

Fairness of the Proceedings: A Recurring Issue before the ICTR

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**1. Introduction**

The fair trial rights of the accused are an indispensable component of any criminal proceedings. By assuring the rights of the accused, courts and tribunals ensure not only that justice is assured by delivering just outcomes, but by guaranteeing that the narrative of the events is accurate and that the verdict can be trusted by future generations. Put another way, fair trial rights transform a two-dimensional *Potemkin* proceeding into a three-dimensional account that serves the lofty purposes of the court and the larger community.

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The International Criminal Tribunal for Rwanda (ICTR or Tribunal) has grappled with fair trial rights since its inception. The ICTR Statute codifies these rights in Articles 19 and 20, which provide

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

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.

While these rights may appear self-evident—and indeed have been codified in various ways in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as in the various regional human rights instruments—realizing them in the context of proceedings for international crimes has required a lot of diligent work by the Judges and lawyers of the ICTR.

This article traces the primary fair trial issues that have confronted the ICTR and the accused persons. It relates the difficulties and successes of the 20 year history of the ICTR, and how the work of this Tribunal has helped transform fair trial declarations into fair trial practices that have become an essential part of international criminal procedure. The mechanisms adopted by the ICTR for ensuring the fair trial rights of the accused will undoubtedly form an essential component of its legacy.

## **2. Fairness of the Proceedings before the beginning of the Trial**

As one scholar has noted, “The trial might be fair but failure to protect the defendant’s interests during the preliminary phase may ultimately result in an unfair trial.”<sup>2</sup> Indeed, from the start of the investigation to the beginning of the trial, it is the responsibility of the Tribunal to ensure the fairness of the proceeding by guaranteeing certain fundamental rights for the accused. The International Criminal Tribunal for Rwanda (ICTR) has encountered many challenges to the fair trial rights of the accused. Three recurring issues arise during the pre-trial phase: the principle of equality of arms, the lack of resources and investigations.

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<sup>2</sup> KARIN N. CALVO-GOLLER, *THE TRIAL PROCEEDING OF THE INTERNATIONAL COURT: ICTY AND ICTR PRECEDENTS* 155 (Martinus Nijhoff Publishers, 2005).

### **a. Equality of Arms and Lack of Resources**

The principle of equality of arms between the Prosecution and Defence is expressed in article 20 of the ICTR Statute. The principle was first expressed in international criminal law during the Nuremberg Trials and later identified by the ICTY Appeals Chamber as a component of “the right of an accused to a fair trial.”<sup>3</sup> The ICTR Appeals Chamber has further defined equality of arms signified as the principle “that neither party is put at a disadvantage when presenting its case.”<sup>4</sup>

During the early years of the ICTR, defence teams filed numerous submissions alleging the violation of this principle, notably concerning the lack of notice of charges, the lack of adequate time or facilities to prepare the defence and the right of the accused to legal counsel. Through these specific issues, the principle of equality of arms was considered at length and took an important place in the Chambers’ deliberations, and allowed the Tribunal to develop caselaw that had contributed to defining the contours of the application of this principle in international criminal law.

The first contribution of the ICTR to ensuring the equality of arms was to interpret and define the minimum guarantees entitled to the accused. Regarding the right of a legal counsel, the Trial Chamber in *Kambanda* held that an indigent accused has the right to a competent counsel.<sup>5</sup> However, in the same case, the Trial Chamber stated that an indigent accused does not have the right to have the counsel of her or his choice. In *Akayesu*, the Trial Chamber reaffirmed those principles and explained that the Tribunal has to balance the rights of the accused with the right to a fair trial, particularly the equality between the defence and the prosecutor.<sup>6</sup> The Trial Chamber in *Kayishema* later held that equality between the parties does not imply equality of means and resources.<sup>7</sup> Rather, equality of arms was interpreted to mean that the accused is guaranteed equal access to the processes of the Trial and that she or he has the same capacity to address the tribunal and redress a violation of her or his rights.

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<sup>3</sup> The right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and the Defence. Prosecutor v. Tadic, *Appeal Judgement* (ICTY, 15 July 1999), para. 48.

<sup>4</sup> Prosecutor v. Kayishema and Ruzindana, *Appeal Judgement* (ICTR, 1 June 2001) para. 69.

<sup>5</sup> *The Prosecutor v. Kambanda, Trial Judgement* (ICTR, 4 September 1998).

<sup>6</sup> Prosecutor v. Akayesu, *Trial Judgement*, (ICTR, 2 September 1998).

<sup>7</sup> Prosecutor v. Kayishema and Ruzindana, *Trial Judgement* (ICTR, 21 May 1999), para. 56; Prosecutor v. Clément Kayishema and Obed Ruzindana, *Appeal Judgement* (ICTR, 1 June 2001), para. 69.

The principle of equality of arms also extends equal rights to the defense and the prosecution to request a remedy to a violation. The ICTR Chambers have had to respond to several submissions of by the defense regarding who had the responsibility to act when there is a violation of the principle and the pre-trial right of the accused. The Appeal Chamber in *Kambanda* held that this responsibility belong first to the accused.<sup>8</sup> An intervention of the Trial Chamber can only be expected in case of offensive or prejudicial conduct towards the accused.<sup>9</sup>

Finally, the Chambers addressed several motions concerning the right of the accused to adequate time and facilities for the preparation of the defense. For instance, in *Kayishema and Ruzindana*, the Appeal Chamber reaffirmed a holding by the ICTY in *Tadic* that the principle of equality of arms does not apply to “conditions, outside the control of a court”.<sup>10</sup>

### **b. Investigations**

One of the most significant challenges ICTR defence teams have faced the lack of resources, the lack of experienced investigators in armed conflicts, and cultural and linguistic barriers. These factors added to the complexity of the cases raised of recurring questions regarding the right to be informed of the reasons of the arrest and illegal and arbitrary detention.

Pursuant to article 17(4) of the ICTR statute, “the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.” During the early years of the Tribunal, most arrests were made before the end of the prosecution’s investigation. Thus, many motions were filed by the defense alleging defects to the indictment because of its vagueness, and the ICTR Chambers had to determine the degree of specificity required for such notification.<sup>11</sup> In *Semanza*, the Appeals Chamber found that at the time of an individual’s arrest, the requirement to respect the right of the accused to be informed can only be that he is detained "for serious violations of international

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<sup>8</sup> Jean Kambanda v. The Prosecutor, *Appeal Judgement* (ICTR, 19 October 2000), para. 23.

<sup>9</sup> Prosecutor v. Akayesu. *Appeal Judgmet* (ICTR, 1 June 2001), para. 83.

<sup>10</sup> Prosecutor v. Kayishema and Ruzindana, *Appeal Judgement* (ICTR, 1 June 2001), para. 73.

<sup>11</sup> Prosecutor v Semanza, *Appeal Judgement* (ICTR, 20 May 2005), para. 45; Prosecutor v. Ntakirutimana, *Appeal Judgmet*, (ICTR, 13 December 2004), paras 469-473; Prosecutor v. Ntagerura, Bagambiki, Imanishimwe, *Appeal Judgement* (ICTR, 7 July 2006), para. 27.

humanitarian law and crimes within the jurisdiction of the Tribunal."<sup>12</sup> Thus, it is the substance of the charges at the time of the arrest that matters.

Regarding the indictment, in *Ntagerura et al.* the Appeals Chamber affirmed that the lack of information about a material fact can be considered as a defect of the indictment because the missing information does not allow the accused to prepare an adequate defense.<sup>13</sup> As the Appeals Chamber held, there must be “timely, clear and consistent notice.”<sup>14</sup> Following this Judgment, the Trial Chamber in *Niyitegeka* further specified what must be included in the indictment to ensure a fair indictment, most notably an historical background of the offences and useful information in connection to the crimes charged.<sup>15</sup>

The last recurring issue raised by the defense is the legality of the arrest and the detention of accused. The right to liberty and security of a person are fundamental human rights protected by several international instruments, including the International Covenant on Civil and Political Rights (ICCPR). Many accused have alleged that they have been illegally arrested and arbitrarily detained because of the lack of an arrest warrant.<sup>16</sup> The ICTR has contributed to the respect of this right by defining in its decisions what constitutes a legal arrest and detention prior to the trial.

In the *Karemera and Ngirumpatse* case, Mathieu Ngirumpatse was arrested in June 1998 in Mali. He alleged that this arrest and detention were illegal because he was not given notice of the charges and interrogated in violation of his right to not incriminate himself.<sup>17</sup> The Trial Chamber ruled on the issue, holding that, with respect to notice of the charges, “the Tribunal is not competent to supervise the legality of arrest, custody, search and seizure executed by the requested State. The laws of the requested State may not require an arrest warrant or impose

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<sup>12</sup> *Semanza v. Prosecutor, Decision* (ICTR, 31 May 2000), paras. 84-85.

<sup>13</sup> *Prosecutor v. Ntagerura, Bagambiki, Imanishimwe, Appeal Judgement* (ICTR, 7 July 2006), para. 27.

<sup>14</sup> *Prosecutor v. Ntagerura, Bagambiki, Imanishimwe, Appeal Judgement* (ICTR, 7 July 2006), para. 35.

<sup>15</sup> *Prosecutor v. Niyitegeka, Decision on Prosecutor’s request for leave to file an amended indictment* (ICTR, 21 June 2000), para. 33(2).

<sup>16</sup> *Prosecutor v. Akayesu. Appeal Judgment* (ICTR, 1 June 2001), paras. 351-77; *Prosecutor v. Barayagwiza, Decision on the Extremely Urgent Motion by the Defence for Orders to Review and/or Nulify the Arrest and Provisional Detention of the Suspect* (ICTR, 17 November 1998), para. 2; *Prosecutor v. Karemera and Ngirumpatse, Appeal Judgement* (ICTR, 29 September 2014), paras 57-64.

<sup>17</sup> *Prosecutor v. Karemera and Ngirumpatse, Appeal Judgement* (ICTR, 29 September 2014), para. 59.

other legal conditions.”<sup>18</sup> However, eight years later, the Appeal Chamber in *Barayagwiza* held that supervisory authority for the arrest and detention of an individual has to be assumed by the Tribunal and that that “it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant’s rights.”<sup>19</sup> More recently, the Appeals Chamber noted that there was no evidence that Mr. Ngirumpatse had been given proper notice and overruled the Trial Chamber and held that the right to be promptly informed of the reasons for his arrest was violated. Despite finding a violation of Mr. Ngirumpatse’s rights, the Appeal Chamber found that it had been remedied by the Trial Chamber when it refused to admit the evidence from the interrogation.<sup>20</sup>

### **3. Fairness of the Proceedings during Trial**

The general fairness of the proceedings during the trial has also been the subject of filings and arguments between the parties and the court, and has been one of the most contentious aspects of the right to a fair trial. Although the fairness of the proceedings encompasses a variety of different claims, it is possible to single out a number of specific aspects that have been brought up repeatedly over the 20 years of the ICTR’s existence. When it comes to analysing the motions and strategies used by the various defence teams during trials and appeals, four types of alleged violations of the fairness of proceedings stand out: (I) governmental interference with and intimidation of witnesses, (II) bias by the Trial Chamber, (III) undue delays, and (IV) violations of Rules 66 and 68 of the ICTR Rules of Procedure and Evidence (RPE).

#### **a. Interference with and Intimidation of Witnesses**

Evidence is the foundation of criminal proceedings, and forms the basis for the judges’ verdict. The evidence adduced at trial, however, is only as good as the witnesses who testify and the material evidence admitted. The availability of witnesses to give evidence has been a concern since the establishment of the ICTR due to continuous allegations of interference and intimidation, which can cast doubt on the factual underpinnings of verdicts.

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<sup>18</sup> Prosecutor v. Ngirumpatse, *Decision on the Defence Motion Challenging the Lawfulness of the Arrest and Detention and Seeking Return or Inspection of Seized Item* (ICTR, 10 December 1999 ), para. 56.

<sup>19</sup> Prosecutor v. Barayagwiza, *Decision* (ICTR, 3 November 1999), para. 73.

<sup>20</sup> Prosecutor v. Karemera and Ngirumpatse, *Appeal Judgement* (ICTR, 29 September 2014), para. 63.

The right of the accused to have witnesses appear on her or his behalf is enshrined in Article 20(4)(e) of the Statute, which provides that the defense is entitled “[t]o 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.” This provision mirrors the one found in the ICCPR,<sup>21</sup> and is one of the bedrocks of a fair trial.

Unfortunately, witnesses at the ICTR have not been free from interference and intimidation, and the active intervention of the Registry has been needed to assure the security and anonymity of witnesses, as provided for in Rule 75 of the Rules of Procedure and Evidence. This Rule has proven essential for witness protection, particularly those for the defense, to ensure their availability to testify at trial and provide necessary evidence.

ICTR Chambers have on several occasions noted the seriousness of witness interference and intimidation. In the *Simba* case, the Appeals Chamber acknowledged the possible existence “of situations where a fair trial is not possible because witnesses crucial to the Defence case refuse to testify due to State interference.”<sup>22</sup> In other cases, interference and intimidation has been called a “grave concern”<sup>23</sup> and in the *Military I* case the Trial Chamber held that “proven threats or interference made by state officials towards prospective or confirmed witnesses as well as non-cooperation or active obstruction would be a serious violation of a state’s duty to cooperate with the Tribunal ... [and] could result in a violation of an Accused’s fair trial rights.”<sup>24</sup>

While various instances of interference and intimidation have been argued and in some cases accepted, defense teams have failed to establish to the Chambers’ satisfaction that the rights of the accused have been infringed upon by such conduct or that remedial action was required. For instance, the Appeals Chamber has held that where an allegation is made “it is incumbent on the Defence to, first, demonstrate that such interference has in fact taken place and, second, exhaust

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<sup>21</sup> Prosecutor v. Bagosora et al., *Decision on Modalities for Examination of Defence Witnesses* (ICTR, 6 April 2005), para. 4.

<sup>22</sup> Prosecutor v. Simba, *Appeal Judgment* (ICTR, 27 November 2007), para. 41.

<sup>23</sup> Prosecutor v. Bagosora et al, *Decision on Motion Concerning Alleged Witness Intimidation* (ICTR, 28 December 2004), para. 11.

<sup>24</sup> Prosecutor v. Simba, *Trial Judgment* (ICTR, 13 December 2005), para. 46. *See also* Prosecutor v. Bagosora et al, *Decision on Motion Concerning Alleged Witness Intimidation* (ICTR, 28 December 2004), para. 7 (“Pursuant to Article 28 of the Statute, all states are obliged to cooperation with the Tribunal. Non-cooperation, or active obstruction, could adversely affect the fairness of a trial. Threats or intimidation of confirmed or prospective witnesses by state officials would, if proven, be a serious violation of the duty of cooperation.”)



all available measures to secure the taking of the witness's testimony."<sup>25</sup> The Trial Chamber has similarly held that

the Defence must establish, on the balance of the probabilities, that government interference with the presentation of its evidence occurred. The proposed evidence must relate to specific allegations or charges against the Accused. The Defence also bears the burden to exhaust all available measures afforded by the Statute and Rules to obtain the presentation of the evidence. For a remedy to be granted at the post-trial phase there must be evidence of material prejudice.<sup>26</sup>

In sum, the defense not only bears the burden of proof for establishing that intimidation did occur,<sup>27</sup> that the intimidation prejudiced the defense's case<sup>28</sup> as the evidence was probative of the facts in dispute,<sup>29</sup> but it must also "exhaust all available measures afforded by the Statute and Rules to obtain the presentation of the evidence."<sup>30</sup> Satisfying each of these elements is difficult where the full extent of the witness' testimony is unclear if she or he is unwilling to testify, or where the witness claims not to have faced intimidation despite having had contact with government officials and received general warnings.<sup>31</sup>

The balance of the probabilities test is a difficult burden for the defense to surmount, especially in conjunction with the other challenges faced by defense teams and the lack of resources needed to mount independent investigations. Nevertheless, while questions of witness interference or intimidation persist in ICTR cases,<sup>32</sup> the capacity and effectiveness of the Registry to deal with these issues has grown substantially since the Tribunal's establishment, and the protections afforded by Rule 75 have proven capable of mitigating the difficulties inherent in protecting witnesses and allowing them to be brought to Arusha to testify on behalf of the defense.

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<sup>25</sup> Prosecutor v. Simba, *Appeal Judgment* (ICTR, 27 November 2007), para. 41.

<sup>26</sup> Prosecutor v. Simba, *Trial Judgment* (ICTR, 13 December 2005), para. 47.

<sup>27</sup> Prosecutor v. Bagosora et al, *Decision on Motion Concerning Alleged Witness Intimidation* (ICTR, 28 December 2004), para. 8. *See also Id.* at para. 9 ("The Chamber is unable, based on the evidence presented, to find on the balance of probabilities that the Rwandan authorities have intimidated Defence witnesses. The evidence provided is vague and indirect. With the exception of the telephone conversation on 17 May 2004, the affiant does not reveal the source of the allegations of intimidation. Even in that telephone conversation, the witness "did not go into details and I could not ask him any more questions regarding his security situation in Rwanda".)

<sup>28</sup> Prosecutor v. Simba, *Trial Judgment* (ICTR, 13 December 2005), para. 47.

<sup>29</sup> Prosecutor v. Simba, *Appeal Judgment* (ICTR, 27 November 2007), para. 55.

<sup>30</sup> Prosecutor v. Simba, *Trial Judgment* (ICTR, 13 December 2005), para. 47.

<sup>31</sup> *See, for instance*, Prosecutor v. Nshogoza, *Confidential Decision on Defence Motion for Stay of Proceedings* (ICTR, 22 May 2009), paras. 14-15.

<sup>32</sup> *See, for instance*, Prosecutor v. Karemera & Ndirumpatse, *Appeal Judgment* (ICTR, 29 September 2014), paras. 31-33.

## **b. Trial Chamber Exhibiting Bias**

The right to be tried before an independent tribunal is an integral component of her or his right to a fair trial as provided in Articles 19 and 20 of the ICTR Statute.<sup>33</sup> Allegations of bias by the Trial Chamber have been raised since the establishment of the ICTR.

The *Akayesu* appeal judgement provides a good example of this kind of claim. On 2 September 1998, Jean Paul Akayesu was found guilty of Genocide, Incitement to Commit Genocide and multiple counts of Crimes against Humanity.<sup>34</sup> His third ground of appeal consisted in pleading that the Tribunal was biased and partisan. Mr. Akayesu raised several issues.<sup>35</sup> First, he submitted that some Judges made remarks that hinted at a lack of impartiality, along with alleged defamatory statements coming from the Registrar. Second, he submitted that the ICTR only prosecuted individuals that were on the “losing side” of the Rwandese conflict between the 1994 government and the Rwandan Patriotic Front. Third, Mr. Akayesu submitted that the very functioning of the Tribunal implied an unfair trial, partly due to the difficulties encountered with the investigation process. Finally, he alleged that the Tribunal lacked the required power—namely, the power to issue subpoenas and compel witnesses to appear in court—to operate properly.

In response to Mr. Akayesu’s first argument, the Appeals Chamber affirmed the principle enunciated by the ICTY Appeals Chamber in *Furundžija* that there is a presumption of impartiality attached to the Judges. The Appeals Chamber held that without any evidence of the contrary, the Judges are deemed impartial. The Appeals Chamber then held that the evidence put forward by Mr. Akayesu was “too general and abstract”.<sup>36</sup> Vagueness by the Defence’s has been cited on a number of occasions by the Appeals Chambers to dismiss defence arguments.

As for Mr. Akayesu’s second argument, the Appeals Chamber affirmed the principle enunciated by the ICTY Appeals Chamber in *Čelebići* not everyone can be prosecuted for financial and human resources reasons. The Appeals Chamber continued, there has to be evidence of both the

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<sup>33</sup> Prosecutor v. Nahimana et al., *Appeal Judgement* (ICTR, 28 November 2007), para. 28.

<sup>34</sup> Prosecutor v. Akayesu, *Trial Judgement* (ICTR, 2 September 1998), para. 293.

<sup>35</sup> Prosecutor v. Akayesu, *Appeals Judgement* (ICTR, 1 June 2001), paras. 90, 93 and 98.

<sup>36</sup> Prosecutor v. Akayesu, *Appeals Judgement* (ICTR, 1 June 2001), para. 92.

discriminatory intent towards the accused person and evidence that the Prosecutor's policy has a discriminatory impact.<sup>37</sup>

In the landmark *Nahimana et al.* case, Jean-Bosco Barayagwiza alleged that political pressure was put on the Tribunal and led to a biased decision.<sup>38</sup> The Appeals Chamber held that while certain actions or statements made by different officials, notably from the Government of Rwanda, could be seen as a form of political pressure, the defence had not produced evidence that these statements had had an influence on the Judges' decisions or that it could have been enough to sway said decisions in a specific direction. Similarly, in the *Kayishema et al.* appeal judgement, Clément Kayishema argued that the Rwandan government was putting pressure on the Tribunal.<sup>39</sup> The Appeals Chamber stated that the fact that the ICTR enjoyed good relations with Rwanda did not mean that the Trial Chamber was not independent. The Appeals Chamber also stated that States have an obligation to cooperate with the Tribunal, and that, as previously stated by the ICTY Appeals Chamber in *Blaškić*, the Tribunal must rely upon the State's cooperation in order to allow the investigation to function properly.<sup>40</sup>

Finally, the Court rejected Mr. Akayesu's third argument as "too sweeping to be rightly considered."<sup>41</sup> To understand the Appeals Chamber's reasoning, it is paramount to keep in mind the state of chaos in which Rwanda was put after both the war and the genocide. Most of the country had to be rebuilt, civil institutions were shattered and the new government was trying to consolidate what was left of the State apparatus. Witnesses were often reluctant to testify, and good portion of them were behind the bars at the time. Defence teams, but also the Prosecution, were facing budgetary and human constraints.

### c. Undue Delay

Pursuant to Article 20 (4)(c) of the ICTR Statute, accused are guaranteed the right to be tried without undue delay. Due to the complexity of the situation in Rwanda, the volume of

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<sup>37</sup> Prosecutor v. Akayesu, *Appeals Judgement* (ICTR, 1 June 2001), para. 96.

<sup>38</sup> Prosecutor v. Bizimungu et al, *Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demanding Speedy Trial and for Appropriate Relief* (ICTR, 27 February 2004), p 3.

<sup>39</sup> Prosecutor v. Kayishema et al., *Appeals Judgement* (ICTR, 1 June 2001), para. 53.

<sup>40</sup> Prosecutor v. Kayishema et al., *Appeals Judgement* (ICTR, 1 June 2001), para. 62.

<sup>41</sup> Prosecutor v. Akayesu, *Appeals Judgement* (ICTR, 1 June 2001), para. 100.

testimonies and evidence that needed to be gathered, and the size and complexity of a single trial, it often took many years for some individuals to be tried. This situation led many of these individuals to include a plea based on undue delay to their general defence when they appeared before the Trial and Appeals Chambers.

In *Nahimana*, the Appeal Chambers affirmed its own precedent in an interlocutory decision in the *Mugiraneza* case,<sup>42</sup> held that the relevant factors when trying to establish if there was undue delay are: (a) the length of the delay; (b) the complexity of the proceedings; (c) the conduct of the parties; (d) the conduct of the authorities involved; and (e) the prejudice to the accused, if any. These factors should always be analysed on a case-by-case basis.

Other cases have also assessed this issue. In *Gatete*, Jean-Baptiste Gatete pleaded that his right to a trial without undue delay was violated by, among other things, stressing the fact that he spent 7 years in pre-trial detention.<sup>43</sup> At trial, the Chamber acknowledged the extent of the delay, but stated that Mr. Gatete had failed to demonstrate that he suffered prejudice as a result of the delay. On appeal, this holding was overturned. Indeed, the Appeals Chamber argued that even though Mr. Gatete may have failed to demonstrate prejudice, the seven year delay was still undue considering the complexity of the case, as he was the only accused and the number of witnesses and quantity of evidence fairly low compared to other cases. The Appeals Chamber concluded that his right to a trial without undue delay had been violated, and thus reduced Gatete's sentence from life to 40 years in prison.

Nevertheless, in multi-accused cases or cases with complex proceedings, the Court has been unwilling to accept arguments concerning undue delay, relying on the size of the case and the fact that the Appellants' claims were often unfounded or too vague.<sup>44</sup>

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<sup>42</sup> Prosecutor v. Bizimungu et al, *Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demanding Speedy Trial and for Appropriate Relief* (ICTR, 27 February 2004) , p 3.

<sup>43</sup> Prosecutor v. Gatete, *Trial Judgement* (ICTR, 31 March 2011), para. 54.

<sup>44</sup> Prosecutor v. Bagosora et al., *Trial Judgement* (ICTR, 18 December 2008), paras. 77-84; Prosecutor v. Nahimana et al., *Appeal Judgement* (ICTR, 28 November 2007), para. 1077.

#### **d. Rule 66 and 68 Violations**

Under the ICTR's framework, the prosecution collects significant amounts of evidence, which then must be disclosed to the defence, as provided by Rules 66 and 68. Questions of full disclosure have been raised on multiple occasions, as defence teams have repeatedly claimed that they have not received all of the materials they require, particularly exculpatory evidence.

In *Renzaho*, Tharcisse Renzaho argued that the Prosecution failed to meet its obligation under Rule 68(A) to disclose exculpatory evidence throughout the trial. The Trial Chamber acknowledged four of the Appellant's claims, but determined that he did not suffer any prejudice from it.<sup>45</sup> The Appeals Chamber, following the precedent from the *Kanyarukiga Decision on Interlocutory Appeal*, held that it would only overturn the Trial Chamber's determination if it was: (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.<sup>46</sup> Mr. Renzaho tried to prove prejudice on Appeal for each time the Prosecution failed to meet its duty to disclose, but the Appeals Chamber again dismissed all of his claims.<sup>47</sup> He also advanced a general prejudice argument, arguing that he lost time and energy because of the lack of disclosure. Once again, the Appeals Chamber stated that he suffered no prejudice from the violation of Rule 68 (A) by the Prosecution.<sup>48</sup>

In other cases, late disclosure was pleaded by the defence, with mixed results. In *Nzabonimana*, for example, requests for disclosure were filed during the pre-trial phase and ruled on by the Trial Chamber. When the disclosure issue arose again during trial regarding the same set of evidence, the Trial Chamber ruled that since no new allegation was raised, it would not revisit its past decisions.

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<sup>45</sup> Prosecutor v. Renzaho, *Trial Judgement* (ICTR, 14 July 2009), paras. 39-51.

<sup>46</sup> Prosecutor v. Renzaho, *Appeals Judgement* (ICTR, 1 April 2011), para. 143.

<sup>47</sup> Prosecutor v. Renzaho, *Appeals Judgement* (ICTR, 1 April 2011), para. 144-171.

<sup>48</sup> Prosecutor v. Renzaho, *Appeals Judgement* (ICTR, 1 April 2011), para. 172.