY Prosecutor has

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¹ National Association of Criminal Defense Lawyers (NACDL) monthly magazine.

LYONS - 30 April 2014

pointed out, “The struggle for the interpretation of historical events through the trial record might be as important in [the] long run as the determination of guilt or innocence of the individuals tried.”⁵

As defense attorneys, we are familiar with the co-existence of multiple “truths” and “facts” about criminal events. We know that how the facts are formulated and presented can, very often, determine the outcome of the case. This is illustrated most clearly in judgments with a dissenting opinion: often, it appears that the majority and dissenting opinions are not discussing the same case and the same evidence. It is the dissent which gives a full account of the facts of a case. Hence, judgments are selective in their choice of facts, and can produce a less than complete and accurate picture of the trial evidence.

Take a look at any ICTR Judgment: to a greater or lesser degree, the judges are writing (or, in some cases, re-writing) the history of the events of 1994 in Rwanda. It is especially in this context that judgments with less than complete facts, or only partial representations of the truths serve an historical function, which exceeds, in my view, the parameters and prerogatives of legal judgments.

Nor do I, as a Defense lawyer, spontaneously think of “being an historian” as part of my job description. But at the Tribunals, due to the subject matter of the proceedings, lawyer/historian roles implicitly overlap. The reason is that the interpretation of historical events, and the determinations of guilt or innocence are inextricably linked. But it is through the fight for fair trial guarantees that we struggle for a more complete truth about the events, and, most importantly, about who was responsible for the crimes. I know of no defense which denies that the crimes of 1994 took place; the issues are who is responsible, and who are the victims of the crimes.

Fair trial issues are usually a key part of any defense strategy – at trial or on appeal – but they serve an additional function at the Tribunals. They provide a “lever” for finding the truth. Fair trial guarantees – such as full disclosure of exculpatory material and other principles - make for truth telling; and they mitigate against the writing/re-writing history

LYONS - 30 April 2014

through judgments. Where there are fair trial violations, the likelihood of an accurate historical account, based on the evidence, is virtually non-existent. Hence, the struggle for fairness is a struggle for the truths.

Litigation in a “hybrid” system is adversarial

The ICTR, like other international courts and tribunals, has elements of both the common law and civil law systems, and is referred to as a “hybrid” court. The civil-law system gives an extensive role to judges in investigation and questioning of witnesses, in addition to procedural and evidentiary matters. But these characteristics are barely evident in many ICTR courtrooms where the judges ask very few, if any, questions, and often fail to intervene on matters of the proceedings, such as procedure and evidence, when they should. This may be due more to the fact that courtroom litigation experience is not a prerequisite for judicial appointment. The judges are appointed by the U.N. General Assembly; they include judges in their home countries, legal practitioners, university professors and diplomats.⁶ The trials are essentially bench trials with three judges; there are no juries at the international tribunals. Judges have triple roles - as finders of fact, finders of law and sentencers. Hence, it is imperative that Defense strategy and tactics take into account each of these functions. Talking to the judges as if they were a jury goes a long way toward articulating the Defense case in a clear and direct manner.

In practice, the common notion that civil-law systems (and those trained within that system) are “less adversarial” is not evidenced by watching any of my civil law-trained colleagues at work. The ICTR system is very much an adversarial system, with the right to cross-examine - a key tool for the Defense attorney - included in the Rights of the Accused, in the ICTR Statute, under Article 20 (e). The techniques of cross-examination may differ based on the system in which the attorney was trained, but this is not always true. I have worked with some civil law-trained attorneys whose cross-examination is brief and direct, similar to common-law trained attorneys; while other civil law-trained attorneys approach cross-examination as an opportunity to ask paragraph-length

questions. Nevertheless, the object of the Defense is the same in both systems – to challenge credibility of the Prosecution’s witnesses.

But there are some differences in the two systems. These are most salient in the rules of evidence. At the ICTR, these rules are general, giving wide latitude to judicial interpretation and application. A few examples:

- Under Rule 89, the Trial Chamber “may admit any relevant evidence which it deems to have probative value” and “may request verification of the authenticity of evidence.”

In one case, when the Defense challenged the authenticity of a document, the Presiding Judge stated that it had a “K” number, implying that the “K” number established authenticity. The “K” number is assigned by the Office of the Prosecution to all documents obtained by its office. Counsel unsuccessfully argued that the “K” number did not go to the authenticity of the document.

- There is an exclusionary rule, ICTR and ICTY Rule 95, Exclusion of Certain Evidence,⁷ although suppression hearings are not routine pre-trial procedures. Rule 95 motions are presented – orally⁸ and in writing – to the Trial Chamber. But I am not aware of any appellate jurisprudence on this issue.

- Hearsay is admissible and there is no list of exceptions to the rule. ICTR judges admit double or even triple hearsay, with the *caveat* that weight is reserved for the judgment. However, many of the exceptions found in national jurisdictions have been litigated by the Defense.

- Prior inconsistent statements: The treatment of prior inconsistent statements varies widely, with the majority of judgments holding that they do not undermine a witness’s credibility. For example, testimony of a witness may be accepted in part, although some of the testimony may be deemed as unreliable. As Professor Nancy Combs has pointed out in her meticulous study of Tribunals’ judgments, there is no standard approach to inconsistencies in Prosecution witness testimony. But, where there have been acquittals,

the court seems to have paid more attention to these inconsistencies as issues of credibility. Strikingly, in the ICTR judgments she reviewed, about fifty per cent involved Prosecution witnesses whose statements featured serious discrepancies.⁹

The other outstanding difference is that at the ICTR, the Prosecution gets “two bites at the apple”: it has a right to appeal a verdict of acquittal, as well as sentences imposed by the trial judges.

“Ordinary” versus “international” crimes

The Tribunals adjudicate international crimes: genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and of additional Protocol II and war crimes.¹⁰ Some of these crimes have been incorporated into national jurisdictions, but at the heart of each of these crimes are many “ordinary” crimes such as murder, rape, imprisonment which are found in national jurisdictions.

Whereas “ordinary” crimes, such as murder or rape, are isolated events,¹¹ these crimes are transformed into “international” crimes based on elements of a) context, b) intent or c) nexus. For example:

- the conduct underlying the crime of genocide (for example killing, or causing serious bodily or mental harm) is distinguished by the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”
- “ordinary” crimes can constitute crimes against humanity under the ICTR Statute when they are “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic racial or religious grounds” (ICTR Statute, Art. 3)
- violations of common article 3 require a nexus between the underlying crime and the existence of an armed conflict

LYONS - 30 April 2014

These additional factors - genocidal intent, systematic and widespread attack and nexus with the armed conflict, combined with the various forms of individual and superior responsibility, add to the complexity of the charges and their defense. This complexity bumps up the level of difficulty of these international cases. But, it also makes the criminal cases at the ICTR and ICTY among the most challenging of any lawyer's career.

The Blurred Line of the Defense

When I accepted my first assignment in 2004 in the *Simba* case, I initially approached it as I would any other criminal defense case. I had been trained at Legal Aid that there two types of defense: the "who did it" and the "how did it happen" defenses. At the ICTR, while the legal analysis and tools with which to wage the defense were familiar to me, there was one major and crucial difference: the line between the two defense strategies was quite blurred. The reason is that the ICTR cases are politically-motivated cases. The innocence or guilt of the client are more than often not interconnected with the struggle for the historical "truth" of what happened in 1994 in Rwanda.¹² As defense counsel, we fight a legal battle, but one cannot do this successfully without considering the interplay between the legal and historical and political factors in a case.

For this reason, in contrast to my Legal Aid experience in the late 1980's through the 1990's, clients who testify is the norm for most cases. It is necessary to "humanize" the client, who has been the object of Prosecutorial attacks, starting in Opening Statements and continuing through Prosecution witness testimony. Especially in multi-defendant cases, the judges stare at the Accused in court, day-in, day-out literally for years, and hear their defense only from their counsel, through the presentation of witnesses. Hence, the need to "personalize" the client becomes paramount.

Of course, this practice also has its negative side: In the *Simba* case, a single defendant case where the trial lasted less than one year, we presented an alibi defense and the client testified. Notwithstanding the jurisprudence, the fact is that once a defendant asserts an

LYONS - 30 April 2014

alibi defense, the burden of proof is shifted to the Defense, and away from the Prosecution.

Based on my ICTR experience, I have concluded that the role of client testimony in political cases may be different than an ordinary criminal case, because the “non-legal” factors can impact on the judges, even subconsciously. Many judges – whether in international or national jurisdictions - essentially decide whether or not the accused person is guilty and then fill this in with evidence, either direct or inferred. For example, Combs has found what she describes as a “troubling pro-conviction bias”¹³ which is based, in part, on notions of organizational liability.¹⁴ The testimony of the client, at the conclusion of a case, may force a crevice to develop in this judicial perspective.

Litigating against two Adversaries: the Prosecution and Rwanda

The presence of a “third party” in the U.S. adversarial system is not an uncommon phenomenon, especially in political cases where the Prosecution’s goal is synonymous with the government’s interest in successfully prosecuting a defendant. The government lends material support to the Prosecution, which operates with the State behind it – whether it be a local, state or Federal government. There is, of course, no similar level of State support to the Defense, which is “normally” maintained at a crisis level.

The same “line-up” exists in the ICTR courtroom: there is the Defense on one side and the Prosecution (+ Rwanda) on the other. Rwanda plays an active, if not leading, role in the court proceedings – despite the fact that it voted against the establishment of the Tribunal in 1994, as a non-Permanent member of the Security Council.

Like any country, Rwanda has to authorize Defense requests for investigative missions which are carried out on its territory, particularly in state institutions such as prisons, and it must also issue travel papers for witnesses to testify in Arusha. But its State policy, dictated by its ideological *raison d’etre* that the Accused military and governmental

LYONS - 30 April 2014

leaders at the ICTR planned the genocide,¹⁵ means that the Rwanda has obstructed and often punished the Tribunal, and especially the Defense and its teams and witnesses.

- Rwanda has withheld witnesses as a protest to ICTR legal decisions with which it disagreed. This occurred in the *Barayagwiza* case, where the Appeals Chamber decided to initially release Barayagwiza because of the egregious violations of his rights in 2004. In fact, in the same year, the U.S. Department of State reported “Government authorities sporadically prevented witnesses from attending and giving testimony at the ICTR.”¹⁶

- Rwanda opposed the “Special Investigations” of then Chief Prosecutor Carla del Ponte into the crimes allegedly committed by RPF soldiers, including members of the current Rwandan government, but she refused to stop.¹⁷ Due to pressure from President Kagame, with U.S. approval,¹⁸ her contract as ICTR Chief Prosecutor was not renewed by the Security Council in 2003.

Fundamental fairness: an anomaly in a victor’s Tribunal?

The ICTR has earned the appellation of a victor’s Tribunal, due to its failure to prosecute both sides of the conflict in 1994.

Under Security Council Resolution 955, the ICTR is mandated to prosecute all those responsible for the crimes of 1994. In its two decades of existence, the ICTR has prosecuted only one side of the struggle in Rwanda in 1994 – the Hutus (mostly government and military officials, at the national and local level, and generally, members of the Hutu intelligentsia). It has refused to prosecute anyone in the leadership, or members of the Rwandan Patriotic Front (RPF), led by Rwanda’s current President Paul Kagame – despite clear longstanding allegations (and evidence) of crimes systematically committed by the RPF against the Hutu population.

Selective prosecution is legally defective, because it does not apply the rule of law equally to all. This refusal to apply the rule of law to “both sides” is not the result of

LYONS - 30 April 2014

negligence or priorities or resources. It is the outcome of a policy, well described by many others, including former Prosecutor Carla del Ponte.¹⁹

This fundamental flaw – dispensing justice for one side only – not only taints, but delegitimizes - the judicial proceedings. Most significantly, it obstructs the Tribunal from its objective to find the truth about what happened in 1994.

As Wilson has pointed out, unless the ICTR changes its position to not investigate and prosecute the RPF mass crimes, the “historical record produced by the ICTR is a partial one, as it has rendered an account of the crimes of just one side of the conflict, the losers.”²⁰ He has also pointed out that the Rwandan government, through “intimidating tactics and a sustained diplomatic offensive at the United Nations,” has succeeded in preventing prosecutions of its own soldiers.²¹

The Rights of the Accused - Article 20

At the Tribunals, the rights of an Accused or defendant are enshrined in the ICTR’s Statute, Article 20 (ICTY Statute, Article 21) which mirrors other international and regional documents. These rights are “minimal guarantees.” Among them, the right to a fair trial and the right to be presumed innocent are fundamental.

• The Presumption of Guilt.....before and during trial, and even after acquittal

Anyone charged with a crime at the ICTR is presumed guilty – in the press, by immigration authorities, and by countless other entities and persons. It is then the duty of ICTR defense counsel, like their colleagues almost universally, to “prove” the client’s innocence. In the media, especially the Rwandan press, the clients are convicted before any proceedings have taken place; but within the ICTR, the presumption of guilt is glued to a defendant, even after he has been acquitted.

As of February 2014, fourteen persons (including my client, Major F.X. Nzuwonemeye) have been acquitted. But, the problem is that almost no country is willing to accept an

LYONS - 30 April 2014

acquitted person who was charged with genocide or crimes against humanity,²² and the acquitted persons (as well as those who have served their sentences) live in a “safe house” under UN auspices in Arusha, Tanzania.

Dr. Andre Ntagerura, who I met at the computers in the ICTR library in Arusha many years ago, has lived in a safe house since his acquittal after trial in 2004. The Appeals Chamber rejected the Prosecution’s appeal and affirmed his acquittal in early 2006. Yet, despite the biennial pleas of the ICTR Presidents to the Security Council for countries to accept the acquitted persons, no country comes forward.

The possibility of acquittal was never envisioned by the Tribunal. A spokesman for the ICTR, then ICTR Deputy Registrar Everard O’Donnell explained:

The simple fact is—and there is some truth in this particular fact—that no proper provision was made for acquittal at the beginning of the setting up of the Tribunal. That much is a fact, and it’s one that we have been struggling with in the registry ever since. There was no budget for dealing with acquitted persons.²³

If acquittal had been envisioned, it would have been budgeted – especially in a United Nations Tribunal, an organization with a super-bureaucracy.

There is also no legal right to compensation for the acquitted persons, and hence, no remedy under the Tribunals’ jurisprudence. An acquitted person cannot be compensated for malicious prosecution, false or wrongful imprisonment or similar causes of action. Many have tried unsuccessfully to litigate this issue; one acquitted person, Rwamakuba, was awarded \$2000 - a pittance which effectively ridiculed the violation of his rights - for a breach of his right to counsel.²⁴

The lack of a legal right to compensation, and the failure to “plan for” acquittals shows that the presumption of guilt is alive and well at the ICTR.

And, it is also omnipresent in the query: “how can you represent ‘so and so,’ who is charged with these horrible crimes?” which is not unfamiliar to criminal defense

LYONS - 30 April 2014

attorneys, especially at Legal Aid. But the question assumes a different invective when dealing with “international crimes.”

My answer is the same as when I worked at Legal Aid: I was not there when the crime occurred. But the pressures of the “international community” to end genocide, war crimes, etc. can even affect the defense attorneys representing those Accused of these crimes – at least initially.

When I accepted my first case, I had almost no information about what happened in Rwanda in 1994 – except what was available in English and in the U.S. At the time, I did not realize that this was a huge disadvantage, and could affect my representation of my client. As I worked on the case, and struggled through materials (in French) from Europe and Africa, I understood there was “another perspective” on the “facts” of 1994 – specifically – who were the perpetrators and who were the victims.

Then, I went on Missions to Rwanda and the neighboring countries, and talked with potential witnesses. I realized the “unspoken” or “silent” assumption that the Prosecution represents the “good guys” or “victims” and that the Defence represents the “bad guys” or “perpetrators” was a gross misrepresentation. In most cases, witnesses for the Defence include both Hutus and Tutsis, and there is intermarriage between Hutus and Tutsis. But, the context of these cases is not framed by the personal relations between individual Hutus and individual Tutsis; it is the political context of the RPF’s war against the Hutu leadership which provides the contours for the legal cases.

Contrary to the Prosecution’s and Rwanda’s position that “extremist Hutus” shot down the plane on 6 April 1994, killing both Rwanda’s President Juvenal Habyarimana and Burundi’s President Cyprien Ntaryamira, the Defense has adduced credible evidence that the RPF, headed by Rwanda’s current President Paul Kagame, was responsible. This was part of the RPF’s continued military campaign to control Rwanda, which started with their invasion from Uganda in October 1990 and culminated in July 1994, with their capture of Kigali.

A few other examples:

• **Right to notice of the charges**

Under Article 20 (a) an Accused has the right to “be informed promptly and in detail in a language which he or she understands of the nature and the cause of the charge against him or her.”

The initial, and most fundamental litigation in any case is the challenge to the indictment. In New York City, I was familiar with “barebones” and facially deficient complaints in arraignments, and the indictments which followed. These were very short, often only a paragraph or two. But at the ICTR, indictments are voluminous, overly broad and vague and the elements of the crimes and forms of liability charged are generally not factually supported.²⁵

Under the ICTR Rules of Procedure and Evidence, Rule 47 (C),²⁶ the indictment is required to include a “concise statement of the facts of the case and of the crime.”

As highlighted by Judge Dolenc,²⁷ this rule distinguishes between “facts of the case” and “facts of the crime.”

The indictments do not appear to have problems with “facts of the case” or information which provides “historical, political, contextual or background facts.” They feature the political analysis of Rwanda and the Prosecution, and many paragraphs contain no criminal allegations. This “official narrative” is that in 1994, the whole state apparatus, from the national level down to local communes, from the Rwandan army to the local *bourgmestre* (equivalent of mayor) at the commune level, had been transformed into a killing machine against the Tutsi population. This is essentially the scenario in the book by the late Alison Des Forges, *Leave None to Tell the Story*, which has been used as the Bible of the Prosecution in drafting the indictments.

But the indictments are defective in respect to the “facts of the crime” – the material factual allegations which provide notice to an Accused so that he can prepare and present his defense.

While there is no requirement that the Prosecution’s evidence in support of the indictment be translated for an Accused’s counsel, it would follow that the “right to translation” was implicit in Article 20 (d), the right to a defense. While documentary materials are sometimes translated, for example, from Kinyarwanda to French and English, the working languages of the Tribunal, this was not the case in the proceedings against Hassan Ngeze, who was charged with, among other charges, incitement to commit genocide based on the newspaper he edited, *Kangura*. He was represented at trial by John C. Floyd, III. In the very beginning, Floyd requested that the 73 issues of *Kangura* be translated into French and English. Both the Registry and the Tribunal rejected this request. Floyd asks: “How can Hassan Ngeze get a fair trial if his lawyer and the judges could not read the documents that allegedly incriminated him? How could experts be found to give an opinion of the writings?”²⁸

- **Right to counsel (Article 20[d])**

Legal Aid clients have a right to counsel, but do not have a choice of counsel. In New York City, a counsel picks up a file from the box at the Legal Aid table, and walks into the pens to meet the client: there is no element of choice, either for the client or the counsel. At the ICTR, a similar situation prevails for clients.

The Defence Counsel Management Section (DCMS), a unit within the Registry, makes the important final decisions about counsel. A defendant submits a choice of three names (in order of preference) for lead counsel, each of whom is contacted by the DCMS. The DCMS makes the final choice. Its decision is supposed to be based on a number of factors: availability, composition of defense team, etc. However, this does not happen without a

LYONS - 30 April 2014

lot of maneuvering, etc. In fact, in the case of *Akayesu*, one of the first cases, his choice of counsel for the appeal stage was rejected.

- **Right to adequate resources and facilities to prepare a defense (Article 20[b])**

Under Legal Aid schema, the resources available to a Legal Aid client are limited, and allocation must be approved by a supervisor. There is no “equality of arms” with the Prosecution.

In New York City, because of the scarcity of resources, one had to prioritize or triage the cases. I felt like I was working in the legal equivalent of an Emergency Room.

Although the principle “equality of arms” is encompassed in fair trial guarantees, it does not require “equality of resources” with the Prosecution, in respect to financial or human resources, in the Tribunals.²⁹

At the ICTR, the allocation of all resources, from approval of payments to the defense team to office space to approval for work missions, must be done by the Defense Counsel Management Section (DCMS). This Defense unit was not established with the idea that it would or could equalize the resources available to the Prosecution. But, unfortunately, the DCMS often exacerbated this inequality, with its bureaucratic decision-making. For example, the DCMS provided the required permissions for work missions for investigators and counsel to meet with prospective witnesses, both civilians and prisoner witnesses. This included an authorization for the amount of days, but DCMS routinely would approve only half the time required by the Defense to meet with witnesses. This made it difficult, if not sometimes impossible, to do the required work – especially in countries where transportation and bureaucracy were a problem. DCMS also provided the paperwork necessary to solicit the co-operation of the country in which the Mission was taking place. Needless to say, co-operation in many countries was forthcoming,

without a hitch. Such was often not the case with defense visits to Rwanda, especially in the prisons.

• **Right to be tried with Undue Delay Article 20 (c)**

Enshrined in international instruments, as in many national jurisdictions, the terms “speedy trial” and “undue delay” take on new proportions at the ICTR.

The situation in multi-defendant cases, for example, the “*Butare case*,” demonstrates the egregious violations. The trial lasted for eight years. By the time it ended in 2009, two of the six co-defendants had been incarcerated almost fifteen years.³⁰ The Trial Judgment was issued on 24 June 2011. The appeal proceedings are not expected to commence until mid-2014.

Generally, the trial chambers have held that undue delay due to the complexity of a case does not prejudice a defendant. “Complexity” refers to the fact-intensive (and hence, witness and document-intensive) nature of the cases: for example, in the “*Butare case*” there was a total number of 189 witnesses, and 13,000 pages of documents were tendered into evidence. The Trial Judgment, excluding the Annexes, was approximately 1500 pages in length.³¹

It is rare that the judges find that there is undue delay. One exception is the *Gatete* case, where the Appeals Chamber, reversing the Trial Chamber’s finding, found “undue delay” where the “pre-trial delay of more than seven years was undue given that the case against Gatete was not particularly complex.”³² In *Gatete*, the 7 years of pre-trial delay was not justified because the Prosecution’s case was presented in 13 days; the whole trial was 30 days (49 witnesses and 146 exhibits).

• **Rule 68**

The ICTR’s disclosure rule, Rule 68 (Disclosure of Exculpatory and Other Relevant Material) states: “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 guilt of the accused or affect the credibility of Prosecution evidence.”³³

It is similar to other such rules in national jurisdictions; it is a right of a defendant and serves to further the interests of fairness. Disclosure of exculpatory material is not categorized as an Accused’s right under ICTR Statute, Article 20. However, it has been incorporated as a right of the Accused in the ICC Statute under Article 67, which is where it belongs.

But disclosure is often excessively late, and its usefulness to the Defence is severely reduced or nil. In the “Military II” case, for example, for some specific statements disclosed in February 2008, the Chamber concluded that the Prosecution had “violated its obligation to disclose these statements ‘as soon as practicable’ - a requirement that is certainly not satisfied by disclosure several years after the trial has started.”³⁴ Some of the statements found to be disclosure violations dated as far back as 1997.³⁵ It could be concluded, then, that these statements had been in the possession of the Prosecution for than a decade prior to their disclosure to the Defence.

The Prosecution’s violation of its Rule 68 obligations is especially egregious when you consider the history-writing of the judgments, and that these violations are routine. Rule 68 litigation has been an area of extensive litigation in almost all cases, at both the trial and appellate levels.³⁶

Conclusion

For criminal defense attorneys who did not participate in the Tribunals, the International Criminal Court (ICC) offers another opportunity to “get in on the ground floor.” Given the ICC’s track record of selective prosecution of “situations” on the African continent, and its baggage of international injustice at the Tribunals, it is crucial to fight for the rights of the Accused, particularly fair trial and the application of the rule of law to all.

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² The ICTR was established by Security Council Resolution 955 (1994); the ICTY by Security Council Resolution 827 (1993).

³ The MICT replaced the ICTR in 1 July 2012 and the ICTY on 1 July 2013. For more information, *see* unmict.org.

⁴ *See*, for example, <http://www.ictrlegacydefenseperspective.org>.

⁵ Nice, Professor Sir Geoffrey, “Legal Process as a Tool to Rewire History – Law, Politics, History, Lecture, Gresham College, 13 February 2013.

⁶ Biographies of the ICTR and ICTY Judges are available on the websites, at www.ictr.org and www.icty.org.

⁷ Rule 95, ICTR and ICTY Rules of Procedure and Evidence, reads: No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

⁸ For example, in *Simba*, an oral Rule 95 motion was made, and was not granted by the Trial Chamber.

⁹ Combs, *Fact-Finding Without Facts, the Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press: 2010), pp. 119–120.

¹⁰ War crimes are found in the ICTY Statute, but not the ICTR Statute.

¹¹ Here, I am not referring to “pattern” or “practice.” The difference is that “pattern” crimes are labeled because of the “signature” factors of crimes: methods, victims, geographical area. Here, the issue is the crime in the context of a broader crime.

¹² *See*, Lyons, Beth S., *The Evolution of a Partisan: Observations of a Criminal Defense Attorney at the ICTR*, available at www.bepress.com.

¹³ Combs, p. 244.

¹⁴ Combs, Chapters 7 and 8.

¹⁵ This is essentially the scenario in the book by the late Alison Des Forges, *Leave None to Tell the Story*, which has been used as the Bible of the Prosecution in drafting the indictments. *See also*, Wilson, Richard Ashby, *Writing History in International Criminal Trials* (Cambridge University Press: 2011), p. 172 (“It is not an overstatement to say that Des Forges’s *Leave None to Tell the Story* became the official version of Rwandan history at the Tribunal.”) However, the Trial and Appeals Chambers have acquitted military and governmental leaders and others of charges of conspiracy to commit genocide. For an alternative to the “official version,” *see* Erlinder, Peter, *The Accidental Genocide* (International Humanitarian Law Institute:

2013) and *The Rwanda Genocide Papers: Report of the UN Reconnaissance Mission to Rwanda – August 1993* (IHLI: 2012).

¹⁶ Country Report on Human Rights for Rwanda 2004, Bureau of Democracy, Human Rights, and Labor.

¹⁷ Combs, p. 244. The Rwandan government's opposition to any investigations or proceedings in respect to the RPF has been reported in the annual U.S. Department of State Country Report for Rwanda, for example, 2009 (Section 5) and 2008 (Section 4).

¹⁸ Del Ponte "had no doubt Mr. Kagame's calls for her resignation were made as a result of her investigations into possible RPF atrocities." Global Policy Forum, "Del Ponte Says UN caved to Rwandan Pressure," by Steven Edwards, 17 September 2003. See, Del Ponte's account of U.S./Rwanda-led pressures on her to drop the "Special Investigations" of the RPF, in her book, *Madame Prosecutor: Confrontation with Humanity's Worst Criminals and the Culture of Impunity*, Other Press, New York: 2009 (English edition), Chapter 9.

¹⁹ See, Del Ponte, *Madame Prosecutor*, *supra*.

²⁰ Wilson, Richard Ashby, *Writing History in International Criminal Trials* (Cambridge University Press: 2011), p.46.

²¹ *Ibid.*, p. 47.

²² France accepted the first person acquitted of genocide, Bagilishema, in 2001, after pressure from the ICTR, but, as late as January 2012, had refused to grant a visa to Gratién Kabiligi, for example.

²³ International Symposium, Geneva, 'International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders', Session 4, Geneva, 10 July 2009, p 12. Available at www.ictor.org.

²⁴ Some countries, such as Denmark, offer compensation to acquitted persons.

²⁵ Indictments are available under each case at www.ictor.org. For a discussion of joint criminal enterprise, see Lyons, "Tortured Law, Tortured 'Justice'- Joint Criminal Enterprise in the Case of Aloys Simba," *ILSA J. Int'l. & Comp.L.*, Vol 17:2 (2011).

²⁶ Rule 47 (C) provides that the "indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

²⁷ Separate and Dissenting Opinion of Judge Dolenc in *Ntagerura et al.* Trial Judgment (2004).

²⁸ Floyd, John, *International Injustice, Rwanda, Genocide and Cover Up United Nations Media Trial*, Kabuki Press: Washington, D.C. (2005), pp. 47-48.

²⁹ *Kalimanzira* Appeal Judgment, Case No. ICTR -05-88-A, para. 34.

³⁰ See Trial Judgment, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, paras 134-143 (Trial Chamber rejected that almost 15 year incarceration of defendant Ndaymabaje violated his right to be tried without undue delay and the presumption of innocence based on the complexity of the case).

³¹ *Prosecutor v. Nyiramasuhuko et al.*, Summary of Judgment and Sentence, 24 June 2011, para. 5.

³² *Gatete* Appeal Judgment (2012), para. 44.

³³ Rule 68(A), ICTR Rules of Procedure and Evidence (2009)

³⁴ *Ndindiliyimana et al.* (“Military II”), Case No. ICTR-00-56-T), Trial Chamber, Decision on Defence Motions Alleging Violation of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68, 22 September 2008, para. 38.

³⁵ *Ibid.*, paras. 38, 46.

³⁶ See litigation in *Nzirorera* case at www.peterrobinson.com. Also see “Military II” decision *supra*, where the Trial Chamber held that the Prosecution’s persistent violations of its disclosure obligation under Rule 68 violated the right of the Accused to a fair trial.