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# *PETER ROBINSON'S*
# SUMMARY OF DECISIONS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

## ICTR STATUTE, RULES OF PROCEDURE AND EVIDENCE, DIRECTIVE ON ASSIGNMENT OF DEFENCE COUNSEL, AND CODE OF CONDUCT FOR DEFENCE COUNSEL ANNOTATED

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# PREFACE

When I first started working as a criminal defence counsel at the Tribunals in 2000, it was difficult to find their prior decisions. Since knowledge and use of the Tribunals' own jurisprudence was essential to defending my clients, I began locating and reading all the prior decisions and making summaries of them. I continued that practice even when the Tribunals' jurisprudence became more widely available, mostly as a discipline for myself to keep up with the decisions and as a way to quickly locate decisions that I had read.

The summaries in this document are not verbatim quotations from the decisions and are intended only to assist in locating the relevant precedent. They are guides to, but not substitutes for, reading the decisions themselves.

I hope others will find these summaries useful.

Peter Robinson

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**Statute of the International Tribunal for Rwanda**

**Article 1—competence of the ICTR**

**The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.**

**death of an accused**

The death of the accused terminates the criminal proceedings against him or her as of the date of the death. The Tribunal cannot exercise jurisdiction over a person who is deceased.[1]

Motions pending at the time of the death of an accused are declared moot, except for challenges to evidence which will remain part of the record upon which the Chamber will deliberate.[2]

Upon the death of an accused during trial of a multi-accused case, the indictment was ordered amended to reflect that the person was no longer an accused but would otherwise remain the same.[3]

**declining to exercise jurisdiction**

A Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction but should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity."[4]

**establishment of Tribunal**

The Security Council's establishment of the Tribunal through a resolution under Chapter VII of the United Nations Charter rather than by treaty adopted by the member

[1] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision Relating to Registrar's Submission Notifying the Demise of the Accused Joseph Nzirorera* (12 August 2010) at para. 2
[2] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision Relating to Pending Motions filed by Joseph Nzirorera Before his Death* (26 August 2010)
[3] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Reasons for Oral Decision on 23 August 2010 and on Oral Applications for Certification to Appeal* (26 August 2010) at para. 14
[4] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 207

States under the auspices of the General Assembly did not violate the sovereignty of Rwanda or the member States.[5]

The Security Council had the power to establish an ad hoc Tribunal under its Article 41 powers.[6]

The Tribunal does not have the authority to review or assess the legality of Security Council decisions and, in particular, that of Security Council Resolution 955. Article 39 of the Charter of the United Nations gives a discretionary power to the Security Council in assessing the existence of a threat to the peace and in taking the measures it deems appropriate to maintain or restore international peace and security.[7]

The Tribunal has incidental jurisdiction to evaluate its constitution. However, this is limited to evaluating whether the Tribunal was validly created in 1994, not whether there is a continued threat to international peace and security that justifies continuation of the Tribunal and its exercise of the power conferred upon it by the Security Council.[8]

United Nations Security Council had power to create the Tribunal and determine its duration regardless of whether threat to peace and security continued to exist in Rwanda at the time of the return of the amended indictment.[9] Peace and security cannot be said to be re-established adequately without justice being done.[10]

The power of the Security Council is not dependent upon the existence of an international, rather than internal, armed conflict.[11]

**standing**

An accused has standing to raise the argument that the creation of the Tribunal infringed upon the sovereignty of a State or States.[12]

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[5] *Prosecutor v Kanyabashi*, No. ICTR-96-8-I, *Decision on the Defence Motion on Jurisdiction* (18 June 1997) at para. 15

[6] *Prosecutor v Kanyabashi*, No. ICTR-96-8-I, *Decision on the Defence Motion on Jurisdiction* (18 June 1997) at para. 27

[7] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at para. 25

[8] *Prosecutor v Karemera*, No. ICTR-98-44-PT, *Decision on Renewed Motion to Dismiss for Lack of Jurisdiction: United Nations Charter, Chapter VII Powers* (5 August 2005) at para. 5

[9] *Prosecutor v Kanyabashi*, No. ICTR-96-8-I, *Decision on the Defence Motion on Jurisdiction* (18 June 1997) at para. 21; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Décision Relative à la Requete Exception Préjudicielle au Nzirorera aux fins de Rejet de l'acte d'Accusation Pour Default de Compétence: Chapitre VII de la Charte des Nations Unies* (29 March 2004); *Prosecutor v Karemera*, No. ICTR-98-44-PT, *Decision on Renewed Motion to Dismiss for Lack of Jurisdiction: United Nations Charter, Chapter VII Powers* (5 August 2005) at para. 6

[10] *Prosecutor v Kanyabashi*, No. ICTR-96-8-I, *Decision on the Defence Motion on Jurisdiction* (18 June 1997) at para. 26

[11] *Prosecutor v Kanyabashi*, No. ICTR-96-8-I, *Decision on the Defence Motion on Jurisdiction* (18 June 1997) at para. 24

**Article 2—genocide**

**1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.**
**2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:**
**(a) Killing members of the group;**
**(b) Causing serious bodily or mental harm to members of the group;**
**(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;**
**(d) Imposing measures intended to prevent births within the group;**
**(e) Forcibly transferring children of the group to another group.**
**3. The following acts shall be punishable:**
**(a) Genocide;**
**(b) Conspiracy to commit genocide;**
**(c) Direct and public incitement to commit genocide;**
**(d) Attempt to commit genocide;**
**(e) Complicity in genocide.**

***actus reus***

**destruction**

The *actus reus* of genocide does not require the actual destruction of a substantial part of the group; the commission of even a single instances of one of the prohibited acts is sufficient, provided that the accused genuinely intends by that act to destroy at least a substantial part of the group.[13]

"Destroy" encompasses only acts that amount to physical or biological genocide.[14]

Destruction within the meaning of Article 2 is "[t]he material destruction of a group either by physical and biological means and not the destruction of the national, linguistic, religious, cultural or other identity of a particular group.[15]

**killing**

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[12] *Prosecutor v Kanyabashi*, No. ICTR-96-8-I, *Decision on the Defence Motion on Jurisdiction* (18 June 1997) at para. 12
[13] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 8
[14] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.315
[15] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 808.

Killing requires an intent to kill but does not require premeditation.[16]

Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that "Homicide committed with intent to cause death shall be treated as murder".[17]

To be held criminally liable for genocide by killing members of a group, the prosecution must show the following elements: (1) the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.[18]

**serious physical harm**

To show that the accused committed the crime of genocide by causing serious bodily or mental harm to members of the group, it must be proven that: (1) the perpetrator intentionally caused serious bodily or mental harm to one or more members of the group; and (2) such person or persons belonged to the targeted national, ethnical, racial, or religious group.[19]

Causing serious bodily harm refers to acts of physical violence that seriously injure the health, cause disfigurement, or any serious injury to the external or internal organs or senses.[20]

Sexual assaults, mutilations, and rapes that Tutsi women were forced to endure from April to June 1994 certainly constituted acts of serious bodily and mental harm.[21]

"Serious harm" need not be an injury that is permanent or irremediable.[22]

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[16] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 664; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 813; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para 414; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 486

[17] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.49; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 58; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 500

[18] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.319

[19] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.323

[20] *Prosecutor v. Kayishema*, No.ICTR-95-1-T,*Judgement* (21 May 1999) at para.109; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 664; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 502 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.291; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.321

[21] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 1666

[22] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.320; *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.50; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 815

Trial Chamber's invocations of "weakening" and "anxiety" were insufficient findings of serious bodily harm, unlike the heinous crimes that obviously constitute serious bodily or mental harm, such as rape and torture.[23]

Bodily or mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.[24]

**serious mental harm**

Serious mental harm refers to more than temporary impairment of mental faculties. The injury need not be permanent.[25]

Whether an act is considered to amount to serious mental harm must be assessed on a case-by-case basis.[26]

Serious mental harm can arise when there is a non-mortal act, such as sexual assault, combined with the threat of death.[27]

The immediate circumstances surrounding the incident, although not a condition for a finding of serious mental harm, is valuable in determining whether an act is considered to amount to serious mental harm.[28]

Despite any direct evidence on the victim's mental state, victim could be found to have suffered serious mental harm due to the circumstances surrounding the sexual assault, such as that members of her ethnic group were victims of mass killings; the accused refused her protection and specifically threatened her; the accused locked her in the room with him, put his firearm down nearby and physically manhandled her in a sexual way; and she was sexually inexperienced.[29]

**unbearable conditions of life**

The *actus reus* of genocide also includes methods of destruction which do not immediately lead to the death of members of the group. Therefore, the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a

[23] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 48
[24] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 814.
[25] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 664; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 502 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.291; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.321; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 58
[26] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 261.
[27] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 586.
[28] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 262.
[29] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 388.

reasonable period, provided the above would lead to the destruction of the group in whole or in part.[30]

The words "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", is construed "as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group", but which are, ultimately, aimed at their physical destruction. The means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.[31]

**preventing births**

The words "measures intended to prevent births within the group" should be construed as including sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages. Measures intended to prevent births within the group may be not only physical, but also mental.[32]

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.[33]

Rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.[34]

**transferring children**

The prohibition of forcible transfer of children from one group to another, is aimed at sanctioning not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another group.[35]

**acts not constituting *actus reus* of genocide**

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[30] *Prosecutor v. Kayishema*, No.ICTR-95-1-T,*Judgement* (21 May 1999) at para.116
[31] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.51; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 506
[32] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.52; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 507-08
[33] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 507.
[34] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 508.
[35] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.53

Raising money to fight the RPF is not in itself incriminating.[36]

Arrest and forcible transportation of victims to a place where massacres took place was not itself an act of genocide.[37]

***mens rea***

**"as such"**

The term "as such" clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. "As such" means that the proscribed acts were committed against the victims *because of* their membership in the protected group, but not *solely* because of such membership.[38]

The intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group.[39]

The term "as such" has been interpreted to mean that the prohibited act must be committed against a person based on that person's membership in a specific group and specifically because the person belonged to this group, such that the real victim is not merely the person but the group itself.[40]

The identification of Tutsi individuals as enemies of the state associated with political opposition, simply by virtue of their Tutsi ethnicity, underscores the fact that their membership in the ethnic group, as such, was the sole basis on which they were targeted.[41]

Acts committed against Hutu opponents "were committed on account of their support of the Tutsi ethnic group and in furtherance of the intent to destroy the Tutsi ethnic group."[42]

**conspiracy**

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[36] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 223
[37] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 5767
[38] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 53
[39] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 64.
[40] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 485
[41] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 969.
[42] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 948.

The requisite intent for the crime of conspiracy to commit genocide is the same intent required for the crime of genocide.[43]

**discriminatory intent**

In a prosecution for genocide, the prosecutor is under no obligation to prove that the killing of an individual victim was committed with a discriminatory intent.[44]

**disparaging language**

Making anti-Tutsi utterances or affiliation with an anti-Tutsi extremist group may facilitate proving specific intent but is not required.[45]

**elements**

The determination of *mens rea* in the case of genocide requires firstly, that a person, who killed or caused serious bodily or mental harm to another person, did so because of the victim's membership in a protected group; secondly, that the perpetrator's intent was to destroy that group as such in whole or in part.[46]

**factors**

When determining the specific intent of an accused through his words and deeds, a balance must be struck between his words and deeds and his actual purposeful conduct, especially when his intention is not clear from what he says or does.[47]

The perpetrator's specific genocidal intent may be inferred from deeds and utterances. It may also be inferred from the general context of the perpetration, in consideration of factors such as: the systematic manner of killing; the methodical way of planning; the general nature of the atrocities, including their scale and geographical location, weapons employed in an attack, and the extent of bodily injuries; the targeting of property belonging to members of the group; the use of derogatory language towards members of the group; and other culpable acts systematically directed against the same group, whether committed by the perpetrator or others.[48]

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[43] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1042.
[44] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 69
[45] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 525
[46] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.312
[47] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 807.
[48] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 496 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para. 252; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 806; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 413

In attempting to establish genocidal intent, the Chamber can rely on a variety of factors including the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership in a protected group, the fact that the perpetrator may have targeted the same group during the commission of other criminal acts, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, whether the perpetrator acted on the basis of the victim's membership in a protected group and whether the perpetrator's intent was to destroy that group in whole or in part, as such.[49]

Relevant facts and circumstances proving intent can include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group or the repetition of destructive or discriminatory acts.[50]

Genocidal intent may be inferred from certain facts or indicia, including but not limited to: (a) the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others, (b) the scale of atrocities committed, (c) their general nature, (d) their execution in a region or a country, (e) the fact that the victims were deliberately and systematically chosen on account of their membership of a particular group, (f) the exclusion, in this regard, of members of other groups, (g) the political doctrine which gave rise to the acts referred to, (h) the repetition of destructive and discriminatory acts, and (i) the perpetration of acts which violate the very foundation of the group or considered as such by their perpetrators.[51]

*Mens rea* for genocide may be inferred from the scale of the atrocities, their general nature, in a region or country, or the systematic targeting of a protected group.[52]

**financial means**

Proof that an accused had certain means at his disposal to prepare and commit genocide is not required. Therefore, the financial situation of the accused would normally not be of major importance to the question of whether he could be liable for genocide.[53]

**foreseeability**

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[49] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 480

[50] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 41; *Prosecutor v. Setako,* No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 467

[51] *Prosecutor v. Kalimanzira,* No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 731; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 29

[52] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 663; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 523

[53] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 169

The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.[54]

**inferences**

In most cases genocidal intent will be proved by circumstantial evidence. In such cases, it is necessary that the finding that the accused had genocidal intent be the only reasonable inference from the totality of the evidence.[55]

Genocidal intent can be proven by inference through the facts and circumstances of the case.[56]

Genocidal intent may be inferred from evidence of other culpable acts systematically directed against the same group.[57]

Explicit manifestations of criminal intent are often rare in the context of criminal trials. To prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from the relevant facts and circumstances.[58]

In the absence of direct evidence, the perpetrator's specific intent may be inferred from his overt statement or other circumstantial evidence.[59]

The use of context to determine intention must be counterbalanced with the actual conduct of the accused. Intent should be determined, above all, from the accused's words and deeds, and should be evident from patterns of purposeful action.[60]

**insufficient evidence**

The prosecution failed to prove beyond reasonable doubt that bourgmestre shared the intent to destroy the Tutsi population.[61]

Statement of accused that victim should be killed because one of her relatives was assisting the "Inyenzi" (Tutsi) was insufficient to establish genocidal intent as another reasonable inference was that the accused wanted her killed because of his feelings toward the relative.[62]

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[54] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 520.
[55] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 524; *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 59
[56] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 40
[57] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1029
[58] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 159
[59] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para.534; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 467
[60] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para.63.
[61] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 812
[62] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 235

General context of mass violence is insufficient to establish genocidal intent where act appeared to be unplanned and spontaneous. This act could reasonably be construed as an opportunistic crime which was not accompanied by the specific intent to commit genocide.[63]

**multiple intentions**

It is immaterial, as a matter of law, whether the refugees were targeted solely because of their ethnicity or whether they were targeted for their ethnicity in addition to other reasons.[64]

The perpetrator need not be solely motivated by genocidal intent and having a personal motive will not preclude such a specific intent.[65]

The fact that the crimes were committed for personal motives is no defence where there was also present the intent to destroy the group.[66]

**negligence**

By their very nature the enumerated acts in Article 2 are conscious, intentional, volitional acts that an individual cannot commit by accident or because of mere negligence.[67]

**related crimes**

Bearing in mind that the rapes and sexual assaults were intricately linked to the killing of members of the Tutsi group and intended to inflict further suffering, the Trial Chamber reasonably concluded that the perpetrators possessed genocidal intent.[68]

**saving Tutsis**

It was reasonable for the Trial Chamber to find that the Appellant had a genocidal intent while also recognizing that he had saved Tutsi.[69]

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[63] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 236
[64] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 304
[65] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 534; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 466
[66] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 161; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 412
[67] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 58.
[68] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 608
[69] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 571

**specific intent**

A distinguishing aspect of the crime of genocide is the specific intent *(dolus specialis*) to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.[70]

**sufficient evidence**

The repeated exhortations of the accused to crowds of people that they should kill all the Tutsis leave no room for any reasonable inference but that of genocidal intent.[71]

Intent to commit genocide inferred from participation of accused in attacks where people were singing songs about exterminating the Tutsi.[72]

Intent to commit genocide inferred from the scale of the killings at Murambi Technical School in a single day.[73]

In Media case, editorial policies as evidenced by broadcasts and writings were deemed conclusive evidence of genocidal intent.[74]

**timing**

A conviction for genocide requires proof that the accused possessed the specific intent to commit the crime at the time he did so.[75]

**types of perpetrators**

Genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike.[76]

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[70] *Prosecutor v. Kayishema*, No.ICTR-95-1-T, *Judgement* (21 May 1999) at para.91
[71] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 43
[72] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 360
[73] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 416
[74] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 965.
[75] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 525; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 22
[76] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 170

**complicity**

Complicity can only exist when there is a punishable, principal act committed by someone, the commission of which the accomplice has associated himself with.[77]

A person can be convicted of complicity even where the principal perpetrator of the crime has not been identified, or where for any other reasons, guilt of the perpetrator could not be proven.[78]

Complicity and genocide can be charged in the alternative,[79] and be based on the same facts.[80]

Complicity to commit genocide refers to all acts of assistance or encouragement that have substantially contributed to, or have had a substantial effect on, the completion of the crime of genocide.[81]

Where complicity is charged as an alternative to genocide, if the accused is convicted of genocide the complicity charge is dismissed.[82]

Complicity is one of the forms of criminal responsibility that is applicable to the crime of genocide, and not a crime itself.[83]

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[77] *Prosecutor v. Musema*, No.ICTR-96-13-T,*Judgement* (27 Jan.2000) at para.171; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 530

[78] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 531.

[79] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Augustin Bizimungu's Preliminary Motion* (15 July 2004) at para. 44; *Prosecutor v Nzuwonemeye*, No. ICTR-2000-56-T, *Decision on Defence Preliminary Motions* (12 December 2002) at para. 31; *Prosecutor v Sagahutu*, No. ICTR-2000-56-T, *Decision on Sagahutu's Preliminary, Provisional Release, and Severance Motions* (25 September 2002) at para. 26; *Prosecutor v Kanyabashi*, No. ICTR-96-15-I, *Decision on Defence Preliminary Motion for Defects in the Form of the Indictment* (31 May 2000) at para. 5.13

[80] *Prosecutor v Bikindi*, No. ICTR-2001-72-I, *Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and the Prosecutor's Motion Seeking Leave to File an Amended Indictment* (22 September 2003) at para. 25; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 57; but *contra*: *Prosecutor v Bikindi*, No. ICTR-2001-72-I, *Confirmation of the Indictment* (5 July 2001) at para. 8;

[81] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 51; *Prosecutor v Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003 ) at para. 395

[82] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 847; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joint Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment* (18 May 2006) at para. 9

[83] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joint Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment* (18 May 2006) at para. 7

Complicity in genocide is like aiding and abetting genocide.[84]

Complicity in genocide encompasses aiding and abetting.[85]

Complicity is a mode of commission like aiding and abetting genocide and not a separate crime for which a conviction can be entered.[86]

Joint criminal enterprise and complicity in genocide are two modes of liability, two methods by which the crime of genocide can be committed. It is therefore impossible to plead that complicity in genocide has been committed by means of a joint criminal enterprise. Complicity can only be pleaded as a form of liability for the crime of genocide.[87]

Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.[88]

The forms of complicity, for the purposes of interpreting Article 2(3)(e) of the Statute, are defined as complicity by aiding and abetting, by procuring means, or by instigation, (these terms are defined in the Rwandan Penal Code).[89]

The *mens rea* of complicity in genocide lies in the accomplice's knowledge of the commission of the crime of genocide by the principal perpetrator. Therefore, the accomplice in genocide need not possess the *dolus specialis* of genocide; rather he or she knowingly aids and abets, instigates or procures for another in the knowledge that the other person intends to destroy, in whole or in part, a national, ethnical, racial or religious group as such.[90]

**conspiracy**

Conspiracy is constituted when two or more persons agree to a common objective, the objective being a criminal act. The *actus reus* of conspiracy to commit

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[84] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision on the Prosecutor's Request to File an Amended Indictment* (4 March 2005) at para. 19; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 51

[85] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 371

[86] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Judgement of Acquittal* (19 March 2008) at para. 16

[87] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joint Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment* (18 May 2006) at para.8

[88] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 536.

[89] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 70; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 537

[90] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 71; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 540-41

genocide, prescribed as an offence under Article 2 (3)(b) of the Statute, is, accordingly, the act of entering into an agreement whose common object is to commit genocide; the *mens rea* is the intent to enter into such an agreement. Neither the *actus reus* nor the *mens rea* exists unless the perpetrator has, in common with his or her co-conspirators, the requisite specific intent of the crime of genocide. That intent may be proven by what the perpetrator said or, as with any crime, by drawing inferences from conduct which may show intent. The offence is complete upon the agreement itself: the criminal object of the agreement need not be achieved. The existence of the agreement may be demonstrated by circumstantial evidence as, for example, co-ordinated action in pursuit of the unlawful act.[91]

Conspiracy is an inchoate offence. The *actus reus* is the agreement, whether it results in the actual commission of genocide.[92]

**agreement**

Conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.[93]

Conspiracy counts dismissed where they failed to allege the *actus reus* of an agreement.[94]

Mere mention of the alleged co-conspirators is not sufficient to enter a conviction. Evidence must be given that the accused made an agreement with others for the commission of the crime.[95]

Coordination is the central element that distinguishes conspiracy from "conscious parallelism".[96]

The evidence must establish beyond reasonable doubt a concerted agreement to act, and not mere similar conduct.[97]

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[91] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motions for Judgement of Acquittal* (2 February 2005) at para. 12; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 23; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 14

[92] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 788; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 14

[93] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 94; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 14

[94] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 70

[95] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 95

[96] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1048.

[97] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para, 898

The evidence must show that an agreement had indeed been reached. Showing a process of negotiation will not do.[98]

Even if the accused wielded authority over ministers from his political party, his mere position of authority cannot suffice to infer, as the only reasonable conclusion, that he influenced the decisions taken by them and in fact agreed or intended to agree to their ultimate decisions. Conviction for conspiracy to commit genocide reversed.[99]

The concerted or coordinated action of a group of individuals can constitute evidence of an agreement required for conspiracy to commit genocide.[100]

Where evidence failed to establish that the alleged co-conspirator was present with the accused at the commune as alleged, the conspiracy between the accused and the co-conspirator had not been proven and the Trial Chamber erred in so finding.[101]

**inference**

The existence of a formal or express agreement is not needed to prove the charge of conspiracy. An agreement can be inferred from concerted or coordinated action on the part of the group of individuals. A tacit understanding of the criminal purpose is sufficient.[102]

The agreement can be proven by circumstantial evidence which points inevitably to the guilt of the accused. The existence of the agreement can be inferred from conduct of concerted or coordinated action on the part of the group of individuals.[103]

A concerted agreement to commit genocide may be inferred from the conduct of the conspirators. However, as in any case where the prosecutor seeks, on the basis of circumstantial evidence, to prove a particular fact upon which the guilt of the accused depends, the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.[104]

In certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these

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[98] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 787
[99] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 651
[100] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 255
[101] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 453
[102] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 95; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1045; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 14
[103] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Judgement of Acquittal* (19 March 2008) at para. 17
[104] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para, 896

institutions. The existence of the conspiracy would, however, have to be the only reasonable inference to be drawn from the evidence.[105]

It would also have been reasonable to find, on the basis of this evidence, that the accused had collaborated and entered into an agreement with a view to promoting the ideology of "Hutu power" in the context of the political struggle between Hutu and Tutsi, or even to disseminate ethnic hatred against the Tutsi, without, however, going as far as their destruction in whole or in part. Consequently, a reasonable trier of facts could not conclude that the only reasonable inference was that the accused had conspired together to commit genocide.[106]

There are two ways to establish the existence of a conspiracy. The first is to prove the existence of a formal and express agreement for the commission of the crime. In most cases, such a demonstration will be very difficult to make. The second is to adduce evidence of a concerted or coordinated action on the part of the group of individuals, from which a reasonable trier of fact could infer the existence of a conspiracy.[107]

The *actus reus* of conspiracy to commit genocide is the making of an agreement between two or more persons to commit genocide. This *actus reus* can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on other evidence.[108]

Co-perpetration of genocide does not equate to participation in a conspiracy to commit genocide. Where the inference that the accused acted pursuant to a pre-existing plan was not the only reasonable inference arising from the evidence, the accused was acquitted of conspiracy.[109]

**arming and training**

In the context of the ongoing war with the RPF, the evidence does not invariably show that the purpose of arming and training civilians or the preparation of lists was to kill Tutsi civilians.[110]

Provision of weapons and military training to the *Interahamwe* between 1992 and 1994 not shown to be part of preconceived plan on the part of Rwandan authorities to target Tutsi civilians.[111]

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[105] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para, 907; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 389; *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 221
[106] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para, 906, 910
[107] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 97
[108] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 221
[109] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at paras. 5683, 5726
[110] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2109
[111] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 357

Establishment of militia forces and their training prior to the events of 1994 does not prove by itself the existence of a plan to kill the Tutsi as such.[112]

Merely urging the audience to join the war effort against the RPF and offering to provide them with weapons is not in itself indicative of a desire to target and kill Tutsi civilians.[113]

The arming and training of civilians, some of whom were *Interahamwe,* as part of Rwanda's system of civilian self-defence does not in itself demonstrate a conspiracy by to use the *Interahamwe* for the purpose of committing genocide against Tutsi civilians. Evidence did not exclude possibility that the training and arming of civilians had motives related to the military objective of waging war against the RPF, particularly considering the government's limited resources and the focus on defence against infiltrators and accomplices.[114]

At least some parts of the civilian military training programs between 1992 and 1994 were accompanied by anti-Tutsi and anti-RPF propaganda. However, the Chamber is not satisfied that the aim of the propaganda was to incite the trainees against members of the Tutsi ethnic group, as opposed to whipping up fervour against the RPF as a military adversary. The anti-Tutsi utterances discussed by Prosecution witnesses could reasonably be understood as being aimed at the RPF force as opposed to members of the Tutsi ethnic group as such.[115]

**civilian defence efforts**

Discussion of patrols to track down *Inkotanyi* and their accomplices and to ensure that all Tutsi would be killed if the RPF resumed hostilities, do not, on their own, establish the existence of an agreement between the Accused and others to commit genocide. Ruhengeri was at that time of the alleged meetings and for some years beforehand a key battleground between the RPF and the FAR. As a result, it is conceivable that the purpose of such meetings was to organise a civilian defence force.[116]

**continuing offence**

Conspiracy is a continuing offence. For this reason, evidence of acts occurring before 1994 may be relied upon as evidence of crimes committed during 1994.[117]

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[112] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 693.
[113] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 271
[114] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 352
[115] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 356
[116] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 410
[117] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 20; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1044; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 15; *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 14

Conspiracy to commit genocide may also include acts committed after the planning period, including acts which prove the crime of genocide itself.[118]

**cooperation with conspirators**

The fact that the gendarmerie commander considered the interim government to be a legally constituted government and may have collaborated with that government to some extent is not in itself evidence that he was implicated in a conspiracy to commit genocide against Tutsi.[119]

It is within the Army Chief of Staff's role to visit sick and convalescing troops under his command to offer support and encouragement. Acknowledging the war and urging those present to keep fighting is in accordance with his role as a leader of troops in a time of conflict.[120]

**defining and identifying the enemy**

Document in which the Army prepared a "definition of the enemy" was not evidence of a conspiracy to commit genocide against Tutsi.[121]

Conspiracy was not proved from conduct of accused in urging persons manning roadblock to check identity paper closely "since Tutsi have changed their identity papers" as a conspiracy to commit genocide is not the only inference which could be drawn from this conduct.[122]

**investing in media**

The accused's act of buying RTLM shares and encouraging soldiers to do so is not indicative of his participation in a conspiracy to commit genocide.[123]

The prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide.[124] The role of founder of RTLM does not in itself sufficiently establish that the accused substantially contributed to the commission of the crime of genocide.[125]

**omission**

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[118] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 27
[119] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 649
[120] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 856
[121] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 241
[122] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 394
[123] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 487
[124] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 492
[125] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 594

There was insufficient evidence that commander's inaction was part of a conspiracy to commit genocide against Tutsi.[126]

Conspiracy cannot be committed by omission.[127]

**opposition to peace negotiations**

Opposition to the implementation of the Arusha Accords or the KWSA, in and of itself, is sufficient to establish involvement in a conspiracy to commit genocide against Tutsi.[128]

**participating in government**

Acceptance of post in genocidal government, or making speech supporting government, did not provide sufficient evidence of agreement to participate in conspiracy to commit genocide where accused may have had other motives in taking the post, such as self-preservation.[129]

**genocidal plan**

A genocidal plan is not an element of the crime of genocide. However, the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.[130]

Proof of the existence of a "high level genocidal plan" is not required to convict an accused of genocide or for the mode of liability of instigation to commit genocide.[131]

The conclusion of the Trial Chamber that the massacres in Rwanda were the result of a genocidal plan executed with the involvement of public officials was not an unreasonable conclusion from the evidence.[132]

**groups**

The 1948 Genocide Convention protects not only the explicitly mentioned groups, but all stable and permanent groups.[133]

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[126] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 860
[127] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para.23; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 14
[128] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 473
[129] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at paras. 5697, 5708, 5718
[130] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para.138
[131] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para 363.
[132] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 143
[133] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 510

Membership of a group is, in essence, a subjective rather than an objective concept where the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. A determination of the categorized groups should be made on a case-by-case basis, by reference to both objective and subjective criteria.[134]

**incitement**

**actus reus**

The acts constituting direct and public incitement to commit genocide must be clearly identified.[135]

*Actus reus* of direct and public incitement to commit genocide requires that the accused directly and publicly incited the commission of genocide.[136]

**causation**

There is no requirement of a causal relationship between incitement and the acts perpetrated. It is the potential of the communication to cause genocide that makes it incitement.[137]

The longer the lapse of time between a statement and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it.[138]

There was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt that the *Kangura* publications in the first months of 1994 susbstantially contributed to the commission of acts of genocide between April and July 1994.[139]

**continuing offence**

The crime of direct and public incitement to commit genocide is not a continuing offence. It is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time. Therefore, there is no jurisdiction over acts of incitement having occurred before 1994 on the grounds that such incitement continued in time until the commission of the genocide in 1994.[140]

The crime is completed as soon as the discourse in question is uttered.[141]

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[134] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 811.
[135] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 726
[136] *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 52
[137] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1015; *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 234
[138] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 514
[139] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 519
[140] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 723
[141] *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 52

**definition**

Direct and public incitement is directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audio-visual communication.[142]

**direct**

When a defendant is indicted pursuant to Article 2(3)(c) of Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide.[143]

The "direct" element of incitement must be viewed in the light of its cultural and linguistic context and is to be assessed on a case-by-case basis, considering the culture of Rwanda, and the specific circumstances of the case, focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.[144]

The "direct" element of incitement to commit genocide requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion.[145]

In determining whether a speech constitutes a direct incitement to commit genocide, the principal consideration is the meaning of the words used in the specific context.[146]

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[142] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 109; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 559; *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment* (8 April 2009) at para. 25

[143] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 693

[144] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 698; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 60; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 558; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 502 *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 25

[145] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 855; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 57; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 24; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3338

[146] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 483

Direct is more than vague or indirect suggestions; it must be such that the inciter knows that the intended audience will understand his call is to commit genocide. However, implicit language may nonetheless be 'direct' and should be viewed considering its cultural and linguistic content, its audience, and the political and community affiliations of the inciter on a case-by-case basis.[147]

Direct and public incitement implies that the speech is a direct appeal to commit a genocidal act and requires more than a vague or indirect suggestion.[148]

Inviting readers to look for back issues of *Kangura* in which inciting comments may have been made was not sufficient to prove "direct" incitement to commit genocide.[149]

Encouraging the public to "work" and "sweep away the dirt" in the context in which these statements were made, were sufficient to constitute "direct" incitement to commit genocide.[150]

Statement of support and commitment for preceding speeches which incited genocide did not rise to the level of directly inciting genocide.[151]

**inchoate crime**

As it is an inchoate offence, the crime is punishable even where the incitement failed to produce the result expected by the perpetrator.[152]

Direct and public incitement is an inchoate crime and is punishable even if no act of genocide resulted therefrom.[153]

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[147] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 514; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 25.
[148] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 233
[149] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 410
[150] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 6027
[151] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3340
[152] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 678; *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 110; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 61; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 855; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 58; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 562; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1015; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para. 510; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 24; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2677, 3345
[153] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 234

**instigation**

Incitement resulting in the commission of a genocidal act is punishable under both Articles 2 (3)(a) and Article 6 (1) as instigation.[154]

Instigation under Article 6 (1) is a mode of liability and thus the accused will only be convicted if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4. However, direct and public incitement is itself a crime, requiring no demonstration that it in fact contributed in any way to the commission of acts of genocide.[155]

**interpretation of words**

It was appropriate to consider the potential impact in context – notably, how the message would be understood by its intended audience – in determining whether it constituted direct and public incitement to commit genocide.[156]

Exhorting a crowd to unite against the "sole enemy", or to "get to work", or calling on "the majority" to "rise up and look everywhere possible" and not to "spare anybody", in the context of the Rwandan genocide has been found in the particular circumstances of other cases to amount to calls to exterminate the Tutsi people. This case-by-case determination will therefore depend on how the speech/language was understood by its intended audience.[157]

A reasonable trier of fact could have determined, based on the public knowledge of the killings and mass graves in the area, that President Sindikubwabo's speech directly incited genocide by congratulating the army and the people of Kibuye for restoring security.[158]

It was open to the Trial Chamber to hold that a speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context.[159]

Broadcast which encouraged ethnic hatred, or sought to mobilize hatred against Tutsis, or named an individual as an RPF member and implicitly suggested the killing of

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[154] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 516.
[155] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 512.
[156] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 711; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at paras. 483,508; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2678
[157] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 514.
[158] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 508
[159] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para.703; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at paras. 483,508

his children nevertheless could not be said beyond a reasonable doubt to be a direct and public incitement to commit genocide.[160]

Where it was possible that speaker's reference to Inkotanyi refered to RPF, it could not be concluded beyond reasonable doubt that there was a direct and public incitement to commit genocide.[161]

Accused failed to show that, when his speech was placed in its proper context, his call for the Interahamwe to fight the enemy did not amount to direct incitement to kill members of the Tutsi group and that his general condemnation of killings was mere abstract and hollow rhetoric.[162]

Where it could not be concluded that individuals singled out in broadcast as Inkotanyi accomplices were accused because they were Tutsi, it could not be concluded that the broadcast constituted a direct and publc incitement to genocide.[163]

**mens rea**

The *mens rea* required for this crime is the intent to directly prompt or provoke another to commit genocide, and the perpetrator must have the specific intent to commit genocide.[164]

In some circumstances, the fact that the speech led to acts of genocide can be an indication that it was intended to incite genocide however, this cannot be the only evidence on which incitement is found.[165]

The mere fact that genocide occurred does not demonstrate that the speaker intended to incite the commission of genocide. However, in some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. Nevetheless, this cannot be the only evidence adduced to conclude that the purpose of the speech was to incite the commission of genocide.[166]

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[160] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 741-42, 744
[161] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 746
[162] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 487
[163] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 749
[164] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 110; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 854; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 560; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 730; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 28; *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 58
[165] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 514; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 26
[166] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 709

The accuracy of the statement is only one factor to be considered in the determination of whether a statement is intended to provoke rather than to educate those who receive it. The tone of the statement is as relevant to this determination as is its content.[167]

**public**

The public element depends on two factors: (i) the place where the incitement occurred; and (ii) whether attendance was "selective or limited.[168]

Only unequivocally public forms of incitement may be punished under Article 2 (3)(c).[169]

Public incitement includes speeches, shouting or threats uttered in public places or at public gatherings, or the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or the public display of placards or posters, or through any other means of audio-visual communication.[170]

Public incitement need not be communicated through mass media, nor is a numerical size of the audience determinative. An incitement may be public if it is given in a public space to an unelected audience.[171]

To be pubic, the incitement must call for criminal action to several individuals in a public place or to members of the general public at large by such means as the mass media.[172]

Supervision of roadblocks cannot form the basis for a conviction for direct and public incitement to commit genocide. While such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement, since only the

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[167] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1022.
[168] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 61; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 58; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 503; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 515; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 27
[169] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 515; *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (25 February 2010) at para. 22
[170] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 515; *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (25 February 2010) at para. 22; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 25
[171] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 126
[172] *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion to Dismiss Based Upon Defects in Amended Indictment* (8 April 2009) at para. 25

individuals manning the roadblocks would have been the recipients of the message and not the general public.[173]

In certain circumstances the number of people in attendance may provide evidence in support of a finding that the incitement was public.[174]

Addressing a specific group of individuals manning a roadblock does not constitute public incitement to commit genocide.[175]

Addressing a group of five persons is not sufficiently "public" to sustain a conviction for incitement.[176]

Statement made in a public location, to a crowd of approximately 30 people, an audience that was not selected or limited qualified as public incitement.[177]

Statement made to 20 members of the public was sufficiently public to qualify for incitement.[178]

When assessing the "public" element of the incitement, factors such as the place where the incitement occurred and whether the audience was selected or limited can be considered.[179]

Speech at roadblock with an intended audience of as many as 150 to 250 persons and was sufficiently public. [180]

All convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to large, fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area.[181]

The drafters of the Genocide Convention only intended to criminalize public incitement and to rule out what may constitute private forms of incitement. There is no requirement that the incitement message be addressed to a certain number of people or that it should be carried through a specific medium such as radio, television, or a

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[173] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 862
[174] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 496
[175] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 155; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 6008
[176] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at paras. 6016, 6032
[177] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 129
[178] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 232
[179] *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 52
[180] *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 54
[181] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 156

loudspeaker. However, both the number and the medium may provide evidence in support of a finding that the incitement was public.[182]

A military camp is not a public place and a speech made there to soldiers cannot be the basis of a charge of direct and public incitement to genocide.[183]

Statement made to group of bourgmestres and ministers were not intended to be heard by the public generally and therefore did not satisfy the "public" requirement for incitement to genocide.[184]

Incitement at meeting of bourgmestres was not public where not made in a public place, audience was limited and selected and statement was not broadcast, despite the presence of a journalist at the meeting.[185]

Fact that statement was made to public officials with expectation that they would disseminate it did not make the statement itself a public one.[186]

Though not required, the number of persons and the medium through which the message is conveyed may be relevant in assessing whether the attendance was selected or limited thereby determining whether the recipient of the message was the public.[187]

The dissemination of inciting messages via the media may establish the public element of incitement.[188]

**in whole or in part**

It is not necessary for the prosecution to establish that the perpetrator intended to achieve the complete annihilation of a group. There is no numeric threshold of victims necessary to establish genocide, even though the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Article 2 of the Statute, is strong evidence of the intent to destroy a group, in whole or in part.[189]

While the Prosecution must establish, beyond reasonable doubt, the intent of the perpetrator to destroy the target group in whole or in part, there is no numeric threshold

[182] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 503
[183] *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (25 February 2010) at para. 23
[184] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 1193
[185] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 387
[186] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 386
[187] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 231
[188] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 499
[189] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 498

of victims necessary to establish genocide.[190]

The phrase "destroy in whole or in part a[n] ethnic group" does not imply a numeric approach. It is sufficient to prove that the Accused acted with intent to destroy a substantial part of the targeted group.[191]

Genocide requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group.[192]

In determining whether the accused meant to target a sufficiently substantial part of the Tutsi population to constitute genocide, the Trial Chamber could consider whether the accused's acts took place within the context of other culpable acts systematically directed against the Tutsi population.[193]

Genocide could take place if essentially the total leadership of a group is targeted, regardless of the actual numbers killed.[194]

**protected persons**

An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs.[195]

The Genocide Convention seems to target only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth.[196]

A national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.[197]

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[190] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 809; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 412; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 28; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 466

[191] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 514 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para. 258; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.316; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 64; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 479; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 534

[192] *Prosecutor v. Kayishema*, No.ICTR-95-1-T,*Judgement* (21 May 1999) at para.97

[193] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 44

[194] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 806.

[195] *Prosecutor v. Kayishema*, No.ICTR-95-1-T,*Judgement* (21 May 1999) at para.98

[196] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 511.

[197] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 512.

An ethnic group is generally defined as a group whose members share a common language or culture.[198]

The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.[199]

The religious group is one whose members share the same religion, denomination or mode of worship.[200]

The aim of the drafters of the Genocide Convention was to protect *any* stable and permanent group. Therefore, the Convention is not limited to the four groups mentioned.[201]

The prosecution has the burden of proving either that the victim belongs to the targeted ethnic, racial, national, or religious group or that the perpetrator of the crime believed that the victim belonged to the group.[202]

If a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.[203]

The determination of a targeted group must be made on a case-by-case basis, consulting both objective and subjective criteria.[204]

Even if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.[205]

**Article 3—crimes against humanity**

**The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:**

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[198] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 513.
[199] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 514.
[200] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 515.
[201] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 516.
[202] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 500 ; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 813
[203] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 65.
[204] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para. 254; *Prosecutor v. Semanza* ,No. ICTR-97-20-T, *Judgement* (15 May 2003 ) at para.317
[205] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 496; *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Judgement and Sentence* (12 November 2008) at para. 338

**(a) Murder;**
**(b) Extermination;**
**(c) Enslavement;**
**(d) Deportation;**
**(e) Imprisonment;**
**(f) Torture;**
**(g) Rape;**
**(h) Persecutions on political, racial and religious grounds;**
**(i) Other inhumane acts.**

**armed conflict**

Article 3 of the ICTR Statute does not require that the crimes be committed in the context of an armed conflict.[206]

**attack**

For purposes of Article 3 of the Statute, an attack against a civilian population means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article.[207]

The concept of "attack", within the meaning of Article 3 of the Statute, has been defined as an unlawful act, event, or series of events of the kind listed in Article 3 (a) through (i) of the Statute.[208]

An "attack" does not necessarily require the use of armed force, it could also involve other forms of inhumane mistreatment of the civilian population.[209] An attack may also be non-violent in nature, like imposing a system of apartheid, or exerting pressure on the population to act in a particular manner, if orchestrated on a massive scale or in a systematic manner.[210]

Although the act need not be committed at the same time and place as the attack or share all the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack.[211]

The *actus reus* cannot be a random inhumane act, but rather an act committed as part of an attack. [212]

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[206] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 269; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 565
[207] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 918; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 476
[208] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 526 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.298
[209] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.327; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 868.
[210] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 581.
[211] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.326

**civilian population**

A population remains civilian in nature even if there are individuals within it who are not civilians and even if the members of the population at one time bore arms, so long as the population is "predominantly civilian" .The term "population" does not require that crimes against humanity be directed against the entire population of a geographic territory or area. The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.[213]

Indictment charging murder of gendarme must allege that he was a member of the civilian population.[214]

The attack must be directed against a civilian population. The presence of certain individuals within the civilian population who do not fall within the definition of civilians does not change the civilian character of this population.[215]

The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.[216]

"Population" does not mean that the entire population of a given State or territory Instead "population" is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting crimes under national penal legislation, do not rise to the level of crimes against humanity.[217]

**discrimination**

The attack against the civilian population must have been carried out on a discriminatory basis, that is, on national, political, ethnic, racial or religious grounds. However, the victim's membership in a national, political, ethnic, racial or religious

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[212] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.67
[213] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.330
[214] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment* (6 May 2004) at para. 17
[215] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 528 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.300; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at paras. 873-874; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 79; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 582
[216] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at paras. 874-875.
[217] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 80.

group is irrelevant, provided that the perpetrator's intention is to support or further an attack against a civilian population on one of the enumerated discriminatory grounds.[218]

Discrimination because of a person's political ideology satisfies the requirement of political' grounds.[219]

Discriminatory intent is not required for crimes against humanity except in the case of persecution.[220]

Acts committed against persons outside the discriminatory categories may nevertheless form part of the attack where the act against the outsider supports or furthers or is intended to support or further the attack on the group discriminated against on one of the enumerated grounds.[221]

**elements**

The elements of a crime against humanity are: (i) an attack; (ii) that was widespread or systematic; (iii) directed against a civilian population; (iv) committed on national, political, ethnical, racial, or religious grounds; (v) that the accused acted with knowledge of the broader context of the attack and with the knowledge that his acts formed part of the attack.[222]

The elements of a crime against humanity include: (1) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (2) the act must be committed as part of a widespread or systematic attack; and (3) the act must be committed against members of the civilian population.[223]

**extermination**

**actus reus**

The *actus reus* of extermination consists of any act, omission, or combination thereof which contributes directly or indirectly to the killing of many individuals.

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[218] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 529 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.301; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 514; *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 56, fn. 121

[219] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 583.

[220] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 464; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 879

[221] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.331; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 584.

[222] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 698

[223] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 68

Although extermination is the act of killing many people, such a designation does not suggest that a numerical minimum must be reached. [224]

The *actus reus* of extermination is that the perpetrator participates with others in a collective on ongoing mass killing event.[225]

The act need not necessarily cause the death of an individual, but must contribute to a mass killing event.[226]

The creation of conditions of life leading to the mass killing of others include, for example imprisoning many people and withholding the necessities of life, so that mass death results; or introducing a deadly virus into a population and preventing medical care, with the same result.[227]

**aiding and abetting**

The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused "only" killed a limited number of persons is irrelevant to determining the accused's responsibility as an aider and abettor of the crime of extermination.[228]

**definition**

The crime of extermination is the act of killing on a large scale.[229] It is directed against a population rather than against individuals.[230]

Extermination is the killing of more than a limited number of people with the intent to perpetrate or participate in a mass killing.[231]

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[224] *Prosecutor v. Setako,* No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 480; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2123
[225] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para 9
[226] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 9
[227] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 90.
[228] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 530
[229] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 516; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.309
[230] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 701; *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.340
[231] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 701

Extermination is participation in the widespread or systematic killing of a group or systematically subjecting several people to conditions of living that would inevitably lead to their deaths.[232]

**elements**

Extermination differs from murder in that it requires an element of mass destruction.[233]

The elements of extermination are that the accused, through his acts or omissions: (1) participated in the mass killing of others, or in the creation of conditions of life leading to the mass killing of others; (2) intended the killings, or was reckless, or grossly negligent as to whether the killings would result; and (3) was aware that his acts or omissions formed part of a mass killing event.[234]

The material element of extermination is killing that constitutes or is part of a mass killing of members of a civilian population. The scale of the killing required for extermination must be substantial. Responsibility for a single or a limited number of killings is insufficient.[235]

**mens rea**

The *mens rea* of extermination requires that the accused intend to kill persons on a massive scale or to subject many people to conditions of living that would lead to their death in a widespread or systematic manner.[236]

Recklessness or grossly negligent conduct are forms of *mens rea*. Understood in that way, the *Semanza* judgement is not at odds with the *Bagilishema* and *Kayishema and Ruzindana* judgments.[237]

The mental element for extermination is the intent to perpetrate or participate in a mass killing.[238]

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[232] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 82; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 522; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para 9

[233] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 890; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 422

[234] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 89; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 72

[235] *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.340

[236] *Prosecutor v. Setako,* No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 480.

[237] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at Para. 895.

[238] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 422; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 10

**perpetrators**

Extermination charges are not reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the killings of large numbers.[239]

**victims**

Customary international law does not consider a precise description or designation by name of victims to be an element of the crime of extermination.[240]

It is not an element of the crime of extermination that a precise identification of "certain named or described persons" be established. It is sufficient that the Prosecution satisfy the Trial Chamber that mass killings occurred.[241]

Trial Chamber erred in considering killings that were not attributed to the accused in its determination that the number of killings amounted to extermination.[242]

Relevant factors to concluding that the killings were on a large scale include the time and place of the killings, the selection of victims and the way they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity.[243]

The element of killing on a large scale cannot be satisfied by a collective consideration of distinct events committed in different prefectures, in different circumstances, by different perpetrators, and over an extended period. However, the facts as found by the Trial Chamber reflect that the incidents individually satisfied the element of killings on a large scale.[244]

Killings in the same commune, by the same category of perpetrators, and approximately at the same time can be aggregated to constitute extermination even if they take place at different locations.[245]

It is unclear whether the killing of 8 Tutsi girls would have met the extermination requirement, but it was proper for the Trial Chamber to aggregate those killings with other killings in the same commune around the same time.[246]

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[239] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 539
[240] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 518
[241] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 521
[242] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 396
[243] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2123
[244] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 661
[245] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2125
[246] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3310

Killing of 10-20 people at a roadblock did not amount to extermination.[247]

Killing of numerous civilians in Gisenyi town was sufficient for extermination.[248]

Fact that one witness testified that a bus was used to transport the victims to the place they were killed supported conclusion that enough people were involved to constitute extermination.[249]

A perpetrator may nonetheless be guilty of extermination if he kills, or creates the conditions of life that kill, a single person, providing that the perpetrator is aware that his or her acts or omissions form part of a mass killing event, namely mass killings that are proximate in time and place and thereby are best understood as a single or sustained attack.[250]

**imprisonment**

Imprisonment is the arbitrary or otherwise unlawful detention or deprivation of liberty rising to the same level of gravity as other crimes against humanity.[251]

Factors to be considered for an individual who has been arrested is whether (i) there was a valid warrant of arrest; (ii) the detainee was informed of the reason for his arrest; (iii) the detainee was formally charged; and (iv) the detainee was informed of any procedural rights.[252]

When a national law is relied upon to justify imprisonment, the national law must not violate international law.[253]

**mens rea-chapeau elements**

The perpetrator must have acted knowing that the act formed part of a widespread or systematic attack against a civilian population.[254]

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[247] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 438
[248] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 398
[249] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 188
[250] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 88.
[251] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 702
[252] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 702
[253] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 702
[254] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 530 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.302; *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.332; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 69; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 881; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 94; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 19; *Prosecutor v. Setako,* No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 477

There is no requirement of a policy or plan for crimes against humanity.[255]

Killing of gendarmes appeared to be random act and therefore not committed with knowledge of broader context or that perpetrator's acts constituted part of a discriminatory attack.[256]

While the existence of a plan can be evidentially relevant, it is not a separate legal element of a crime against humanity and the proof of a plan is not a prerequisite to a conviction for extermination.[257]

However, the accused need not necessarily share the purpose or goals behind the broader attack. There is no requirement that the enumerated acts other than persecution be committed with discriminatory intent.[258]

Motive need not be shown as part of the *mens rea* and the lack of motive will not invalidate the judgement.[259]

**murder**

Murder is the intentional killing of a person, or intentional infliction of grievous bodily harm knowing that such harm will likely cause the victim's death or being reckless as to whether death will result, without lawful justification or excuse. Murder, as with extermination, is punishable as a crime against humanity "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds", as required by Article 3 of the Statute.[260]

The requisite elements of murder are: (1) the victim is dead; (2) the death resulted from an unlawful act or omission of the accused or a subordinate; and (3) at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death and is reckless whether death ensures or not.[261]

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[255] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 84
[256] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 445
[257] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 149
[258] *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.332 ; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 421; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 477
[259] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 262
[260] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 158; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 568 ; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 68; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 17
[261] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 589.

Murder as a crime against humanity must be premeditated.[262] Premeditated murder of a particular individual is not required so long as the accused had a premeditated intention to murder civilians as part of a widespread or systematic attack on discriminatory grounds.[263]

The Trial Chamber rejected the prosecution's argument that an accused can be found guilty of murder for the generalized killings that occurred in Rwanda between April and July 1994 without sufficient evidence establishing a link between the commission of a specific killing of an identifiable individual by the accused, or one or more persons over whom the accused exercised control.[264]

Accused who made public statements that the victim should be killed acquitted of murder in Rule 98 *bis* motion where no link was shown between the accused and those who killed the victim.[265]

Murder and *assassinat* should be considered together to ascertain the standard of *mens rea* intended by the drafters and demanded by the Statute. When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing. The accused is guilty of murder if the accused, engaging in conduct which is unlawful (1) causes the death of another; (2) by a premeditated act or omission; (3) intending to kill any person, or intending to cause grievous bodily harm to any person.[266]

**other inhumane acts**

Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are satisfied.[267]

For an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act, and with knowledge that the act is perpetrated within the overall context of the attack.[268]

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[262] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 700; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 569 ; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 68; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (22 March 2007) at para. 16

[263] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 700; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 569

[264] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 77

[265] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (22 March 2007) at para. 16

[266] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 84.

[267] *Prosecutor v. Musema*, No.ICTR-96-13-T,*Judgement* (27 Jan.2000) at para.212

[268] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 72

Other inhumane acts include those crimes against humanity that are not specified in Article 3 of the Statute but are of comparable seriousness.[269]

Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute.[270]

Inhumane acts are only those which deliberately cause great suffering.[271]

Accused could not be convicted of sexual assault where evidence showed that bottle was put in vagina of victim after she died.[272]

Preventing refugees from seeking sanctuary, sheparding Tutsis into a house of worship to be killed, stripping women, and torturing and murdering a victim in front of his family all constitute inhumane acts.[273]

Other inhumane acts include acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim.[274]

The confinement of many people on exposed ground without water, food or sanitary facilities will amount to an inhumane act if the act is deliberate and its consequences are serious mental or physical suffering or a serious attack on human dignity.[275]

If the inhumane act is witnessed by a third party, an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the time of the act, the accused was unaware of the third-party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.[276]

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[269] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 72
[270] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 688.
[271] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 932.
[272] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 729
[273] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2222.
[274] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 164
[275] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 490.
[276] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 529

**persecution**

Persecution may take diverse forms and does not necessarily require a physical act.[277]

Persecution may include acts enumerated under other sub-headings of crimes against humanity, such as murder or deportation, when they are committed on discriminatory grounds. Persecution may also involve a variety of other discriminatory acts, not enumerated elsewhere in the Statute, involving serious deprivations of human rights.[278]

Unlike the crime of incitement, which is defined in terms of intent, the crime of persecution is defined also in terms of impact. It is not a provocation to cause harm. It is itself the harm. Accordingly, there need not be a call to action in communications that constitute persecution. For the same reason, there need be no link between persecution and acts of violence.[279]

Persecution is broader than direct and public incitement [to commit genocide], including advocacy of ethnic hatred in other forms.[280]

Hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings, and therefore constitutes "actual discrimination".[281]

Speech inciting to violence against a population based on ethnicity, or any other discriminatory ground, violates the right to security of the members of the targeted group and therefore constitutes "actual discrimination".[282]

However, hate speech alone cannot amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.[283]

Hate speeches and direct calls for genocide broadcast by RTLM after 6 April 1994, while a massive campaign of violence against the Tutsi population was being conducted, also constituted acts of persecution.[284]

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[277] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.348
[278] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.349
[279] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1073.
[280] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1078.
[281] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 986
[282] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 986
[283] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 986
[284] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 995

It is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.[285]

Arresting refugees and forcing them to move to a different location, or preventing persons being evacuated, was not of similar gravity as the enumerated acts of persecution in Article 3 and could not form the basis of a conviction for persecution.[286]

The argument that mere hate speech cannot constitute an underlying act of persecution because discourse of this kind is protected under international law is rejected.[287]

The act of persecution must have been committed on political, racial, or religious grounds. Unlike the other enumerated crimes against humanity, persecution requires a discriminatory intent. The enumerated grounds of discrimination for persecution in Article 3(h) of the Statute do not include national or ethnic grounds, which are included in the list of discriminatory grounds for the attack contained in the chapeau of Article 3.[288]

The group against which discriminatory attacks were perpetrated can be defined by its political component [moderate Hutu] as well as its ethnic component.[289]

Judgement did not allow for conclusion that accused committed persecution on other than ethnic grounds. Since ethnicity is not a ground for persecution under Article 3(h) of the statute, the convictions for persecution had to be reversed.[290]

**rape**

**definition**

Rape is a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is any act of a sexual nature which is committed on a person under circumstances which are coercive.[291]

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[285] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 987
[286] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at paras. 6113, 6119
[287] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 987, fn. 2264
[288] *Prosecutor v. Semanza* ,No. ICTR-97-20-T, *Judgement* (15 May 2003 ) at para.350; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2136
[289] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1071.
[290] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2140

The offence of rape exists whenever there is sexual penetration of the vagina, anus or mouth of the victim, by the penis of the perpetrator or some other object under, circumstances where the victim did not agree to the sexual act or was otherwise not a willing participant to it.[292]

**actus reus**

The *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.[293]

Any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute is not limited to such acts alone.[294]

Disembowelling the victim by cutting her open with a machete from her breasts to her vagina cannot be classified as rape. Although the act interferes with the sexual organs, it does not constitute a physical invasion of a sexual nature.[295]

Other acts of sexual violence which may fall outside of this specific definition may of course be prosecuted and would be considered by the Chamber under other categories of crimes for which the Tribunal has jurisdiction, such as *other inhumane acts*.[296]

**mens rea**

The *mens rea* consists of the intent of the perpetrator to affect such sexual penetration with knowledge that it occurs without the consent of the victim.[297]

The mental element for rape as a crime against humanity is the intention to affect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.[298]

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[291] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 598. See also para. 688.
[292] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 522
[293] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 66; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 915
[294] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.328
[295] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 557
[296] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 916.
[297] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 522

The Trial Chamber cannot infer knowledge on the part of the accused of rapes simply based on expert testimony that rape was widespread and systematic in Rwanda during 1994.[299]

**consent**

Coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape.[300]

Non-consent of the victim and knowledge thereof by the accused is an element of the offence—consent is not an affirmative defence to rape.[301]

Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.[302]

The prosecution can prove non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible.[303]

The Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.[304]

Although force is not an element *per se* of rape, force or threat of force provides clear evidence of non-consent.[305]

Knowledge by the perpetrator of non-consent may be proven by facts that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.[306]

Coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion.[307]

Coercive circumstances can vitiate a victim's ability to consent to the sexual assault in question, as meaningful consent is not possible.[308]

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[298] *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.346
[299] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 96
[300] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 546
[301] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 153
[302] *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.344
[303] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 155
[304] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 155
[305] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2199.
[306] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 157
[307] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 382.
[308] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 385.

**evidence insufficient**

Insufficient evidence of the accused's rape was presented when he was shown to be only one of the persons in a house from which women emerged who had been raped.[309]

No reasonable trier of fact could have relied on general testimony of witness that over three-week period at the prefecture office, soldiers constantly picked out young girls to rape, absent further details.[310]

**sexual violence**

Sexual violence is broadly defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive".[311]

Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[312]

Acts of sexual violence are a broader category than rape. Where the Indictment only charged the accused with rape as a crime of humanity. the Trial Chamber erred in relying on its findings of sexual assaults committed throughout Rwanda to convict the accused of rape as a crime against humanity.[313]

**torture**

Torture may be defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[314]

Torture is the intentional infliction of severe physical or mental pain or suffering for prohibited purposes, including obtaining information or a confession; punishing, intimidating, or coercing a victim or third person; or discriminating against the victim or third person.[315]

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[309] *Muhimana v Prosecutor*, No. ICTR-95-1B-A, *Judgement* (21 May 2007) at para. 51
[310] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 237
[311] *Prosecutor v Rukundo,* No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 379.
[312] *Prosecutor v Rukundo,* No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 380.
[313] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 611
[314] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 593
[315] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 703; *Prosecutor v. Semanza,* No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.343

The essential elements of torture are: (1) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes: (a) to obtain information or a confession from the victim or a third person; (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them; (c) for the purpose of intimidating or coercing the victim or the third person; or (d) for any reason based on discrimination of any kind; and (2) the perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.[316]

There is no requirement that the conduct constituting torture be perpetrated solely for one of the prohibited aims.[317]

There is no requirement that the accused be a public official to be convicted of torture.[318]

**widespread or systematic**

The French and the English language versions of the Statute, equally authentic, do not say the same thing. The French language version has the conjunctive "widespread and systematic" whilst the English language version has the disjunctive "widespread or systematic". The practice of the ICTR and ICTY Tribunals has been to accept the English language version, in line with customary international law.[319]

It is not necessary that the underlying crime, i.e. rape, be widespread or systematic, but that the attack be widespread or systematic.[320]

An act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.[321]

A widespread attack is an attack on a large scale directed against a multiplicity of victims. A systematic attack is one carried out pursuant to a preconceived policy or plan. To qualify the attack must be at least widespread or systematic but need not be both.[322]

The concept of a "widespread" attack refers to the scale of the attack and multiplicity of victims. The concept of a "systematic" attack, within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct but does not necessarily

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[316] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 594.
[317] *Prosecutor v. Semanza*, No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.343
[318] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 248
[319] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 920; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 869.
[320] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 102
[321] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 924
[322] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 77; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 579-80

require the proof of a plan. The existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic. However, the existence of such a policy or plan is not a distinct legal element of the crime.[323]

Either of the requirements of widespread or systematic will be enough to exclude acts not committed as part of a broader policy or plan. The policy element can be seen to be an inherent feature of the attack, whether the attack be characterized as widespread or systematic.[324]

An attack may be instigated or directed by any organization or group, whether representing the government of a State.[325]

A widespread attack is one that is directed against a multiplicity of victims. A systematic attack means an attack carried out pursuant to a preconceived policy or plan. Either of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons.[326]

The deployment of "substantial resources" is not a legal element of crimes against humanity.[327]

The existence of a plan is not a legal element of crimes against humanity. Hence, the conclusion that the killings were not part of a pre-conceived plan for purposes of conspiracy to commit genocide is not inconsistent with a finding that the killings were related to a broader attack against the civilian population.[328]

It is well established and virtually conceded that a widespread and systematic attack against the Tutsi population commenced following the shooting down of the plane carrying President Habyarimana and his death on 6 April 1994.[329]

RTLM broadcasts from 1 January to 6 April 1994 cannot amount to underlying acts of persecution pursuant to Article 3 of the Statute, since it cannot be concluded that they were part of a widespread or systematic attack against the Tutsi population.[330]

**Article 4—war crimes**

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[323] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 527 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.299
[324] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 78.
[325] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 78.
[326] *Prosecutor v. Kayishema*, No.ICTR-95-1-T,*Judgement* (21 May 1999) at para.123
[327] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 922
[328] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 262
[329] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 118.
[330] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 993

**The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:**
**(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;**
**(b) Collective punishments;**
**(c) Taking of hostages;**
**(d) Acts of terrorism;**
**(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;**
**(f) Pillage;**
**(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;**
**(h) Threats to commit any of the foregoing acts.**

**chapeau elements**

The elements of a violation of Article 4 are: (i) the existence of a non-international armed conflict on the territory of the concerned state; (ii) a nexus between the alleged violation and the armed conflict; (iii) the victims were not directly taking part in the hostilities at the time.[331]

**character of the conflict**

A clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.[332]

Where alleged offences are charged under both Common Article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common Article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to afford protection to victims in conflicts not of an international character.[333]

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[331] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 766
[332] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 601.
[333] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 618.

The suggestion that proof that the accused thought that the conflict was international would be a defence has to be rejected because murder and acts of violence are offences regardless of the nature of the conflict.[334]

There is adequate precedent in the Tribunal to conclude that the conflict in Rwanda was a non-international armed conflict.[335]

Individual criminal responsibility applies for breaches of Common Article 3 and Addition Protocol II.[336]

The conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that: (1) an armed conflict took place in Rwanda, between its armed forces and dissident armed forces or other organized armed groups; (2) the dissident armed forces or other organized armed groups were under responsible command; (3) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and (4) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.[337]

This degree of organization should be such to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.[338]

Armed conflict' suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions.[339]

A joint criminal enterprise to commit war crimes cannot extend beyond the existence of the relevant armed conflict. Dates alleged in indictment ordered to be amended.[340]

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[334] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Judgement of Acquittal* (19 March 2008) at para. 45
[335] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 74; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 621
[336] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at paras. 615-617.
[337] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 623.
[338] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 626.
[339] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 620.
[340] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Defence Preliminary Motion on Defects in the Indictment* (15 December 2010) at para. 80

**cruel treatment**

Cruel treatment is an intentional act or omission which causes serious physical or mental suffering or injury or constituting a serious attack on human dignity. It is short of the severe suffering that is required for torture.[341]

**murder**

Murder as a war crime requires intent to kill, but not premeditation.[342]

**nexus**

For an offence to fall within the scope of Article 4 of the Statute of the Tribunal, the Chamber must find that there existed a nexus between the alleged breach of Common Article 3 or Additional Protocol II and the underlying armed conflict.[343]

Factors to be considered in determining the nexus of the act to the armed conflict include (1) whether the perpetrator is a combatant; (2) whether the victim is a non-combatant; (3) whether the victim is a member of the opposing party; (4) whether the act can be said to serve the goal of the military campaign; (5) and whether the crime was committed as part of the perpetrator's official duties.[344]

Care is needed when the accused is a non-combatant.[345]

Once the conditions for applicability of Common Article 3 and Additional Protocol II are satisfied, their scope extends throughout the territory of the state where the crimes were committed.

There must be a nexus between the offence and the armed conflict. This is met when the offence is closely related to the hostilities or committed in conjunction with the armed conflict.[346]

The burden rests on the prosecutor to establish that a nexus exists.[347]

Adequate nexus between the acts charged and the armed conflict found where the acts were committed by Interahamwe armed with guns, grenades, and clubs, alongside soldiers of the Presidential Guard and the victims were protected persons.[348]

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[341] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 765
[342] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 765
[343] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.368
[344] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 569
[345] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 570
[346] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 105.
[347] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 106.
[348] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 579

Trial Chamber erred in ruling that the accused must be shown to have been a member of the armed forces or held a position in the civilian government to be responsible for war crimes.[349]

Adequate nexus existed where killings by Army members took place in military camp, even if the war had not come to that area.[350]

Adequate nexus between the armed conflict and killings in Gisenyi town was established.[351]

**torture**

Torture under Article 4 has the same elements as torture as a crime against humanity.[352]

**victims**

To take a direct part in hostilities means, for the purposes of these provisions, to engage in acts of war that strike at personnel or equipment of the enemy armed forces.[353]

The use of rudimentary defensive weapons does not change the status of victims.[354]

**violations**

A serious violation within the meaning of Article 4 is a breach of a rule protecting important values with grave consequences for the victim. The acts enumerated in Article 4 of the Statute constitute serious violations of Common Article 3 and Additional Protocol II, entailing individual criminal responsibility.[355]

**violence to life, etc.**

To establish the offence of violence to life, health, and physical or mental well-being (murder) the prosecution must prove the following elements: (1) the death of the victim taking no active part in the hostilities; (2) that the death was the result of an act or omission of the accused or of one or more persons for whom the accused is criminally responsible; (3) the intent of the accused or the person for whom he is responsible to (a)

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[349] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 444
[350] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 250
[351] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 406
[352] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 765
[353] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.366
[354] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2238.
[355] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.370

kill the victim, or (b) to wilfully cause serious bodily harm which the perpetrator should reasonably have known might lead to death.[356]

The offence of "violence to life, health, and physical or mental well-being" is expressly included in the Statute and is part of customary international law. Therefore, the challenge to the vagueness of this part of the statute does not mean that the Tribunal has no jurisdiction over this offence.[357]

The offence of "violence to life, health, and physical or mental well-being" is found in common Article 3, which was expressly incorporated into Article 4 of the ICTR Statute, unlike at the ICTY. Therefore, it existed as part of customary international law in 1994 and its application to this case would not violate the concept of *nullem crimen sine lege*.[358]

The use of the term "killing" in the indictment could potentially be misleading since the statute uses the term "murder". Therefore, the prosecution should amend the indictment to charge murder as a form of violence to life, rather than killing.[359]

**Article 5—personal jurisdiction**

**The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.**

**Article 6—individual criminal responsibility**

**1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.**
**2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.**
**3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.**
**4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be**

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[356] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 257
[357] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba, and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise* (11 May 2004) at paras. 49-52
[358] *Prosecutor v Karemera*, No. ICTR-98-44-PT, *Decision on Count Seven of the Amended Indictment—Violence to Life, Health and Physical or Mental Well-Being of Persons* (5 August 2005)
[359] *Prosecutor v Karemera*, No. ICTR-98-44-PT, *Decision on Count Seven of the Amended Indictment—Violence to Life, Health and Physical or Mental Well-Being of Persons* (5 August 2005) at para. 9

**considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.**

**aiding and abetting**

**definition**

Aiding and abetting are distinct legal concepts. Aiding means assisting or helping another to commit a crime. Abetting means facilitating, advising, or instigating the commission of a crime.[360]

**presence**

It is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offence.[361]

The Trial Chamber erred in finding that the only reasonable inference to be drawn from the presence of the accused at hotel where arms were distributed was that the accused consented to the distribution of weapons and erred in concluding that the accused therefore aided and abetted the killings.[362]

**substantial contribution**

Aiding and abetting include all acts of assistance in either physical form or in the form of moral support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime.[363]

Proof of a causal relationship, in the sense of a *conditio sine que non* between the conduct of the aider and abettor and the commission of the crime, is not required so long as the support of the aider and abettor has a substantial effect upon the perpetration of the crime.[364]

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[360] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 507 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.286; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.384; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 765

[361] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.43; *Prosecutor v. Semanza*, No. ICTR-97-20-T, *Judgement* (15 May 2003 ) at para.385; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 33; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 35

[362] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 386

[363] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.43

[364] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2083

Whether a particular contribution is substantial is a fact-based inquiry and need not serve as a condition precedent for the commission of the crime.[365]

The contribution of an aider and abettor before or during the fact may take the form of practical assistance, encouragement or moral support, which has a substantial effect on the accomplishment of the substantive offence. Such acts of assistance before or during the fact need not have caused the consummation of the crime by the actual perpetrator, but it must have had a substantial effect on the commission of the crime by the actual perpetrator.[366]

In determining substantial contribution to aiding and abetting a crime, it is necessary to assess the link between the conduct of the aider and abettor and the crime. Such conduct must have a substantial effect upon the commission of the crime. Whether a particular contribution qualifies as substantial is a fact-based inquiry. The conduct need not serve as a condition precedent for the commission of the crime.[367]

It must be proven that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime .[368]

The threshold for finding a significant contribution to a JCE is less than that of finding a substantial contribution as an aider and abettor.[369]

The actus reus need not serve as condition precedent for the crime.[370]

Prosecution failed to prove link between accused's decision to release prisoners and their subsequent commission of crimes and therefore element of substantial contribution for aiding and abetting was not established.[371]

Bourgmestre's speech endorsing speeches of President and Prime Minister was not shown to have substantially contributed to killings which followed.[372]

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[365] *Ntawukulilyayo v Prosecutor*, No. ICTR-05-82-A, *Judgement* (14 December 2011) at para. 214
[366] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 766; *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 140; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 16; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 469; *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 52; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 87, fn.238
[367] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 489
[368] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 44; *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 117
[369] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 199, fn. 526
[370] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 373; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 450; *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 52; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3332
[371] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 492

A person need not be physically present at the time of the crimes to have made a substantial contribution to them.[373]

Although he was not present, military commander's tacit approval of the conduct of his soldiers constituted a substantial contribution to their crimes and made him guilty of aiding and abetting genocide.[374]

Tacit approval of President and Prime Minister's speeches which incited genocide did not constitute a substantial contribution to the subsequent killings such as to render the accused liable as aiders and abettors to genocide.[375]

Where it could not be shown that perpetrators knew of accused's prior crimes at other locations, Trial Chamber's conclusion that his presence at the scene substantially contributed to the crimes was unreasonable.[376]

**actus reus**

The *actus reus* of aiding and abetting is constituted by acts or omissions aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific crime, and which substantially contributed to the perpetration of the crime.[377]

The actus reus of aiding and abetting is constituted by acts or omissions specifically directed to assist, encourage, or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[378]

Expressing satisfaction over broadcasts having allegedly instigated the killing of Tutsi could not support the finding that the accused was responsible under Article 6(1) of the Statute. This fact cannot represent an act or omission capable of constituting the *actus reus* of one of the modes of liability.[379]

Encouragement is a form of conduct which may lead to criminal responsibility for aiding and abetting a crime.[380]

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[372] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3333
[373] *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 151
[374] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 496
[375] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at paras. 5747, 5753
[376] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2088
[377] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 482 *Prosecutor v. Setako,* No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 450; *Ntawukulilyayo v Prosecutor*, No. ICTR-05-82-A, *Judgement* (14 December 2011) at para. 214; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1955, 3332
[378] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 147
[379] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 593
[380] *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 150

**after-the-fact**

Contrary to the other modes of responsibility which require that the conduct of the accused precede the perpetration of the crime itself, the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[381]

For aiding and abetting, the accused's participation may take place at the planning, preparation, or execution stage of the crime and may take the form of a positive act or omission , occurring before or after the act of the principal offender.[382]

**mens rea**

The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[383]

The requisite *mens rea* for aiding and abetting genocide is the accomplice's knowledge of the genocidal intent of the principal perpetrators. Aiding and abetting genocide is a mode of criminal participation which does not require the accused share the specific intent of the perpetrator.[384]

Trial Chamber failed to make specific findings on the *mens rea* of the principal perpetrators or of the accused's knowledge of their intent. However, that the evidence before the Trial Chamber was sufficient to support a finding that the principal perpetrators acted with genocidal intent in view of how the attack unfolded and the context in which it occurred.[385]

In cases of specific intent crimes, such as persecution or genocide, the aider and abettor must know of the principal perpetrator's specific intent.[386]

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[381] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 482; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 766; *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 140; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 16; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 469; *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 52; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 87, fn.238; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3332

[382] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 33

[383] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 482; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 450; *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 155; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1955

[384] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 364; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 16; *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 56; *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 157

[385] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 89

[386] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 157; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 450; *Rukundo v Prosecutor*, No.

Where the crime alleged is genocide, it must also be proven that the perpetrator acted with the specific intent to destroy a protected group as such in whole or in part.[387]

The accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*.[388]

It is not necessary for the accused to know the precise crime which was intended and which in the event was committed, but he must be aware of its essential elements.[389]

The *mens rea* requirement will be fulfilled where an individual acts with the knowledge that his or her act(s) assist in the commission of the crime by the actual perpetrator(s). While the accused need not know the precise offence being committed by the actual perpetrator(s), the accused must be aware of the essential elements of the crime and must be seen to have acted with awareness that he or she thereby supported the commission of the crime.[390]

Knowledge of the actual commission of the crime is not required. Where an accused is aware that one of several crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime and is guilty as an aider and abettor.[391]

An accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[392]

To satisfy the *mens rea* requirement of an aider and abettor, the Prosecution must show that the Accused's inaction amounted to an acquiescence positively contributing to the commission of crimes.[393]

No reasonable finder of fact could have concluded that the accused knew of his subordinates' involvement of the killing of the Prime Minister, and therefore he could not be convicted of aiding and abetting in her murder.[394]

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ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 53; *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 155

[387] *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 166

[388] *Ndahimana v Prosecutor,* No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 157; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.388; *Prosecutor v Bisengimana,* No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 36; *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 155

[389] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 482

[390] *Prosecutor v Kajelijeli,* No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 768.

[391] *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 158

[392] *Prosecutor v Ntakirutimana,* No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 499

[393] *Prosecutor v Bagilishema,* No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 682.

**relationship with perpetrator**

In order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person.[395]

Whether the accused personally knew the individual perpetrators is irrelevant.[396]

It is not necessary for a principal perpetrator to be aware of the aider and abettor's contribution.[397]

While the Prosecution must establish the acts of the principal perpetrators for which it seeks to hold the aider and abettor responsible, an accused may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified.[398]

**approving spectator—in general**

An individual can be found liable for aiding and abetting a crime when it is established that his conduct amounted to tacit approval or encouragement of the crime and that such conduct substantially contributed to the crime.[399]

Criminal responsibility as an "approving spectator" does require actual presence during the commission of the crime or at least presence in the immediate vicinity of the scene of the crime, which is perceived by the actual perpetrator as approval of his conduct. The authority of an individual is frequently a strong indication that the principal perpetrators will perceive his presence as an act of encouragement. Responsibility, however, is not automatic, and the nature of the accused's presence must be considered against the background of the factual circumstances.[400]

The "approving spectator" must have a significant status if his or her presence is to have the required effect on the perpetrators.[401]

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[394] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 317
[395] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 672; *Muhimana v Prosecutor*, No. ICTR-95-1B-A, *Judgement* (21 May 2007) at para. 189
[396] *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 168
[397] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 87; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3332
[398] *Ngirabatware v Prosecutor,* No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 149
[399] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1955
[400] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 824; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.386; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 18
[401] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 829

Presence, when combined with authority/status, may constitute assistance (the *actus reus* of the offence) in the form of moral support. Insignificant status may, however, put the "silent approval" below the threshold necessary for the *actus reus.*[402]

Liability for aiding and abetting as an approving spectator has required the authority of the accused combined with his presence on or very near to the crime scene, especially if considered with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it.[403]

Aiding and abetting by tacit approval and encouragement is not, strictly speaking, liability for an omission. The combination of a position of authority and physical presence at the crime scene allows for the inference of tacit approval or encouragement to be drawn.[404]

Mere presence at the crime scene may constitute aiding and abetting where it is demonstrated to have a significant encouraging effect on the principal offender, particularly if the individual standing by was the superior of the principal offender or was otherwise in a position of authority.[405]

Even for a person of high office, it must be shown that the accused's inaction had an encouraging or approving effect on the perpetrators; the effect was substantial; and the accused knew of this effect and of the perpetrator's criminal intention, albeit without necessarily sharing the perpetrator's intent.[406]

Criminal responsibility is derived not from the omission alone, but from the omission combined with the choice to be present.[407]

In cases where this category of Article 6 (1) liability has been applied, the accused held a position of authority, was physically present on the scene of the crime and his non-intervention was seen as tacit approval and encouragement. Individual responsibility pursuant to Article 6 (1) is based not on a duty to act, but from the encouragement and support that might be afforded to the principals of the crime." In such cases, the combination of a position of authority and physical presence on the crime scene allows the inference that non-interference by the accused amounted to tacit approval and encouragement.[408]

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[402] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 34.
[403] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 147; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 74; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1955
[404] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 386
[405] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 202; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 34
[406] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 22
[407] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 22
[408] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 825

A causal relationship between the presence of the accused and the commission of the crime is not required for an accused to be convicted as an approving spectator, nor must it be shown that his presence was known to all the perpetrators of the crime.[409]

**approving spectator—*mens rea***

The *mens rea* of the approving spectator may be deduced from the circumstances, and may include prior concomitant behaviour, for instance allowing crimes to go unpunished or providing verbal encouragement.[410]

In the case of the "approving spectator", the individual must know that his presence would be seen by the perpetrator of the crime as encouragement or support. The requisite *mens rea* may be established from the circumstances including prior like behaviour, failure to punish, or verbal encouragement.[411]

With respect to an aider and abettor who is in a position of authority vis a vis the principal offender, his *mens rea* may be deduced from the fact that he knew that his presence would be interpreted by the principal offender as a sign of support or encouragement.[412]

The *mens rea* required for liability as an approving spectator is knowledge on the part of the Accused that the perpetrators would see his presence as approval or encouragement.[413]

An accused's position of superior authority, in and of itself, does not suffice to conclude that the accused, by his or her mere presence at the scene of the crime, encouraged or supported the offence. The presence of the accused at the crime site, however, may be perceived as a significant *indicium* of his or her encouragement or support. The requisite *mens rea* may be established from an assessment of the circumstances, including the accused's prior and similar behaviour, failure to punish or verbal encouragement.[414]

**approving spectator—substantial contribution**

The perpetrator's encouragement or moral support must always substantially contribute to the commission of the crime.[415]

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[409] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 149
[410] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at Para. 36.
[411] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.389
[412] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 36
[413] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 472; *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 830
[414] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 769.
[415] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 826

Encouragement and moral support can only form a substantial contribution to a crime when the principal perpetrators are aware of the accused's presence.[416]

Communal police officer's presence at scene of attack did not necessarily mean that he made a substantial contribution to the crime since his attendance may have gone unnoticed by the perpetrators. Therefore, the accused could not be convicted for superior responsibility for the acts of this communal policeman.[417]

**association**

A person found to have knowingly been part of an organisation with criminal objectives will not necessarily incur responsibility. The person must have positively participated in the group's crimes by substantially contributing to the crimes or by influencing the course of related events; alternatively, there must have been personal dereliction.[418]

**committing**

To "commit" a crime usually means to perpetrate or execute the crime by oneself or to omit to fulfil a legal obligation in a manner punishable by penal law. In this sense, there may be one or more perpetrators in relation to the same crime where the conduct of each perpetrator satisfies the requisite elements of the substantive offence.[419]

For the crime of genocide, the term committing is broader than physically killing a victim but includes supervising and directing a massacre at the scene and separating people so they could be killed, even if the accused killed no one himself.[420]

An accused may be convicted of "committing" when his actions were as much an integral part of the genocide as were the killings which they enabled.[421]

Based on his leadership position at the crime sites, the accused was as much an integral part of the killings as those he enabled and approved and embraced the decision to commit the crimes as his own. Therefore, he was guilty of "committing".[422]

Accused's actions in approving decision to destroy the church and directing bulldozer driver to do it were as much an integral part of the crime of genocide as the killings themselves. Therefore, he was not merely an aider and abettor, but a perpetrator under the mode of liability of committing.[423]

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[416] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 827
[417] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 209
[418] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 144.
[419] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 764.
[420] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 61
[421] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 161; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3332
[422] *Prosecutor v Munyakazi*, No. ICTR-97-36A-T, *Judgement and Sentence* (5 July 2010) at para. 491
[423] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 171

Where the accused did not supervise or direct the attack but lured Tutsis to the location and brought armed reinforcements, it was not sufficient to constitute "committing" as opposed to aiding and abetting.[424]

The accused "committed" the crime of genocide because he participated from the outset until the completion of the crime – he viewed documents given to him by soldiers who acknowledged his authority, he abducted Madame Rudahunga, followed the vehicle which took her away, and boasted about killing her and her two children. His acts were as much an integral part of the criminal act as were the killing and the causing of serious bodily harm which they enabled.[425]

In cases where the accused's conduct constituted an integral part of the crime, the accused were present at the crime scene, and conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators.[426]

Making a speech days or weeks before the physical perpetration of killings cannot be deemed to constitute direct participation in the *actus reus* of the killings.[427]

**inchoate offences**

Article 6(1) does not criminalize *inchoate* offences, which are punishable only for the crime of genocide pursuant to Article 2(3)(b), (c), and (d).[428]

**instigating**

**actus reus**

The *actus reus* of "instigating" implies prompting another person to commit an offence.[429]

The actus reus of instigating is to prompt another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[430]

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[424] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 220
[425] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 563.
[426] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3322
[427] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3323
[428] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.378
[429] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 480; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at paras. 188 and 230; *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 162; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3327
[430] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 146; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3327

The Trial Chamber could reasonably find that, because of his involvement in the supervision of roadblocks erected during the genocide, and of the instructions given to the *Impuzamugambi* manning those roadblocks to stop and kill the Tutsi who came there – instructions that were in fact followed –Barayagwiza instigated the commission of genocide.[431]

**assistance to perpetrators**

Accused's instructions at roadblock to check identity cards and providing food to persons manning the roadblock were not necessarily perceived as an instruction or prompting to kill Tutsi and did not constitute instigation.[432]

No reasonable trier of fact could have concluded, based on the evidence before it, that the accused had played an active role in broadcasts instigating the killing of Tutsi, or that he had used RTLM for such purpose.[433]

It is not required that the individuals being instigated be the same as those who commit the crimes.[434]

**definition**

Instigation is urging or encouraging, verbally or by other means of communication, another person to commit a crime, with the intent that the crime will be committed.[435]

Instigating means prompting another person to commit an offence, thus requiring subsequent action.[436]

**incitement**

Instigating involves prompting another person to commit an offence. Instigating need not be direct or public, as required for direct and public incitement to commit genocide, punishable pursuant to Article 2 (3) (c) of the Statute. Proof is required of a causal connection between the instigation and the *actus reus* of the crime.[437]

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[431] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 663
[432] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 417
[433] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 599
[434] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 146
[435] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 18
[436] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 117
[437] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 679; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 504 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.279; *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.381; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 762; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 30; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 464

Instigation is not required to be direct and public.[438]

Instigation as an act of commission of genocide, pursuant to Article 6(1) of the Statute, does not necessarily require the existence of a public call to commit genocide, an element at the core of the crime of public and direct incitement to genocide.[439]

The analysis in the *Nahimana et al.* Appeal Judgement in fact supports the proposition that the offence of direct and public incitement to commit genocide is, in and of itself, a serious offence warranting serious punishment, notwithstanding that no physical act of genocide may have been committed. It does not indicate any hierarchy between instigating and incitement.[440]

**inchoate crime**

Instigation is punishable only where it leads to the actual commission of an offence desired by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.[441]

**influence**

The influence of the accused in the community is insufficient to establish that the accused instigated the alleged attack. There was insufficient evidence to establish that the accused instigated the attack.[442]

**mens rea**

The *mens rea* required to establish a charge of instigating a statutory crime is proof that the Accused directly or indirectly intended that the crime in question be committed and that he intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of the crime would be a probable consequence of his acts.[443]

The mens rea for instigating is established when the perpetrator acts either with

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[438] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 478
[439] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1030.
[440] *Bikindi v. The Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 146.
[441] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 678; *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.38
[442] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at paras. 65-66
[443] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 480; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 465; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 447; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 61; *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 166

direct intent to prompt another to commit a crime, or with awareness of the substantial likelihood that a crime will be committed in the execution of the instigation.[444]

To prove genocide through instigating, the Prosecution must prove that the accused had/shared the genocidal intent.[445]

**presence**

The accused does not need to be actually present when the instigated crime is committed.[446]

**substantial factor**

It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[447]

Instigation does not require that the crime would not have been perpetrated without the involvement of the accused. It is sufficient to demonstrate that instigation was a factor substantially contributing to the other person committing the crime.[448]

The instigation must directly and substantially contribute to the perpetration of a crime by the other person.[449]

It has not been established that the RTLM broadcasts prior to 6 April 1994 substantially contributed to the murder of Tutsi after 6 April 1994. Consequently, broadcasts prior to 6 April 1994 were not shown to have instigated the commission of acts of persecution.[450]

Bourgmestre's speech in which he stated his commitment to follow the directives outlined in speeches of President and Prime Minister was not shown to have prompted others to have killed Tutsis and thus did not constitute instigation.[451]

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[444] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 153
[445] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 61; *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 161.
[446] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 660; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3327
[447] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 480; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 447
[448] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 129
[449] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 678; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 18
[450] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 994
[451] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3328

**joint criminal enterprise**

**agreement**

Unlike conspiracy, no specific agreement to commit the crime need be shown: the common purpose may arise spontaneously and informally, and the persons involved need not be associated through a formal organization.[452]

**common plan**

Evidence of killing of 10-20 people at roadblock did not support inference that there was a concerted plan or joint enterprise to kill the Tutsis.[453]

The common purpose may be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[454]

**customary international law**

Commission of genocide by the "joint criminal enterprise" form of liability was recognized by customary international law.[455]

Under customary international law, joint criminal enterprise liability is applicable to both international and internal conflicts.[456] Although its judicial application had been in conflicts of an international character, any potential perpetrator was able to understand that such acts were prohibited regardless of the character of the conflict. Therefore, the principle of *nullem crimen sine lege* was not violated.[457]

**basic form—JCEI**

Three categories of joint criminal enterprise have been identified as having the status of customary international law. The first category is a "basic" form of joint criminal enterprise--where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.[458]

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[452] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 13
[453] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 418
[454] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 327
[455] *Rwamakuba v Prosecutor*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004)
[456] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba, and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise* (11 May 2004) at paras. 33-38
[457] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba, and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise* (11 May 2004) at paras. 39-45
[458] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 463

**systemic form—JCEII**

The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.[459]

**extended form—JCEIII**

The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village, or region (to effect "ethnic cleansing") with the consequence that, while doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.[460]

Convictions for deviatory crimes that are not part of the joint criminal enterprise's common purpose are possible pursuant to the third or extended form of joint criminal enterprise. Convictions for such crimes require that the additional deviatory crimes were a "foreseeable" possible consequence of carrying out the actus reus of the crimes forming part of the common purpose, and that the accused, with the awareness that such a deviatory crime was a possible consequence of the implementation of the enterprise, decided to participate in that enterprise.[461]

What is natural and foreseeable to one person participating in a joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a joint criminal enterprise does not necessarily entail criminal responsibility for all crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise.[462]

During a campaign to destroy, in whole or in part, a national, ethnic, racial, or religious group, a natural and foreseeable consequence of that campaign will be that

[459] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 464
[460] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 465
[461] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 623
[462] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 627

soldiers and militias who participate in the destruction will resort to rapes and sexual assaults unless restricted by their superiors.[463]

During a JCE to destroy, in whole or in part, an ethnic group as such or exterminate a specific population, a natural and foreseeable consequence of that JCE will be that some members of this enterprise who participate in the destruction will resort to rapes and sexual assaults.[464]

The extended form of joint criminal enterprise liability applies to sexual crimes as a foreseeable consequence of genocide and does not impose a form of strict liability. There is no automatic conclusion that in all genocides, rape is a natural and foreseeable consequence.[465]

**mens rea**

The *mens rea* differs according to the category of joint criminal enterprise under consideration. The basic form requires the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). The systemic form requires personal knowledge of the system of ill-treatment, as well as the intent to further this system of ill-treatment. Finally, the extended form of joint criminal enterprise, requires the intention to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group.[466]

For the basic form of joint criminal enterprise, the *mens rea* which must be possessed by a co-perpetrator is no different than the *mens rea* which must be possessed by a person committing a crime on his or her own.[467]

Although an accused's good character and assistance to Tutsis may be relevant to the assessment of his *mens rea,* it does not preclude a finding that the accused acted with genocidal intent.[468]

Where only reasonable inference from accused's sharing drinks with perpetrators and celebrating after destruction of the church was that he shared their genocidal intent, Trial Chamber erred in acquitting accused of JCE.[469]

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[463] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 1483
[464] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Judgement and Sentence* (20 December 2012) at para. 1387; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 630
[465] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motions Challenging the Indictment as Regards Joint Criminal Enterprise Liability* (14 September 2005) at paras. 4-6
[466] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 467
[467] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 38
[468] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 195
[469] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 195

The intent for the basic and systemic forms of joint criminal enterprise are very similar.[470]

Under the "extended" form, responsibility for a crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk–that is, being aware that such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.[471]

Where the underlying crime requires a special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent. [472]

Knowledge of crimes combined with continued participation in a joint criminal enterprise can be conclusive as to a person's intent.[473]

Even if she didn't know in advance what the President was going to say, the presence of the accused at the speech of the President and her failure to disassociate herself from it gave rise to the only reasonable inference—that she endorsed such inflammatory statements.[474]

**non-member perpetrators**

For a member of a JCE to incur responsibility for crimes within the common purpose of the JCE committed by non-members of that JCE, it must be shown that the crimes can be imputed to one member of the JCE and that this member, when using the non-member to perpetrate the crime, acted in accordance with the common purpose.[475]

**participation**

The members of a joint criminal enterprise need not be organised in a military, political or administrative structure. There is no necessity for the criminal purpose to have been previously arranged or formulated.[476] It may materialise extemporaneously and be inferred from the facts. The accused's participation in the criminal enterprise need not involve commission of a specific crime under one of the provisions (for example murder,

[470] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para 15, fn.24
[471] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 467
[472] *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 453.
[473] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 632
[474] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 649
[475] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 1440
[476] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 193

extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common purpose.[477]

It is immaterial whether the accused was out of the country while some of the criminal acts were perpetrated. A participant in a joint criminal enterprise is not required to be physically present when and where the crime is being committed.[478]

**scale**

The scale of the alleged joint criminal enterprise does not have any impact on the Tribunal's jurisdiction to prosecute an accused under that form of liability and an allegedly vast joint criminal enterprise may be prosecuted at the Tribunal.[479] The size of the enterprise will matter only in whether it is proven that the crimes of the perpetrator were foreseeable to the accused—which may be affected by structural and geographical distance.[480]

Joint criminal enterprise liability is not confined to cases involving close relationships between members. Liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a "nationwide government-organized system of cruelty and injustice."[481]

**significant contribution**

There is no specific requirement that an accused make a substantial contribution to the joint criminal enterprise.[482]

Although an accused's contribution to a JCE need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is found to be responsible.[483]

It is not required to be proven that the offence could not be committed without the accused's participation. Rather, it must be shown that the accused's contribution to the common purpose amounted to a significant contribution to the execution of the crime.[484]

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[477] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 466
[478] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 153
[479] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR72.5&6, *Decision on Jurisdictional Appeals: Joint Criminal Enterprise* (12 April 2006) at para. 16; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion Challenging the Jurisdiction of the Tribunal—Joint Criminal Enterprise* (5 August 2005) at para. 7
[480] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR72.5&6, *Decision on Jurisdictional Appeals: Joint Criminal Enterprise* (12 April 2006) at para. 17
[481] *Rwamakuba v Prosecutor*, No. ICTR-98-44-AR72.4, *Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide* (22 October 2004) at para. 25
[482] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 403, fn. 407
[483] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 303
[484] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 96

Where accused was involved in the planning, but not the execution, of the objective of killing Tutsis inside the church, the evidence was insufficient to find that he substantially contributed to the execution or commission of the crimes charged. Therefore, he did not incur joint criminal enterprise liability.[485]

Any act or omission which assists or contributes to the criminal purpose may attract liability; there is no minimum threshold of significance or importance, and the act need not independently be a crime.[486]

Although the *actus reus* may be satisfied by any participation, no matter how insignificant, the significance and scope of the material participation of an individual in a joint criminal enterprise may be relevant in determining whether that individual had the requisite *mens rea*.[487]

Since the Prosecution failed to prove Ngirabatware's contribution to the common purpose of exterminating the Tutsi civilian population, he could not be convicted for rape via the extended form of joint criminal enterprise.[488]

**omission**

An accused can be held criminally responsible for omissions under Article 6(1), but he must be under an obligation to act.[489]

Failure to link alleged omissions to specific acts of genocide made it impossible to convict the accused of aiding and abetting by omission.[490]

To find an accused criminally responsible for an omission, it must be shown that (a) the accused had a duty to act mandated by criminal law; (b) the accused must have had the ability to act; (c) the accused failed to act intending the criminal consequences or knowing that they would occur; and (d) the failure to act resulted in the commission of the crime.[491]

The *mens rea* of aiding and abetting by omission is that (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator, and (2) he must be aware of the essential elements of the crime that was ultimately committed by the principal.[492]

An individual can be criminally liable for an omission failing to perform an act in violation of his or her duty to perform such an act. International law imposes duties and

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[485] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at para. 643
[486] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 13
[487] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 14
[488] *Ngirabatware v Prosecutor*, No. MICT-12-29-A, *Judgement* (18 December 2014) at para. 251
[489] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 334
[490] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 1904
[491] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 659
[492] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2255

liabilities upon individuals who therefore may be held personal1y responsible for failing to perform those duties.[493]

Involvement in a joint criminal enterprise may be proven by evidence characterized as an omission, so long as the omission contributes to the common criminal purpose.[494] However, failure to prevent or punish a crime does not make one liable under the joint criminal enterprise form of liability.[495]

An omission may constitute the *actus reus* of aiding and abetting, provided that the failure to act had a decisive effect upon the commission of the crime.[496]

Omission proper may lead to criminal responsibility under Article 6(1) where there is a legal duty to act mandated by a rule of criminal law.[497]

The legal duty to act by a person in a position of authority may arise not only from criminal law, but from the general obligations flowing from the Geneva Conventions.[498]

If the accused had wished to assist with the extermination of Tutsis without being discovered, it is difficult to understand why he would plead with a foreigner to remain on the scene.[499]

The question whether the legal duty to act must derive from a rule entailing individual criminal responsibility remains an open question at the Tribunal.[500]

A prefect has the duty to ensure protection of individuals within his prefecture.[501] However, this legal duty was not mandated by criminal law.[502]

The prosecution failed to show that the bourgmestre's failure to have the killers arrested demonstrated criminal intent. Failure to arrest did not necessarily lead to the conclusion that the accused wished to assist in the perpetration of crimes. The evidence left open the reasonable possibility that the accused was overwhelmed by the situation, did not know with any degree of certainty who was leading the attacks, was incapable of

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[493] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at fn. 19, quoting *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 — 1 October 1946. vol. 22, p. 65.*
[494] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 24
[495] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 39; *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 810
[496] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 34
[497] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 386, fn. 740
[498] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 5899
[499] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 159
[500] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2194
[501] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 660
[502] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 660

restoring order with the law enforcement resources at his disposal, or concern that failure to arrest would have led to a total breakdown of civil authority.[503]

Aiding and abetting by omission necessarily requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty.[504]

While more effective solutions may have been available to the accused, the prosecution did not show that the accused's inaction was for the purpose of assisting the attackers.[505]

**ordering**

**actus reus**

The *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence.[506] No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[507]

Even if all the factors consistently show that the accused's actions were aimed at the killing of Tutsis at roadblocks or that he was aware of the risk that Tutsis would be killed at roadblocks, there was an insufficient basis to make the factual finding that the accused "ordered" such killings.[508]

The conclusion that the accused gave an order to kill at roadblocks is, standing alone, an insufficient basis to find that he is criminally responsible under Article 6(1) for ordering any such killings where the Trial Chamber made no findings concerning when or where he gave the order, to whom or to what category of perpetrators he gave the order, and whether he was in a position of authority *vis-à-vis* the recipient.[509]

The *actus reus* of ordering cannot be established in the absence of a positive action by a person in a position of authority.[510]

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[503] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at paras. 75, 93
[504] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2205
[505] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 105
[506] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 361; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 365; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 505 ; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.281; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 763
[507] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 361; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1915
[508] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 319
[509] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 320
[510] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1911

There is no requirement that the order be given in writing or in any particular form.[511]

It is not impermissible to enter a conviction for ordering in the absence of direct evidence as to when and where the order was issued.[512]

"Commanding", as a form of participation, corresponds rather to the form of participation expressed in "ordering", as used in the Statute, considering the ordinary meaning of the term.[513]

**inchoate crime**

With respect to ordering, a person in a position of authority may incur responsibility for ordering another person to commit an offence, if the person who received the order actually proceeds to commit the offence subsequently.[514]

The Prosecution must prove that the person who received the order actually and subsequently proceeded to commit the offence/underlying crime.[515]

**inferences**

While ordering can be established by circumstantial evidence, the Trial Chamber erred in concluding that the only reasonable inference from the evidence was that the accused, as the highest military authority in Gisenyi, had ordered the attacks.[516]

In the absence of evidence that the accused gave instructions, the mere involvement of soldiers under his command in the killing and the pattern of crimes committed in his area of responsibility were not sufficient to conclude that the accused ordered the attacks.[517]

Trial Chamber erred in concluding that accused military commander ordered the killing of Tutsis at a parish where it was not the only reasonable conclusion from the evidence.[518]

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[511] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 76
[512] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 210
[513] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.268
[514] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 481
[515] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 17 and 18.
[516] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 279
[517] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 283
[518] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 342

Trial Chamber erred in concluding that the accused ordered the killings committed by soldiers where it was also a reasonable inference from the evidence that the killing was ordered by another military authority.[519]

The mere fact that two roadblocks were located close to one another, and a similar pattern of killings was occurring at those roadblocks are insufficient to establish, as the only reasonable inference, that the accused's orders to kill Tutsis at one roadblock applied to the killings at the other roadblock as well.[520]

No reasonable finder of fact could have concluded that the accused's order to soldier to kill the Belgian peacekeepers had a direct and substantial effect on the killing of the peacekeepers where there was no evidence that the soldier carried out the crime.[521]

**mens rea**

To prove genocide by ordering, the Prosecution must prove the mens rea: that the accused had/shared the genocidal intent.[522]

The *mens rea* for ordering is established when the person acts with the direct intent to give the order.[523]

**substantial likelihood**

Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order.[524]

A person in a position of responsibility can incur liability for ordering another person to commit an offense if the order has a direct and substantial effect on the commission of the illegal act.[525]

No reasonable finder of fact could have concluded that the accused's deployment of soldiers to the vicinity of the Prime Minister's residence to re-enforce the Presidential

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[519] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 572, 577, 604, 608
[520] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 275
[521] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 368
[522] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 161.
[523] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 365
[524] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 481; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 315; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at fn. 642; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 976
[525] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 67; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 976

Guard was intended to kill the Prime Minister or contemplated the substantial likelihood that this would occur because of the order. Convictions for ordering reversed.[526]

**superior-subordinate relationship**

"Ordering" refers to a situation where an individual has a position of authority and uses that authority to order – and thus compel – another individual, who is subject to that authority, to commit a crime. Criminal responsibility for ordering the commission of a crime under the Statute implies the existence of a superior-subordinate relationship between the individual who gives the order and the one who executes it.[527]

To be held responsible for "ordering" under Article 6(1), as opposed to superior responsibility under Article 6(3), it is sufficient if the accused has authority over the person committing the crime and that his order have a direct and substantial effect on the commission of the illegal act. No formal superior-subordinate relationship is required.[528]

Ordering requires merely authority to order, a more subjective criterion than for superior responsibility that depends on the circumstances and the perception of the listener.[529]

Despite the accused's influence, he could not be convicted of ordering where there was no finding that he had a position of authority over the persons committing the crimes.[530]

The authority creating the kind of relationship envisaged under Article 6 (1) of the Statute for ordering may be informal or of a purely temporary nature.[531]

Trial Chamber erred when it considered effective control as an element necessary to prove that the accused participated in the crimes by "ordering"[532]

Trial Chamber erred in concluding that the accused military commander ordered the killing of a RPF sympathizer in Gisenyi in the absence of evidence of involvement of soldiers in the murder or in coordination with civilian attackers.[533]

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[526] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 297
[527] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.382
[528] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 75; *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 181; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 19; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 467; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 315
[529] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 182
[530] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 483
[531] *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 449.
[532] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 202
[533] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 323

No reasonable finder of fact could have concluded that soldiers who were ordered by the accused to deploy to the Prime Minister's residence participated in the killing of the Prime Minister.[534]

The authority creating the kind of superior-subordinate relationship envisaged under Article 6(1) of the Statute for ordering may be informal or of a purely temporary nature.[535]

The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles.[536]

Instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an "order" within the meaning of Article 6(1) of the Statute.[537]

The Prosecution failed to demonstrate that, in the absence of a formal superior-subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.[538]

**planning**

The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[539]

It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[540]

The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[541]

To prove genocide by planning, the Prosecution must prove that the accused had/shared the genocidal intent.[542]

**"**Planning" implies that one or more persons contemplate designing the

[534] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 312
[535] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 363
[536] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.282
[537] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.282
[538] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.283
[539] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 479
[540] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 479
[541] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 479
[542] *Prosecutor v. Kalimanzira*, No. ICTR-05-88-T, *Judgement* (22 June 2009) at para 161.

commission of a crime at both its preparatory and execution phases.[543]

"Planning" envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime. The level of participation in the planning must be substantial such as actually formulating the criminal plan or endorsing a plan proposed by another.[544]

Planning occurs when one or more persons contemplate and take any steps towards commission of a crime.[545]

The level of participation in planning to commit a crime must be substantial, such as actually formulating a plan or endorsing a plan proposed by another individual.[546]

Planning does not require a position of authority.[547]

Trial Chamber erred in concluding from the fact of the visit of accused and prefet to a location where Tutsis were killed the next day, his experience in logistical operations, and the fact that the place he visited may have been a command centre necessarily meant that they were planning those killings. That was not the only reasonable inference open on that evidence.[548]

**roadblocks**

Under Article 6(1), the Accused will be responsible for crimes committed in connection with a roadblock if, in the first place, he was instrumental in the roadblock's establishment, or — should the roadblock have been set up by others — he endorsed or acquiesced to its continuing operation, notwithstanding his power to have the roadblock discontinued. The Prosecution must show, secondly, that the Accused knew that the roadblock had a criminal purpose (even if this purpose were not its sole purpose), that is, knew that it was established expressly to murder Tutsi civilians or knew that it operated in fact as if that were its purpose. These two elements would suffice to show that the Accused, in establishing or perpetuating the roadblock, intended that Tutsi civilians be killed there or acted with reckless indifference to that outcome.[549]

**substantial contribution**

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[543] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.37; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 480
[544] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.380; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 30
[545] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 503
[546] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 761; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 20
[547] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 258
[548] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at paras. 152-57
[549] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 895.

To satisfy Article 6(1), an individual's participation must have *substantially* contributed to, or have had a *substantial* effect on, the completion of a crime.[550]

**superior responsibility**

**civilians**

The doctrine of superior responsibility is not limited to military superiors, but also extends to civilian superiors.[551] The establishment of civilian superior responsibility requires proof beyond reasonable doubt that the accused exercised effective control over his subordinates, in the sense that he exercised a degree of control over them which is similar to the degree of control of military commanders.[552] However, the control exercised by a civilian superior need not be of the same nature as that exercised by a military commander.[553]

Superior responsibility for civilian superiors in internal armed conflict was part of customary international law.[554]

The military commander is under an obligation to take all necessary and reasonable measures to prevent or punish criminal acts committed by his subordinates. On the other hand, non-military superiors are only expected to have known or consciously disregarded information which clearly indicated that their subordinates were committing or about to commit crimes. The nature of military service and discipline is consistent with the expectation that superior military officers have a more active duty to inquire about the possible criminal behaviour of men under their command and to prevent or punish such behaviour when it occurs.[555]

***de facto* control**

Trial Chamber erred when finding no *de jure* control and not also considering *de facto* control.[556]

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[550] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.379; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 759

[551] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 51; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 85; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion for Partial Acquittal Pursuant to Rule 98 bis* (13 September 2002) at para. 13; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 773

[552] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 52

[553] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 55; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 87; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 605; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 258

[554] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Judgement of Acquittal* (19 March 2008) at para. 15

[555] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 473

[556] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 143

Any imposition of superior responsibility must be based upon a material ability of an accused to prevent or punish the crimes in question.[557] It is not necessary that *de jure* authority exist, *de facto* authority may suffice.[558]

***de jure* control**

A person possesses a *de jure* power when legally vested with such power.[559]

*De jure* power can derive from law, from a contract or from any other legal document, and may have been conferred orally or in writing.[560]

Where *de jure* authority is proved, a court may presume the existence of effective control on a *prima facie* basis. Such a presumption can, however, be rebutted by showing that the superior had ceased to possess the necessary powers of control over subordinates who committed the crimes.[561]

*De jure* authority is not synonymous with effective control.[562]

Although a showing of *de jure* authority may suggest the material ability to prevent or punish an offence, its proof is neither necessary nor itself sufficient to prove beyond reasonable doubt that an accused exercised effective control over his subordinates.[563]

The test for responsibility for the acts of a subordinate is one of "effective control". *De jure* control is not required, and it may be that a *de jure* superior lacks effective control.[564] It is mandatory to use the effective control test for both *de jure* and *de facto* superiors.[565]

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[557] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 302; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 85; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 628

[558] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 61; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 85

[559] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 787

[560] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 787

[561] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 51, 475

[562] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 53 *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 752

[563] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 752

[564] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 294; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 628

[565] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 56

While the formal legal status of the accused may be relevant to the determination of effective control, the power to prevent or punish cannot be inferred solely based on the existence of formal status.[566]

A superior's authority to issue orders is one indicator of effective control but does not automatically establish such control.[567] Such orders must be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators.[568]

**effective control—company directors**

Even though the Trial Chamber held that the Steering Committee had continued to have *de jure* authority to manage the activities of RTLM, no evidence was led at trial regarding the existence of effective control by the Steering Committee or regarding interventions by Barayagwiza's on behalf of the Steering Committee after 6 April 1994. In these circumstances, the Trial Chamber erred in finding that Barayagwiza was able to exercise effective control over the journalists and employees of RTLM after 6 April 1994.[569]

Mere membership of a collegiate board of directors does not suffice, *per se*, to establish the existence of effective control, but such membership may, taken together with other evidence, may prove control.[570]

**effective control--factors**

Effective control as the prerequisite for superior responsibility is tantamount to the material ability to prevent or punish conduct.[571]

The doctrine of command responsibility was not intended to impose criminal liability on persons for the acts of other persons of completely equal status.[572]

Effective control is not satisfied by showing a general influence on the part of the accused.[573]

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[566] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 475
[567] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 272
[568] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 121
[569] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 635
[570] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 788
[571] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 342; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 49; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 564
[572] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2568
[573] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 628; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 564; *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 459

Only through the accused's superior position does the corresponding duty arise to exercise effective control to prevent and punish crimes.[574]

The material ability to prevent or punish can only amount to effective control over the perpetrators if it is premised on a pre-existing superior-subordinate relationship between the accused and the perpetrators.[575]

The concepts of subordination, hierarchy, and chains of command need not be established in the sense of formal organisational structures, so long as the formal requirement of effective control over the subordinate, in the sense of the material ability to prevent or punish criminal conduct is satisfied.[576]

Substantial influence as a means of control in any sense which falls short of the possession of material abilities to prevent subordinate offenses or to punish subordinate offenders is insufficient for superior responsibility.[577]

A superior's ability to issue binding orders that are complied with by subordinates is one of the indicators of effective control.[578]

The reporting of subordinates to a superior and rewards by a superior for doing so are indicia relevant to determining effective control but are not a necessary requirement.[579]

The ability to take disciplinary action is a necessary but not sufficient condition to show that an individual was a subordinate.[580]

It was reasonable for the Trial Chamber to have relied upon the accused's good reputation as a commander as a factor supporting its finding of effective control.[581]

While a superior need not have ordered or authorized a crime to be liable under superior responsibility, proof that an accused is able to issue orders and that his orders are actually followed are indicators of effective control.[582]

The fact that international representatives believed that the accused had the ability to prevent the crimes was not, on its own sufficient to establish that the accused failed to

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[574] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 5966
[575] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 995
[576] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 995
[577] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 58, fn. 164
[578] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at paras. 1000, 2568
[579] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1003
[580] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 173.
[581] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 118
[582] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 202

prevent or punish crimes, it was proper for the Trial Chamber to take it into consideration.[583]

**effective control—local and regional officials**

It could not be concluded that the bourgmestre had effective control over every person in his commune. Therefore, evidence was insufficient to hold him responsible for rapes committed by members of the population.[584]

Sous prefet did not have ability to prevent or punish crimes of communal police, soldiers, or citizen assailants and therefore lacked effective control for purposes of liability under Article 6(3).[585]

It was not established that former bourgmestre had effective control over civilians committing killings in the prefecture.[586]

It was not established that bourgmestre had effective control over soldiers or Interahamwe who participated in the killings.[587]

The fact that soldiers had followed an earlier order from the bourgmestre was not sufficient to find that there was a pre-existing superior-subordinate relationship between the bourgmestre and soldiers which imposed a duty on the bourgmestre to prevent or punish their crimes.[588]

Prefet was not found to have *de jure* control of gendarmerie or soldiers simply by virtue of his right to requisition them.[589] He did have effective control over bourgmestre and communal police, but not over conseillers.[590]

Prefet had no *de jure* or *de facto* control over military personnel. If they acted pursuant to his instructions, it was due to personal influence rather than effective control over them. Therefore, he could not be held liable for failing to prevent or punish their crimes.[591]

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[583] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 168
[584] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 144
[585] *Prosecutor v. Ntawukulilyayo*, No. ICTR-05-82-T, *Judgement and Sentence* (3 August 2010) at para. 447
[586] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 5764, 5780
[587] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at paras. 5795, 5798
[588] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2570
[589] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 347; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 636, 641
[590] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 645-46
[591] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 568

The theoretical possibility of submitting reports of crimes to the same authorities who were actively organising and ordering massacres is not sufficient to establish the criminal responsibility of the prefet.[592]

Bourgmestre found to have control over communal authorities, but not conseillers, gendarmerie, soldiers, or Interahamwe.[593]

Elected members of the *conseil communal*, were not *de jure* subordinates of the accused in the sense of Article 6 (3) even though each member's work was supervised by the *bourgmestre*, who was entitled to write a quarterly report on his or her activities. Legislation which made the *bourgmestre* is responsible, generally, for executing the decisions of the Communal Council did not make them his subordinates.[594]

The *bourgmestre* did not have *de jure* control over the *gendarmes.*[595]

A superior-subordinate relationship not shown to have existed between bourgmestre and the civilian assailants.[596]

Communal staff cannot be regarded as subordinates of the *Bourgmestre* under Article 6(3) of the Statute.[597]

A *Bourgmestre* was not found to have a *de jure* superior-subordinate relationship with the army. A civilian administrator could not have interposed himself in a structure which is based on a hierarchy in which each one's place is defined. At every level a subordinate's obedience to the orders of his superiors is valued highly, and any initiative outside the framework is open to punishment.[598]

Bourgmestre had the material ability to punish the crimes through disciplinary measures such as demotion and was liable under Article 6(3) for failure to do so.[599]

Demotion of brigadier of communal police by the accused bourgmestre showed that he had the material ability to issue binding orders to communal policemen.[600]

Sous prefet had effective control over communal policemen stationed at his house.[601]

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[592] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 345
[593] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para. 242-43
[594] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 772
[595] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 786
[596] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 799
[597] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 664.
[598] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 184.
[599] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 767
[600] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 55
[601] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 565

**effective control—military commanders**

Effective control over the gendarmes who committed offenses at a college was not a reasonable inference that could be drawn from the fact that the accused spent a large proportion of his time in Kigali and the college was situated there.[602]

The fact that the accused managed to suspend several senior officers on competence-related issues while serving as Chief of Staff indicates that he had the material ability to prevent and punish crimes.[603]

Even if gendarmes at accused's residence could be considered his subordinates, arrival of separate unit of gendarmes to collect them and take them to participate in the attack on parish allowed for reasonable inference that at the time of the crimes at the parish the accused lacked the material ability to prevent or punish their conduct.[604]

Military commander did not have effective control over civilian attackers, even those wearing military uniforms.[605]

After 7 April 1994, the Commander of the gendarmerie no longer had effective control over most *gendarmes* who had been transferred under the operational command of the Rwandan Army to engage in combat against the RPF.[606]

Where operational control over the gendarmerie had been subordinated to the Army, and there was no evidence that the accused played a role in the assignment of gendarmes to his residence, issued orders to them, or interceded with them in any way, no reasonable finder of fact could have concluded that the accused had effective control over the gendarmes stationed at his residence.[607]

No reasonable Trial Chamber could have concluded that because Interahamwe in some provinces of Rwanda were trained by the Army, that Interahamwe who carried out attacks in other prefectures were under the control of the Army.[608]

In certain circumstances civilian assailants can be considered as acting under the authority of the military. This is particularly the case where civilian assailants operate in close coordination with military perpetrators,[609] or where the military play a role in training and distributing weapons.[610]

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[602] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 72
[603] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1997
[604] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 58
[605] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 329
[606] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1935
[607] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 56
[608] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 134
[609] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at paras. 2033, 2063, 2078.
[610] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2079.

Although there was evidence that the accused exercised control over Interahamwe in Kigali on some specific occasions, no reasonable Trial Chamber could conclude that he exercised effective control over the Interahamwe who committed crimes in other prefectures.[611]

Trial Chamber erred in finding that civilian attackers were subordinates of military commander.[612]

**effective control—national officials**

Ministers of the interim government, while influential, did not have effective control over everyone in their jurisdiction.[613]

While the accused Chief of the Cabinet of the Ministry of Defence may not have had the material ability to punish Army officers, he did have the ability to request investigations by competent authorities.[614]

**effective control--political parties**

The leaders of a political party cannot be held accountable for all acts committed by party members or others affiliated to the party.[615]

A political party and its leadership cannot be held accountable for all acts committed by party members or others affiliated to the party. A political party is unlike a government, military or corporate structure in that its members are not bound through professional affiliation or in an employment capacity to be governed by the decision-making body of the party. Nevertheless, to the extent that members of a political party act in accordance with the dictates of that party, or otherwise under its instruction, those issuing such dictates or instruction can and should be held accountable for their implementation.[616]

Although the Appellant doubtless exerted substantial influence over CDR militants and *Impuzamugambi*, that is insufficient – absent other evidence of control – to conclude that he had the material capacity to prevent or punish the commission of crimes by all CDR militants and *Impuzamugambi*.[617]

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[611] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 138
[612] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 295, 347
[613] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 1891
[614] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 510
[615] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 882
[616] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 976.
[617] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 882

It was not established that former MRND President at commune level had control over Interahamwe beyond his personal influence and therefore a superior-subordinate relationship was not established beyond a reasonable doubt.[618]

Accused political party leader could have punished offenders among the party's youth wing by sanctioning offenders politically, removing them from the ranks of the organisation, disabling their benefits and privileges, publicly humiliating them, or demoting them within the organisation, among other measures.[619]

The accused's role in creation of the Interahamwe was relevant circumstantial evidence supporting the inference that he had effective control over members of this organization during the genocide even if this was insufficient, on its own, to establish such a finding.[620]

The Trial Chamber found that the Interahamwe was a youth movement associated with, but not necessarily incorporated into, the MRND party.[621]

Although the Trial Chamber did not cite any evidence to support its conclusion that the accused could have punished the offenders through measures such as political sanction, removal from the organization, disabling benefits and privileges, public humiliation, or demotion, a superior's duty to punish the offences can be fulfilled by reporting the crimes to the competent authorities to trigger an investigation or disciplinary action. The accused's failure to report his subordinates' crimes to the judicial and security authorities can be the basis of a finding that he had a duty to prevent and punish their crimes and failed to do so.[622]

As to the ability of the witnesses to identify people as belonging to the *Interahamwe*, the Trial Chamber indicated it was aware that in the minds of witnesses who experienced such events, the word *Interahamwe* may sometimes refer to a member of a structured national and local group that was usually thought of as being the youth wing of MRND. The word may sometimes also refer to any person who took part in the massacres of 1994 and who was wearing, or not wearing, special attire. In assessing the evidence on this issue, the Trial Chamber took care not to make a premature finding as to the presence in Rusumo *commune* of a structured *Interahamwe* group, solely on the evidence of the presence and actions of the *Interahamwe* during the massacres.[623]

**elements of superior responsibility**

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[618] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 567
[619] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 1553
[620] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 193
[621] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 84
[622] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 258
[623] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.150

To establish liability under section 6(3) it must be shown that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused had effective control over the perpetrators of the crime; (3) the accused had reason to know the crime was about to be committed or had been committed; and (4) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by the subordinate.[624]

**excuses**

Where a superior is found to have the material ability to prevent or punish crimes, the fact that he was, at the relevant time, assuming key responsibilities or handling a critical situation such as an armed conflict does not relieve him of the obligation to take reasonable or necessary measures to prevent or punish the commission of crimes.[625]

A superior who enjoys power of effective control is under an obligation to exercise that power, even if it was shared with others.[626]

The accused enjoyed sufficient influence to take necessary and reasonable measures to prevent RTLM broadcasts of criminal discourse without having to fear for his own life, or for the lives of his family.[627]

The accused had a relatively small window of opportunity in which to punish the *gendarmes* who committed crimes. The accused also faced a shortage of resources and did not always have the full support of the government, and this made it more difficult for him to punish his subordinates effectively. Notwithstanding these difficulties, he retained the material ability to take at least basic measures to punish the *gendarmes* under his effective control.[628]

The ongoing war with the RPF did not negate the Army Chief of Staff's material ability to prevent and/or punish the crimes underlying the charges against him to the extent that he could not reasonably be expected to address those crimes. As of April 1994, the forces under his command numbered between 39,000 and 40,000 soldiers. Not all those troops were engaged in combat operations.[629]

***mens rea*--actual knowledge**

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[624] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 143; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 474; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 484; *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 269

[625] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 642

[626] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 848

[627] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 853

[628] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1954

[629] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1996

The accused's overall command of the *Gendarmerie* suggests some distance from the daily operations of the various *gendarmerie* brigades. It cannot therefore automatically be assumed that he would have been aware of the myriad actions of lower echelon *gendarmes* in various brigades in Rwanda in the absence of sufficient evidence to that effect.[630]

The fact that the accused admitted in general terms to having received SITREPs from his units around the country in the absence of additional evidence, is insufficient to ground a definitive finding that the accused knew or had reason to know of the events at one brigade.[631]

In the absence of evidence that the contents of the situation reports reviewed by the accused contained information about the specific crimes for which he was convicted, the Trial Chamber should not have placed any decisive weight on the accused's receipt of these reports.[632]

The Trial Chamber erred in concluding that the accused had knowledge from various means of communication available to him without specific information as to the fact that the crimes were reported to him through one of these means.[633]

Where there was no evidence that the accused was alerted to statements made by a US official or Human Rights Watch, these did not establish his knowledge of the crimes.[634]

In determining whether an accused possessed actual knowledge of the role of his subordinates in the crime, the Chamber may consider the following factors: the number, type and scope of illegal acts committed by the subordinates; the time during which the illegal acts occurred; the number, type of troops and logistics involved; the geographical location of the acts; whether the acts were widespread; the tactical tempo of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the superior at the time.[635]

Information about the general situation in Rwanda that prevailed at the time is not the kind of sufficient general information to put an accused on notice that his subordinates might commit crimes.[636]

Finding that it was "highly unlikely" that crimes would have escaped the accused's attention does not reflect the accepted standard for assessment of circumstantial evidence.[637]

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[630] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1218
[631] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1404
[632] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 146
[633] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 147
[634] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 150
[635] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1919
[636] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 396
[637] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 336

No reasonable trier of fact could have concluded that information about "disturbances" in Butare prefecture was sufficient to provide knowledge to the accused of the killings and rapes that took place in the prefecture office there.[638]

Receipt of situation reports by gendarmerie commander was not sufficient to establish that he had notice of the involvement of gendarmes in the crimes charged.[639]

***mens rea*—in general**

The *mens rea* for superior responsibility requires proof of (i) actual knowledge that subordinates of the accused were about to or had committed a crime under the statute; (ii) information providing notice of the risk of such offenses such that there was a duty to investigate.[640]

The mental element of knowledge must be demonstrated beyond reasonable doubt but may be established by circumstantial evidence.[641]

Factors to consider in determining whether a superior had knowledge of the crimes of his subordinates include: (i) the number of illegal acts; (ii) the type of illegal acts; (iii) the scope of illegal acts; (iv) the time during which illegal acts occurred; (v) the number and type of troops involved; (vi) the logistics involved; (vi) the geographical location of the acts; (vii) widespread occurrence of the acts; (viii) the tactical tempo of the operations; (ix) the modus operandi of similar illegal acts; (x) the officers and staff involved; and (xi) the location of the commander at the time.[642]

Knowledge will not be presumed from status alone. So, a superior in a chain of hierarchical command with authority over a given geographical area will not be held strictly liable for subordinates' crimes.[643]

The *mens rea* requirement for command responsibility is not strict liability. Knowledge may not be presumed based on position alone.[644]

To be responsible as a superior, it is not required that the accused shared the intent of the perpetrator.[645]

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[638] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 252
[639] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 411
[640] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 629
[641] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 967.
[642] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 648; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 971
[643] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 776.
[644] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 45.
[645] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 384

In the case of specific intent crimes such as genocide, this requires proof that the superior was aware of the criminal intent of the subordinate.[646]

Although there was no evidence of what was said at the meeting, the Trial Chamber was entitled to infer that at a meeting with two persons who participated in the crime shortly after it occurred, the accused had been informed of the crime and the fact that communal policemen had participated in it.[647]

***mens rea*--reason to know**

The "had reason to know" standard does not require that actual knowledge, either explicit or circumstantial, be established. Nor does it require that the Chamber be satisfied that the accused knew that crimes had been committed or were about to be committed. It merely requires that the Chamber be satisfied that the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates.[648]

The "reason to know" standard is met when the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates"; such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates.[649]

It is necessary to make a distinction between the fact that the accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes. Only the latter can be the basis of a conviction under section 6(3).[650]

The numerous complaints from representatives of the United States Government, the UN and Human Rights Watch would have indicated to a responsible commander a need for further investigation to ascertain whether offences were being committed or were about to be committed by his subordinates.[651]

A superior possesses or will be imputed the mens rea required to incur criminal liability where:(1) he or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes; or, (2) he or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about

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[646] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 307
[647] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 68
[648] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 28
[649] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 791
[650] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 42
[651] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1218

to be committed, were being committed, or had been committed, by subordinates; or, the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she should have known.[652]

Military superiors have a more active duty to inform themselves of the activities of their subordinates when they knew, or, owing to the circumstances, should have known that those subordinates were committing or about to commit crimes.[653]

**negligence**

Negligence is not punishable under Article 6(3). Depending on the nature of the breach of duty (which must be a gross breach), and the gravity of the consequences thereof, breaches of duties imposed by the laws of war may entail a disciplinary rather than a criminal liability of a superior who is subject to military discipline.[654]

For the Prosecution in the present case to establish criminal negligence in relation to roadblock operations it would have to prove the following four elements, in addition to the Accused's public duty in matters of security: (1) that one or more crimes were committed in connection with identified roadblocks; (2) that the Accused was responsible for the administration of those roadblocks because he was involved in their establishment, acquiesced to their continuing existence, or more generally because they came under his control as bourgmestre; (3) that measures, if any, taken by the Accused to detect and prevent crimes in connection with the stated roadblocks were clearly inadequate in the circumstances; (4) and that the crimes in question would have been detected or prevented had the Accused administered the roadblocks with reasonable diligence; or, in other words, that the crimes flowed from the breach of duty at (3).[655]

If the Prosecution fails to prove any of these elements beyond reasonable doubt, the Accused falls to be acquitted on this ground.[656]

**prevent or punish—measures required**

The superior is required to take reasonable and necessary measures to prevent or punish. The reasonableness of the measures is guided by the degree of the superior's effective control.[657]

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[652] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 46.
[653] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 363
[654] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 36
[655] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 1011.
[656] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 1012
[657] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 630; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 779

"Necessary" are those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time. "Reasonable" are those measures which the commander was able to take in the circumstances.[658]

A superior incurs criminal responsibility only for failing to take "necessary and reasonable measures" to prevent or punish crimes under the Statute committed by subordinates. These measures have been described as those that are within a superior's "material possibility" even if the superior lacks the "formal legal competence" to take such measures. [659]

While the commander of the gendarmerie's personal intervention to dissuade journalists at RTLM from broadcasting hateful messages against Tutsi may not be tantamount to investigating them for their conduct, in the context that prevailed in Rwanda at the time, this intervention evinced a genuine attempt on his part to prevent RTLM from issuing hateful broadcasts against Tutsi. Therefore, the prosecution did not lead credible evidence to prove that the accused failed to take measures within his power to investigate or order a judicial probe into the anti-Tutsi broadcasts on RTLM.[660]

There was no positive obligation on gendarmerie commander to investigate based upon sufficiently alarming information that anyone had or was about to commit a crime against Tutsi refugees. The information must have put him on notice that the crimes had been or were about to have been committed by his subordinates.[661]

Speech which requested an end to "killings", fell markedly short of a reasonable measure for preventing an ongoing genocide. When confronted with a situation where a superior is aware that his subordinates are committing genocide, there is no room for ambiguity when taking a measure to prevent the crime. In this regard, "killers should stop killing" is unreasonably ambiguous. The only reasonable message he could have given is: "the *Interahamwe* must stop massacring Tutsis immediately". He did not give that message.[662]

The issuance of general communiqués calling for calm did not constitute reasonable and necessary measures to prevent crimes.[663]

Given the scale of the crimes committed by his subordinates, the means available to him and the extent of his authority as suggested by the evidence, it was open to the accused to adopt additional measures to avert the large-scale crimes committed against Tutsi civilians and/or to punish the perpetrators of those crimes who were his

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[658] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 47.
[659] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.406
[660] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at paras. 504-05
[661] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 414, fn. 997
[662] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 1566
[663] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 674

subordinates. The measures adopted by the accused fall far below what could be deemed necessary and reasonable given the means available to him.[664]

The insufficiency of the measures adopted by the accused is demonstrated by the fact that none of the measures that he claims to have taken included disciplinary or punitive actions against his subordinates for their implication in crimes. His refusal to punish the offenders must have been viewed by his subordinates as implicit acquiescence on the part of the Army's high command in their crimes. This greatly diminished the force of the numerous orders and instructions that the accused claimed to have issued to his troops regarding discipline.[665]

Trial Chamber's finding that the perpetrators of crimes were not punished was insufficient to find that the accused failed to discharge his duty to punish his subordinates and therefore could not support a finding of failure to punish under Article 6(3).[666]

Trial Chamber erred in concluding from the fact that no one was punished that the accused failed to punish the perpetrators, where he was only in a position of authority for three days and investigations to identify the perpetrators could have reasonably taken longer than that.[667]

The Trial Chamber did not adequately explain why the nearly 12-day period during which the accused was in Rwanda following the operation was insufficient to address the crimes.[668]

**prevention vs punishment**

Failure to punish is a legally distinct concept and a separate basis for incurring criminal responsibility as a superior than failure to prevent.[669]

The duty to prevent arises for a superior from the moment he knows or has reason to know that his subordinate is about to commit a crime, while the duty to punish arises after the commission of the crime.[670]

Prevent or punish are not alternative options for an Accused. Where the Accused knew or had reason to know that his or her subordinates were about to commit crimes and

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[664] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 2009
[665] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 2010
[666] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 234
[667] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 685
[668] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at paras. 727,729
[669] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 79
[670] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 642; *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 79; *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 384

failed to prevent them, the Accused cannot make up for the failure to act by punishing the subordinates afterwards.[671]

**roadblocks**

Under Article 6(3), the Accused will be responsible for crimes committed in connection with a roadblock if persons staffing and committing crimes at that roadblock were his subordinates. The Prosecution must prove the standard three elements of superior responsibility; namely, in addition to the existence of a superior-subordinate relationship, knowledge of the imminent or completed crimes and failure to prevent or to punish them…. the knowledge element of superior responsibility will be fulfilled if the Accused knew of one or more crimes committed or about to be committed in connection with a roadblock, or alternatively was put on notice and failed to inquire further.[672]

A *bourgmestre* cannot be held responsible for crimes committed in connection with the roadblock if he did not personally set it up, if he did not lend it his substantial support, or if he did not acquiesce, despite his powers of termination, to its continuing operation.[673]

The text of the Prime Minister's directive of 27 April 1994 does not support a finding that the official purpose of roadblocks was criminal. Indeed, the letter admonishes against victimization of innocent persons.[674]

**superior responsibility vs ordering**

Where subordinates are alleged to have followed the orders of the accused, the charge is not one of superior responsibility under Article 6(3).[675]

An accused may be not convicted under superior responsibility for crimes that he was found responsible for under "ordering".[676]

**superior-subordinate relationship**

A superior-subordinate relationship requires a formal or informal hierarchical relationship where a superior is senior to a subordinate.[677]

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[671] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 49.
[672] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 896.
[673] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 902.
[674] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 935.
[675] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-PT, *Decision on Defence Motions Objection to the Form of the Third Amended Indictment and Requesting the Harmonization or Reconsideration of the Decision of 2 March 2005* (22 September 2005) at para. 5; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-R50, *Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion Objecting to the Form of the Recast Indictment* (2 March 2003) at para. 19
[676] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1925
[677] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.401

The law does not know of a universal superior without a corresponding subordinate. Generalized allegations that leaders had control over the population cannot sustain a conviction under Article 6(3).[678]

An accused need not know the exact identity of his subordinates to be responsible for their crimes.[679]

More than one person may be held responsible for the same crime committed by a subordinate.[680]

An accused may be held responsible as a superior not only where a subordinate committed a crime referred to in the Statute, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime.[681]

There was no superior-subordinate relationship between a mother and her son with respect to the criminal offenses he committed.[682]

Trial Chamber erred in concluding that the attackers were soldiers where militiamen also wore military clothing during the attacks.[683]

It was not unreasonable for the Trial Chamber to infer that the accused may not have had effective control over the perpetrators from the presence of troops from other units at the scene of the crime.[684]

The Trial Chamber erred in finding that the accused's subordinates from Kigali were implicated in crimes committed in other parts of Rwanda.[685]

Mere evidence of the presence of communal police is not sufficient to prove beyond reasonable doubt that the police participated in the attack. Command responsibility can only be considered in relation to crimes committed or about to be committed by the subordinates.[686]

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[678] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para.1898
[679] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 196,674; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 2868
[680] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 201; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 2872
[681] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 485
[682] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 5883
[683] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 361
[684] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 439
[685] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 286, 292-93
[686] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 759

An accused can be held liable for the conduct of subordinates who were acquitted in another trial. Two judges, both acting reasonably, can come to different conclusions based on the same evidence.[687]

**timing**

The Trial Chamber must be satisfied that the superior had effective control over the subordinates at the time the offence was committed.[688]

There are no cogent reasons for departing from the holding that a superior cannot be liable for failing to punish the crimes of a subordinate unless he had effective control at the time the crimes were committed.[689]

**Article 7—temporal and territorial jurisdiction**

**The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.**

It must be shown that (1) the crime with which the accused is charged was committed in 1994; and (2) the acts or omissions of the accused establishing his responsibility occurred in 1994, and at the time of such acts or omissions the accused had the requisite intent.[690]

Even where conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994.[691]

The Prosecution does not exceed its mandate by charging an individual with an offence that begins at some date prior to 1994 but continues into that year.[692]

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[687] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 151

[688] *Prosecutor v. Semanza* ,No. ICTR-97-20-T,*Judgement* (15 May 2003 ) at para.402; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 774

[689] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 370

[690] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 313

[691] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 317

[692] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Proponed Testimony of Witness DBY* (18 September 2003) at para. 9; *Prosecutor v Bikindi*, No. ICTR-2001-72-I, *Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and the Prosecutor's Motion Seeking Leave to File an Amended Indictment* (22 September 2003) at para. 34; *Prosecutor v Simba*, No. ICTR-2001-76-AR72.2, *Decision on Interlocutory Appeal Regarding Temporal Jurisdiction* (29 July 2004); *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment* (6 May 2004) at para. 8

Indictment may charge pre-1994 speech as incitement even though conviction cannot be based upon pre-1994 acts, as the allegation may be part of the context of the crime alleged to be committed in 1994.[693]

**Article 8—concurrent jurisdiction**

**1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994.**
**2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.**

**Article 9—non bis in idem**

**1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.**
**2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:**
**(a) The act for which he or she was tried was characterised as an ordinary crime; or**
**(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.**
**3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall consider the extent to which any penalty imposed by a national court on the same person for the same act has already been served.**

The *non bis in idem* principle applies only where a person has effectively already been tried. The term "tried" implies that proceedings in the national Court constituted a trial for the acts covered by the indictment brought against the accused by the Tribunal and at the end of which trial a final judgement is rendered.[694]

[693] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Strike 1993 Incitement Allegation from the Indictment…*(16 July 2008) at para. 7
[694] *Semanza v .Prosecutor*, No.ICTR-97-20-A, *Decision* (31 May 2000) at para.74

Accused who appeared before Belgian Commission on Refugees was not "tried" within meaning of Article 9 and therefore those proceedings were not a bar to his prosecution by the Tribunal.[695]

Counts dismissed at ICTR pursuant to plea agreement not subject to *non bis in idem* because accused was never tried on them.[696]

Prohibition against double jeopardy not applicable where case against accused in national jurisdiction had not resulted in conviction or acquittal.[697]

An order to national authorities not to prosecute an accused for the same conduct as that which he was being prosecuted at the Tribunal was premature. It would be for the national authorities to decide after the conclusions of the Tribunal proceedings.[698]

Article 9 only applies to serious violations of international humanitarian law and therefore does not apply to contempt.[699]

**Article 10—organisation of International Tribunal for Rwanda**

**The International Tribunal for Rwanda shall consist of the following organs:**
**(a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;**
**(b) The Prosecutor;**
**(c) A Registry.**

**Article 11—composition of the Chambers**

**1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine ad litem independent judges appointed in accordance with article 12 ter, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.**
**2. Each Trial Chamber may be divided into sections of three judges each. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.**
**3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.**
**4. A person who for the purposes of membership of the Chambers of the**

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[695] *Prosecutor v Ndindiliyimana*, No. ICTR-2000-56-I, *Decision on Urgent Preliminary Motion to Stay the Indictment or in the Alternative to Cure Defects in the Indictment* (19 October 2000) at paras. 16-17
[696] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 46
[697] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Judicial and Administrative Deferral in Favour of the ICTR* (5 November 2008) at para. 28
[698] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Judicial and Administrative Deferral in Favour of the ICTR* (5 November 2008) at para. 29
[699] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Request for Order for Cooperation of the Republic of Rwanda and the United Republic of Tanzania* (28 July 2009) at para. 10

**International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.**

A full bench of the Appeals Chamber is comprised of 5 judges.[700]

**Article 12—qualification and election of judges**

**The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.**

**Article 12 *bis*—election of permanent Judges**

**1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:**
**(a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;**
**(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 bis of the Statute of that Tribunal;**
**(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;**
**(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda.**
**The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining**

[700] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 21

**permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.**
**2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.**
**3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election**.

**Article 12 ter—election and appointment of ad litem Judges**

**1. The ad litem judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:**
**(a) The Secretary-General shall invite nominations for ad litem judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;**
**(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;**
**(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;**
**(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen ad litem judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;**
**(e) The ad litem judges shall be elected for a term of four years. They shall not be eligible for re-election.**
**2. During their term, ad litem judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular ad litem judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in**

**paragraphs 1 (b) and (c) above and the number of votes the ad litem judge received in the General Assembly.**

**Article 12 *quater*—status of *ad litem* Judges**

**1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, ad litem judges shall:**
**(a) Benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal for Rwanda;**
**(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;**
**(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;**
**(d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.**
**2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, ad litem judges shall not:**
**(a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;**
**(b) Have power:**
**(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;**
**(ii) To review an indictment pursuant to article 18 of the present Statute;**
**(iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute.**

*Ad litem* Judges are not precluded from participating in decisions on motions for leave to amend the indictment, which is a separate function from review and confirmation of an indictment.[701]

Simply because amended Rule 50 specifies that an amended indictment should be considered according to the same standards as initial indictments under Rule 47 does not make the decision on leave to amend an indictment a "review" under Article 18 for which *ad litem* judges may not participate.[702]

[701] *Karemera & Nzirorera v Prosecutor*, No. ICTR-98-44-AR73.4, *Decision on Interlocutory Appeals Regarding Participation of Ad Litem Judges* (11 June 2004)
[702] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion to Dismiss Indictment for Violation of Article 12 Quarter of the Statute* (12 April 2005); *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment* (14 February 2005) at para. 24

*Ad litem* Judges enjoy the same powers as the permanent Judges of the Tribunal, except in expressly delimited circumstances. They have the power to decide to continue the proceedings under Rule 15*bis*(D)[703]

**Article 13—officers and members of the Chambers**

**1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.**
**2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.**
**3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 bis of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda. Notwithstanding the provisions of article 11, paragraph 1, and article 11, paragraph 3, the President may assign to the Appeals Chamber up to four additional permanent judges serving in the Trial Chambers, on the completion of the cases to which each judge is assigned.**
**The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.**
**4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.**
**5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such ad litem judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.**
**6. A judge shall serve only in the Chamber to which he or she was assigned.**
**7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.**

**Article 14—rules of procedure and evidence**

**The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.**

**Article 15—the Prosecutor**

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[703] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR15*bis*.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion to Consider New Material* (22 October 2004) at para. 49

**1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.**
**2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.**
**3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.**
**4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases.**
**The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.**
**5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.**

**independence and discretion**

The Prosecutor has independence and unfettered discretion to decide which investigations and prosecutions to pursue.[704] A Trial Chamber cannot order the Prosecutor to pursue investigations and prosecutions against an accused.[705]

The Prosecution has broad discretion in relation to the preparation of indictments.[706] It is not the role of the Chamber or any other government source to dictate a certain trial strategy.[707]

Trial Chamber lacks the power to order the prosecutor to investigate the assassination of President Habyarimana.[708]

The Trial Chamber is without authority to appoint a special prosecutor to investigate and prosecute the RPF.[709]

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[704] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007) at para. 6
[705] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007) at para. 7
[706] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 78
[707] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 78
[708] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on the Defence Motion Seeking an Order to the Prosecutor to Investigate the Circumstances of the Crash of President Habyarimana's Plane* (2 June 2000); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007)
[709] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007) at para. 16

**selective prosecution**

Selective prosecution requires the accused to establish (1) an unlawful or improper (including discriminatory) motive for the prosecution against the accused and (2) other similarly situated persons were not prosecuted.[710] The accused was not entitled to an evidentiary hearing to establish discriminatory motive.[711]

The remedy of dismissal of the indictment is not available even for a proven case of selective prosecution.[712]

Persons who were not in the custody of the Tribunal were not "similarly situated" to the accused, who was on trial, for purposes of determining whether there has been unequal treatment.[713]

Persons are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.[714]

For judges of this tribunal to interfere with the exercise of prosecutorial discretion, the defence must prove that the prosecutor exercised his discretion improperly or for impermissible motives.[715] The Prosecution's discretion is not absolute but is subject to the principle of equality before the law and to this requirement of non-discrimination.[716]

The defence did not meet its burden of showing the prosecution's impermissible motive in indicting and continuing to prosecute the accused. The Trial Chamber therefore

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[710] *Prosecutor v Ndindiliyimana et al*, No. ICTR-200-56-T, *Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council* (26 March 2004) at para. 25; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment* (14 February 2005) at para. 28; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Décision Relative à La Requete de Joseph Nzirorera Aux Fins de Rejeter L'Acte D'Accusation Pour Poursuites Discriminatoires* (22 March 2005) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 14

[711] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Décision Relative à La Requete de Joseph Nzirorera Aux Fins de Rejeter L'Acte D'Accusation Pour Poursuites Discriminatoires* (22 March 2005) at para. 12

[712] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (21 November 2008) at paras. 4-5

[713] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Rule 66(B) Motion: Selective Prosecution Documents* (21 November 2008) at para. 7

[714] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 18

[715] *Prosecutor v Ndindiliyimana et al*, No. ICTR-200-56-T, *Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, Including Reasons in Support of Chamber's Oral Ruling Delivered on Monday 20 September 2004* (24 September 2004) at para. 26

[716] *Prosecutor v Ndindiliyimana et al*, No. ICTR-200-56-T, *Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council* (26 March 2004) at para. 23

did not inquire into whether other similarly situated persons, namely the RPF, were not prosecuted.[717]

It is not sufficient to show that the failure to prosecute others is politically motivated. The accused must show that his prosecution would not have occurred but for invidious discrimination.[718]

**Article 16—the Registry**

**1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.**
**2. The Registry shall consist of a Registrar and such other staff as may be required.**
**3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.**
**4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.**

**Article 17—investigation and preparation of indictment**

**1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.**
**2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.**
**3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.**
**4. Upon a determination that a prima facie case exists, 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. The indictment shall be transmitted to a judge of the Trial Chamber.**

[717] *Prosecutor v Ndindiliyimana et al*, No. ICTR-200-56-T, *Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council* (26 March 2004) at para. 28
[718] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 16

**prosecutor's interview of suspect**

Neither the Statute nor the Rules requires the Prosecution to interview a suspect prior to indictment.[719]

Prosecution failed to inform the accused of the nature and cause of the charges against him when interviewing him after his arrest. As a result, the statement could not be admitted in his trial.[720]

**Article 18—review of the indictment**

**1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.**
**2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.**

**Article 19—commencement and conduct of trial procedings**

**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.**

**abuse of process**

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[719] *Prosecutor v Seromba*, No. ICTR-2001-66-I, *Decisions on the Defence Motions to Annul or Withdraw the Indictment* (13 January 2004)
[720] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 13

"Abuse of process" has been defined as "something so unfair and wrong that the Court should not allow a prosecutor to proceed."[721] An order staying proceedings for abuse of process should never be made where there were other means of achieving a fair hearing of the case and still less where there was no prejudice to the accused.[722]

The abuse of process doctrine may be relied on its two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[723]

Delay of 7 years in commencement of trial did not warrant dismissal of charges for abuse of process.[724]

The burden of showing that there has been an abuse of process rests with the accused.[725]

If an accused claims abuse of process, it is important that he show that he has suffered prejudice.[726]

Where the provisions under the Statute and Rules which exist to alleviate the difficulties faced by parties by empowering the Chambers to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of investigation or for the preparation or conduct of trial, have proved to no avail, a Chamber may order those proceedings be adjourned or, if the circumstances so require, that they be stayed.[727]

Payment of huge sums of money to prosecution witnesses did not constitute abuse of process where they were aimed at neutralizing the risks faced by witnesses cooperating with the prosecution.

**adversarial trial**

There is a fundamental right that criminal proceedings should be adversarial. This requires that both the prosecution and defence be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the

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[721] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 339
[722] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 340
[723] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Decision for a Stay of Proceedings and Abuse of Process* (20 February 2004) at para. 14
[724] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 39
[725] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Dismiss for Abuse of Process: Payments to Prosecution Witnesses…*(27 October 2008) at para. 3
[726] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Dismiss for Abuse of Process: Payments to Prosecution Witnesses…*(27 October 2008) at para. 3
[727] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 62

other party. The Trial Chamber should ensure that the other party will be aware that the observations have been filed and gets a real opportunity to comment thereon.[728]

**equality of arms**

The principle of equality of arms between the accused and the prosecution is a component of the right to a fair trial.[729]

This obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case. It does not necessarily amount to equality of resources.[730]

While the equality of arms principle requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case, it does not require material equality between the parties in terms of material or human resources.[731]

The equality of arms principle does not require material equality between the parties in terms of financial or human resources. The rights of the accused were not violated simply because the prosecution had a larger team of lawyers.[732]

Fact that defence counsel could not travel to Rwanda to investigate was not sufficient to establish inequality of arms. The principle of equality of arms does not apply to conditions outside the control of a court.[733]

Basic principles of fairness and justice dictate that a Trial Chamber should not apply differing standards in its treatment of Prosecution and Defence evidence.[734]

**expeditious trial**

**balancing expeditious and fair trial**

In accordance with Articles 19 and 20, the Trial Chamber must assure the fairness and expeditiousness of the trial and protect the right of the accused to be tried without delay.[735]

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[728] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 80
[729] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 44; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 67; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana* (5 June 2003) at para. 4.; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 14
[730] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 69; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 14
[731] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-A, *Decision on Ntahobali's Request for Review of Registrar's Decisions* (21 February 2014) at para. 28
[732] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 34
[733] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at paras. 72-73
[734] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 540
[735] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 19

The Trial Chamber must ensure that a trial is fair and expeditious while respecting the rights of the accused. The Trial Chamber must consider whether the accused will be disadvantaged when presenting his case if the trial is ordered to commence.[736]

Between a speedy trial and an equitable trial preference should be given to the latter. But there is no necessary opposition between the two: a trial is inequitable if it is too long drawn out. Speed, in the sense of expeditiousness, is an element of an equitable trial.[737]

The right to be tried without undue delay should be balanced with the need to ascertain the truth about the serious crimes with which the accused is charged.[738]

**burden of establishing delay**

The accused has the burden of establishing undue delay.[739]

The delay would be evaluated after it has occurred. The Trial Chamber would not speculate on further delays in the case.[740]

**complexity justifying delay**

Both the gravity of the charges and the complexity of the case do not render unreasonable the four-year delay between arrest and commencement of the proceedings in the case,[741] or eight-year delay between arrest and the current stage of the trial.[742]

Length of Butare trial did not violate the rights of the accused to be tried without undue delay where the case was factually and legally complex.[743]

Length of Military I trial did not violate the right of the accused where he did not demonstrate that there had been undue delay.[744]

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[736] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Continuance of the Trial* (14 September 2005) at para. 3
[737] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis*, *Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at para. 24
[738] *Prosecutor v Mugenzi et al*, No. ICTR-99-50-I, *Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)* (8 November 2002) at para. 32
[739] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (29 May 2007) at para. 18
[740] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance* (14 June 2007) at para. 14
[741] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Decision for a Stay of Proceedings and Abuse of Process* (20 February 2004) at para. 16
[742] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (29 May 2007)
[743] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for a Stay of Proceedings for Undue Delay* (26 November 2008) at para. 58
[744] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 38

Length of Government I trial was not undue. In the circumstances of this case, which is among the largest ever heard by the Tribunal, the period of time which elapsed during these proceedings can be reasonably explained by the size and complexity of the case. The pace of the trial was not dissimilar from that of other multi-accused trials, where no undue delay has been identified.[745]

The Appeals Chamber underscores that lengthy delays can give rise to serious questions regarding fairness to the accused. However, in view of the complexity of Renzaho case, including the number of charges and the volume of evidence produced by the parties, it was not demonstrated that the delivery of the Trial Judgement was unduly delayed.[746]

The reasonableness of the period of delay before trial cannot be translated into a fixed period of years or months. It must be assessed on a case-by-case basis.[747] Five-year delay in multiple accused case was not unreasonable.[748], nor was six-year delay,[749] nor was eight-year delay.[750] There is no fixed period by which a case against an accused must be completed.[751]

Ten-year delay between arrest and judgement was not undue delay in complex case.[752]

Twelve-year delay between arrest and judgement was not undue delay because of size and complexity of the case.[753]

In view of the size and complexity of the trial, the eleven-year process from arrest to delivery of judgment did not constitute undue delay.[754]

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[745] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 71

[746] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 241

[747] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 26; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 6

[748] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 29

[749] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 8

[750] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (29 May 2007)

[751] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (29 May 2007) at paras. 27-28

[752] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Third Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (10 February 2009)

[753] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 75

[754] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 84; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Fourth Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (23 June 2010) (note: Judge Short dissented)

In view of the size and complexity of the trial, the twelve-year process from arrest to delivery of judgment did not constitute undue delay.[755]

In view of the size and complexity of the trial, the 15-year process from arrest to delivery of judgment did not constitute undue delay.[756]

**determining length of delay**

The time begins to run when a person is "charged"—meaning when the accused is notified by an authority that he has committed an offence.[757] An accused who was arrested by Namibian authorities but released when the ICTR said it lacked sufficient evidence was "charged" for purposes of commencing the period of pretrial delay.[758]

**diligence of Trial Chamber**

Common challenges of trial administration of a multi-accused case with a complicated procedural history, rather than Tribunal's organisational failures, were responsible for delay.[759]

Delays resulting from judges' simultaneous participation in other trials were undue. Logistical considerations should not take priority over the Trial Chamber's duty to safeguard the fairness of the proceedings.[760]

Delay of 2 years and 2 ½ months for preparation of trial judgement was not unreasonable in complex multi-accused case.[761]

Delay in trial due to illness of co-accused did not rise to the level requiring dismissal of the indictment.[762]

**factors for unreasonable delay**

The following factors must be considered when determining whether there has been a violation of the right to be tried without undue delay: (1) The length of the delay; (2) The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and

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[755] *Mugenzi & Mugiraneza v Prosecutor,* No. ICTR-99-50-A, *Judgement* (4 February 2013) at paras. 32,37
[756] *Prosecutor v Niyiramasuhuko et al,* No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 139
[757] *Prosecutor v Rwamakuba,* No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 19
[758] *Prosecutor v Rwamakuba,* No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 23
[759] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 79
[760] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 376
[761] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 377
[762] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion Relating to his Right to be Tried Without Undue Delay* (23 June 2009)

law; (3) The conduct of the parties, including the Prosecutor; (4) The conduct of the relevant authorities; and (5) The prejudice to the accused, if any. The fundamental purpose of the Tribunal is not a factor to be considered.[763]

Factors to be considered in assessing the delay before trial include (1) the gravity of the charges; (2) complexity of the case; (3) the complexity of the proceedings, including the complexity of investigations; (4) the joinder of the accused; (5) conduct of the accused; (6) number of motions filed by the parties; (7) conduct of the Registry and prosecution.[764]

Several factors are relevant to this assessment, including: (i) the length of the delay; (ii) the complexity of the proceedings; (iii) the conduct of the parties; (iv) the conduct of the relevant authorities; and (v) the prejudice to the accused, if any.[765]

Trial Chambers have a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.[766]

Additional time to prepare sought by the accused, so long as it is not obstructive, cannot be blamed for undue delay.[767]

**need to investigate and prepare**

Disclosure of 143 new witnesses on sexual assault is not grounds for continuing the trial where the defence can investigate during the progress of the case.[768]

Late disclosure of witnesses and statements did not justify continuance of trial where alternative remedies, such as excluding the testimony or mid-trial adjournments, were available.[769]

**prejudice**

Prolonged detention resulting from undue delay is prejudicial per se.[770]

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[763] *Prosecutor v Mugiraneza*, No. ICTR-99-50-AR73, *Decision on Prosper Mugiraneza's Interlocutory Appeal From Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial, and for Appropriate Relief* (27 February 2004); *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 238; *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 18; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 360

[764] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 19

[765] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 69

[766] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 346

[767] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 911

[768] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Continuance of the Trial* (14 September 2005) at para. 6

[769] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-PT, *Decision on the Defence Motion for Continuance of Trial* (30 September 2005)

**prosecutorial diligence**

Indictment would not be dismissed for undue delay where the 4 ½ year delay in the commencement of the trial was not attributable to the prosecution and did not prejudice the defence.[771]

Prosecution acted with due diligence although its investigation was delayed and it changed theories of the case, first opposing, then moving for severance of the accused.[772]

Prosecution motion for extra time to complete its case denied where it did not exercise diligence in obtaining the testimony of the witness it now wished to call.[773]

Prosecution's failure to fulfil its disclosure obligations created unjustified delays in the start of the trial.[774]

**remedy**

Seven-year delay in single accused case was undue. However, where the accused did not show prejudice, the remedy was a reduction of sentence from life to 40 years.[775]

Formal recognition of the violation of the accused's rights due to undue delay was not an effective remedy considering the length of the undue delay.[776]

**independent tribunal**

The right of an accused to be tried before an independent tribunal is an integral component of his right to a fair trial.[777]

There is a strong presumption that the Judges of the Tribunal take their decisions in full independence, and it is for the accused to rebut this presumption.[778]

Certain official statements from Rwanda and the suspension of cooperation of Rwanda with the Tribunal. may be regarded as an attempt to exert pressure on the

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[770] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 388
[771] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay* (3 November 2004)
[772] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Decision on Defence Motion for Stay of Proceedings* (3 June 2005) at para. 34
[773] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Prosecution Motion for Reconsideration, or in the Alternative, Certification to Appeal Chamber's Decision Denying Request for Adjournment* (29 September 2005)
[774] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 372
[775] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at paras. 23, 29, 43-45
[776] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 394
[777] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 28
[778] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 28

Tribunal in order to prevent the release of the accused. However, the fact that pressures were exerted is not enough to establish that the judges were influenced by those pressures.[779]

**procedural fairness**

Procedural fairness is a paramount consideration in international criminal trials encompassing such fundamental guarantees as the right of parties to be equal before the Tribunal, and the right of the accused to examine the witnesses against him.[780]

**public trial**

In principle, it is preferable that hearings are conducted in public, and this includes making public as much of the written pleadings and decisions as is possible. However, it is of primary importance that the safety of victims and witnesses are not compromised.[781]

**reasoned opinion**

The right to a reasoned opinion is an aspect of the fair trial requirement.[782]

The right to a reasoned opinion applies to pretrial motions as well as final judgement.[783]

A reasoned opinion in the trial judgement is essential to ensuring that the Tribunal's adjudications are fair and *inter alia*, allows for a meaningful exercise of the right to appeal by the parties, and enables the Appeals Chamber to understand and review the Trial Chamber's findings.[784]

Where the Trial Chamber failed to give a reasoned opinion, this amounts to an error of law which allows the Appeals Chamber to consider the relevant evidence and factual findings to determine whether a reasonable trier of fact could have found the disputed issue to have been established beyond a reasonable doubt.[785]

Despite the extraordinary nature of the Trial Chamber's omissions and the gravity of the crime of genocide, it would not be unfair for the Appeals Chamber to review the findings of the Trial Chamber and make its own determinations whether those findings

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[779] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 32
[780] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges* (2 September 2005) at para. 20
[781] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Remove Confidentiality from Portions of the Prosecutor's Pre-Trial Brief* (10 December 2004) at para. 10
[782] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 18
[783] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 15, fn. 21
[784] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 18
[785] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 56

supported a conviction for genocide considering the failure of the Trial Chamber to do so.[786]

Trial Chamber's failure to address whether the facts established the actus reus and mens rea of genocide and hence the accused's individual responsibility for genocide was unprecedented in the history of the Tribunal and violated the right of the accused to a reasoned opinion.[787]

Trial Chamber failed to give reasoned opinion for relying on testimony of two prosecution witnesses and disbelieving a defence witness where it failed to discuss contradictions in versions of prosecution witnesses and failed to explain why it did not believe the defence witness besides the fact that his testimony was contradicted by the prosecution's witnesses.[788]

The absence of discussion in the Trial Judgement reconciling the apparently contradictory evidence of certain witnesses prevents the Appeals Chamber from determining whether a reasonable trier of fact could have accepted all the accounts of the Appellant's activities that it did.[789]

Decision on amended indictment which merely restated the Tribunal's jurisprudence without explaining why each of the contested paragraphs in the amended indictment is properly pleaded failed to constitute a reasoned opinion.[790]

**witness intimidation**

The issue of witness intimidation is one that the Tribunal does not take lightly. Affirmative interference with prospective witnesses can undermine the judicial process. While the burden of proving the charges in the indictment beyond a reasonable doubt rests firmly on the Prosecution, the Defence's ability to present evidence on its behalf is a fundamental tenant of the right to a fair trial.[791]

Where allegations of witness intimidation are raised the Defence must show how the content of the anticipated evidence relates to specific allegations or charges against the Accused.[792]

The Chamber has the authority to issue subpoenas and order the attendance of otherwise reluctant witnesses and enlist the cooperation of the State in assuring their attendance. The failure of the Defence to seek such assistance to ensure the presentation

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[786] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 24
[787] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 19
[788] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 19 *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 147
[789] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 354.
[790] *Uwinkindi v Prosecutor*, No. ICTR-01-75-AR72(C), *Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment* (16 November 2011) at para. 20
[791] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 70
[792] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 63

of evidence from witnesses would alone allow the Chamber to dismiss Defence arguments that the accused did not receive a fair trial because witnesses refused to testify based on fear of reprisals.[793]

**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.**

**adequate time and facilities**

The rights of the accused to be informed of the nature of the charge against him and to have adequate time for the preparation of the defence imply that the accused must be able to identify the criminal acts and conduct alleged in the indictment at all times.[794]

**balancing preparation and delay**

Time and resource constraints exist in all judicial institutions. It is legitimate for a Trial Chamber to ensure that the proceedings do not suffer undue delays and that the trial

[793] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 65
[794] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 303

is completed within a reasonable time. However, these considerations should never impinge on the right of the parties to a fair trial.[795]

**completion strategy**

The Tribunal's completion strategy is irrelevant to the determination of issues by the Trial and Appeals Chamber and was not a factor in decision to commence defence case as scheduled.[796]

Despite the existence of the completion strategy, the overriding obligation is to observe the mandate to guarantee a fair trial to the accused. The requirements of expediency will not outweigh the interests of justice.[797]

The completion strategy by 31 December 2008 is not equivalent to the mandate of this Tribunal and is more of a target date.[798]

The present target for completion of all trials at the ICTR—the end of 2008—has been set by the Security Council in its Resolution 1503 and reiterated in Resolution 1534. Any modification of this deadline falls within the province of the Security Council. Motion to extend mandate of ICTR to prosecute RPF denied.[799]

The overriding consideration of the completion strategy must be the strict adherence to the minimum guarantees of the rights of the accused pursuant to Article 20 of the Statute. The remaining Judges did not err in determining that full respect for the rights of the accused would be guaranteed if the trial was not completed by the end of 2008.[800]

**equal time with prosecution**

The accused is entitled to time to present his case relatively proportional to that of the prosecution. The Trial Chamber must also consider whether the amount of time is objectively adequate to enable the accused to present his defence in a manner consistent with his rights.[801]

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[795] *Ngirabatware v Prosecutor*, No. ICTR-99-54-A, *Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date* (12 May 2009) at para. 31
[796] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi* (19 January 2005) at para. 41
[797] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Scheduling Order* (21 August 2007) at para. 5
[798] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (6 March 2007) at para. 87
[799] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007) at para. 12
[800] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 24
[801] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 28

Differences in the number of years each side had to prepare its case did not violate the principle of equality of arms where the prosecution had the burden of proof.[802]

**remedies**

The right of the accused to adequate time and facilities to prepare his defence requires that he be given a reasonable adjournment to compensate for the mid-trial replacement of his counsel. The duration of that adjournment depends on the extent and nature of prosecution evidence, the situation of the defence team, and the pace of the trial.[803]

Trial Chamber erred in failing to provide a reasoned decision for denying adjournment to obtain legible Gacaca records, but no prejudice was shown when defence did not ask witness about his involvement in Gacaca proceedings and did not raise the issue in his closing brief.[804]

Exclusion of evidence is at the extreme end of a scale of remedies that the Trial Chamber has at its disposition.[805]

Prosecution ordered not to call a witness in next trial session where defence did not have adequate time to prepare after receiving disclosure.[806]

Failure to file Rule 98 *bis* motion for judgement of acquittal demonstrated that the defence was not prejudiced by inclusion in the indictment of counts that were ultimately not proven.[807]

**time for commencement of trial**

Trial Chamber abused its considerable discretion by scheduling trial without considering whether the time for preparation was adequate given the staffing of the defence team, the recent amendment of the indictment, and the pending motions and disclosure issues.[808]

It is not possible to set a standard of what constitutes adequate time to prepare a defence. The length of the preparation period depends on several factors specific to each case, such as, for example, the complexity of the case, the number of counts and charges,

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[802] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on the Defence Motion for Postponement of the Start of the Trial* (30 October 2009) at para. 54
[803] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Postponement of Defence of Accused Kabiligi* (21 April 2005) at para. 7
[804] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at paras. 32-33
[805] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua* (20 April 2006) at para. 8
[806] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Scheduling Order* (30 March 2006) at para. 5
[807] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Judgement and Sentence* (31 May 2012) at para. 23
[808] *Ngirabatware v Prosecutor*, No. ICTR-99-54-A, *Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date* (12 May 2009) at para. 27

the gravity of the crimes charged, the individual circumstances of the accused, the status and scale of the Prosecution's disclosure, and the staffing of the defence team.[809]

Accused failed to demonstrate that trial date was based upon political considerations related to the Completion Strategy where the trial had already been postponed to a date later than that envisioned by the President's report to the Security Council.[810]

Difficulties in obtaining defence witnesses in Rwanda due to the political climate there did not justify postponement of the trial. Trials do not stop because the political circumstances are less than ideal.[811]

Resignation of co-counsel and other commitments of lead counsel justified postponement of the commencement of the trial.[812]

**time for preparation of cross examination**

If the cross examination of a witness does indeed require prior preparation, it is inconceivable that the defence should wait until it is informed of the time that a witness will effectively be called to testify before it starts its investigations.[813]

Trial Chamber did not abuse its discretion by requiring cross examination immediately after disclosure of the witness' report, where it allowed supplemental submissions, and report was only 5 pages long.[814]

Right to effective cross-examination was not abridged by failure of Registry to authorize sufficient time for investigation. Defence should have commenced investigation in time allotted and requested an extension from the Registry if it wasn't adequate.[815]

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[809] *Ngirabatware v Prosecutor*, No. ICTR-99-54-A, *Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date* (12 May 2009) at para. 28
[810] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on the Defence Motion for Postponement of the Start of the Trial* (30 October 2009) at para. 23
[811] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on the Defence Motion for Postponement of the Start of the Trial* (30 October 2009) at para. 48
[812] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on the Extremely Urgent Defence Motion for Postponement of the Start of the Trial* (29 May 2009)
[813] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Submissions by Edouard Karemera and the Prosecutor on the List of Prosecution Witnesses for the Fifth Session and the Final List of Prosecution Witnesses* (12 June 2007) at para. 8
[814] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 139
[815] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Written Reasons for Oral Decision of 18 February 2004 on Motions for Further Postponement of Testimony of Witness DBQ* (1 March 2004)

**counsel**

**absence**

When the accused is represented, the presence of his counsel or co-counsel at the hearing is essential. [816]

A counsel who absents himself without having ensured that his co-counsel will be present is committing gross professional misconduct. The same can be said for counsel or co-counsel absenting himself while being the only representative for the Defence of the accused and while the presentation of evidence continues save in exceptional circumstances.[817]

The manifest misconduct of the representatives of the accused in failing to appear obliges the Trial Chamber to act, for example by ordering an adjournment, and if necessary by sanctioning such behaviour.[818]

Testimony taken in the absence of any counsel for the accused must be excluded, even where the absence was for a few hours.[819]

Trial Chamber erred in taking testimony between time it discharged counsel and time new counsel arrived and evidence taken during that period must be excluded.[820]

**choice**

The right to free legal assistance by counsel does not confer the right to choose one's counsel.[821]

**co-counsel**

There was no error in the Trial Chamber's decision not to postpone the commencement of trial in the absence of lead counsel. The purpose of a co-counsel is not

[816] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 139
[817] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 139
[818] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 139
[819] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 143
[820] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 173
[821] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 128; *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at para. 37; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 61; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 9

only to assist the lead counsel but indeed to conduct the case to allow the proceedings to continue in the event of an unforeseeable absence of the lead counsel.[822]

Trial Chamber did not err in proceeding to hear evidence in the absence of lead counsel where co-counsel was present, even though she had requested to withdraw.[823]

**communication**

The right of an accused to communicate freely and confidentially with counsel is a fundamental right with respect to the preparation of an accused's defence and to the fairness of the proceedings before the Tribunal, pursuant to Articles 19 and 20 of the Statute.[824]

**duty counsel**

The Registrar's failure to appoint a Duty Counsel for the accused resulted in the absence of any legal assistance for the accused over an extended period and, further, in the delay in the accused's initial appearance. However, the delay did not cause the accused a serious and irreparable prejudice such that he is entitled to dismissal of the indictment.[825]

Duty Counsel appointed to represent accused at pre-trial deposition rendered effective assistance of counsel.[826]

**effective assistance**

The accused has a right to competent counsel.[827]

The right to counsel is possessed by the accused, not counsel. The relevant issue is whether the defence, not any single counsel, has had adequate time and facilities to provide effective representation.[828]

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[822] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 32
[823] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 92
[824] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-I, *Decision on the Defence Motion to Protect the Applicant's Right to Full Answer and Defence* (15 November 2002) at para. 24; *Prosecutor v Mugiraneza*, No. ICTR-99-50-T, *Decision on the Defence Urgent Motion for Relief Under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice* (19 September 2001) at para. 10
[825] *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-I, *Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused* (12 December 2000) at paras. 43-44
[826] *Prosecutor v Muvunyi*, No. ICTR-2000-55ª-T, *Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX* (31 May 2006) at para. 17
[827] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 130; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 76; *Prosecutor v Muvunyi*, No. ICTR-2000-55ª-T, *Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX* (31 May 2006) at para. 10

Counsel who commenced his representation of the accused after only a two-day continuance did not render ineffective assistance of counsel where he assured the Trial Chamber it was adequate time for him to be prepared.[829]

For an appeal alleging incompetence of counsel to succeed, an appellant must rebut the presumption of competence by demonstrating gross professional misconduct or negligence on the part of the counsel which occasioned a miscarriage of justice.[830]

It is not for the Trial Chamber to dictate to a party how to conduct its case. Thus, where an accused claims that his right to competent assistance from counsel is violated, the onus is on the accused to bring this violation to the attention of the Trial Chamber. If the accused does not do so at trial, he must establish on appeal that his counsel's incompetence was so manifest as to oblige the Trial Chamber to act. He must further demonstrate that the Trial Chamber's failure to intervene occasioned a miscarriage of justice. [831]

**immunity**

Motion to postpone Appeal Chamber hearing due to arrest of Lead Counsel in another case denied where accused failed to show how that arrest impeded his counsel's ability to represent him in his case.[832]

Motion to suspend proceedings due to arrest of Lead Counsel in another case denied where defence teams had immunity while on mission in Rwanda and therefore had no reason not to continue their trial preparations and investigation.[833]

**imposed**

A Trial Chamber has the authority to instruct the Registry to assign a counsel to represent the interests of the accused, even against his will, when the accused had waived his right to be present and participate at the hearings.[834]

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[828] *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 10

[829] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para.138

[830] *Bikindi v. The Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 21; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 130; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 77; *Prosecutor v Muvunyi*, No. ICTR-2000-55ª-T, *Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX* (31 May 2006) at para. 10

[831] *Bikindi v. The Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 22.

[832] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Decision on Kalimanzira's Request to Postpone the Appeal Hearing* (2 June 2010); *Rukundo v Prosecutor*, No. ICTR-01-70-A, *Decision on Rukundo's Request to Postpone the Appeal Hearing* (4 June 2010)

[833] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-PT, *Decision on Ildephonse Nizeyimana's Motion to Suspend Trial Proceedings* (9 June 2010) at para. 15

[834] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 127

Trial Chamber did not err in forcing counsel to actively defend the accused where he had instructed his counsel not to participate in the proceedings. The accused waived his right to examine the witnesses by such an attitude.[835]

**investigators**

The contribution of investigators is an integral part of the work of the defence. Investigators have the right to attend closed sessions.[836]

**legal assistants**

The appointment of legal assistants is not subject to the verifications provided for in Rule 44(A) of the Rules and Articles 13 and 14 of the Directive on the Assignment of Defence Counsel. Therefore, counsel and co-counsel could not validly be replaced by legal assistants.[837]

**self-representation**

Where an accused is represented by counsel, and except in special circumstances, it is for Counsel to conduct the cross-examination on his behalf. [838]

**obtaining witnesses**

The accused's right to obtain examination of a potential witness on his behalf is a component of his right to a fair trial.[839]

The accused has the right to obtain the attendance of and examine witnesses for his case under the same conditions as witnesses against him. This right encompasses the issues of witness availability and protection.[840]

Trial Chamber erred in refusing to allow defence to call investigator to testify about recantation of prosecution witness. However, error was harmless where investigator's version was contained in affidavit and *amicus curiae* report which were before the Trial Chamber.[841]

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[835] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at paras. 124-25
[836] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion to Permit Investigators to Attend Closed Sessions* (18 Aug 2005) at para. 8; *Prosecutor v Seromba,* No. ICTR-2001-66-T, *Décision Relative à la Requete de les Defence Aux Fins de l'Admission de son Enquêteur Lors les Dépositions à Huis Clos Des Témoins de la Defence* (8 November 2005)
[837] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 139
[838] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 267, fn. 651
[839] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 4
[840] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11bis, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (28 May 2008) at para. 58
[841] *Rukundo v Prosecutor,* No. ICTR-2001-70-A, *Judgement* (20 October 2001) at paras. 147-48

Where it is alleged that the absence of a witness may compromise the accused's right to a fair trial, it is entirely proper for the Trial Chamber to consider the anticipated evidence of the witness to determine whether its absence caused any unfairness.[842]

When the defence asserts that the trial was unfair because witnesses crucial to the defence refused to testify due to interference, it is incumbent on the defence to, first, demonstrate that such interference has in fact taken place and, second, exhaust all available measures to secure the taking of the witnesses' testimony.[843]

Where an accused believes that the Witnesses and Victims Unit has made insufficient efforts to locate a defence witness, it is his obligation to raise an objection with the Trial Chamber and exhaust all available means to seek the assistance of the Unit and the Trial Chamber in securing the witness' attendance prior to the close of proceedings.[844]

Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*. Trial Chamber was obliged, at the very least, to ensure that a final report was received from the *amicus curiae* before delivering the judgement. By failing to do so, the Trial Chamber erred and brought into question the accused's right to a fair trial under Article 20(2) of the Statute.[845]

Defence was entitled to rely on *amicus curiae* to investigate alleged witness intimidation once he was appointed.[846]

**presence**

The physical presence of an accused before the Chamber, as a rule, is one of the most basic and common principles of a fair criminal trial.[847]

**medical reasons**

Trial would not be held in the absence of the accused, over his objection, where his medical condition allowed him to concentrate on written material for only 6 hours per week and this would be insufficient for trial to continue with minimal amount of expeditiousness.[848]

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[842] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 192
[843] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 196
[844] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 114
[845] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 209
[846] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 215
[847] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Stay of Proceedings While he is Unfit to Attend Trial or Certification to Appeal* (11 July 2007) at para. 11
[848] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 25

**proportionality**

The right of the accused to be tried in his presence includes the right to be physically present at trial. This right is not absolute. However, abridgement of this right must be proportional and no more than necessary under the circumstances.[849]

Departing from its previous jurisprudence, the Appeals Chamber held that the relevance of a witness' testimony is a factor which the Trial Chamber can consider in determining whether to continue the trial in the absence of the accused.[850]

No prejudice inured to an accused who was absent for cross examination of a prosecution witness by his co-accused and therefore the witness would not be recalled.[851]

The right to an expeditious trial was a relevant consideration for the Trial Chamber in balancing whether to proceed in the absence of the Appellant. However, in the circumstances of this complex and lengthy case, the three-day delay to the trial was not sufficient to outweigh the statutory right to be present at his own trial when the accused's absence was due to no fault of his own.[852]

Trial Chamber misapplied the proportionality principle when proceeding in the absence of the accused for one week, rather than adjourning the proceedings. However, there was no prejudice to the accused.[853]

**waiver**

Accused voluntarily absented himself from the trial where his alleged medical condition was not accepted by the Trial Chamber after reviewing medical reports.[854]

Waiver by an accused of his right to be present at trial must be free and unequivocal (though it can be express or tacit) and done with full knowledge. The accused must have had prior notification as to the place and date of the trial, as well as of the charges against him or her. The accused must also be informed of his/her right to be present at trial and be informed that his or her presence is required at trial. Where an accused who is in the custody of the Tribunal decides voluntarily not to be present at trial, it is in the interests of justice to assign him or her counsel.[855]

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[849] *Zigiranyirazo v Prosecutor*, No. ICTR-2001-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006); *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 43

[850] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 58

[851] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand on the Right of the Accused to be Present at Trial* (28 November 2007)

[852] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.10, *Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial* (5 October 2007) at para. 15

[853] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 61-62

[854] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 48

[855] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para.

Accused waived his right to be personally present at trial when he refused to appear for his closing submissions after the Chamber refused to dismiss his lead counsel.[856]

There is no prohibition on holding a trial in the absence of the accused if he refuses to attend.[857]

**self-incrimination**

No adverse inference can be drawn from the decision of the accused not to testify on his own behalf.[858]

**specificity of indictment**

**prosecution must know its case**

No conviction may be pronounced where the accused's right to a fair trial has been violated because of a failure to provide him with sufficient notice of the legal and factual grounds underpinning the charges against him.[859]

The prosecution is expected to know its case before it goes to trial and cannot omit material aspects of its main allegations in the indictment with the aim of moulding the case against the accused during the trial depending on how the evidence unfolds.[860]

Naturally, the Prosecution cannot intentionally seek to exhaust its opponent's resources by leaving the Defence to investigate charges that it has no intent to prosecute. The Prosecution should make every effort to ensure not only that the indictment specifically pleads the material facts that the Prosecution intends to prove but also that any facts that it does not intend to prove are removed. The same applies to other communications that give specific information regarding the Prosecution's intended case, such as the Pre-Trial Brief. It would be a serious breach of ethics for the Prosecution to draw the Defence into lengthy and expensive investigations of facts that the Prosecution does not intend to prove at trial.[861]

If an accused is not properly notified of the material facts of his alleged criminal activity until the Prosecution files its Pre-Trial Brief or until the trial itself, it will be difficult for his Defence to conduct a meaningful investigation prior to the commencement of the trial.[862]

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[856] *Hategekimana v Prosecutor,* No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 38
[857] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 102
[858] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Judgement and Sentence* (29 March 2011) at para. 78
[859] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at paras. 27,67
[860] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 172; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 27
[861] *Prosecutor v Ntakirutimana,* No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 43
[862] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 22

**amendment of indictment**

When material facts are unknown at the time of the initial indictment, the prosecution should make efforts to ascertain these important details through further investigation and seek to amend the indictment at the earliest opportunity.[863]

While there are instances in criminal trials where the evidence turns out differently than expected, such situations may call for measures such as an amendment of the indictment, an adjournment, or the exclusion of evidence outside the scope of the indictment.[864]

A clear distinction must be drawn between vagueness in an indictment and an indictment omitting certain charges altogether. While it is possible to remedy the vagueness of an indictment, omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.[865]

When the Prosecutor relies on material facts which are not stated in the Indictment and, which on their own, could constitute distinct charges, the Prosecutor must seek leave to amend the Indictment to add the new material facts.[866]

Where indictment which charged that accused sent troops to Bisesero at the request of the Minister of Interior did not provide notice to the accused that he was charged with killings committed by the troops at Bisesero, remedying such a defect required an amendment to the indictment and could not be cured by notice.[867]

Trial Chamber erred in reconsidering its pre-trial decision that the indictments were not defective in its final judgement, without suspending its deliberations and reopening the proceedings to allow the prosecution to try to convince the Trial Chamber of the correctness of its initial decision or that the defects had been cured.[868]

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[863] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 125
[864] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 26; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 194; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 13
[865] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2014) at para. 117; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 156; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 325; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 32
[866] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 406
[867] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 186
[868] *Prosecutor v Ntagerura et* al, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 55

A clear distinction must be drawn between vagueness in an indictment and an indictment omitting certain charges altogether. Omitted charges can be incorporated into the indictment only by a formal amendment pursuant to Rule 50 of the Rules.[869]

Failure to allege President's speech under count relating to conspiracy to commit genocide precluded conviction for conspiracy based upon that act. This is the type of defect that cannot be cured other than by amendment of the indictment.[870]

**burden of persuasion**

A vague indictment, not cured by timely and sufficient notice, leads to prejudice. The burden of showing that the defence was not materially impaired by the defect in notice falls squarely on the prosecution. The prosecution cannot cure a vague indictment by presuming that the defence would not have changed had proper notice of a material fact been given.[871]

A vague or an ambiguous indictment, not cured by timely, clear, and sufficient notice constitutes a prejudice to the accused. The defect may only be deemed harmless through demonstrating that the accused's ability to present his defence was not materially impaired.[872]

The prosecution bears the burden of demonstrating that the new incidents that became known at trial caused no prejudice to the accused.[873] Where the prosecution is in possession of witness statements which mention the participation of the accused in the events, it has ample opportunity to obtain more specific information from the witness prior to trial.[874]

The prosecution did not carry its burden of showing that no unfairness resulted from the conviction of the accused based on an attack the material facts of which were first revealed at trial.[875]

Where there is a resulting defect in the indictment, an accused person who fails to object at trial has the burden of proving on appeal that his ability to prepare his case was materially impaired. Where, however, the accused person objected at trial, the burden is on the Prosecution to prove on appeal that the accused's ability to prepare his defence was not materially impaired.[876]

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[869] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 55
[870] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 1971
[871] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 58
[872] *Prosecutor v Ntagerura et* al, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 30
[873] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 77
[874] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 78
[875] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 112
[876] *Prosecutor v Ntagerura et* al, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 31; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 200; *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 49; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A,

Although accused failed to object when the evidence was introduced, he raised the issue of lack of notice in his motion for judgement of acquittal and defence brief and therefore did not waive the objection such as to relieve the prosecution of its burden on appeal.[877]

Where the accused raised the issue of lack of notice in his closing brief and the Trial Chamber examined his claim without considering it untimely, the burden rests on the prosecution to prove that his ability to prepare his defence was not materially impaired.[878]

Where the accused failed to raise lack of notice at trial, but the Trial Chamber addressed it *proprio motu* in the final judgement, it was the prosecution which had the burden on appeal of showing that the accused's ability to prepare his defence was not materially impaired.[879]

Prosecution failed to meet its burden of showing that the defence was not materially impaired when questions by accused were not directed at substance of statements allegedly made by accused, indicating that defence may not have understood he was charged with incitement by virtue of those statements.[880]

**degree of specificity required**

The charges against the accused and the material fact underpinning them, should not be suggested by the indictment, but clearly and unambiguously set forth.[881]

The issue as to whether a fact is material or not cannot be determined in the abstract: whether a fact is considered "material" depends on the nature of the Prosecution's case.[882]

The Prosecution's characterization of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment to provide the accused with adequate notice.[883]

Individual actions of an accused that contribute to crimes will require more specific notice than proof of the crimes themselves, where they are physically committed

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*Judgement* (28 November 2007) at para. 327; *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 30

[877] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para.54

[878] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1182

[879] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2294

[880] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2740

[881] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 531

[882] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 322

[883] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 324

by others. The specificity of the notice required is proportional to the extent of the Accused's direct involvement.[884]

**incorporation by reference**

An incorporation of other paragraphs by reference into each count is too general and it must be deleted.[885]

The prosecution's failure to expressly state that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation is not charged as a crime.[886]

Indictment which charged murders "including" at various specified locations was defective when it failed to specify the Mukura forest, which was the site of a major massacre, despite prosecution's contention that list of sites in indictment was not intended to be exhaustive.[887]

**identification of perpetrators**

Description of perpetrators as "Interahamwe militiamen" was sufficient given large scale of crimes committed at the prefectural office.[888]

**identification of victims**

Where the prosecution alleges that an accused personally committed the criminal acts in question, it must plead the identity of the victim with the greatest precision.[889]

If the personal physical commission of criminal acts is charged, the indictment should set forth the victim's identity, the place and time of the events and how the acts were committed.[890]

The Prosecution cannot simultaneously argue that the accused killed a named individual yet claim that the "sheer scale" of the crime made it impossible to identify that individual in the indictment.[891]

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[884] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Motion for Exclusion of Evidence* (4 September 2006) at para. 3
[885] *Prosecutor v Sagahutu*, No. ICTR-2000-56-T, *Decision on Sagahutu's Preliminary, Provisional Release, and Severance Motions* (25 September 2002) at paras. 28-29
[886] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 156; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2270
[887] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 94
[888] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 494
[889] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 385, fn. 905; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 23
[890] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 16
[891] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 74

The scope and nature of the alleged killings made it impracticable for the prosecution to identify the victims by name, even where the accused was only convicted of a limited number of killings.[892]

Failure to specify the identity of a victim allegedly personally murdered by the accused rendered the indictment defective.[893]

Indictment that failed to identify the victim killed by a specific order by the accused was defective as to the identity of the victim and the time and place of the event.[894]

Identification of victims as "Tutsi refugees taken from Mount Leon Minor Seminary" was not defective for failure to identify the victims where the number of victims was significant.[895]

**location**

When the Prosecution seeks to prove that the accused committed an act at a specified location, it cannot simultaneously claim that it is impracticable to specify that location in advance.[896]

Indictment that alleged massacres within Cyangugu prefecture was defective in failing to specify location within the prefecture of massacre for which the accused was charged.[897]

Allegations of killings simply in " throughout Byumba and the surrounding areas" were insufficiently specific.[898]

Prosecution ordered to make more precise the locations where the victims were killed—stating the commune is not sufficient.[899]

Indictment was not defective in failing to specify the exact location and dates of the rapes and sexual assaults.[900]

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[892] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 121
[893] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 50; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at paras. 33,99
[894] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 132
[895] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2010) at para. 160
[896] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 75
[897] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 122
[898] *Prosecutor v Gatete*, No. ICTR-00-61-I, *Decision on Defence Motion Concerning Defects in Amended Indictment* (3 July 2009) at para. 16
[899] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motion Concerning Defects in the Indictment* (3 March 2008) at paras.13-14
[900] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 594

Location of eventual killings need not be specified in the indictment when the gravamen of the accusation was that the accused facilitated the abduction of the victims at the prefecture office.[901]

**meetings and speeches**

Meeting of civilian and military leaders at which accused's responsibility for crimes at Amici supposedly arose was a material fact which should have been pleaded in the indictment.[902]

Where the accused is alleged to have spoken at a specific meeting, the prosecution should, if possible, specify the date of the meeting.[903]

The allegation of Appellant Niyiramasuhuko's presence at the installation of Elie Ndayambaje as mayor in Muganza commune on 21 June 1994 should have been pleaded as a material fact in the indictment.[904]

Dates of the meetings and distribution of weapons should be specified.[905]

Prosecution ordered to provide greater specificity of ranges or dates of incidents and meetings alleged in indictment.[906]

Allegation of meetings in general was not specific enough to provide adequate notice of specific meetings and indictment was defective in this respect.[907]

**dates**

A broad date range in the indictment, in and of itself, is not impermissibly vague. There may be instances where the sheer scale of the crimes makes it impracticable to

[901] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 492
[902] *Prosecutor v Kordic & Cerkez*, No. IT-95-14/2-A, *Judgement* (17 December 2004) at para. 147
[903] *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at para. 20 (vii); *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on Preliminary Motion* (26 February 2003) at para. 13,22
[904] *Ntahobali & Niyiramasuhuko v Prosecutor*, No. ICTR-98-42-AR73, *Decision on the Appeals by Pauline Niyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible* (2 July 2004) at para. 12
[905] *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Decision on Defence Motion on Defects in the Form of the Indictment* (27 September 2006) at para. 20
[906] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 25,29,42; *Prosecutor v. Ntawukuliilyayo*, No. ICTR-05-82-PT, *Decision on Defence Preliminary Motion Alleging Defects in the Indictment* (28 April 2009) at paras. 19-20
[907] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 35

require a high degree of specificity in such matters as the identity of the victims or the dates for the commission of the crime.[908]

Indictment that alleged three-month period for killings proven to have taken place over three days was impermissibly vague and overly broad.[909]

Indictment that alleged two-month period for killings that took place in much shorter times during that period was not defective.[910]

Date range of April-June 1994 was defective in case of charges of incitement which took place at particular meetings and locations.[911]

"In and around late May" provided sufficient notice to encompass acts that occurred in late mid and mid-June.[912]

**defective indictment in general**

An indictment is presumed to be a true, accurate, and full reflection of the drafter's intention and free from oversight and error.[913]

An accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together. It is incumbent on the prosecution to set forth the material facts clearly and unambiguously.[914]

A specific, precise, clear, and unambiguous indictment is an essential prerequisite for a fair and expeditious trial. Besides being a right of the accused, a specific indictment assists the prosecution in focusing its case and assists the Trial Chamber in ensuring the efficient use of court time.[915]

An indictment that fails to set forth material facts in sufficient detail is defective.[916]

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[908] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 150

[909] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 151

[910] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2010) at para. 163; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 493

[911] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2281

[912] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2552

[913] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2274

[914] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2538

[915] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 28

[916] *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

Under Articles 17(4), 20(2), 20(4)(a) and 20(4)(b) of the Statute and Rule 47(C) of the Rules, the Prosecutor must state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proved.[917]

The Prosecution must not only inform the accused of the nature and cause of the charges against him in the indictment but must also provide a concise description of the facts underpinning those charges.[918]

An indictment is defective if it does not plead the material facts underpinning the charges in sufficient detail to provide notice to the accused and enable the accused to prepare his or her defence.[919]

**cumulative charges**

Cumulative charging is generally permitted.[920]

Cumulative charging of liability under Articles 6(1) and 6(3) is permitted.[921]

Regardless of whether the charges were cumulative or not, the Prosecution was entitled to bring overlapping charges. It is up to the Trial Chamber at a later stage to winnow the charges and to prevent impermissibly cumulative convictions.[922]

**cumulative defects**

When the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of many material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially

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[917] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 322
[918] *Prosecutor v Ntagerura et al,* No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 121
[919] *Nahimana et al v Prosecutor,* No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 322
[920] *Musema v Prosecutor,* No. ICTR-96-13-A (16 November 2001) at para. 369; *Prosecutor v Nsengimana*, No. IT-2001-61-PT, *Decision on Prosecution Motion for Leave to File Amended Indictment* (29 March 2007) at para. 57; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 5832
[921] *Prosecutor v Ndahimana*, No.ICTR-2001-68-PT, *Decision on Ndahimana's Motion on Alleged Defects in the Indictment* (30 April 2010) at para. 12
[922] *Semanza v Prosecutor,* No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 309; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 108; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1089.

prejudice an accused's right to a fair trial by hindering the preparation of a proper defence. The Appeals Chamber found that the Trial Chamber failed to do so in this case.[923]

The assessment of the cumulative effect of defects in the indictment is a continuous duty on the part of the Trial Chamber.[924]

It is reasonable to review the cumulative effect of admitting material facts not charged in the indictment at the close of the prosecution case to clarify the case that the defence would have to answer.[925]

The assessment of the cumulative effect of defects in the indictment is a continuous duty on the part of the Trial Chamber.[926]

Where most of defects were cured by notice years before the accused had to present its defence, the accused was not unfairly prejudiced by the cumulative admission of facts outside the indictment.[927]

Where no specific rapes were alleged in the indictment, and prosecution reduced its witness list from 143 rape witnesses to 16, defence was not denied adequate notice of case which it had to meet.[928]

No cumulative prejudice resulted from defects in indictment where the accused benefitted from vigorous advocacy which reflected a nuanced and complete understanding of the prosecution's case.[929]

Although none of the five crimes for which the accused was convicted was pleaded in the indictment, he did not demonstrate cumulative prejudice from the defects in the indictment such as to warrant reversal of the indictment.[930]

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[923] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 26
[924] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment* (18 March 2008) at para. 45
[925] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment* (18 March 2008) at para. 9
[926] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment* (18 March 2008) at para. 45
[927] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision* (17 April 2007) at paras. 31-32; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision Reconsidering Exclusion of Evidence Related to Accused Kabiligi* (23 April 2007)
[928] *Prosecutor v Karemera et al*, No. ICTR-8-44-T, *Decision on Joseph Nzirorera's Motion to Dismiss Count 5* (21 August 2007)
[929] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 106; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Judgement and Sentence* (20 December 2012) at para. 27
[930] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 217

Notwithstanding the prosecution's failure to plead several material facts in the Indictment, the Defence was not materially prejudiced, and that the trial was not rendered unfair, by the cumulative effect of the defects in the Indictment having been cured.[931]

It is proper to consider the aptitude of the defence to impeach the prosecution's case when considering the cumulative effect of defects in the indictment.[932]

**curing defects—in general**

The defect may be cured if the prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.[933]

Although the Appeals Chamber allows that defects in an indictment may be "remedied" under certain circumstances, it emphasizes that this should be limited to exceptional cases.[934]

The Trial Chamber did not err in deferring its assessment of the cumulative effect of any curing until the conclusion of the case. Indeed, it is reasonable to do so to allow the Trial Chamber an opportunity to consider the totality of the defects in the context of the overall presentation of the parties' cases and its own factual and legal findings.[935]

**curing defects—pre-trial brief and witness summaries**

Witness summary that indicated accused said that Tutsi women were food for soldiers did not cure defect in indictment where pre-trial brief was ambiguous as to means by which accused had knowledge of rapes.[936]

Witness summaries which varied as to the date of the attack for which the accused was convicted failed to provide the clear and consistent notice required to cure the defect in the indictment.[937]

Witness summary which did not provide precise location, correct date, or key element that the accused directed the attackers did not satisfy the requirement of clear and consistent notice such as to cure the defect in the indictment.[938]

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[931] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 80
[932] *Ntabakuze v Prosecutor*, No. ICTR-98-41A-A, *Judgement* (8 May 2012) at para. 133
[933] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 172; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2014) at para. 117; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 325
[934] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 114; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 125
[935] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 132
[936] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 124
[937] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 71
[938] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at paras. 112,114

Witness summaries of uncharged event attached to pre-trial brief, although referring to that event, did not cure defect in indictment where there was no reason for the accused to expect that he was being charged with that event.[939]

Although one sentence in one witness summary indicated that the accused had transported the attackers, given the lack of other notice and the ultimate testimony of several witnesses to this fact, it could not be said that this constituted clear and consistent notice sufficient to cure the defect in the indictment.[940]

Pre-Trial brief provision that the perpetrators of the Prime Minister's killing acted upon the accused's instructions did not cure defect as it neither informed the accused by which conduct he aided and abetted the crime nor that the prosecution intended to hold him responsible under this mode of liability.[941]

Witness summaries appended to pre-trial brief indicated that accused ordered his subordinate to re-enforce the Presidential Guards at the Prime Minister's residence and maintained radio contact with his subordinates at that location, this information did not provide the accused with adequate notice that the prosecution was pursuing a case of aiding and abetting against him.[942]

Defect in indictment was not cured where Pre-Trial brief and appended witness summaries failed to provide notice of the materials facts underlying the accused's conviction for aiding and abetting.[943]

Where pretrial brief alleged that the accused was present during the massacre, the defect in the indictment was not cured by clear, consistent, and timely notice that the accused, although not present, had knowledge of the crime as a superior.[944]

Prosecution's pre-trial brief which alleged that accused was present during the massacre failed to provide clear, consistent, and timely notice as to the accused's failure to prevent or punish the crimes and did not cure the defect.[945]

Overly broad time frame alleged in the indictment was cured by summaries of witness testimonies annexed to the pre-trial brief that provided the dates of the attack in question.[946]

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[939] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 100
[940] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 57
[941] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 187
[942] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 187
[943] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 194
[944] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 155
[945] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 156
[946] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 154

Summary of witness testimony contained in the pre-trial brief which indicated that there had been killings on a certain date and place by para-commando battalion soldiers cured defect in indictment.[947]

Summary of witness testimony annexed to the pre-trial brief which described killing in Gisenyi town was sufficient to provide notice that the accused was charged with those killings.[948]

Defective language in the indictment concerning common purpose and acting in concert was cured by notice in pre-trial brief and opening statement that prosecution was relying on joint criminal enterprise mode of liability.[949]

Simply repeating the language of Article 6(3) in the Pre-Trial brief was insufficient to cure the defect in the indictment. However, witness summaries appended to the Pre-Trial brief cured the defect.[950]

**curing defects—motions and responses**

Information in prosecution's pleadings in support of pre-trial decision on joinder which used the word "enterprise" was not sufficiently clear to cure defect of failure to plead joint criminal enterprise.[951]

Information contained in a motion to add a witness to the prosecution's witness list was sufficient to provide timely notice such as to cure defect in indictment.[952]

Information in proceedings for judgment of acquittal could not provide timely notice such as to cure a defect in the indictment.[953]

**curing defects—witness statements**

Supplemental witness summary provided four days before trial was not sufficiently timely to cure defect in the indictment.[954]

The mere service of witness statements does not serve to cure a defect in the indictment.[955]

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[947] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at paras. 49,92
[948] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 121
[949] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2014) at para. 124
[950] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 207
[951] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 38
[952] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at paras. 229-31; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 169
[953] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 111
[954] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 84
[955] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 162; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2735

Statement disclosed among hundreds of other statements and documents cannot cure defect in indictment.[956]

Disclosure in a witness summary filed several months after the trial started could not be used to cure defect in indictment.[957]

Information contained in proofing note just prior to witness' testimony does not constitute timely notice when determining whether a defect in the indictment has been cured.[958]

**curing defects—opening statement**

Mention of acting in concert and joint enterprise in opening statement was not clear enough to cure defect arising from not pleading joint criminal enterprise in the indictment.[959]

**curing defects—closing brief**

Information in prosecution's closing brief comes too late to be considered when determining whether defect in indictment has been cured.[960]

**duty of Trial Chamber**

Where question of whether the Trial Chamber would consider facts not pleaded in the indictment was, until the very end of trial, not settled, this uncertainty "materially affected" the ability of the accused to prepare their defence.[961]

**murder**

Indictment that charged accused with distribution of weapons on several occasions in April 1994 in Kigali-rural prefecture was defective in failing to specify the date and place of the weapons distribution.[962]

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[956] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 162; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Exclusion of Testimony Outside the Scope of the Indictment* (27 September 2005) at para. 3; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Motion for Exclusion of Evidence* (4 September 2006) at para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 14

[957] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 380

[958] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 94

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

[960] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 80

[961] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 28

[962] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 20

Indictment which charged murders at University which occurred on a continuous basis throughout a two-month period was not defective where the nature of the crime made it impracticable to require a higher degree of specificity as to the dates of the attacks or the identity of the victims.[963]

Indictment which charged that accused sent troops to Bisesero at the request of the Minister of Interior did not provide notice to the accused that he was charged with killings committed by the troops at Bisesero.[964]

Indictment that alleged "numerous massacres of the Tutsi population at places where they sought refuge" was defective for failing to specify the location, date, and circumstances of the incident for which the accused was convicted.[965]

Indictment which alleged that roadblocks were established during the genocide for the purpose of identifying Tutsis did not provide adequate notice for conviction of accused for murders at roadblocks carried out by his subordinates.[966]

Indictment was defective in failing to allege that the accused participated in the murders by supplying weapons, ammunitions, and gendarmes for the attack.[967]

Indictment which claimed the accused participated in the attack and was part of a convoy that went to the location was defective in failing to allege that the accused participated in the murders by conveying the attackers to the location of the attack.[968]

Indictment which charged participation by the accused in several attacks in the Bisesero region was defective in not specifying the locations where and how the accused personally committed the attacks.[969]

Indictment that charged accused with personal participation in 15 April murders at hospital could not be interpreted as encompassing crime for which accused was convicted—superior responsibility for an attack at the hospital after 20 April at which he was not present.[970]

**extermination**

[963] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 60
[964] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 185
[965] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at paras. 38,88; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 118,160
[966] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 109
[967] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 45
[968] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at para. 51
[969] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A & 96-17-A, *Judgement* (13 December 2004) at paras. 64,81-82,86,89
[970] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 22

The allegation that the accused was informed of the decision to destroy the church by the authorities and accepted that decision is a material fact whose absence from the indictment made the indictment defective as to the charge of extermination.[971]

**conspiracy to commit genocide**

An indictment charging conspiracy to commit genocide must include the following material facts: (1) an agreement between individuals aimed at the commission of genocide and (2) the fact that the individuals taking part in the agreement possessed the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.[972]

The existence of an agreement among the conspirators is a material fact that much be pleaded in the indictment.[973]

Alleging that the accused participated in meetings with the other alleged co-conspirators was not sufficient to allege the existence of an agreement.[974]

Alleging that accused participated in meetings to organize and prepare the genocide was unacceptably vague where the precise nature of the role that the accused played in the meetings was not specified.[975]

Indictment was defective in failing to plead the conduct which constituted concerted action by the other alleged conspirators. However, this defect was cured by information provided in the Pre-Trial Brief.[976]

It is not necessary to specify the ending date of a conspiracy in the indictment.[977]

Identities of specific individuals who were members of the conspiracy need not be specified. The co-conspirators can be identified by group.[978]

**incitement to genocide**

Indictment for incitement to genocide was defective when it alleged address at meeting in Musaga commune in late April 1994 without further specifying the location and date of the address and he was convicted for a meeting that took place in late May or June.[979]

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[971] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 102
[972] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 255; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 469
[973] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 92
[974] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 93
[975] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 95
[976] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at paras. 260-61
[977] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 473
[978] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 474
[979] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 121

Indictment for incitement was defective when it failed to specify how the accused was alleged to have incited the population as well as the occurrence of public meetings and their location.[980]

Indictment for incitement to genocide was defective when it failed to allege as a material fact that the incitement was committed by virtue of a competition in 1994 in which pre-1994 articles were republished and broadcast. This was necessary for the accused to understand how he could be liable under the temporal jurisdiction of the Tribunal for the pre-1994 articles.[981]

Since the 1994 competition was an independent basis for liability of the accused for incitement to genocide within the temporal jurisdiction of the Tribunal, it must have been pleaded as a separate charge and therefore was a defect which could not be cured.[982]

**rape**

Allegations of rape which failed to specify how accused obtained knowledge that his subordinates were involved in rapes were defective and required reversal of convictions for rape.[983]

Indictment which alleged that rapes were perpetrated by soldiers from the Ngoma camp was defective when evidence showed that the rapes were perpetrated by soldiers from the ESO camp.[984]

Where indictment charged that rapes were committed by soldiers from Ngoma camp, the defect could not be cured by notice that the rapes were committed by soldiers from the ESO camp as such a difference amounted to a radical transformation of the prosecution's case.[985]

**plunder**

Nine-month range of systematic plunder was insufficiently specific. Indictment was defective in this regard.[986]

**other inhumane acts**

Indictment which charges "other inhumane acts" without a clear indication of what the inhumane acts are is impermissibly vague.[987]

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[980] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2281
[981] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 405
[982] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 406
[983] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 129
[984] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 163
[985] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 166
[986] *Prosecutor v Natelic & Martinovic*, No. IT-98-34-A, *Judgement* (3 May 2006) at para. 78

Indictment's allegation that para-commando battalion diverted refugees heading to sanctuary, by forcing them to walk from Sonatube junction to Nyanza where they were killed, could not be said to have provided notice to the accused that he was being charged with other inhumane acts by preventing refugees from seeking sanctuary. Conviction for this crime was reversed.[988]

Where count of indictment charging other inhumane acts was limited to certain paragraphs of the indictment, the accused could not be convicted of acts charged in other paragraphs.[989]

**forms of liability**

The prosecution has repeatedly been discouraged from simply restating the language of Article 6(1) of the Statute.[990]

Cumulative charging of several forms of responsibility in an indictment is allowed, provided that the prosecution discharges its obligation to state all material facts underpinning each charge.[991]

Where it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the prosecution is required to identify the particular acts or the particular course of conduct on the part of the accused which forms the basis for the charges in question.[992]

Paragraphs of an indictment that specifically charge the accused with respect to one mode of liability may be presumed to apply exclusively that that mode of liability.[993]

***mens rea***

If the indictment pleads the state of mind of the accused, then the facts by which that state of mind is established are matters of evidence and need not be pleaded.[994]

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[987] *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Preliminary Motions* (29 August 2005) at para. 12-14

[988] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 81

[989] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 153

[990] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 172; *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2010) at para. 30

[991] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 149

[992] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 172; *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 53; *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at paras. 27,100; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1199

[993] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 108

[994] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 469, 508, 2752

An indictment may also plead the evidentiary facts from which a state of mind is to be inferred.[995]

**planning**

When the accused is charged with planning, the Prosecution is required to identify the "particular acts" or the "particular course of conduct" on the part of the accused that forms the basis for the charge in question.[996]

Telephone conversation between accused and Prefet that was the basis of the accused's conviction for planning the murders at Nyange church should have been pleaded and indictment was defective as a result.[997]

Indictment which alleged planning of genocide through the distribution of weapons was defective when the period alleged was more than one year and the location was only described as "Gisenyi prefecture".[998]

**instigating**

When the Prosecution pleads a case of "instigation", it must precisely describe the instigating acts and the instigated persons or groups of persons,[999]

Indictment was defective when it failed to plead threat against a specified Tutsi member when charging instigation. However, accused did not show that his defence was materially impaired.[1000]

**ordering**

Indictment for "ordering" and "aiding and abetting" was vague and defective where it failed to identify the conduct for which the accused was liable—that he ordered the deployment of soldiers to the Prime Minister's residence, remained in contact with his subordinates at this location, sent supplies, and issued operational instructions.[1001]

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[995] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 469
[996] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 76
[997] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 76
[998] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 377
[999] *Uwinkindi v Prosecutor*, No. ICTR-01-75-AR72(C), *Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment* (16 November 2011) at para. 36
[1000] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at paras. 34-35
[1001] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at paras. 174-75, 185

Where the accused is alleged to have given orders for the killing of specific individuals, the obligation to provide precision as to the circumstances thereof is at its highest.[1002]

Prosecution ordered to specify where and when the order, instigation, or authorization took place, by what means it was transmitted, and to whom it was transmitted.[1003]

Prosecution's failure to specify the particular killings that the accused was charged with ordering rendered the indictment defective.[1004]

**committing**

Indictment that alleged that accused committed the offense by ordering, instigating, and aiding and abetting the crimes could not be convicted of the mode of liability of "commission" and his conviction under this mode of liability was reversed.[1005]

**aiding and abetting**

Trial Chamber erred in convicting the accused for aiding and abetting Prime Minister's killing because he lacked proper notice of this form of responsibility.[1006]

The Indictment was defective for failing to specify how the accused aided and abetted the killing.[1007]

Where the indictment, pre-trial brief, and pleadings in relation to severance gave clear and consistent notice that the accused would be tried only for his direct involvement in crimes, the prosecutor's submissions in its closing brief that the accused should be liable for failure to act in his capacity as a Minister of the Interim Government was insufficient notice upon which to base a conviction.[1008]

Where the prosecution gave clear and consistent information that its case was framed on the direct participation in criminal activities it would therefore be contrary to the fundamental fair trial rights of the accused, including his right to defend himself and

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[1002] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 175, fn. 448; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 132

[1003] *Prosecutor v Nizeyimana*, No. 2001-55C-PT, *Decision on Nizeyimana's Preliminary Motion on Defects in the Amended Indictment* (9 June 2010) at para. 9

[1004] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1200

[1005] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2010) at para. 37

[1006] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 190

[1007] *Prosecutor v. Ntawukuliilyayo*, No. ICTR-05-82-PT, *Decision on Defence Preliminary Motion Alleging Defects in the Indictment* (28 April 2009) at para. 40

[1008] *Prosecutor v Rwamakuba*, No. IT-98-44C-T, *Judgement* (20 September 2006) at para. 28

to know the charges against him, if he was to be held criminally responsible for aiding and abetting by omission.[1009]

Indictment for "ordering" and "aiding and abetting" was vague and defective where it failed to identify the conduct for which the accused was liable—that he ordered the deployment of soldiers to the Prime Minister's residence, remained in contact with his subordinates at this location, sent supplies, and issued operational instructions.[1010]

Indictment was defective in failing to plead material facts that the accused sent an armoured unit to the Prime Minister's residence and provided supplies to the Reconnaissance Battalion soldiers deployed there as basis for charge of aiding and abetting killing of Prime Minister.[1011]

Failure to plead accused's conduct underpinning responsibility for ordering and aiding abetting killing of Belgian peacekeepers—instructing Reconnaissance Battalion subordinates to put down resistance by the captured peacekeepers and approving use of a rifle from his office—made the indictment defective.[1012]

**joint criminal enterprise**

In cases where the Prosecution alleges liability pursuant to a JCE, the following material facts must be pleaded: "the nature and purpose of the enterprise, the period over which the enterprise is said to have existed, the identity of the participants in the enterprise, and the nature of the accused's participation in the enterprise."[1013]

The three categories of JCE have the same actus reus. The indictment will only be defective if it fails to plead the mens rea of the applicable JCE category.[1014]

Indictment must plead the *mens rea* element of joint criminal enterprise.[1015]

The indictment should clearly indicate which form of joint criminal enterprise is alleged.[1016]

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[1009] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 823

[1010] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at paras. 174-75, 185

[1011] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 193

[1012] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 227

[1013] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2014) at para. 116; *Prosecutor v Munyakazi*, No. 97-36A-A, *Judgement* (28 September 2011) at para. 161; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 24

[1014] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 77; *Uwinkindi v Prosecutor*, No. ICTR-01-75-AR72(C), *Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment* (16 November 2011) at para. 11

[1015] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment* (6 May 2004) at para. 12

Prosecution ordered to further identify the "others" it alleged were members of the joint criminal enterprise, if not by name, then by categories of participants.[1017]

The identity of those known to be members of the joint criminal enterprise must be specified in the indictment.[1018]

While it may not be possible to name all members of the joint criminal enterprise due to the scale of the events, the prosecution is required to indicate whether the names of additional members are known or unknown.[1019]

There is no requirement to specifically identify each of the persons involved in a joint criminal enterprise.[1020]

Failure to specifically plead joint criminal enterprise, including the supporting material facts and category, constitutes a defect in the indictment.[1021]

Joint criminal enterprise liability was not adequately pleaded simply because the accused was charged with collective crimes.[1022]

Use of the term "committed" in the indictment was insufficient to plead joint criminal enterprise liability.[1023]

Participants in joint criminal enterprise should not include the phrase "other unknown persons".[1024] However, the members of the joint criminal enterprise can include categories of participants where those persons cannot be individually identified.[1025]

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[1016] *Prosecutor v Munyakazi*, No. 97-36A-A, *Judgement* (28 September 2011) at para. 161; *Prosecutor v Simic*, No. IT-95-9-A, *Judgement* (28 Nov 2006) at para. 22; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 24

[1017] *Prosecutor v Ndahimana*, No.ICTR-2001-68-PT, *Decision on Ndahimana's Motion on Alleged Defects in the Indictment* (30 April 2010) at para. 15

[1018] *Prosecutor v Bagaragaza*, No. ICTR-05-86-I, *Decision on the Prosecutor's Application for Leave to Amend the Indictment* (30 November 2006) at para. 12

[1019] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 20

[1020] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 150

[1021] *Prosecutor v Munyakazi*, No. 97-36A-A, *Judgement* (28 September 2011) at para. 161

[1022] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 166

[1023] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 167

[1024] *Prosecutor v. Ntawukuliilyayo*, No. ICTR-05-82-PT, *Decision on Defence Preliminary Motion Alleging Defects in the Indictment* (28 April 2009) at para. 25

[1025] *Prosecutor v Ndahimana*, No.ICTR-2001-68-PT, *Decision on Ndahimana's Motion on Alleged Defects in the Indictment* (30 April 2010) at para. 6

The expressions "other conseillers", "communal policemen", and "other Hutu civilians" did not sufficiently identify JCE members by group or category.[1026]

Indictment that charged accused with acting in concert together and with a common purpose failed to sufficiently put the accused on notice that they were being charged with the joint criminal enterprise form of liability.[1027]

**superior responsibility—in general**

An Indictment alleging superior responsibility should plead the following: (i) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (ii) the criminal conduct of those others for whom he is alleged to be responsible; (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (iv) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[1028]

The indictment should clearly specify and distinguish the acts giving rise to individual responsibility and the acts giving rise to superior responsibility.[1029]

The indictment should distinguish for each count the acts giving rise to individual responsibility and the acts and relationships giving rise to superior responsibility and leave no doubt which facts are related to which type of responsibility.[1030]

For a charge of superior responsibility pursuant to Article 6(3), the indictment must plead, inter alia, the criminal conduct of those for whom the accused is alleged to be responsible, the conduct by which the accused may be found to have known or had reason to know that crimes were about to be committed or had been committed by his subordinates as well as the conduct by which the accused may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.[1031]

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[1026] *Uwinkindi v Prosecutor*, No. ICTR-01-75-AR72(C), *Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment* (16 November 2011) at para. 17

[1027] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2014) at para. 118; *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at paras. 171-72

[1028] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 119; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2511

[1029] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-I, *Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment* (15 October 2003) at para. 26; *Prosecutor v Kanyabashi*, No. ICTR-96-15-I, *Decision on Defence Preliminary Motion for Defects in the Form of the Indictment* (31 May 2000) at para. 5.11

[1030] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-I, *Decision on the Defence Preliminary Motion Objecting to the Form of the Indictment* (15 July 2004) at para. 34-37

[1031] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 201; *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 100; *Bagosora &*

The law on indictments requires more than a mere mention or restatement of Article 7(3) in an indictment.[1032]

Indictment alleging murder at a convent was defective where it failed to correctly allege the identity of the alleged subordinates of the accused (soldiers from ESO Camp), failed to plead their role in kidnapping and the refugees, and failed to specify the conduct by which the accused allegedly knew of their crimes and failed to prevent and punish them. Conviction reversed.[1033]

**superior responsibility—authority over subordinates**

The description of an accused as the commander of a specified military unit is a sufficient basis for asserting the material fact that he was in a position of superior authority over the unit for the purposes of Article 6(3).[1034]

Accused's participation in a meeting of senior military officials on the night before the killings did not amount to a material fact underpinning his superior responsibility, but merely constituted evidence of his superior-subordinate relationship with the perpetrators. Therefore, failure to plead this fact did not make the indictment defective.[1035]

Paragraph of indictment which alleged that militia committed crimes on the orders and directives of the accused was insufficient to provide adequate notice that the militiamen were subordinates of the accused pursuant to Article 6(3).[1036]

Defect in alleging that militia were subordinates of accused pursuant to Article 6(3) was not cured by witness statements alleging that accused "supervised" killings by militia. Conviction for superior responsibility for crimes committed by militia reversed.[1037]

**superior responsibility—acts of subordinates**

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*Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 191; *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 54; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 19; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 323; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at paras. 26,152

[1032] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 158

[1033] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 46

[1034] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 203; *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 107

[1035] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 204

[1036] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 109, fn. 242

[1037] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at paras. 110,128

The indictment must plead the criminal conduct of the subordinates for whom the accused is alleged to be responsible.[1038]

Where indictment charged only that soldiers committed the crimes at a specified location, the accused could not be convicted based upon a theory that the soldiers gave their tacit approval to crimes committed at that location by others.[1039]

At a minimum, this includes pleading the location and approximate date of the alleged criminal acts and how they were committed when this information is available to the prosecution.[1040]

Where paragraph of indictment charging crimes by militia referred only to liability under Article 6(1), it was not sufficient to put the accused on notice that he was liable for the acts of the militia pursuant to Article 6(3).[1041]

**superior responsibility—identity of subordinates**

The indictment must plead that the accused is the superior of sufficiently identified subordinates over whom he had effective control in the sense of the material ability to prevent and punish conduct.[1042]

A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes to incur liability under Article 6(3).[1043]

Where the prosecution is in possession of the names of subordinates, it should list them in the indictment.[1044]

Identity of subordinates must be specified in indictment. The specificity will vary depending on the number of subordinates under the control of the accused.[1045] Given the high rank of the accused, specifying only the units over which he had control was sufficient.[1046]

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[1038] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 38, fn.88
[1039] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 363
[1040] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 38, fn. 88
[1041] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 109
[1042] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2537
[1043] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 251; *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 64; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 5886
[1044] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 24
[1045] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Particulars of the Amended Indictment* (27 September 2005) at para. 12
[1046] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Particulars of the Amended Indictment* (27 September 2005) at para. 13

Indictment failed to put accused MRND leaders on notice that Bagosora was alleged to be their subordinate and that they were being charged with superior responsibility for his crimes.[1047]

Physical perpetrators can be identified by category in relation to a particular crime site.[1048]

Identification of subordinates in the indictment as members of the Reconnaissance Battalion was sufficient.[1049]

Identification of subordinates in the indictment as soldiers from a particular camp was sufficient.[1050]

Identity of the accused's subordinates as "soldiers", "civilian militia", or "armed militia" is insufficient to meet the specificity requirement.[1051]

Failure to allege the identity of the accused's subordinates rendered the indictment defective and failed to provide notice to the accused that her subordinates included Interahamwe.[1052] However, this defect was cured.[1053]

Where the indictment alleged that the perpetrators were soldiers from the Ngoma Camp, failure to identify soldiers from ESO camp as being among the perpetrators rendered the indictment defective as to the identity of the subordinates for whom the accused could be responsible.[1054]

Where the indictment alleged that the crimes had been committed by gendarmes assigned to guard the house of the accused, the Chamber would not consider evidence of the participation of other gendarmes in the crimes, as the accused had no notice of that.[1055]

**superior responsibility--knowledge**

The indictment was defective by simply repeating the language of Article 6(3) and failing to mention any conduct on the part of the accused from which to deduce that

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[1047] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 376
[1048] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 64
[1049] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 251
[1050] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 55
[1051] *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (25 February 2010) at para. 17; *Prosecutor v Nizeyimana*, No. 2001-55C-PT, *Decision on Nizeyimana's Preliminary Motion on Defects in the Amended Indictment* (9 June 2010) at paras. 27-28
[1052] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at paras. 531-32
[1053] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 538
[1054] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 40
[1055] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 1224

he was aware of the Reconnaissance Battalion's involvement in the crime and thus had the requisite knowledge for superior responsibility.[1056]

General language that the accused was responsible as a superior is insufficient. The indictment must plead the conduct of the accused by which he may be found to have known or had reason to know that crimes were about to be committed or had been committed by his subordinates.[1057]

The reason why the Belgian peacekeepers were killed, and the accused's knowledge of those reasons essentially concerns motive and not mens rea and need not be pleaded in the indictment.[1058]

Failure to specify the basis upon which the accused had reason to know of his subordinate's criminal conduct in ordering the Reconnaissance Battalion to put down resistance by the Belgian peacekeepers and approving use of a rifle, made the indictment defective.[1059]

Failure to specify the basis upon which the accused had knowledge or reason to know of crimes committed by subordinates rendered the indictment defective.[1060]

Defect in alleging knowledge and failure to punish under Article 6(3) was not cured by general language in Pre-Trial Brief and opening statement that all the accused "by their speech, instructions, and overt acts" failed to punish crimes of their subordinates.[1061]

Failure of indictment to allege that accused was alleged to have known of rapes because he actively encouraged them was not cured by pre-trial brief, which did not mention encouragement as a means by which the accused had the requisite knowledge.[1062]

Allegations that accused directly participated in the crimes was sufficient to allege his knowledge of those crimes as a superior.[1063]

**superior responsibility—failure to take measures**

General language that the accused was responsible as a superior is insufficient. The indictment must plead the conduct of the accused by which he may be found to have

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[1056] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 206
[1057] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 44
[1058] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 219
[1059] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 237
[1060] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 119; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2518
[1061] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 239
[1062] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 124
[1063] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 122

failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[1064]

Failure to plead that the accused did not take reasonable and necessary measures to prevent or punish rendered the indictment defective.[1065]

In many cases, it will be sufficient to plead that the accused did not take any necessary and reasonable measures to prevent or punish the commission of criminal acts.[1066]

Allegation that crimes were carried out on the accused's orders and directives was sufficient to allege a failure to take the necessary measures to prevent and punish crimes.[1067]

Allegations that accused directly participated in the crimes was sufficient to allege a failure to take the necessary measures to prevent and punish those crimes.[1068]

General statement in the pre-trial brief that it was necessary to prove that an accused failed to take necessary and reasonable measures to prevent or punish crimes by subordinates did not cure defect in indictment which failed to charge this element.[1069]

**bill of particulars**

The indictment is the primary accusatory instrument and missing details must be supplied by amending the indictment, not by bill of particulars.[1070]

Allegation that accused was responsible for killings at roadblocks, which was included in a motion to amend indictment which was denied, could not be added by its inclusion in a bill of particulars.[1071]

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[1064] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 44
[1065] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 366
[1066] *Ndindiliyimana et al v Prosecutor*, No. ICTR-00-56-A, *Judgement* (11 February 2014) at para. 211; *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 123; *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Judgement* (1 April 2011) at para. 54; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 323; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1268
[1067] *Ntabakuze v Prosecutor*, No. IT-98-41/1-A, *Judgement* (8 May 2012) at para. 125; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 207
[1068] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 122
[1069] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 367
[1070] *Prosecutor v Bikindi*, No. ICTR-2001-72-PT, *Decision on the Amended Indictment and the Taking of a Plea Based on the Said Indictment* (11 May 2005) at para. 7
[1071] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 111

**objections**

Objections based on lack of notice should be specific and timely. The Appeals Chamber agrees with the Prosecution that blanket objections that "the entire indictment is defective" are insufficiently specific. As to timeliness, the objection should be raised at the pre-trial stage (for instance in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced. However, an objection raised later at trial will not automatically lead to a shift in the burden of proof: the Trial Chamber must consider relevant factors, such as whether the Defence provided a reasonable explanation for its failure to raise the objection earlier in the trial.[1072]

Objection to evidence as falling outside the indictment, when made in the Motion for Judgement of Acquittal, was not timely.[1073]

Objections to evidence for lack of notice made for the first time in the closing brief were untimely. The Trial Chamber, in its discretion, determined that the burden of proof therefore shifted to the defence to demonstrate that the lack of notice prejudiced the accused in the preparation of his defence.[1074]

Failure of defence to file a motion challenging alleged defects in indictment prior to closing brief indicates that defence was not prejudiced by any such defects.[1075]

**remedies**

When lack of notice is raised during trial, the Trial Chamber must consider whether fairness requires amendment of the indictment, an adjournment, or exclusion of evidence.[1076]

Defects in an indictment may arise during the trial because the evidence turns out differently than expected. In such circumstances, the Trial Chamber must consider whether a fair trial requires an amendment of the indictment, an adjournment, or the exclusion of evidence outside of the indictment.[1077]

When the Defence is of the view that the Prosecution introduces evidence of material facts of which it had no notice, it can make an objection to the admission of such evidence for lack of notice. If the Trial Chamber agrees with the Defence that insufficient notice has been given, it should exclude the challenged evidence in relation to the

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[1072] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 46
[1073] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision Reconsidering Exclusion of Evidence Following Appeals Chamber Decision* (17 April 2007) at paras. 20,24
[1074] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 19
[1075] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Judgement and Sentence* (31 May 2012) at para. 36
[1076] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 18; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 29
[1077] *Prosecutor v Ntagerura et* al, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 27

material facts not pleaded in the indictment, require the Prosecution to amend the indictment, grant an adjournment to allow the Defence adequate time to respond to the additional allegations, or take other measures to preserve the rights of the accused to a fair trial.[1078]

Where indictment alleged that the accused was present during an attack on 15 April and the evidence proved that an attack was carried out on 20 April by subordinates of the accused in his absence, the fact that this was a different criminal event meant that the accused did not have adequate notice.[1079]

Faulty allegations in the indictment of distribution of weapons which were vague as to time and place were cured by showing that the accused was not prejudiced in presenting his defence to these allegations.[1080]

**translation**

The right of the accused to the free assistance of an interpreter requires that the following documents be translated by the Registry into a language the accused understands: (1) disclosure between the parties; (2) supporting material for the indictment; (3) material used as evidence at trial; (4) decisions and orders.[1081]

The right of the accused to material in a language he understands is limited to the indictment, the supporting material, and decisions of the Trial Chamber concerning the indictment.[1082]

The following documents must be translated into both working languages of the Tribunal: (1) exhibits to be used at trial; (2) motions and briefs; (3) decisions and orders.[1083]

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[1078] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence* (18 September 2006) at para. 18

[1079] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 22

[1080] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 381

[1081] *Prosecutor v Muhimana*, No. ICTR-95-1B-I, *Decision on the Defence Motion for Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel* (6 November 2001); *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on Defence Motion for Translation Into French of Prosecution and Procedural Documents in the Rukundo Case* (5 March 2004)

[1082] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Sur la Requete d'Edouard Karemera Aux Fins de Lui Garantir Un Process Équitable* (28 October 2005) at para. 7

[1083] *Prosecutor v Muhimana*, No. ICTR-95-1B-I, *Decision on the Defence Motion for Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel* (6 November 2001); *Prosecutor v Bisengimana*, No. ICTR-2000-60-I, *Decision on Motion by Paul Bisengimana to be Served with the French Translations of all Procedural Documents Within Reasonable Time* (5 November 2004)

It is imperative, for the proper administration of justice and for equality of treatment of the parties, that their written submissions, and particularly their briefs, are translated into the Tribunal's two working languages.[1084]

Prosecution would not be required to file bilingual motions or responses to motions.[1085]

The time for responses shall run from the date of translation of the document by the Registry.[1086]

Translation of a prosecution motion into the working language of counsel and the accused constituted good cause for an extension of time for a response to the motion until after the official translation was received.[1087]

Since counsel knows some English, there is no reason to require a French translation of a motion before a response is due.[1088]

It was not necessary to translate the annexes to the Pre-Trial brief where defence counsel was able to work in English and could explain the contents to his client.[1089]

Translation of pre-trial brief and witness list ordered, but pre-trial preparation time would not be extended.[1090]

Although not specified in the statute, given the importance of the venue of the trial, the Trial Chamber required that the prosecution's motion to transfer the case of the accused to Rwanda be translated into Kinyarwandan.[1091]

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[1084] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Order (For Translation of Appellant's Briefs)* (29 March 2001).
[1085] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for an Order to File Notice of Alibi* (22 March 2007) at para. 11
[1086] *Prosecutor v Muhimana*, No. ICTR-95-1B-I, *Decision on the Defence Motion for Translation of Prosecution and Procedural Documents into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel* (6 November 2001); *Prosecutor v Bisengimana*, No. 2002-60-I, *Decision on Bisengimana's Motion for Complete and Accurate Translation into Working Languages of the Tribunal and Respect for the Rights of the Accused* (7 March 2003)
[1087] *Prosecutor v Seromba*, No. ICTR-01-66-A, *Décision on Requete a la Defence Aux Fins de Prorogation du délais de Dépôt de la Réponse A la Requete de Procureur Intitulée Prosecutor's Urgent Motion Objecting to the Filing of Athanase Seromba's Appellant Brief* (8 May 2007)
[1088] *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on Defence Motion for Translation Into French of Prosecution and Procedural Documents in the Rukundo Case* (5 March 2004)
[1089] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-PT, *Décision Relative à la Requete en Extrême Urgence de la Defence aux fin de Traduction des Éléments Essentiels du Mémoire Préalable au Procès du Procureur* (30 August 2005)
[1090] *Prosecutor v Nizeyimana*, No. ICTR-2001-55C-PT, *Decision on Ildephonse Nizeyimana's Motion Concerning Translation of the Amended Indictment, Pre-Trial Brief, and 2 August 2010 List of Witnesses* (31 August 2010)
[1091] *Prosecutor v Uwinkindi*, No. ICTR-2001-75-I, *Decision on Defence Motion for Setting a Date for the Filing a Response to the Prosecution's (Rule 11 bis) Request for the Referral of the Case of Jean Uwinkindi to Rwanda and Request for Translation* (8 December 2010) at para. 20

A Trial Chamber will only intervene in the translation of documents if the party and the Registrar have been unable to settle a dispute, or where the unavailability of translation impacts directly upon the trial, such as where it is necessary to preserve the rights of the accused.[1092]

**Article 21—protection of victims and witnesses**

**The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.**

**Article 22—judgement**

**1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.**
**2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.**

Resignation of judge after issuance of oral judgement but before issuance of written judgement did not invalidate the judgement, since the judgement was rendered on the date of its oral pronouncement, and the written judgement issued upon the completion of the editorial process.[1093]

**Article 23—penalties**

**1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.**
**2. In imposing the sentences, the Trial Chambers should consider such factors as the gravity of the offence and the individual circumstances of the convicted person.**
**3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.**

**Article 24—appellate proceedings**

**1. The Appeals Chamber shall hear appeals from persons convicted by the Trial**

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[1092] *Prosecutor v Nshogoza* , No. ICTR-07-91-T, *Decision on the Defence Motion for Urgent Translation of Official Filings into French* (12 February 2009) at para. 4
[1093] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 25

**Chambers or from the Prosecutor on the following grounds:**
**(a) An error on a question of law invalidating the decision; or**
**(b) An error of fact which has occasioned a miscarriage of justice.**
**2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.**

**acquittal**

Accused acquitted of ordering murder could be convicted of aiding and abetting by Appeals Chamber where Trial Chamber erroneously failed to consider this form of liability but made factual findings which would support such a conviction.[1094]

**binding effect**

The Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions.[1095]

Inherent in the notion of discretion is that different Trial Chambers are permitted to reach different decisions within that sphere of discretion, even if they are presented with the same question.[1096]

A Trial Chamber may only consider facts found in another proceeding before the Tribunal according to the procedure for taking judicial notice in Rule 94. Where the accused failed to request the taking of judicial notice of facts relating to the acquittal of his alleged subordinate for the same crimes, there was no error in its failure to consider the acquittal.[1097]

Factual findings in another case are neither binding nor authoritative in a different trial, even if based on the same events.[1098]

One Trial Chamber is not bound to follow the decisions of other Trial Chambers, even if comprised of the same judges.[1099]

There is no doctrine of precedence in international law which requires a Trial Chamber to follow practices and decisions of another international court.[1100]

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[1094] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 124
[1095] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 202
[1096] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 32; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.8, *Decision on Interlocutory Appeal Regarding Witness Proofing* (11 May 2007) at para. 7
[1097] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 208
[1098] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 209
[1099] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 188
[1100] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.8, *Decision on Interlocutory Appeal Regarding Witness Proofing* (11 May 2007) at para. 7

The jurisprudence of the EHCR and HRC may be used as persuasive, but not binding authority, only when the Tribunal's statutes, rules, and jurisprudence do not address the issue.[1101]

**collateral estoppel and res judicata**

The principle of *res judicata*, or issue estoppel, may apply to interlocutory decisions such as to preclude a party from raising an issue which has previously been decided in the case. However, where a motion is based upon new circumstances which have arisen since the original decision, *res judicata* will not apply.[1102]

The prohibition against double jeopardy is an accepted principle of international law.[1103]

A person who was not a party to the previous litigation cannot invoke collateral estoppel.[1104]

Trial Chamber declined to apply collateral estoppel where another accused was acquitted of conspiracy with the accused, where the conspiracies alleged in each case were different.[1105]

**facts and credibility**

When faced with competing versions of the same event, it is the prerogative of the Trial Chamber to decide which version is more credible. The Appeals Chamber will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned findings.[1106]

The Trial Chamber is in a unique position to evaluate the demeanour of the testifying witness, to question the witnesses directly about the gaps or inconsistencies in their testimonies, and to evaluate their credibility based on the witnesses' reaction to the difficult questions put to them by the parties or by the judges.[1107]

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[1101] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (29 May 2007) at para. 20
[1102] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial Without Undue Delay* (29 May 2007) at paras. 6,10
[1103] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel* (16 July 2008) at para. 4
[1104] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel* (16 July 2008) at para. 5
[1105] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Strike Allegation of Conspiracy with Juvenal Kajelijeli on the Basis of Collateral Estoppel* (16 July 2008) at para. 7
[1106] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3210
[1107] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 204

A Trial Chamber is not obliged to identify and discuss in its Judgement every piece of evidence it has considered.[1108]

Deference to the Trial Chamber on matters of fact and witness credibility is based essentially on the fact that the Trial Chamber has the advantage of observing witnesses in person and so are better placed to choose between divergent accounts of the same event.[1109]

**interlocutory appeals**

Although the requirement that the error complained of be such as to have invalidated the Trial Chamber's decision or occasioned a miscarriage of justice does not apply to interlocutory appeals, the Appeals Chamber will not pass on inconsequential errors, even where certification has been granted.[1110]

A Trial Chamber's decision concerning judicial notice of facts of common knowledge is subject to *de novo* review on appeal.[1111]

**jurisdiction**

The Appeals Chamber has jurisdiction to determine issues which, though they have no bearing on the verdict reached by the Trial Chamber, are of general significance to the Tribunal's jurisprudence.[1112]

Where the issue has already been decided by the Appeals Chamber, the issue is not one of general significance.[1113]

An applicant for closed session testimony whose conviction is final has a right to appeal a Trial Chamber decision denying him access to closed session testimony in another case pursuant to Rule 75(G).[1114]

Appeals Chamber has no power to review an issue simply because the Trial Chamber delayed its decision. However, where the Trial Chamber had not decided a motion in six months, the Appeals Chamber urged them to decide it right away.[1115]

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[1108] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 32 *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 252

[1109] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 21

[1110] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 21

[1111] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 23

[1112] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 19

[1113] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007) at para 10

[1114] *Prosecutor v Niyitegeka*, No. ICTR-96-14-R75, *Decision on Motion for Clarification* (20 June 2008) at para.14; *Nahimana v Prosecutor*, No. ICTR-99-52B-R, *Decision on Ferdinand Nahimana's Motion for Reconsideration of Appeals Judgement* (30 June 2010)

**mootness**

Appeal of decision on motion to amend indictment moot where indictment had subsequently been further amended.[1116]

**reconsideration**

The Appeals Chamber does not have jurisdiction to reconsider its final judgement.[1117]

**remand**

The Appeals Chamber retains jurisdiction over a matter which it remanded to a Trial Chamber where the question whether the Trial Chamber complied with its instructions is at issue. However, it does not retain jurisdiction to review other aspects of the decision on remand.[1118]

**retrial**

Where Appeals Chamber reversed conviction because Trial Chamber had not given sufficient reasons for its decision, the prosecution would not be precluded from calling additional witnesses and scope of retrial would not be limited to hearing same witnesses who testified at trial.[1119]

**review of administrative decisions**

The Appeals Chamber has the statutory duty to ensure the fairness of the proceedings on appeal and, thus, has jurisdiction to review decisions of the Tribunal's Registrar and President. However, that the exercise of such jurisdiction should be closely related to the fairness of proceedings on appeal and should not be used as a substitute for a general power of review which has not been expressly provided by the Rules.[1120]

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[1115] *Rutaganda v Prosecutor*, No. ICTR-96-3-R, *Decision on Georges Rutaganda's Appeal Concerning Access to Closed Session Testimony and Sealed Exhibits* (11 November 2008)
[1116] *Nizeyimana v Prosecutor*, No. ICTR-00-55-AR73, *Decision on Nizeyimana's Interlocutory Appeal from Decision on Nizeyimana's Motion to Order the Prosecutor to Conform With a Trial Chamber Decision…*(14 October 2000)
[1117] *Barayagwiza v Prosecutor*, No. ICTR-99-52A-R, *Decision on Jean Bosco Barayagwiza's Motion for Review and/or Reconsideration of the Appeal Judgement of 28 November 2007* (22 June 2009) at para. 20
[1118] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR82, *Decision on Matthieu Ngirumpatse's Further Motions for Extension of Time and Motions for Reconsideration and on the Appeal Filed on 25 September 2009* (29 September 2009) at para. 19
[1119] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to be Adduced in the Retrial* (24 March 2009)
[1120] *Nahimana v Prosecutor*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Motion to Set Aside President Mose's Decision and Request to Consummate his Marriage* (6 December 2005)

While the President has jurisdiction to review a fee dispute under the *Directive on Assignment of Defence Counsel*, the Appeals Chamber may also review the dispute as part of its inherent power to review administrative decisions where such issues are closely related to issues involving the fairness of proceedings before it.[1121]

There is an inherent right to appeal the decisions of the President and Trial Chamber relating to relocation of an acquitted person to give effect to the Appeals Chamber's direction in its judgement that the Registrar take steps to affect the acquittal.[1122]

A decision taken by the Tribunal's President within his exclusive discretion is not subject to appeal.[1123]

The Appeals Chamber has the statutory duty to ensure the fairness of proceedings on appeal and, to this effect, has jurisdiction to review decisions taken by the Tribunal's President, but only in cases which are pending before the Appeals Chamber.[1124]

The review of administrative decisions does not fall within the ambit of the Pre-Trial Judge's responsibilities but is a matter for the bench assigned to the case.[1125]

**right of audience**

Right of audience granted to *pro bono* legal consultant to make arguments at the oral hearing on the appeal.[1126]

**sentencing**

A Trial Chamber has considerable discretion when determining a sentence and the Appeals Chamber will not intervene unless there has been a discernible error in the exercise of the Trial Chamber's discretion.[1127]

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[1121] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-A, *Decision on Ntahobali's Request for Review of Registrar's Decisions* (21 February 2014) at para. 14
[1122] *In Re Andre Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008* (11 September 2008)
[1123] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007) at para. 9
[1124] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007) at para. 10
[1125] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-A, *Decision on Ntahobali's Request for Review of Registrar's Decisions* (21 February 2014) at para. 15
[1126] *Ndindiliyimana v Prosecutor*, No. ICTR-00-56-A, *Decision on Innocent Sagahutu's Request for Right of Audience for a Legal Consultant* (4 July 2012)
[1127] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 549

**standard of review**

Only errors which invalidate the decision or occasion a miscarriage of justice warrant the intervention of the Appeals Chamber.[1128]

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[1129]

The Appeals Chamber must give deference to the trial chamber that received the evidence at trial as it is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. If the finding of fact is erroneous, it will be quashed or revised only if the error occasioned a miscarriage of justice[1130]

Where the prosecution appeals an acquittal, it faces a more difficult task. It must show that when account is taken of the errors of the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[1131]

An appellant who challenges a Trial Chamber's exercise of a discretionary power "must show that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion."[1132]

**standing**

Only a party to a decision before the Appeals Chamber has standing to move to reconsider the decision.[1133]

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[1128] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 18

[1129] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 11; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 179

[1130] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 12,177; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 8; *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para.21-22; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 178; *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 14

[1131] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 24, 574

[1132] *Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.3, *Decision on Interlocutory Appeal Against Decision of 13 February 2004 Partially Granting Prosecutor's Motion for Leave to Amend the Indictment* (27 August 2004) at para. 26

[1133] *Ntabakuze v Prosecutor*, No, ICTR-98-44-AR73, *Decision on Motion for Reconsideration* (4 October 2006) at para. 15; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance Following the Decision of the Appeals Chamber*

**waiver**

It is settled jurisprudence that if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[1134]

The fact that an appellant did not raise an objection before the Trial Chamber means, in the absence of exceptional circumstances, that he waived his right to raise the issue as a valid ground of appeal.[1135]

In the absence of special circumstances, a party cannot raise arguments for the first time on appeal where it could reasonably have done so in the first instance. Prosecution notice of appeal dismissed where it had not objected to the underlying motion.[1136]

A party should not be permitted to refrain from making an objection to a matter which was apparent during the trial, and to raise it only in the event of an adverse finding against that party.[1137]

Where the defence failed to seek appropriate relief from the Trial Chamber for the prosecution's failure of disclosure, it could not raise such issues on appeal.[1138]

Where the defence did not raise the issue of delay between arrest and initial appearance at trial, it would not be considered on appeal.[1139]

In the case of objections based on lack of notice, the defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations to respond to the allegation not pleaded in the indictment.[1140]

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*Dated 16 June 2006 in Prosecutor v Karemera et al Case and Prosecutor's Motion to Object to the Late Filing of Jean-Bosco Barayagwiza's Reply* (8 December 2006) at para. 10

[1134] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 63

[1135] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 71

[1136] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Prosecutor's Notice of Appeal and Scheduling Order* (18 April 2007) at para. 6

[1137] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 52; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 199; *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 127; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 91

[1138] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 84

[1139] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 31

[1140] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 199

However, because of the Trial Chamber's unequivocal statement that it believed the challenges to the vagueness of the Indictment to have been properly presented, the Appeals Chamber found no waiver.[1141]

**Article 25—review proceedings**

**Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.**

**Article 26—enforcement of sentences**

**Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.**

Sentence of Georges Ruggiu ordered served in Italy.[1142]

**Article 27—pardon or commutation of sentences**

**If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.**

A request for early release may be considered even though the accused has not been transferred to a state to serve his sentence.[1143]

Request for early release denied where mitigating factors were already considered when determining the length of the sentence.[1144]

No injustice results from rejection of an early release application from a 6-year sentence on the grave crime of extermination.[1145]

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[1141] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 52
[1142] *Prosecutor v Ruggiu*, No. ICTR-97-32-A26, *Decision on the Enforcement of Sentence* (13 February 2008)
[1143] *Prosecutor v Rutaganira*, No. ICTR -95-IC-T, *Decision on Request for Early Release* (2 June 2006); *Prosecutor v Imanishimwe*, No. ICTR-99-46-S, *Decision on Samuel Imanishimwe's Application for Early Release* (30 August 2007)
[1144] *Prosecutor v Rutaganira*, No. ICTR -95-IC-T, *Decision on Request for Early Release* (2 June 2006)

Request for early release after serving 10 of 12-year sentence denied where gravity of crimes were greater than mitigating factors.[1146]

Release after serving ¾ of sentence granted to prisoner who had pled guilty and cooperated with the prosecution,[1147] and prisoner whose sentence was at high end of range of those convicted for incitement.[1148]

The President's decision on early release is not appealable.[1149]

**Article 28—cooperation and judicial assistance**

**1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.**
**2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:**
**(a) The identification and location of persons;**
**(b) The taking of testimony and the production of evidence;**
**(c) The service of documents;**
**(d) The arrest or detention of persons;**
**(e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.**

**acquitted persons**

Article 28's obligations pertain solely to the investigation and prosecution of persons accused of committing serious violations of international criminal law and does not extend to the relocation of acquitted persons.[1150]

While the Tribunal does not have the ability to direct any State to accept an acquitted person on its territory, it has a duty to ensure the welfare of acquitted persons,

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[1145] *Prosecutor v Rutaganira*, No. ICTR-95-1C-R73, *Decision on the Motion for Reconsideration of the Denial of Early Release* (13 February 2008) at para. 10
[1146] *Prosecutor v Imanishimwe*, No. ICTR-99-46-S, *Decision on Samuel Imanishimwe's Application for Early Release* (30 August 2007)
[1147] *Prosecutor v Bagaragaza*, No. ICTR-05-86-S, *Decision on the Early Release of Michel Bagaragaza* (24 October 2011); *Prosecutor v Rugambarara*, No. ICTR-00-59-S, *Decision on the Early Release Request of Juvenal Rugambarara* (8 February 2012)
[1148] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on Tharcisse Muvunyi's Application for Early Release* (6 March 2012)
[1149] *Prosecutor v Rutaganira*, No. ICTR -95-IC-A, *Decision on Appeal of a Decision of the President on Early Release* (24 August 2006)
[1150] *In Re Andre Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008* (18 November 2008) at para. 15

and to that extent, to inquire whether appellant's life or liberty would be at risk upon relocation to a given country.[1151]

President refused to appoint Trial Chamber to adjudicate motion by acquitted persons for Article 28 order, where the Appeals Chamber had held that Article 28 did not provide for the obligation of a State to accept acquitted persons on its territory.[1152]

**consent**

Consent of the witness whose statements are sought to be disclosed from the State in possession of the statements is not required.[1153]

**defence**

The obligation of States under Article 28 extends not only to efforts by the Prosecution to obtain inculpatory evidence, but also efforts by the Defence to obtain exculpatory information.[1154]

**disclosure to national authorities**

A request for disclosure of closed session testimonies to national authorities may be granted when the following conditions are met: (1) the request is in keeping with the Tribunal's objective of investigating and prosecuting persons responsible for the Rwandan events of 1994; (2) the witness has consented to the disclosure; and (3) there is no risk for the privacy and security of the witness.[1155]

**efforts to obtain assistance**

The defence must demonstrate the efforts that it has undertaken to obtain the requested documents when seeking an order for cooperation of a State.[1156]

Unanswered letter to Rwandan government requesting prior statements was sufficient to discharge obligation to make efforts to obtain the material prior to a request for cooperation being made to the Trial Chamber.[1157]

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[1151] *In Re Andre Ntagerura*, No. ICTR-99-46-A28, *Decision on Motion to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008* (18 November 2008) at para. 19
[1152] *In Re Andre Ntagerura et al*, No. ICTR-99-46, *Decision on the Motion Seeking an Order from a Trial Chamber regarding the Relocation of Acquitted Persons* (17 July 2012)
[1153] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Disclosure of Witness T Materials and Cooperation from Belgium* (30 June 2010) at para. 6
[1154] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania* (29 August 2006) at para. 2
[1155] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA* (22 March 2007) at para. 16
[1156] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on the Defence Request for the Cooperation of the Rwandan Government Pursuant to Article 28* (28 October 2004)

Denial by Belgian Judge to allow defence to interview potential witness being prosecuted in Belgium was sufficient to demonstrate efforts to obtain voluntary cooperation.[1158]

Unanswered request for documents transmitted by Note-Verbale, was sufficient effort to obtain voluntary compliance with defence request.[1159]

Where Belgian law prohibited cooperation with the defence absent a Trial Chamber order, no further informal efforts were needed.[1160]

Article 28 does not require that a party exhaust all possible mechanisms before seeking intervention by the Chamber.[1161]

Requests to the prosecution do not discharge the defence's obligation to make reasonable efforts to obtain the documents directly from the State before seeking the Chamber's assistance.[1162]

Trial Chamber declined to issue request to Rwandan government for prior statements of prosecution witness where defence counsel had become aware of the existence of additional statements when the witness arrived in Arusha to testify. The defence should first make its own efforts to obtain the records, and, if necessary, the witness could be recalled.[1163]

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[1157] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW* (25 July 2007) at para. 7
[1158] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium* (9 November 2005) at para. 11
[1159] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Government of Burundi* (30 October 2008) at para. 14
[1160] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute* (21 April 2006) at para. 4; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mr. Bicamumpaka's Request for Order for Cooperation of the Kingdom of Belgium* (12 September 2007); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Request for the Cooperation of the Kingdom of Belgium for the Appearance of Witnesses CBP3 and CBP4* (14 December 2007); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Urgent Second Motion of Defendant Bicamumpaka Regarding Cooperation of the Kingdom of Belgium* (27 February 2008) at para. 10
[1161] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Government of Burundi* (30 October 2008) at para. 14
[1162] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 7
[1163] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation of the Government of Rwanda* (27 Nov 2006) at paras.14-15

Request for cooperation to United States government was premature where defence had not attempted to obtain the material informally.[1164]

**enforcement**

The Trial Chamber possesses the power only to issue requests and binding orders. It does not possess the power to take enforcement measures against States.[1165]

Although parties had been unsuccessful in obtaining videotape from the Rwandan government in informal requests, Trial Chamber believed that formal request under Rule 28 would assist in expediting the inquiries.[1166]

There is no such thing as a non-binding order under Article 28. The intervention of the Trial Chamber under Article 28 would serve no purpose if its requests were not binding.[1167]

**exceptions**

A State is permitted to rely on exceptional circumstances, including security interests, to be relieved of its obligation to cooperate with the Tribunal.[1168]

**interviews**

The Trial Chamber is competent to direct a request for cooperation to a State to facilitate a meeting between a party and a person in that State.[1169]

Request to United States[1170] and Tanzania[1171] to facilitate defence interview of its Ambassador to Rwanda in 1994 granted.

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[1164] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence, or in the Alternative, Motion for Subpoena to the Government of the United States of America* (8 December 2004)
[1165] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana* (5 June 2003) at paras. 8-9.
[1166] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Request for Cooperation to Government of Rwanda: MRND Videotape* (14 December 2006) at para. 7
[1167] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Pursuant to Article 28* (6 November 2006) at para. 5
[1168] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motions Under Rule 66(C) of the Rules* (15 February 2006) at para. 11
[1169] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium* (9 November 2005) at para. 9
[1170] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of the United States of America for Cooperation* (10 July 2002)
[1171] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania* (29 August 2006)

Request to interview French military personnel present in Rwanda during the events granted where French government required an order from the Trial Chamber.[1172]

Request to interview Belgian UNAMIR officers granted when the Belgian government required an order from the Trial Chamber.[1173]

Defence request to interview Togo national granted where it established that he had relevant information and that it may wish to call him as a witness.[1174]

Request for cooperation order to interview three Belgian witnesses and obtain documentary evidence from the government of Belgium granted.[1175]

When the defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the Defence to meet with the witness and assess his testimony.[1176]

**material related to credibility of witnesses**

Request granted under Article 28 for cooperation of government prosecuting prosecution witness to provide copies of charging documents and statements of witness for defence.[1177]

It is settled jurisprudence that the judicial records of a witness are material for his/her cross examination and are therefore necessary for the opposing party. Order issued to Rwandan government to provide judicial and Gacaca records for prosecution witnesses.[1178]

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[1172] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Republic of France for Cooperation and Assistance Pursuant to Article 28 of the Statute* (22 October 2004)
[1173] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006)
[1174] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion Requesting an Order Directed at the Togolese Republic* (23 November 2010)
[1175] *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute* (16 September 2009)
[1176] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006) at para. 8
[1177] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision Relative a la Requete de Joseph Nzirorera aux Fins D'Obtenir la Cooperation du Gouvernment d'Un Certain Etat* (23 February 2005); *Prosecutor v Bagambiki et al*, No. ICTR-98-46-T, *Decision on Bagambiki and Ntagerura's Motion for Disclosure of Confessions of Detained Witnesses* (8 March 2002)
[1178] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion for the Cooperation of the Government of Rwanda in Relation With Prosecution Witnesses AVY and SGO* (17 January 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (14 February 2006) at para. 7

Judicial records of witnesses are also required to assist the Chamber in its assessment of witness credibility.[1179]

Request for cooperation granted for France and Canada to provide immigration records to prosecution to be used in cross examination of witnesses.[1180]

Prior statements of prosecution witnesses in national proceedings in Belgium and Canada would not be requested on appeal where the statements existed at the time of trial and no showing was made why they had not been obtained earlier.[1181]

Request for amount of benefits conferred upon prosecution witness by government providing witness protection denied where the amounts were not necessary to challenge the credibility of the witness.[1182]

It was not error for Trial Chamber to have denied request for prosecution witness' immigration file where witness claimed he had not mentioned accused in his interviews with immigration officials and witness was cross examined extensively about his contacts with immigration officials.[1183]

**method of compliance**

Providing the prosecutor with material requested in an Article 28 binding order by the defence was an acceptable way of complying with the Tribunal's Request for Assistance, even where prosecutor subsequently withheld portions of the material from the defence pursuant to Rule 66(C).[1184]

**national prosecutions**

Article 28 does not extend to ordering a State to refrain from prosecuting someone in its own judicial system.[1185]

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[1179] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (14 February 2006) at para. 7
[1180] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion Requesting a Cooperation Order Directed to France* (30 March 2011); *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Defence Motion for Variance of Witness Protective Measures and International Cooperation of the Government of Canada* (22 June 2011)
[1181] *Prosecutor v Hategekimana*, No. ICTR-00-55B-A, *Decision on Ildephonse Hategekimana's Motion for Cooperation and Judicial Assistance* (5 May 2011)
[1182] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for a Request for Governmental Cooperation* (19 April 2005)
[1183] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 222
[1184] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motions Under Rule 66(C) of the Rules* (15 February 2006) at para. 12
[1185] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Request for Order for Cooperation of the Republic of Rwanda and the United Republic of Tanzania* (28 July 2009) at para. 9

While the Tribunal does not lightly interfere in the affairs of a State, it has the competence to issue an order to a State when the action of that State threatens the fairness of the proceedings before the Tribunal.[1186]

State ordered not to prosecute defence counsel based upon words spoken or written during his representation of his client before the Tribunal.[1187]

**necessity**

In addition to a showing of relevance, a party must show that the requested documents are necessary to a fair determination of a relevant issue at the trial.[1188]

**prerequisites**

A request for assistance under Article 28 or for an order under Rule 54 must set forth the nature of the evidence sought; the relevance of that evidence to the trial; and the efforts that have been made to obtain the evidence. Requests for assistance under Article 28 should also identify the nature of the assistance requested with particularity.[1189]

**relevance**

**standards**

However, when a party, in a timely manner prior to the original examination of a witness, has made all reasonable efforts to obtain the witness' prior and/or records and subsequently, after the witness' testimony, makes a request for cooperation to obtain such

[1186] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 18

[1187] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 30

[1188] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of its Officials* (6 October 2006) at para. 6, fn. 10; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Pursuant to Article 28* (6 November 2006) at fn. 3

[1189] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to the Kingdom of the Netherlands for Cooperation and Assistance* (7 February 2005); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Ex Parte and Confidential Motion to Obtain the Cooperation of the Kingdom of Belgium* (9 November 2005) at para. 10; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute* (21 April 2006) at para. 2; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Bagosora Defence Request for Subpoena of Ambassador Mpungwe and Cooperation of the United Republic of Tanzania* (29 August 2006) at para. 2

material to ascertain whether the witness should be recalled, that party should only be required to meet the standards that apply before a witness testifies.[1190]

Although a party need not prove that a document will be admissible to make a request for its disclosure, it must at least make a showing that the documents are likely to be relevant to the case. Documents created or issued in the months preceding the start of 1994 probably describe policies that may still have been in effect in that year and are, therefore, likely to be relevant.[1191]

**relevant**

Disclosure of judicial records is not merely for the benefit of the preparation of the defence, but it is also required to assist the Trial Chambers in their assessments of witness credibility.[1192]

Where the documents sought from the State related to the testimony of a witness who has already testified, the moving party must demonstrate that the material sought bears on subjects on which the witness testified before the Chamber and that the statements may be inconsistent with this testimony.[1193]

Request for prior statements of prosecution witnesses in Rwanda met the relevance requirement for Article 28.[1194]

Request for Gacaca court documents pertaining to events which were the subject of the indictment granted. Rwandan government ordered to provide defence access to such records.[1195]

Request to Belgium to interview UNAMIR officers and a prisoner likely to have information contradictory to prosecution witness testimony granted.[1196]

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[1190] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of the Decision on his Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG and GK* (21 November 2007) at para. 7

[1191] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 9

[1192] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation to Government of Rwanda to Obtain Statements of Witnesses ADW and AJY* (1 November 2007) at para. 4

[1193] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK, and UB* (22 March 2007) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG, GK, and UB* (2 October 2007) at para. 10

[1194] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW* (25 July 2007) at para. 6

[1195] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Confidential Ex Parte Defence Motion for Judicial Cooperation of the Government of the Republic of Rwanda* (6 January 2011)

[1196] *Decision on Request to the Kingdom of Belgium for Assistance Pursuant to Article 28 of the Statute* (21 April 2006)

Request to Belgium for prior statements and documents of Ambassador Swinnen granted when shown to be material to the defence of alibi and intent.[1197]

Defence request to Belgium for immigration records of prosecution witness for possible impeachment granted.[1198]

Request to France to facilitate meeting between defence and former diplomats and to provide relevant documents granted where French authorities had failed to respond to correspondence from defence team and witnesses were material to the defence.[1199]

Request to Rwanda for videotape of MRND party rally referred to in indictment was relevant.[1200]

**irrelevant**

Request to government of France for report of Judge Bruguière denied where the identity of those responsible for the assassination of President Habyarimana was not relevant to the charges against the accused.[1201]

Request for information and testimony related to "Gersony report" denied where report concerned alleged RPF crimes after it obtained power in Rwanda and was therefore not relevant to crimes with which accused was charged.[1202]

**Rwandan government**

Government of Rwanda requested to cooperate with defence and allow them access to interview prisoners.[1203]

It was incumbent upon defence counsel to request a stay of proceedings until appropriate arrangements could be made to conduct investigations in Rwanda.[1204]

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[1197] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mr. Bicamumpaka's Supplementary Request for an Order for the Cooperation of the Kingdom of Belgium* (26 September 2007)
[1198] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Urgent Motion for an Order Directed at the Kingdom of Belgium Pursuant to Article 28 of the Statute* (4 December 2009)
[1199] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mr. Bicamumpaka's Request for an Order for the Cooperation of the Government of France* (26 September 2007)
[1200] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Request for Cooperation to Government of Rwanda: MRND Videotape* (14 December 2006) at para. 5
[1201] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision Relative a la Requete de Joseph Nzirorera aux Fins D'Obtenir la Cooperation du Gouvernment Francais* (23 February 2005); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière report and the Cooperation of France* (25 September 2006) at para. 27; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Cooperation of the Government of France* (6 October 2006) at para. 6
[1202] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Information from the UNHCR and a Meeting With One of its Officials* (6 October 2006) at para. 8
[1203] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-PT, *Request for the Cooperation of the Government of Rwanda* (6 May 2005)

It is improper for a State official to warn a prospective witness that he will be viewed as opposing the government in he testifies in ongoing criminal proceedings, particularly if the witness is detained and dependent on the State for his welfare.[1205]

Threats or intimidation of confirmed or prospective witnesses by state officials would, if proven, be a serious violation of the duty of cooperation. However, the Trial Chamber did not find on the balance of probabilities that the Rwandan authorities have intimidated Defence witnesses. The Chamber did note that such allegations are of grave concern, and it is important that the WVSS document the allegations, assist the parties in addressing the appropriate authorities, and, where feasible, investigate allegations of intimidation of actual or prospective witnesses. [1206]

The defence failed to establish on the balance of probabilities that interference with its witnesses by the Rwandan government occurred as to two witnesses but did demonstrate as to a third witness that there was interference. However, it failed to request a stay of proceedings and should have done so if the evidence was essential to a fair trial.[1207]

The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses crucial to the defence case refuse to testify due to State interference. In such cases, it is incumbent on the defence to (1) demonstrate that such interference has taken place; and (2) exhaust all available means to secure taking the witness' testimony.[1208]

**scope**

Article 28 does not impose obligations on non-member States of the United Nations and therefore the Tribunal cannot compel their cooperation.[1209]

Binding orders may be issued to United Nations organs, such as the Department of Peacekeeping Operations, as well as States. However, there should be no penalties for non-compliance.[1210]

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[1204] *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 19
[1205] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 50
[1206] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion Concerning Alleged Witness Intimidation* , (28 December 2004) at paras. 7,9
[1207] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 50; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 50-52
[1208] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 41
[1209] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion to Obtain Cooperation from the Vatican Pursuant to Article 28* (13 May 2004)
[1210] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the ex parte Defence Motion for Order to United Nations Department of Peace-keeping Operations for Production of Documents* (9 March 2004)

International organizations are subject to requests for cooperation under Article 28. Request issued for World Bank.[1211]

A request for cooperation from UNHCR has been granted where witnesses are under its protection.[1212]

There is no mechanism for issuing an order to a State to appear before the Tribunal and show cause why it has not complied with a request for cooperation.[1213]

The Tribunal does not have the power to order a State to allow a person to remain on its territory after he has been released from the Tribunal's custody.[1214]

The Chamber's powers under Article 28 may include any request or order, the purpose of which is to assist the Tribunal in its mandate.[1215]

**specificity**

Requests to inspect archives are inappropriate and over-broad, particularly absent any showing that inspections are necessary to obtain the documents.[1216]

A party cannot request hundreds of documents, particularly when it is evident that the identification, location, and scrutiny of such documents by the relevant national authorities would be overly taxing and not strictly justified by the exigencies of the trial.[1217]

Request for documents from United States, France, Germany, and Belgium concerning statements of the accused, distribution of weapons by the Interahamwe, and information on assassination of President Habyarimana denied as too broad.[1218]

Request for prior statements and judgement of listed prosecution witnesses adequately specified the materials requested but charging documents and information

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[1211] *Prosecutor v Ngirabatware*, No.ICTR-99-54-T, *Decision on Defence Motion Requesting an Order Directed at the World Bank Pursuant to Article 28* (27 April 2010) at para. 4
[1212] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion for Extension of Judicial Cooperation to Certain States Pursuant to Article 28 of the Statute of the Tribunal* (8 May 2002).
[1213] *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion to Order the Government of Rwanda to Show Cause* (4 September 2003)
[1214] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Request for Order for Cooperation of the Republic of Rwanda and the United Republic of Tanzania* (28 July 2009) at para. 14
[1215] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Motion Requesting Cooperation from the Government of Belgium Pursuant to Article 28 of the Statute* (7 June 2006) at para. 5
[1216] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 5
[1217] *Prosecutor v Nahimana et al,* No. ICTR-99-52-T, *Decision on the Motion to Stay Proceedings in the Trial of Ferdinand Nahimana* (5 June 2003) at para 11 and 12.
[1218] *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Request to the Governments of United States of America, Belgium, France, and Germany for Cooperation* (4 September 2003)

from persons who accuse the witness of crimes relating to the events of 1994 is not sufficiently precise to warrant a request to Rwandan authorities.[1219]

Request for disclosure of a collection of RPF archive material of documents seized from MRND party, and previously made available to the prosecution, was specific enough to be the subject of an order for cooperation.[1220]

Request for prior statements of prosecution witnesses from Rwandan government between 1995 to 2002 to specified court was sufficiently specific to meet the requirements for issuing a request for cooperation.[1221]

Request for prior statements of designated prosecution witnesses from Rwandan government was sufficiently specific to enable the records to be found even though no dates or dossier numbers for the records were specified.[1222]

**waiver**

Failure to request documents to impeach prosecution witness from Rwandan government until near the close of defence case was not justified by the fact that Rwandan government had ignored previous requests from defence.[1223]

**Article 29—status, privileges, and immunities**

**1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.**
**2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.**
**3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.**
**4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.**

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[1219] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Order for Production of Documents by the Government of Rwanda and for Consequential Orders* (14 February 2006) at para. 8
[1220] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Cooperation of Government of Rwanda: RPF Archives* (21 January 2008) at para. 4
[1221] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation of Government of Rwanda: Statements of Witness BDW* (25 July 2007) at para. 5
[1222] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Request for Cooperation of Government of Rwanda to Obtain Statements of Witnesses ADW and AJY* (1 November 2007) at para. 3
[1223] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of School Documents* (9 May 2007) at para. 8

Defence counsel must be accorded such treatment as is necessary to perform their functions. The proper functioning of the Tribunal requires that defence counsel be able to investigate and support arguments in support of their client's case without fear of repercussions against them for these actions. Without such assurance, defence counsel cannot reasonably be expected to adequately represent their clients.[1224]

Defence counsel are to be accorded the privileges and immunities due to experts performing missions for the United Nations.[1225]

Defence counsel benefit from immunity from personal arrest or detention while performing their duties assigned by the Tribunal and with respect to words spoken or written and acts done by them in the course of the performance of their duties as defence counsel before the Tribunal.[1226]

Although defence counsel was not on mission at the time of his arrest in Rwanda, he nevertheless benefits from immunity from legal process in respect of words spoken or written and acts done by him during his representation of his client before the Tribunal.[1227]

Defence counsel does not benefit from immunity from articles or speeches which refer to his case before the Tribunal. Those constitute private commentary on the case rather than words spoken or written during representation of one's client at the Tribunal.[1228]

Article reporting statements of defence counsel during closing argument may not be used as basis for prosecution of defence counsel as it constitutes words spoken during his representation of his client before the Tribunal.[1229]

Defence counsel and their investigators have immunity when present in Rwanda to conduct investigations in preparation of their defence case. This immunity extends to

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[1224] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 19

[1225] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 23

[1226] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 26

[1227] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 27

[1228] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 28

[1229] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (6 October 2010) at para. 30

immunity from arrest and legal process of every kind for words spoken or written or acts done by them during performance of their mission.[1230]

Defence teams enjoy functional immunity when in Rwanda on official mission. Therefore, there are no grounds to believe that the defence cannot carry out investigations in Rwanda, [1231]or to postpone a site visit,[1232] or for lead counsel to refuse to travel to Arusha for a hearing.[1233]

**Article 30—expenses**

**The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.**

**Article 31—working languages**

**The working languages of the International Tribunal for Rwanda shall be English and French.**

**Article 32—annual report**

**The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.**

**Rules of Procedure and Evidence**

**Rule 1—entry into force**

**These Rules of Procedure and Evidence, adopted pursuant to Article 14 of the Statute of the Tribunal, shall come into force on 29 June 1995.**

**Rule 2—definitions**

**(A) In the Rules, unless the context otherwise requires, the following terms shall mean:**
**Rules: The Rules referred to in Rule 1;**
**Statute: The Statute of the Tribunal adopted by Security Council Resolution**

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[1230] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-PT, *Decision on Ildephonse Nizeyimana's Motion to Suspend Trial Proceedings* (9 June 2010) at paras. 8,11
[1231] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-PT, *Decision on Ildephonse Nizeyimana's Second Motion to Suspend Trial Proceedings* (29 June 2010)
[1232] *Prosecutor v Gatete*, No.ICTR-2000-61-T, *Decision on Defence Motion for Reconsideration of Decision on Site Visit Postponement or for Heightened Security During Site Visit and for Statement from Rwandan Authorities on Immunity for Defence Counsel* (6 July 2010)
[1233] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motion for Video-Conference Participation of Lead Counsel in the Appeal Hearing…*(15 March 2011) at para. 14

**955 of 8 November 1994;**

**Tribunal:** **The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994;**

**Accused:** **A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47;**

**Ad litem Judge:** **A Judge appointed pursuant to Article 12 ter of the Statute;**

**Arrest:** **The act of apprehending and taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40;**

**Bureau:** **A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;**

**Investigation:** **All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after confirmation of an indictment;**

**Transaction:** **A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;**

**Party:** **The Prosecutor or the accused;**

**Permanent Judge:** **A Judge elected or appointed pursuant to Article 12 bis of the Statute;**

**President:** **The President of the Tribunal;**

**Prosecutor:** **The Prosecutor designated pursuant to Article 15 of the Statute;**

**Regulations:** **The provisions framed by the Prosecutor pursuant to Rule 37(A) for the purpose of directing the functions of the Office of the Prosecutor;**

**Suspect:** **A person concerning whom the Prosecutor possesses reliable information which tends to show that he may have committed a crime over which the Tribunal has jurisdiction;**

**Victim:** **A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.**

**(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.**

**Rule 3—languages**

**(A) The working languages of the Tribunal shall be English and French.**

**(B) The accused or suspect shall have the right to use his own language.**

**(C) Counsel for the accused may apply to a Judge or a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the Defence and the interests of justice.**

**(D) Any other person appearing before the Tribunal, who does not have sufficient**

**knowledge of either of the two working languages, may use his own language.**
**(E) The Registrar shall make any necessary arrangements for interpretation and translation of the working languages.**
**Rule 4—sittings away from the seat of the Tribunal**

**A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice.**

**discretion**

Motion for sitting away from the seat of the Tribunal should be made in the first instance to the Trial Chamber, not the President.[1234]

Managerial decisions, such as whether to make a site visit, are left to the discretion of the Trial Chamber.[1235]

A Trial Chamber has discretion whether to make a site visit, and if so, the determination of the itinerary.[1236]

Trial Chamber authorized to hear testimony in The Hague on an exceptional basis where it indicated its preference to hear live testimony and security of witness precluded his travel to Arusha. However, video link testimony remains an important, necessary and reliable resource for the Tribunal.[1237]

Logistical and budgetary considerations seriously restrict the possibility of the Trial Chamber hearing a witness live in The Hague.[1238]

**factors**

Site visit granted where physical aspects of the area where the crimes alleged to have occurred were relevant and a first-hand knowledge of the area would be in the interest of justice.[1239]

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[1234] *Prosecutor v Nzabirinda*, No. ICTR-01-77-I, *Decision on Prosecution's Request to Withdraw Motion for Trial in Rwanda* (3 March 2005)
[1235] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 16
[1236] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 54
[1237] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on Request for Authorization to Hold Trial Session Away from the Seat of the Tribunal* (12 May 2006)
[1238] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Confidential Motion Requesting the Chamber to Hear Expert Witness Helmut Strizek in The Hague or Alternatively to Authorize Testimony by Video-Link* (11 September 2006) at para. 5
[1239] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Defence Motion for a View Locus in Quo* (16 December 2005); *Prosecutor v Mpambara*, No. ICTR-2001-65-T, *Decision on the Prosecution Motion for a Site Visit* (10 February 2006); *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative à la Requete du Procureur pour une Visite de Sites au Rwanda* (29 March 2006); *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Site Visit to Rwanda* (1 September 2006); *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Prosecution's Motion for a View of the Locus in Quo* (19 June 2007); *Prosecutor v Bikindi*, No. ICTR 2001-72-T, *Decision on Defence Motion for Judicial View of the Locus In*

In determining whether a site visit is appropriate, it is relevant to look to whether disputed issues at trial relate to physical attributes of various sites relevant to the case.[1240]

A site visit may assist a Chamber in its assessment of issues of visibility, layout of buildings, distances between locations, and correlative proximity of places.[1241]

Where disputed issues at trial relate to physical attributes of various places, including lines-of-sight, distances between various locations, and the suitability of certain locations for the activities alleged to have occurred there, a site visit may be appropriate.[1242]

Site visit denied when Chamber was able to determine physical attributes from photographs and sketches, time between visit and events meant that many sites would have changed, and logistical and financial considerations militated against site visit.[1243]

Motion for site visit to Butotori Military Camp denied where testimony concerning the camp was extensive and it may have changed since 1994.[1244]

Visits to sites for the sole purpose of providing context are not warranted.[1245]

There is a distinction between a site visit being informative and it being instrumental in the discovery of the truth and the determination of the matter before the Chamber.[1246]

**modalities**

The Chamber is not obligated to consult the parties prior to establishing the modalities for a site visit.[1247]

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*Quo* (6 December 2007); *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Site Visit to Rwanda* (27 February 2008); *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Decision on Prosecution's Motion for Judicial View of the Locus in Quo in the Present Case* (9 October 2009); *Prosecutor v Munyakazi*, No. ICTR-97-36A-T, *Decision on Yussuf Munyakazi's Motion for Judicial View of the Locus in Quo* (17 March 2010)

[1240] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Site Visit to Rwanda* (17 June 2010) at para. 4

[1241] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Site Visit to Rwanda* (17 June 2010) at para. 4

[1242] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motions for Site Visits to Rwanda* (21 April 2008) at para. 6; *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Site Visit to Rwanda* (23 November 2010) at para. 5

[1243] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Site Visits in the Republic of Rwanda* (26 February 2009) at para. 21

[1244] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion for Site Visit* (11 December 2006)

[1245] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motions for Site Visits to Rwanda* (21 April 2008) at para. 8

[1246] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis* (17 February 1998) at para. 8.

[1247] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Extremely Urgent Defence Motion for the Trial Chamber to Reissue New Modalities for the Site Visit to Rwanda* (25 April 2010) at para. 7

This is no requirement that the parties be able to make contemporaneous submissions during the site visit. Should they wish to draw the Chamber's attention to certain observations made during the visit or dispute any matters arising from the official notes made by the Registry, the parties can file written submissions after the site visit has been completed.[1248]

Prosecution would not be required to submit its observations in advance of the site visit.[1249]

Video and audio record of site visit, as well as transcript, would be admitted into evidence as exhibits.[1250]

Failure to object to exclusion of witness' alleged hiding place during site visit indicated that defence was not prejudiced by failure to include it in the site visit.[1251]

Refusal to allow parties to make submissions during the site visit was not abuse of discretion.[1252]

**timing**

In view of the logistics and costs involved, a decision to carry out a site visit should preferably be made when the visit will be instrumental in the discovery of the truth and determination of the matter.[1253]

Site visits decision more properly made at the conclusion of all the evidence in the case.[1254]

Motion for site visit made near close of the prosecution case denied as premature.[1255]

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[1248] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Extremely Urgent Defence Motion for the Trial Chamber to Reissue New Modalities for the Site Visit to Rwanda* (25 April 2010) at para. 7-8
[1249] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for an Order to the Prosecution to Provide Explanations and References for Each Location of the Site Visit* (14 May 2012)
[1250] *Prosecutor v Kanyarukiga*, No.ICTR-2002-78-T, *Decision on the Extremely Urgent Defence Motion for Admission into Evidence of Records Made During the Site Visit in Rwanda* (7 May 2010)
[1251] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 55
[1252] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para.62
[1253] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda* (29 September 2004); *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on Defence Renewed Request for Site Visits in Rwanda* (4 May 2005); *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Requests for Site Visits in Rwanda* (31 January 2005)
[1254] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Requests for Site Visits in Rwanda* (31 January 2005); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Defence Motion for the Chamber to Visit Sites in Rwanda* (24 June 2005); *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Site Visit to Rwanda* (27 February 2008) at para. 4; *Prosecutor v Ndahimana*, No. ICTR-2001-68-T, *Decision on Prosecution's Motion for Site Visits in the Republic of Rwanda* (7 December 2010) at para. 8

**use in judgement**

Chamber used time of travel from site visit during time of peace to conclude that it was feasible for the accused to commute between Kigali and Gitarama during the genocide.[1256]

Although observations made on a site visit many years after the event may be of limited assistance, the Trial Chamber did not err in comparing its observations on the site visit with the testimony of the alibi witnesses.[1257]

**Rule 5—non-compliance with rules**

**(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party.**
**(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief, if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party.**
**(C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.**

Rule 5 on "Non-compliance with Rules" sets forth three principles: First, the party must raise an objection on the ground of non-compliance with the Rule or Regulations at the earliest opportunity. Second, the alleged non-compliance must be proved, and it must cause material prejudice to that party. Third, the relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with fundamental principles of fairness.[1258]

**Rule 6—amendment of the rules**

**(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted, if agreed to by not less than a majority of all Judges. The decision shall be taken at a Plenary Meeting of the Tribunal convened with notice of the proposal addressed to all Judges.**

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[1255] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Sagahutu's Motion for a Site Visit* (6 October 2006); *Prosecution v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on Prosecution Motion for Site Visits* (19 October 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Prosecution Motion for a Site Visit* (23 March 2010) at para. 9
[1256] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Judgement and Sentence* (31 May 2012) at paras. 401, 423-24, 426
[1257] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 150
[1258] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Decision for a Stay of Proceedings and Abuse of Process* (20 February 2004) at para. 21

**(B) An amendment of the Rules may be adopted otherwise than as stipulated in Sub-Rule (A) above; provided it is approved by at least two-thirds of all Judges by any appropriate means either done in writing or confirmed in writing.**
**(C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.**

**retroactivity**

Statutes which make alterations in procedure regulate secondary rather than primary conduct; they apply to existing proceedings even though these were commenced before the statutes were made and in that sense may be regarded as retrospective. By contrast, there is a presumption that enactments affecting substantive rights are intended to be prospective. This presumption is however a rebuttable one; if it is rebutted, an amendment, though affecting substantive rights, applies retrospectively (barring any impediment of a constitutional nature) and so can affect existing proceedings.[1259]

There was a right to consent to continuation of the trial under the old provision, but the operation of the newly amended Rule 15*bis* does not prejudice the rights of the accused in the pending trial because the new rule provided similar safeguards by requiring that the new Judge certify that he was familiar with the record.[1260]

Strict application of an amended Rule 98 *bis,* containing the seven-day deadline, was held to prejudice the rights of the accused and so an exception was granted, and the Defence motion considered. The Prosecution case had closed before the Rule was amended.[1261]

**Rule 7—authentic texts**

**The English and French texts of the Rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.**

**Rule 7 bis—non-compliance with obligations**

**(A) Except in cases to which Rules 11, 13, 59 or 61 applies, where a Trial Chamber or a Judge is satisfied that a State has failed to comply with an obligation under Article 28 of the Statute relating to any proceedings before that Chamber or Judge, the Chamber or Judge may request the President to report the matter to the Security Council.**
**(B) If the Prosecutor satisfies the President that a State has failed to comply with an**

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[1259] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis, Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at para. 13
[1260] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis, Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at para. 19
[1261] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion for Partial Acquittal Pursuant to Rule 98 bis* (13 September 2002) at para. 9.

**obligation under Article 28 of the Statute in respect of a request by the Prosecutor under Rules 8 or 40, the President shall notify the Security Council thereof.**

The failure of a State to comply with a Request for Cooperation must be decided first by the Trial Chamber seized of the case, not necessarily the Trial Chamber which made the request of cooperation. The Trial Chamber was not satisfied that the matter should be referred to the President and ordered the Registrar to make further efforts to obtain cooperation of the State.[1262]

The decision to refer the non-compliance of a State to the President for referral to the Security Council is a discretionary one. The Trial Chamber prefers to renew its request to the government of Rwanda to provide the documents requested to the defence rather than request their non-compliance be reported to the Security Council.[1263]

Trial Chamber preferred to request Registry to inquire of government of France what steps it has taken to comply with Trial Chamber order before reporting non-compliance to Security Council.[1264]

The President cannot report non-compliance of a State to the Security Council on his own initiative—Rule 7 *bis* must be triggered by a request from a Trial Chamber.[1265]

The President serves only as a transmitter of the request from the Trial Chamber to the Security Council, he does not have any discretion in the matter.[1266]

Request for sanctions for failure to resettle an accused person could not be made pursuant to Rule 7 *bis* where no Trial Chamber had previously requested the cooperation of the State. Matter referred by the President to a Trial Chamber to consider such a request for cooperation.[1267]

Where government of France had failed to comply with request for list of its personnel at its embassy in Kigali in April 1994, but had otherwise cooperated with

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[1262] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Nzirorera Defence Motion to Report Government of Benin to United Nations Security Council* (19 March 2004)
[1263] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative aux Requete de la Defence Concernant la Coopération avec le Gouvernement de Rwanda* (11 December 2003); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion to Report Government of Rwanda to United Nations Security Council* (2 October 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Third Motion to Report Government of Rwanda to United Nations Security Council* (2 November 2007)
[1264] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Interim Order on Jerome-Clement Bicamumpaka's Motion to Report the Matter of France's Refusal to Cooperate to the Security Council* (24 January 2008)
[1265] *Prosecutor v Ntagerura*, No. ICTR-46-A28, *Decision on Motion of Andre Ntagerura for Cooperation with Canada and for Reporting to the Security Council* (31 March 2008) at para. 5
[1266] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*, *Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and the Motion for Leave to Appeal the President's Decision dated 5 May 2010* (20 September 2010) at para. 35
[1267] *Prosecutor v Ntagerura*, No. ICTR-46-A28, *Decision on Motion of Andre Ntagerura for Cooperation with Canada and for Reporting to the Security Council* (31 March 2008) at para. 6

defence request, it was not appropriate to report France to the Security Council, but another request would be made to the government of France.[1268]

After a second request to France failed to result in provision of the required information, the Trial Chamber referred the matter to the President, but denied a stay of proceedings or to postpone the trial.[1269]

Trial Chamber declined to request that Togo be reported to Security Council for lack of cooperation with defence team, preferring instead to make another request to the government of Togo.[1270]

A Trial Chamber has the authority to reconsider a Rule 7 *bis* request, particularly when the State has complied with the request in the meantime. While subsequent compliance does not rectify the earlier failure, it is a new circumstance which can be considered.[1271]

Where the Trial Chamber had rescinded its request that the President transmit the non-cooperation of France to the Security Council, the President was without authority to act.[1272]

**Rule 7 ter—time limits**

**(A) Unless otherwise ordered by the Chambers or otherwise provided by the Rules, where the time prescribed by or under the Rules for the doing of any act shall run as from the occurrence of an event, that time shall run from the date on which notice of the occurrence of the event has been received in the normal course of transmission by counsel for the accused or the Prosecutor as the case may be.**
**(B) Where a time limit is expressed in days, only ordinary calendar days shall be counted. Weekdays, Saturdays, Sundays and public holidays shall be counted as days. However, should the time limit expire on a Saturday, Sunday or public holiday, the time limit shall automatically be extended to the subsequent working**

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[1268] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion Asking the Chamber to Request the President to Report the Matter of France's Refusal to Cooperate to the Security Council* (19 October 2009)
[1269] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for Stay of Proceedings…*(13 November 2009) at paras. 39-40
[1270] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion Asking the Trial Chamber to Request the President to Report the Matter of the Republic of Togo's Refusal to Cooperate to the Security Council* (14 September 2011)
[1271] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*, *Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and the Motion for Leave to Appeal the President's Decision dated 5 May 2010* (20 September 2010) at paras. 23-24
[1272] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*, *Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and the Motion for Leave to Appeal the President's Decision dated 5 May 2010* (20 September 2010) at para. 35; *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for the Implementation of the Order of Trial Chamber III of 4 March 2010 and for Allowing the Defence to Make Submissions before the Security Council* (5 May 2010)

**day.**

**Rule 8—request for information**

**Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with Article 28 of the Statute.**

Rule 8 is not a mandatory obligation on the prosecution to seek relevant information from a national jurisdiction.[1273]

**Rule 9—prosecutor's application for deferral**

**Where it appears to the Prosecutor that crimes which are the subject of investigations or criminal proceedings instituted in the courts of any State:**
**(i) Are the subject of an investigation by the Prosecutor;**
**(ii) Should be the subject of an investigation by the Prosecutor considering, inter alia:**
**(a) The seriousness of the offences;**
**(b) The status of the accused at the time of the alleged offences;**
**(c) The general importance of the legal questions involved in the case;**
**(iii) Are the subject of an indictment in the Tribunal, the Prosecutor may apply to the Trial Chamber designated by the President to issue a formal request that such court defer to the competence of the Tribunal.**

**Rule 10—formal request for deferral**

(**A) If it appears to the Trial Chamber seized of a request by the Prosecutor under Rule 9 that paragraphs (i), (ii) or (iii) of Rule 9 are satisfied, the Trial Chamber shall issue a formal request to the State concerned that the Court defer to the competence of the Tribunal.**
**(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.**
**(C) The State to which the formal request for deferral is addressed shall comply without undue delay in accordance with Article 28 of the Statute.**

Only the prosecutor, and not the defence, may initiate an order that a State defer its prosecution to the Tribunal.[1274]

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[1273] *Prosecution v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion Seeking Relief on the Ground of Non-Compliance with the Rules or Regulations of the Tribunal* (25 November 2009) at para. 27
[1274] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Judicial and Administrative Deferral in Favour of the ICTR* (5 November 2008) at para. 20

**Rule 11—non-compliance with a formal request for deferral**

**If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may invite the President to report the matter to the Security Council.**

**Rule 11 bis—referral of the indictment to another court**

**(A) If an indictment has been confirmed, whether or not the accused is in the custody of the Tribunal, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:**
**(i) in whose territory the crime was committed; or**
**(ii) in which the accused was arrested; or**
**(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.**
**(B) The Trial Chamber may order such referral proprio motu or at the request of the Prosecutor, after having given to the Prosecutor and, where the accused is in the custody of the Tribunal, the accused, the opportunity to be heard.**
**(C) In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused will receive a fair trial in the courts of the State concerned and that the death penalty will not be imposed or carried out.**
**(D) Where an order is issued pursuant to this Rule:**
**(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;**
**(ii) the Trial Chamber may order that protective measures for certain witnesses or victims remain in force;**
**(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;**
**(iv) the Prosecutor may, and if the Trial Chamber so orders, the Registrar shall, send observers to monitor the proceedings in the State concerned. The observers shall report, respectively, to the Prosecutor, or through the Registrar to the President.**
**(E) The Trial Chamber may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred for trial.**
**(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a court in the State concerned, the Trial Chamber may proprio motu or at the request of the Prosecutor and upon having given to the authorities of the State concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10."**

**(G) Where an order issued pursuant to this Rule is revoked by the Trial Chamber, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal, and the State shall accede to such a request without delay in keeping with Article 28 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused.**
**(H) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Trial Chamber whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision.**

**burden of proof**

In cases where the Prosecution requests referral, it bears the burden of proof to demonstrate that the conditions set out in Rule 11*bis* of the Rules are met.[1275]

**conditions**

A Referral Chamber may attach conditions on the referral, which the receiving State is free to accept, or decline the referral.[1276]

Conditions on a referral must be reasonably related to ensuring a fair trial.[1277]

Condition that defence counsel in Rwanda have previous international experience was not reasonably necessary to ensure a fair trial in Rwanda.[1278]

Condition requiring assurance that testimony of potential defence witnesses would not be used against them was speculative and not reasonably necessary to ensure a fair trial in Rwanda.[1279]

**detention**

Rwanda's transfer law's guarantee that detention of persons referred to Rwanda will comply with international standards, coupled with the existence of a facility

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[1275] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 28
[1276] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 96
[1277] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 106
[1278] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 108
[1279] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 118

currently housing international prisoners and the ability to monitor the conditions of detention, justified the Trial Chamber to conclude that if transferred, the accused would not be subject to inhumane conditions of detention.[1280]

**fugitives**

Rule 11 bis applies to the transfer of accused at large.[1281]

**indictment**

A Trial Chamber considering referral should rely on the most recently confirmed, or operative, indictment.[1282]

Trial Chamber erred in refusing to require the prosecution to amend its indictment to eliminate JCE prior to referring the case to Rwanda.[1283]

**monitoring**

A Trial Chamber has the discretion to dictate the scope of monitoring and frequency of reporting.[1284]

An accused has the right to access to monitoring reports of his case.[1285]

Monitoring provisions were sufficient to overcome some doubts about the fairness in prospective trials in Rwanda but were not sufficient to overcome issues concerning willingness of defence witnesses to testify and sentences of life imprisonment with isolation.[1286]

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[1280] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at paras. 37-39

[1281] *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 8

[1282] *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11*bis*, *Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda* (19 June 2008) at para. 9

[1283] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 34

[1284] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 83

[1285] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 84

[1286] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda* (6 June 2008) at para. 103; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11 *bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (4 December 2008) at para. 29; *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 55

The Trial Chamber erred in failing to consider the availability of monitoring and revocation procedures. [1287]

Monitoring provision was sufficient to overcome potential problem of whether Rwandan law which prohibited testimony by persons suspected of a crime applied to cases transferred to Rwanda. If such provision was applied to the case of the accused, it could be reported by the monitors and the transfer could be revoked.[1288]

Transfer stayed until President could be satisfied that adequate monitoring mechanism existed.[1289]

***non bis in idem***

Trial Chamber did not err in finding that *ne bis in idem* principle would not be violated by transfer of the accused where his convictions before the Gacaca court had been vacated,[1290] or where his acquittal had been vacated but no judgement of conviction imposed.[1291]

**penalty structure**

There is genuine ambiguity about which punishment provision would apply to transfer cases. Therefore, the possibility exists that Rwandan courts might hold that a penalty of life imprisonment in isolation would apply to such cases. Thus, the current penalty structure in Rwanda is not adequate for the purposes of transfer under Rule 11*bis* of the Rules. [1292]

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[1287] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 30; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11 *bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (4 December 2008) at para. 29

[1288] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 52

[1289] *Uwinkindi v Prosecutor*, No. ICTR-01-75-AR11*bis*, *Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda…*(23 February 2012) at para. 19; *Prosecutor v Uwinkindi*, No. ICTR-01-75-R11*bis*, *Order to Stay the Transfer of Jean Uwinkindi Pending the Establishment of a Suitable Monitoring Mechanism* (24 February 2012)

[1290] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 44

[1291] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 65

[1292] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 20; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis*, *Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis* (30 October 2008) at para. 16; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11 *bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (4 December 2008) at para. 38

Where a transferred accused could be sentenced to life imprisonment in isolation, the punishment does not accord with international human rights standards and therefore the transfer would be precluded as the penalty structure was inadequate.[1293]

**receiving State**

In assessing whether a state is competent within the meaning of Rule 11*bis* to accept one of the Tribunal's cases, a designated Trial Chamber must consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure.[1294]

The Trial Chamber must determine whether the Referral State has jurisdiction within the definition provided by the Statute. Where several applicable laws exist within the domestic law of the Referral State, the Chamber does not have the power to determine which one should be applied, if each of the laws provides for appropriate legal qualification in accordance with the Statute.[1295]

**France**

Transfer to France approved under Rule 11 *bis*.[1296]

**Netherlands**

War Crime Statute and Genocide Convention Implementation Act of The Netherlands provided adequate legal framework for penalizing conduct of accused and therefore referral to The Netherlands was authorized. If a court in The Netherlands was to determine it did not have jurisdiction, the case could be returned to the ICTR.[1297]

**Norway**

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[1293] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11bis, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (28 May 2008) at para. 32; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda* (6 June 2008) at para. 96; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11*bis*, *Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda* (19 June 2008) at para. 25; *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 29

[1294] *Prosecutor v Bagaragaza*, No. ICTR-05-86-AR11*bis*, *Decision on Rule 11 bis Appeal* (30 August 2006) at para. 9; *Prosecutor v Bagaragaza*, No. ICTR-2005-86-11*bis*, *Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands* (13 April 2007) at para. 11

[1295] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-R11*bis*, *Decision on the Prosecution Motion for Referral to the Kingdom of Norway* (19 May 2006) at para. 15

[1296] *Prosecutor v Munyeshyaka*, No. ICTR-2005-87-I, *Decision on the Prosecutor's Motion to Refer the Indictment Against Wenceslas Munyeshyaka to French Authorities* (20 November 2007); *Prosecutor v Bucyibaruta*, No. ICTR-2005-85-I, *Decision on the Prosecutor's Motion to Refer the Indictment Against Laurent Bucyibaruta to French Authorities* (20 November 2007)

[1297] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-11*bis*, *Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands* (13 April 2007) at para

Where the referral state could not prosecute the accused for genocide, but only homicide, the referral state did not have jurisdiction *ratione materiae* or the acts alleged in the Indictment. Since the accused's criminal acts cannot be given their full legal qualification under the law of the referral state, the request for the referral was dismissed.[1298]

Article 8 of the Statute limits the transfer of cases from an International Tribunal, allowing it only to refer cases where the state will charge and convict for those international crimes listed in its Statute. Since Norway had no such crime, referral to that country pursuant to Rule 11 *bis* is not appropriate.[1299]

The Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law. This is particularly so when the accused has been charged with genocide, an offense that -- unlike murder -- is designed to protect a "national, ethnical, racial or religious group, as such".[1300]

**Rwanda**

The composition of a High Court by a single judge is as not incompatible with the right to a fair trial[1301]

The fact that appeals may be heard only on an error on a question of law invalidating the decision or an error of fact which has occasioned a miscarriage of justice is not an unusual standard of review and is not incompatible with a fair trial.[1302]

No reasonable Trial Chamber could have concluded that there was sufficient risk of government interference with the Rwandan judiciary to warrant denying request to transfer the accused to Rwanda.[1303]

Rwanda law prohibits genocide and crimes against humanity and may therefore prosecute for such crimes if cases are transferred from ICTR.[1304]

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[1298] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-R11*bis*, *Decision on the Prosecution Motion for Referral to the Kingdom of Norway* (19 May 2006) at para. 16

[1299] *Prosecutor v Bagaragaza*, No. ICTR-05-86-AR11*bis*, *Decision on Rule 11 bis Appeal* (30 August 2006) at para. 16

[1300] *Prosecutor v Bagaragaza*, No. ICTR-05-86-AR11*bis*, *Decision on Rule 11 bis Appeal* (30 August 2006) at para. 18

[1301] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 26; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda* (6 June 2008) at para. 40

[1302] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para.27

[1303] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para.29

[1304] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda* (6 June 2008) at para. 19; *Prosecutor v Hategekimana*, No. ICTR-00-

Trial Chamber erred in concluding that Rwanda law did not punish command responsibility for offences.[1305]

Despite concerns over whether the accused would receive a fair trial in Rwanda, the existence of a monitoring mechanism by the African Commission on Human and People's Rights and ability to revoke the referral if impediments existed to a fair trial justified referral of the case to Rwanda.[1306]

Persons transferred to Rwanda could not be tried *in absentia* under the law pertaining to transfer of accused from the ICTR.[1307]

The Trial Chamber did not err in finding that the availability of video-link facilities is not a completely satisfactory solution to the testimony of witnesses residing outside Rwanda, given that it is preferable to hear direct witness testimony, and that it would be a violation of the principle of the equality of arms if the majority of Defence witnesses would testify by video-link while the majority of Prosecution witnesses would testify in person.[1308]

The information available to the Trial Chamber demonstrated that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence because of the fear that they may face serious consequences, including threats, harassment, torture, arrest, or being killed. The Trial Chamber did not err in

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55B-Rule 11*bis*, *Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda* (19 June 2008) at para. 17

[1305] *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11 *bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (4 December 2008) at para. 12

[1306] *Prosecutor v Uwinkindi*, No. 2001-75-R11*bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda* (28 June 2011); *Prosecutor v Sikubabwo*, No. ICTR-95-1D-R11*bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda* (26 March 2012) at para. 157; *Prosecutor v Ntaganswa*, No. ICTR-96-9-R11*bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda* (8 May 2012) at para. 90; *Prosecutor v Munyagishari*, No. ICTR-2005-89-R11*bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda* (6 June 2012); *Prosecutor v Ryandikayo*, No. ICTR-95-1E-R11*bis, Decision on Prosecutor's Request for Referral of Case to Rwanda* (20 June 2012) at para. 82; *Prosecutor v Ndimbati*, No. ICTR-95-1F-Rule 11*bis*, *Decision on Prosecutor's Request for Referral of Case to Rwanda* (25 June 2012)

[1307] *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of the Case of Aloys Ndimbati to Rwanda* (16 December 2008) at para.8; *Prosecutor v Munyarugarama*, No. ICTR-02-79-Rule 11*bis, Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda* (28 June 2012)

[1308] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 42; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis* (30 October 2008) at para. 33; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11 *bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (4 December 2008) at para. 26; *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 42

concluding that it was unlikely that Defence witnesses would feel secure enough to testify in a transferred case.[1309]

The fact that the witness protection service is presently administered by the Office of the Prosecutor General and that threats of harassment are reported to the police does not necessarily render the service inadequate. However, the Trial Chamber did not err in finding that witnesses would be afraid to avail themselves of its services for this reason.[1310]

The Trial Chamber did not err in concluding, based on information before it, that despite the protections available in Rwandan law, many witnesses residing abroad would fear intimidation and threats. [1311]

Citing murder of witnesses and inadequate witness protection program, as well as unavailability of concrete video link mechanism and unfairness of defence witnesses not being heard live, Trial Chamber concluded that an accused's right to obtain attendance and examine witnesses in the same manner as the prosecution could not be guaranteed in Rwanda.[1312] This was affirmed on appeal. [1313]

Transfer to Rwanda denied because defence witnesses in Rwanda may legitimately be afraid to testify and those living outside Rwanda would not likely return to testify, with video link of many such witnesses of one party being an unsuitable substitute for live testimony.[1314]

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[1309] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 37; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis* (30 October 2008) at para. 26; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11 *bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (4 December 2008) at para. 22

[1310] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 38; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis* (30 October 2008) at para. 27

[1311] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 40; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Appeal Against Decision on Referral Under Rule 11 bis* (30 October 2008) at para. 31

[1312] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11bis, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (28 May 2008) at para. 66; *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 45

[1313] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008)

[1314] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-R11*bis, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda* (6 June 2008) at paras. 73.81; *Prosecutor v Hategekimana*, No. ICTR-00-55B-Rule 11*bis*, *Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda* (19 June 2008) at paras. 67,71

Transfer to Rwanda upheld where changes to the laws on witness immunity, witness protection, and existence of alternative means of hearing testimony from abroad made it reasonable to conclude that an accused could receive a fair trial in Rwanda.[1315]

Existence of right to legal aid and the fact that it was budgeted by Rwanda was all that the Chamber needed to consider in determining that an accused's right to counsel would be satisfied if the case were referred to Rwanda.[1316]

Instances of corruption and political interference with judicial independence in Rwanda did not preclude referral where there was no showing that the accused was similarly situated to those whose cases had been subject of such interference or influence.[1317]

**Switzerland**

The absence of consent by the receiving state (Switzerland) precludes the transfer pursuant to Rule 11 *bis*.[1318]

**requirements**

In assessing whether a state is competent within the meaning of Rule 11*bis* of the Rules to accept a case from the Tribunal, a designated Trial Chamber must first consider whether it has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure. The penalty structure within the state must provide an appropriate punishment for the offences for which the accused is charged, and conditions of detention must accord with internationally recognized standards. The Trial Chamber must also consider whether the accused will receive a fair trial, including whether the accused will be accorded the rights set out in Article 20 of the Tribunal's Statute.[1319]

There are three requirements which must be met before a referral under this section is authorized: (1) the referral State must have jurisdiction and be willing and adequately prepared to accept the case; (2) the Chamber must be satisfied that the

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[1315] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 62; *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on Prosecutor's Request for Referral to Republic of Rwanda* (22 February 2012)
[1316] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 71
[1317] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 75
[1318] *Prosecutor v Rukundo*, No. ICTR-2001-70-PT, *Décision de la Requete Relative de la Defence Aux Fins de Fixation de la Date d'Ouverture du Process, au a Default de la Transfert de l'Affaire Devant Une Juridiction Nationale* (1 June 2005) at para. 21
[1319] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11*bis*, *Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11 bis* (8 October 2008) at para. 4

accused will receive a fair trial in the courts of the referral State; and (3) the Chamber must be satisfied that the death penalty will not be imposed or carried out.[1320]

**request**

Rule 11 *bis* does not authorize an accused to request transfer of his case to a national jurisdiction. However, the Trial Chamber can do so *proprio motu*.[1321]

Trial Chamber has no power to order a referral because the President has not designated them as a referral Chamber in accordance with Rule 11 *bis* (A) of the Rules.[1322]

**senior position**

While the prosecutor has discretion to select cases for possible transfer to competent national jurisdictions, the Tribunal is mandated to transfer cases involving intermediate and low rank accused.[1323]

Interahamwe leader in prefecture was sufficiently low ranking to be eligible for transfer pursuant to Rule 11 *bis*.[1324]

Police inspector in commune was sufficiently low ranking to be eligible for transfer pursuant to Rule 11 *bis*.[1325]

Lack of senior position of the accused was not a requirement of transfer pursuant to Rule 11 *bis*.[1326]

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[1320] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-11*bis*, *Decision on Prosecutor's Request for Referral of the Indictment to the Kingdom of the Netherlands* (13 April 2007) at para. 8

[1321] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 38; *Prosecutor v Rukundo*, No. ICTR-2001-70-PT, *Décision de la Requete Relative de la Defence Aux Fins de Fixation de la Date d'Ouverture du Process, au a Default de la Transfert de l'Affaire Devant Une Juridiction Nationale* (1 June 2005) at para. 20

[1322] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 36; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (6 March 2007) at para. 90

[1323] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11bis, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (28 May 2008) at para. 9; *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 11

[1324] *Prosecutor v Munyakazi*, No. ICTR-97-36-R11bis, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (28 May 2008) at para. 13

[1325] *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda* (16 December 2008) at para. 16

[1326] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 41

**disclosure of information**

Upon referral of case to France, Trial Chamber authorized disclosure of protected witness information to French authorities.[1327]

**revocation of referral**

Although Rule 11 *bis* (F) does not provide the accused with a right to be heard on the issue of revocation of a referral, the defence arguments against revocation were considered in the interests of justice.[1328]

An accused has standing to request the revocation of his referral after transfer.[1329]

Referral to The Netherlands revoked where Dutch authorities concluded that they did not have jurisdiction to prosecute accused.[1330]

**appeal**

The Tribunal's Statute and Rules do not provide for appellate review of a decision taken by the President pursuant to Rule 11*bis* (A) to designate a Trial Chamber for determining whether referral of a case would be appropriate.[1331]

**Rule 12—determination of courts of any State**

**Subject to Article 9 (2) of the Statute, determinations of courts of any State are not binding on the Tribunal.**

**Rule 13—*non bis in idem***

**When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for acts constituting serious violations of international humanitarian law under the Statute for which that person has already been tried by the Tribunal, a Trial Chamber shall, following mutatis mutandis the procedure provided in Rule 10, issue a**

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[1327] *Prosecutor v Bucyibaruta,* No. ICTR-2005-85-I, *Decision on Prosecutor's Motion to Modify Protective Measures for Witnesses* (14 December 2007)
[1328] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-11*bis*, *Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of The Netherlands Pursuant to Rule 11 bis (F) and (G)* (17 August 2007) at para. 8
[1329] *Uwinkindi v Prosecutor*, No. ICTR-01-75-R11*bis*, *Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions* (16 December 2011) at para. 85
[1330] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-11*bis*, *Decision on Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of The Netherlands Pursuant to Rule 11 bis (F) and (G)* (17 August 2007)
[1331] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007) at para. 9

**reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.**

**Rule 14—solemn declaration**

**(A) Before taking up his duties each Judge shall make the following solemn declaration:**
**"I solemnly declare that I will perform my duties and exercise my powers as a Judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, honourably, faithfully, impartially and conscientiously."**
**(B) The text of the declaration, signed by the Judge and witnessed by the Secretary-General of the United Nations or his representative, shall be kept in the records of the Tribunal.**

**Rule 14 bis**

**The members of the Tribunal shall continue to discharge their duties until their places have been filled.**

**Rule 15—disqualification of Judges**

**(A) A Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the Judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place.**
**(B) Any party may apply to the Presiding Judge of a Chamber for the disqualification of a Judge of that Chamber from a case upon the above grounds. After the Presiding Judge has conferred with the Judge in question, the Bureau, if necessary, shall determine the matter. If the Bureau upholds the application, the President shall assign another Judge to sit in place of the disqualified Judge.**
**(C) The Judge who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rule 47 or 61, shall not be disqualified from sitting as a member of a Trial Chamber for the trial of that accused.**

**administrative functions**

Judge who was previously disqualified from case for reasonable apprehension of bias is not precluded from serving in administrative capacity as Presiding Judge of Trial Chamber overseeing judges assigned to trial of the case.[1332]

There was no actual bias or appearance of bias from fact that Presiding Judge called upon to decide issue of severance of defendants was also President of the Tribunal who had pledged to the Security Council execute the Tribunal's completion strategy.[1333]

There were no grounds to disqualify President of Tribunal from deciding issues relating to the commencement of the trial, particularly where the Trial Chamber over which the President presided had granted several continuances to the defence.[1334]

**appeal**

There is no right to appeal a decision of the Bureau denying disqualification of judges.[1335]

**appearance of bias**

**definition**

An appearance of bias is established if (1) a judge is a party to a case or has a financial or proprietary interest in the outcome of the case, or if the judge's decision will lead to the promotion of a cause in which the judge is involved; or (2) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[1336]

Although the standpoint of the accused is a relevant consideration, the test for the appearance of bias is whether a perception of lack of impartiality is objectively justified.[1337]

The test of the reasonable observer, properly informed, refers to "an informed person, with knowledge of all the relevant circumstances, including the traditions of

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[1332] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Reassign Case to Different Trial Chamber* (22 March 2005)
[1333] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 12
[1334] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on the Defence Motion for Postponement of the Start of the Trial* (30 October 2009) at para. 31
[1335] *Prosecutor v Seromba*, No. ICTR-01-66-AR, *Decision on Interlocutory Appeal of a Bureau Decision* (22 May 2006); *Ngirabatware v Prosecutor*, No. ICTR-99-54-AR15B, *Decision on Augustin Ngirabatware's Appeal of the Bureau's Decision of 25 January 2011 on Disqualification* (18 April 2011)
[1336] *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 4; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2843
[1337] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 5

integrity and impartiality, apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.[1338]

The objective test for appearance of bias does not purport to detect "latent" bias, but to determine whether a reasonable person, properly informed, would reasonably apprehend bias.[1339]

The apprehension of bias test reflects the maxim that "justice should not only be done but should undoubtedly and manifestly be seen to be done."[1340]

**personal relationships**

Judge's undisclosed association and cohabitation with a Prosecution counsel who was one of the trial attorneys appearing in the present case gave rise to reasonable apprehension of bias.[1341] Appearance of bias also attached to the remaining Judges by virtue of their decision to continue the trial after learning of the Presiding Judge's association and cohabitation with the Prosecution counsel.[1342]

Judge's acquaintance with expert witness' parents did not create appearance of bias such as to disqualify him from deciding motion to admit her testimony.[1343]

There is nothing *per se* improper about a Judge providing an assessment of a counsel's professional competence –whether ultimately positive or negative or characterized as a letter of recommendation—in connection with an application for distinction or rank conferred by a domestic jurisdiction.[1344]

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[1338] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 50

[1339] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Motion for Disqualification of Judges* (28 May 2007) at para. 12

[1340] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam* (14 June 2007) at para. 10; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 5

[1341] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR15*bis*.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion to Consider New Material* (22 October 2004) at para. 67

[1342] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR15*bis*.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion to Consider New Material* (22 October 2004) at para. 68

[1343] *Prosecutor v Nizeyimana*, No. ICTR -2000-55C-PT, *Decision on Prosecutor's Motion to Admit into Evidence the Report of Binaifer Nowrojee* (1 November 2010) at para. 6

[1344] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 15

By agreeing to complete an assessment for a prosecution counsel, it does not indicate that the Judge cannot bring an unbiased mind to matters in issue in the case, including matters which might bear on the prosecution counsel's integrity.[1345]

**ex parte contacts**

Failure of judges to disclose *ex parte* filings alleging witness tampering by the defence did not disclose bias or the appearance of bias since the prosecution was entitled to make such submissions pursuant to Rule 66(C).[1346]

**Tribunal activities**

While it was highly improper to have a drawing depicting the accused admitting to killing 77 people in the corridors of the Tribunal while his trial was ongoing, the display did not create an appearance of bias on the part of the judges.[1347]

**disclosure**

The Rules do not prevent a request for disclosure from a Judge. The request for disclosure must specifically identify the material or information in possession of the Judge and make a prima facie showing that it is capable of demonstrating actual bias or the appearance of bias.[1348]

**judicial function**

Rule 15(A) must be read broadly to permit any ground of impartiality to be raised before the Bureau as a basis of disqualification. Disqualification can be based upon actual bias or the appearance of bias. Although the standpoint of the accused is a relevant consideration, the test for the appearance of bias is whether a perception of lack of impartiality is objectively justified. Appearance of bias may arise from judicial decisions themselves, but there is a high threshold for the party alleging bias. An examination of the decisions by the Trial Chamber in this case did not sustain that burden.[1349]

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[1345] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 17

[1346] *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 13

[1347] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 17

[1348] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 11

[1349] *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Motion by Karemera for Disqualification of Trial Judges; Decision on Motion by Nzirorera for Disqualification of Judges;* (17 May 2004); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Motion for Disqualification of Judges* (7 March 2006); *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on Motion for Disqualification of Judges* (25 April 2006) at para. 9; *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Motion for Disqualification of Judges* (28 May 2007); *Prosecutor v Karemera et al*, No,

Appeals Chamber Judge who sat on Trial Chamber in related case and made credibility findings on witnesses who testified in both trials would not be disqualified as this is not a sufficient basis for a finding of appearance of bias.[1350]

Where an allegation of appearance of bias is made by virtue of decisions of the Trial Chamber, the Bureau has a duty to examine the content of the judicial decisions. It must be shown that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law or to the assessment of the relevant facts.[1351]

Where a single issue has been the subject of multiple decisions, the consistency of the Trial Chamber's position cannot be the basis for a finding of bias or the appearance thereof.[1352]

Judge Pocar would not be disqualified for having said in dissenting opinion in related case that appellant's speech incited people to kill Tutsis, where reasonable observer would not conclude that judge had made up his mind on appellant's case.[1353]

The fact that a judge performs an act in a judicial capacity provides no shield from a claim of bias or appearance of bias.[1354]

Judicial decisions alone almost never constitute a valid basis for alleging bias or the appearance thereof. Those are grounds for appeal not recusal unless they display a deep-seeded favouritism or antagonism that would make a fair judgement impossible. A party's disagreement with decision of the Judges does not warrant disqualification.[1355]

While the possibility is not ruled out that decisions rendered by a judge or a chamber could suffice to establish bias, this would be truly extraordinary.[1356]

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ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008)

[1350] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz* (24 February 2011) at para. 17

[1351] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on Motion for Disqualification of Judges* (25 April 2006) at para. 12; *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Motion for Disqualification of Judges* (28 May 2007) at para. 10

[1352] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Motion for Disqualification of Judges* (28 May 2007) at para. 14

[1353] *Prosecutor v. Niyiramasuhuko*, No. ICTR-98-42-A, *Decision on Motion for Disqualification of Judge Fausto Pocar* (2 October 2012) at para. 18

[1354] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 12

[1355] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Disqualify Judges Byron, Kam, and Joensen* (27 February 2008) at para. 4

[1356] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 406, 2843

Disqualification motion based upon allegedly erroneous rulings and unequal treatment between the prosecution and defence denied as unfounded.[1357]

Judges are not disqualified by virtue of their participation in hearing other cases on the same subject matter.[1358]

No appearance of bias where four Appeals Chamber judges had upheld Trial Chamber's assessment of credibility of two witnesses whose credibility was at issue in the current appeal and where they had upheld findings that related to the accused's conduct.[1359]

The possibility that having previously decided the same issues on the merits on a decision that was vacated, the judges are predisposed to apply the law and assess the facts in the same manner is insufficient as a matter of law to displace the presumption of impartiality and show either actual bias or the appearance of bias.[1360]

Disqualification based on pre-judgement of the case requires a high threshold and must be firmly established.[1361]

**legal officers**

Rule 15 does not apply to legal officers.[1362]

In some cases, a prospective staff member's statements or activities may be so problematic as to either impugn the perceived impartiality of the judges or the appearance thereof, or even if that were not the case, the Tribunal's fundamental guarantees of fair trials. However, this case did not meet that threshold.[1363]

The engagement of the former Deputy Registrar by the Chambers as a legal consultant at the judgement writing stage would not create actual bias or the appearance

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[1357] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for Disqualification of the Judges of the Trial Chamber* (25 January 2011) at para. 73

[1358] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 78; *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at para. 27; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 43

[1359] *Ntawukulilyayo v Prosecutor*, No. ICTR-05-82-A, *Decision on Motion for Disqualification of Judges* (8 February 2011)

[1360] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam* (14 June 2007) at para. 15

[1361] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 45

[1362] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.8, *Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer* (17 December 2009) at para. 8

[1363] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.8, *Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer* (17 December 2009) at para. 11

of bias regardless of whether he had access to confidential information from the defence or whether he had authored submissions opposing defence requests.[1364]

Chief of Chambers would be excluded *proprio motu* from participation in any deliberations on the case where his name had appeared on six pleadings as counsel for the prosecution in the early stages of the case.[1365]

Involvement of legal officer who awarded prize to student who drew cartoon of accused admitting to 77 murders in drafting of the judgement was not such as to require that the judges be disqualified for allowing the legal officer to participate in the case. Legal officers play no role in the decision making in a case.[1366]

Legal officers assisting judges at the Tribunal are not subject to the same standards of impartiality as judges.[1367]

Legal officers merely assist Judges in legal research and preparing draft decisions, judgements, opinions, and orders in conformity with the instructions given to them by the judges.[1368]

No error in participation of Legal Officer ,who had worked on the case for the prosecution, in drafting Trial Chamber judgement where he only had limited involvement in the drafting process.[1369]

**presumption of impartiality**

There is a presumption of impartiality that attaches to a judge or tribunal.[1370]

It is for the appellant doubting the impartiality of a Judge to adduce reliable and sufficient evidence to the Appeals Chamber to rebut this presumption of impartiality.[1371]

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[1364] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Objections of the Mugiraneza and Bicamumpaka Defence Teams to the Engagement of Mr. Everard O'Donnell as a Chambers Consultant* (28 August 2009) at paras. 21,23, and 26

[1365] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 204

[1366] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 20

[1367] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 273

[1368] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 273

[1369] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 274

[1370] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 48; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 91; *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on Motion for Disqualification of Judges* (25 April 2006) at para. 9; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam* (14 June 2007) at para. 11; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 6; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2843

[1371] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 48; *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 91; *Prosecutor v Seromba*, No.

The reason for the high threshhold of showing bias or the appearance of bias is that while any real or apparent bias on the part of the judge undermines confidence in the administration of justice so would disqualifying judges on the basis of unfounded allegations of bias.[1372]

**referral to the Bureau**

Under the principle that the same person cannot be both judge and party, the President of the Chamber cannot rule on a request for recusal if he or she is directly affected by such request and should have referred the issue to the Bureau.[1373]

However, the procedural irregularities committed by the Trial Chamber in ruling on the motion for disqualification were not, in themselves, sufficient to create in the mind of a reasonable observer, properly informed, an appearance of bias, or to rebut the presumption of impartiality of those judges.[1374]

Rule 15(B) prescribes a two-stage process for making a request to disqualify a Judge (1) an application to the Presiding Judge of the Trial Chamber seised of the proceedings; and (2) a *de novo* determination by the Bureau.[1375]

However, a motion filed with the Bureau in the first instance may be entertained in the interests of justice.[1376]

**relationship with States**

Official visits to States likely to be called upon to cooperate with the Tribunal is part of the duties of the President and Vice-President of the Tribunal. Rwanda cannot be an exception to that rule, given moreover that cooperation with that country is of fundamental importance to the realization of the Tribunal's statutory mission.[1377]

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ICTR-2001-66-T, *Decision on Motion for Disqualification of Judges* (25 April 2006) at para. 9; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam* (14 June 2007) at para. 11; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judges Bryon, Kam, and Joensen* (8 March 2008) at para. 6

[1372] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 6

[1373] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para.73

[1374] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para.75

[1375] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 10

[1376] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for Disqualification of the Judges of the Trial Chamber* (25 January 2011) at para. 6

[1377] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 65

**remedy**

Where Trial Chamber was found to have appearance of bias, interests of justice required that its decision granting leave to amend the indictment not be given effect.[1378]

**rulemaking functions**

Article 14 of the Statute, which gives a rule-making competence to the judges of the Tribunal, does not prevent them from later deciding in their judicial capacity on the *vires* or operation of the rules adopted.[1379]

**right to impartial judge**

The right to an impartial judge is a component of the right to a fair trial recognized in Articles 19 and 20 of the Statute.[1380]

**suspension of proceedings**

While neither the Statute nor the Rules provide for the suspension of a trial while a motion for disqualification is being considered, an accused may request a suspension of proceedings while a motion for disqualification is pending. The matter is committed to the discretion of the Trial Chamber.[1381]

Presiding Judge of Trial Chamber before whom disqualification motion is pending does not have authority to grant stay of proceedings.[1382]

**timing**

There is no time limit within which a motion to disqualify a judge must be filed.[1383]

**Rule 15 bis—absence of a judge**

**(A) If**
**(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorized Tribunal business, unable to continue sitting in a part-heard case for a**

[1378] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Severance of Andre Rwamakuba and Amendments of the Indictment* (7 December 2004) at para. 21
[1379] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis, Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at para. 9
[1380] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 39; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 47
[1381] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 21
[1382] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 3
[1383] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for Disqualification of the Judges of the Trial Chamber* (25 January 2011) at para. 9

**period which is likely to be of short duration, and**
**(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days.**
**(B) If**
**(i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and**
**(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then**
**(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and**
**(b) the Presiding Judge may adjourn the proceedings.**
**(C) If, by reason of death, illness, resignation from the Tribunal, non-reelection, non-extension of term of office or for any other reason, a Judge is unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the Presiding Judge shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of the accused, except as provided for in paragraph (D).**
**(D) If, in the circumstances mentioned in the last sentence of paragraph (C), the accused withholds his consent, the remaining Judges may nonetheless decide to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken or the Appeals Chamber affirms the decision of the Trial Chamber, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.**
**(E) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.**
**(F) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the**

**absence of one or more of its members.**

**appeal**

Failure of President to designate referral bench to consider alternative of referral of case to national jurisdiction could not be considered on appeal of decision of remaining Judges to continue trial.[1384]

**burden of persuasion**

Neither party has the burden of proving that continuing or not continuing the proceedings would better serve the interests of justice. It would have been error for the remaining Judges to decide that the defence had not demonstrated that re-starting the trial would serve the interests of justice. However, the remaining Judges did not place that burden on the defence.[1385]

**cumulative effect**

Proceeding under Rule 15 *bis* for 8 of 30 trial days involving 12 witnesses did not violate the rights of the accused to a fair trial where no contemporaneous objection was made, nor a motion to recall the witnesses, nor any aspect of the witness' demeanour specified.[1386]

**decision of remaining judges**

Routine matters within the meaning of Rule 15 *bis* (F) are generally matters of a regular and standardized nature such as the convening of a status conference to organize exchanges between the parties. Other matters, both substantive and procedural, are non-routine matters.[1387]

Rule 15 *bis* (F), which only authorises Trial Chamber to conduct routine matters in the absence of one or more of its members, does not apply to the decision to continue the trial pursuant to Rule 15 *bis* (D).[1388]

Decision on motion to exclude testimony for disclosure violation was not a routine matter within the meaning of Rule 15 *bis* (F).[1389]

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[1384] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 38

[1385] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR15*bis*.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion to Consider New Material* (22 October 2004) at paras. 53-54

[1386] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Judgement and Sentence* (29 March 2011) at paras.74-75

[1387] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.9, *Decision on Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining Prior Statements of Prosecution Witnesses After they have Testified* (31 May 2007) at para. 10

[1388] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis*, *Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at para. 10

Defence motions for certification to appeal, issuance of subpoenas to prosecution witnesses, and prosecution motion for notice of alibi were subject to extensive litigation and therefore were not routine matters for purposes of Rule 15 *bis* (F) and decisions of two Judges on those motions had to be vacated.[1390]

The power of the remaining Judges to make decisions on routine matters extends to the period between the naming of the substitute Judge and his certification that he is sufficiently familiar with the case to join the bench.[1391]

Granting unopposed motion for disclosure of closed session testimony to third party was a routine matter upon which the remaining Judges could issue a decision.[1392]

**discretion of President**

The President has the discretion to order a rehearing of the trial under Rule 15 *bis* (C), rather than referring the matter to the remaining Judges, in the situation where the defence does not consent to a continuation of the trial. However, the accused has no standing to make submissions to the President and no right to a reasoned opinion thereon.[1393]

Legal nature and complex history in Article 28 motion rendered it a non-routine matter and the remaining Judges erred in ruling on the motion. Decision vacated.[1394]

**effect of prior decisions in new trial**

Where a trial *de novo* has been ordered, all previous interlocutory orders or decisions related to the evidence presented during trial must be disregarded and have no more effect.[1395]

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[1389] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joseph Nzirorera's Motions to Vacate the Decision on Defence Motions for Subpoenas to Prosecution Witnesses , to Exclude the Testimony of Witnesses AMB, ANU, AWD, AWE, FH, and KGV, and to Postpone the Testimony of Witness ANU* (14 June 2007) at para. 16

[1390] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions to Vacate Decisions* (17 July 2007)

[1391] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007) at para. 6

[1392] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion to Unseal and Disclose to the Canadian Authorities the Transcripts of Witness CEA* (22 March 2007) at para. 12

[1393] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at paras. 32-33

[1394] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.9, *Decision on Joseph Nzirorera's Interlocutory Appeal of Decision on Obtaining Prior Statements of Prosecution Witnesses After they have Testified* (31 May 2007) at para. 13

[1395] *Prosecutor v Karemera et al*, No. IT-98-44-PT, *Decision on Severance of Andre Rwamakuba and Amendments of the Indictment* (7 December 2004) at para. 14

Decisions of prior bench on evidentiary matters, disclosure, State cooperation, protective measures and amended indictment would not be given effect in trial *de novo*[1396]

**factors**

Trial Chamber III issued at least thirty-two written decisions in preparation for trial, none of which would necessarily be immune from challenge upon a trial *de novo*. Judicial economy would not be served by forcing the parties back into the position of zealously revisiting the very same procedural issues to which significant resources have already been devoted. Continuing the trial with the consent of the accused ordered.[1397]

Arguments with respect to alleged past violation of fair trial rights are irrelevant to the decision whether to continue the trial with a substitute Judge.[1398]

The Trial Chamber was also entitled to consider that, for one reason or another, some of the witnesses from Rwanda who had already testified might not return for a new trial.[1399]

The ability to evaluate credibility on a point of demeanour is essential to there being a fair trial. In the absence of video-recordings, it will not be possible for the substitute judge to make such an evaluation. However, the power of the Trial Chamber to recall witnesses whose demeanour may be particularly important renders resumption with a substitute Judge proper, even in the absence of video-recordings.[1400]

For a witness to be recalled, the accused must identify a particular issue which involves a matter of credibility which the substitute judge may need to assess in the light of the witness' demeanour. General issues of credibility do not justify the recall of a witness.[1401]

Admission of evidence by curing an Indictment requires continuous evaluation of their impact on the rights of the Accused. Accordingly, even if at a certain stage some

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[1396] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Declaring Prior Decisions to be of "No Effect"* (24 May 2005) at paras. 9-10
[1397] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Continuation or Commencement De Novo of Trial* (11 June 2003)
[1398] *Prosecutor v Karemera et al,* No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 40
[1399] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis, Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at para. 26
[1400] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-41-A15*bis, Decision in the Matter of Proceedings Under Rule 15bis(D)* (24 September 2003) at paras. 30,35
[1401] *Prosecutor v Nyarimasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motion for Recall of Witnesses TA, QI, TK, SJ, SU, SS, QBP, RE, FAP, SD, and QY, or in Default, a Disjunction of Trial or a Stay of Proceedings Against Niyiramasuhuko* (6 May 2004) at para. 31

evidence of material fact not pleaded in the Indictment is admitted, this does not prejudice subsequent consideration of the concept of the accumulation of curing.[1402]

**new trial ordered**

Decision of remaining judges to continue trial with substitute judge reversed where testimony of protected witness testimony was not videotaped and where Trial Chamber had appearance of bias due to personal and professional relationship between Presiding Judge and member of prosecution trial team.[1403]

**opportunity to be heard**

The parties must be given an opportunity to be heard prior to a decision by the remaining Judges to continue the trial with a substitute Judge.[1404]

**substitute Judge**

There is no violation of the accused's rights where a substitute Judge reviews the records of the proceedings, including the transcripts, audio and video recordings, to observe the demeanour of the witness.[1405]

The familiarization by the substitute Judge can be done through different methods such as relying on transcripts, audio and video records of the testimonies, exhibits, and decisions.[1406]

The substitute Judge need not detail the steps taken to familiarize himself with the records of the proceedings.[1407]

While there is a clear preference for live testimony to be heard by each judge, this preference does not represent an unbending requirement.[1408]

Although the preference for live testimony to be heard by each Judge does not present an unbending requirement, audio recordings alone do not allow a substitute judge

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[1402] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (6 March 2007) at para. 71
[1403] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR15*bis*.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion to Consider New Material* (22 October 2004)
[1404] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*, *Decision in the Matter of Proceedings Under Rule 15 bis (D)*, (21 June 2004)
[1405] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR15*bis*.3, *Decision on Appeals Pursuant to Rule 15 bis (D)* (20 April 2007) at para. 43
[1406] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Submission to Substitute Judge* (8 June 2007) at para. 8
[1407] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Submission to Substitute Judge* (8 June 2007) at para. 10
[1408] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 164

to thoroughly assess all aspects of the witnesses' demeanour in court, in particular when the judge is not proficient in the language spoken by the witness.[1409]

Transcripts or audio recordings do not always allow a judge to assess thoroughly the witness' possible aggressiveness, reluctance to answer questions, lack of emotion, and arrogance.[1410]

The accused failed to point to any aspect of any witness' demeanour in court which could not have been properly assessed without seeing or hearing the witness.[1411]

**Rule 16—resignation**

**A Judge who decides to resign shall give notice of his resignation in writing to the President, who shall transmit it to the Secretary-General of the United Nations.**

**Rule 17—precedence**

**(A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.**
**(B) The Presiding Judges of the Chambers shall take precedence according to the dates of their election or appointment as judges, after the President and the Vice-President. Presiding Judges elected or appointed on the same date shall take precedence according to age.**
**(C) Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected or appointed on the same date shall take precedence according to age.**
**(D) In case of re-election, the total period of service as a Judge of the Tribunal shall be considered.**

**Rule 18—election of the President**

**(A) The President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his term of office as a Judge. The President may be reelected once.**
**(B) If the President ceases to be a member of the Tribunal or resigns his office before the expiration of his term, the Judges shall elect from among their number a successor for the remainder of the term.**
**(C) The President shall be elected by a majority of the votes of the Judges of the Tribunal.**
**If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with Rule 17 shall be declared elected.**

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[1409] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 140
[1410] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 148
[1411] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 141

**Rule 19—functions of the President**

**(A) The President shall preside at all plenary meetings of the Tribunal, co-ordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on him by the Statute and the Rules.**
**(B) The President may, in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal.**

**defence counsel**

The President has the power to review an application by a discharged counsel concerning his discharge, as counsel has an interest in his reputation and standing. The Registrar is required to give Counsel a sufficient opportunity to meet the allegations against him which must include a detailing of those allegations. This was done in this case of Andrew McCartan.[1412]

**defence investigators**

Review of the Registrar's administrative decision to hire or suspend an investigator is by the President, who is empowered under Rule 19 of the Rules to supervise the activities of the Registry.[1413]

The President declined to overturn the Registrar's decision to refuse to appoint an individual as an investigator on the grounds he was suspected of involvement in the genocide or close family ties to the accused.[1414]

The President has the authority to review the Registry's denial of work schedules for investigators, but such review is limited to whether the decision of the Registrar was reasonable, which in this case it was.[1415]

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[1412] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *The President's Decision on Review of the Decision of the Registrar Withdrawing Mr. Andrew McCartan as the Lead Counsel for Joseph Nzirorera* (13 May 2002)
[1413] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Augustin Ndindiliyimana's Motion for an Order that the Registrar Hold a Hearing on the Suspension of the Contract of His Investigator Pierre-Claver Karangwa* (12 November 2002); *Prosecutor v Bizimungu*, No. ICTR-00-56-T, *Decision on an Application of Review of the Registrar's Decision Denying the Requested Assignment of Emmanuel Rwirangira as a Defence Investigator* (10 June 2004); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *The President's Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator* (23 November 2002)
[1414] *Prosecutor v Nyarimasuhuko et al*, No. ICTR-98-42-T, *The President's Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator* (23 November 2002)
[1415] *Prosecutor v Karera*, No. ICTR-2001-74-I, *The President's Decision on the Defence Request for a Review of the Registrar's Decision Declining a Work Program* (13 October 2004)

The Trial Chamber will not intervene in the decision of the Registry to deny work schedules to investigators unless the right of the accused to a fair trial is implicated. The approval of some work schedules indicates that the defence can conduct adequate preparation for trial.[1416]

A party challenging DCMS' decisions with respect to payment of fees or access of investigators to the accused must first exhaust his administrative remedies by appealing to the Registrar.[1417]

**expert witness**

Accused did not have a protected right or interest in decision of Registrar to deny payment to an expert witness who was subsequently not qualified as an expert by the Trial Chamber, where witness was allowed to, and was willing to testify as a fact witness without resolution of the payment issue.[1418]

**legal assistant**

An application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively, is admissible under Rules 19 and 33(A) of the Rules, if the accused has a protective right or interest, or if it is otherwise in the interests of justice. The assignment of a legal assistant could have a bearing on the accused's ability to prepare his defence and his right to defend himself and the decision refusing to reinstate a legal assistant is reviewable. However, the Registrar did not abuse his discretion.[1419]

**protected right or interest**

An application for review of the Registrar's decision by the President on the basis that it is unfair procedurally or substantively is admissible under Rules 19 and 33(A) if the applicant has a protected right or interest or if it is otherwise in the interests of justice in the case of the applicant.[1420]

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[1416] *Prosecutor v Gatete*, No. ICTR-2000-61-I, *Decision on the Defence Request for Necessary Resources for Investigations* (2 November 2004)
[1417] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Release of the Accused* (22 October 2002) at para. 5
[1418] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Appeal of the Registrar's Decision of 13 April 2005 with Regard to Mr. Edmond Babin* (18 April 2005) at para. 11
[1419] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *The President's Decision on a Motion Filed by the Defence Appealing the Registrar's Decision of 16 August 2002* (22 January 2003)
[1420] *Prosecutor v Nyarimasuhuko et al*, No. ICTR-98-42-T, *Decision on the Appeal of the Registrar's Decision of 13 April 2005 with Regard to Mr. Edmond Babin* (18 April 2005) at para. 8; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *The President's Decision on the Application by Arsene Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator* (23 November 2002); *Karemera v Prosecutor*, No. ICTR-98-44-T, *Decision on Complaint by Edouard Karemera* (28 May 2007) at para. 6

**Rule 20—the Vice-President**

**(A) The Vice-President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his term of office as a Judge. The Vice-President may be re-elected once.**
**(B) Rules 18 (B) and (C) shall apply mutatis mutandis to the Vice-President.**

**Rule 21—functions of the Vice-President**

**The Vice-President shall exercise the functions of the President in case the latter is absent or is unable to act.**

**Rule 22—replacements**

**If neither the President nor the Vice-President can carry out the functions of the Presidency, this shall be assumed by the senior Judge of the Trial Chambers, determined in accordance with Rule 17.**

**Rule 23—The Bureau**

**(A) The Bureau shall be composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.**
**(B) The President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal.**
**(C) A Judge may draw the attention of any member of the Bureau to issues that in his opinion ought to be discussed by the Bureau or submitted to a Plenary Meeting of the Tribunal.**

**Rule 23 bis—the coordination council**

**(A) The Coordination Council shall be composed of the President, the Prosecutor and the Registrar.**
**(B) In order to achieve the mission of the Tribunal, as defined in the Statute, the Coordination Council ensures the coordination of the activities of the three organs of the Tribunal.**
**(C) The Coordination Council shall meet once a month at the initiative of the President. A member may at any time request that additional meetings be held. The President shall chair the meetings.**
**(D) The Vice-President, the Deputy Prosecutor and the Deputy Registrar may ex officio represent respectively, the President, the Prosecutor and the Registrar.**

**Rule 23 ter—the management committee**

**(A) The Management Committee shall be composed of the President, the Vice-President, a Judge elected by the Judges in plenary session for a one year renewable mandate, the Registrar, the Deputy Registrar and the Chief of Administration.**

**(B) The Management Committee shall assist the President with respect to the functions set forth in Rules 19 and 33, concerning in particular, all Registry activities relating to the administrative and judicial support provided to the Chambers and to the Judges. To this end, the Management Committee shall coordinate the preparation and implementation of the budget of the Tribunal with the exception of budgetary lines specific to the activities of the Office of the Prosecutor.**
**(C) The Management Committee shall meet once a month at the initiative of the President. Two members may at any time request that additional meetings be held. The President shall chair the meetings.**
**(D) In the performance of its functions, the Management Committee may call on the services of one or several advisers or experts.**

**Rule 24—plenary meetings of the Tribunal**

**The Judges shall meet in plenary to:**
**(i) Elect the President and Vice-President;**
**(ii) Adopt and amend the Rules;**
**(i) Adopt the Annual Report provided for in Article 32 of the Statute;**
**(iv) Decide upon matters relating to the internal functioning of the Chambers and the Tribunal;**
**(ii) Determine or supervise the conditions of detention;**
**(vi) Exercise any other functions provided for in the Statute or in the Rules.**

**Rule 25—dates of plenary meetings**

**(A) The dates of the scheduled Plenary Meetings of the Tribunal shall normally be agreed upon in July of each year for the following calendar year.**
**(B) Other Plenary Meetings shall be convened by the President if so requested by at least eight Judges, and may be convened whenever the exercise of his functions under the Statute or the Rules so requires.**

**Rule 26—quorum and vote**

**(A) The quorum for each Plenary Meeting of the Tribunal shall be a majority of all Judges.**
**(B) Subject to Rule 6 (A) and (B) and Rule 18 (C), the decisions of the Plenary Meeting of the Tribunal shall be taken by the majority of the Judges present. In the event of an equality of votes, the President or the Judge who acts in his place shall have a casting vote.**
**Rule 27—rotation of the Judges**

**(A) Judges shall rotate on a regular basis between the Trial Chambers. Rotation shall consider the efficient disposal of cases.**
**(B) The Judges shall take their places in their assigned Chamber as soon as the President thinks it convenient, having regard to the disposal of pending cases.**

**(C) The President may at any time temporarily assign a member of one Trial Chamber to another Trial Chamber.**

**Rule 28—duty judges**

**Every six months and after consultation with the Judges, the President shall, designate for each month of the next six months one Judge from each Trial Chamber to whom indictments, warrants, and other submissions not pertaining to a case already assigned to a Chamber, shall be transmitted for review. The duty roster shall be published by the Registrar. However, in exceptional circumstances, a Judge on duty may request another Judge of the same Chamber to replace him, after having informed the President and the Registrar.**

**Rule 29—deliberations**

The deliberations of the Chambers shall take place in private and remain secret.

**Rule 30—appointment of the Registrar**

**The President shall seek the opinion of the Judges on the candidates for the post of Registrar, before consulting with the Secretary-General of the United Nations pursuant to Article 16 (3) of the Statute.**

**Rule 31—appointment of the Deputy Registrar and Registry staff**

**The Registrar, after consultation with the President, shall make his recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff.**

**Rule 32—solemn declaration**

**(A) Before taking up his duties, the Registrar shall make the following declaration before the President:**
**"I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January1994 and 31 December 1994, in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal."**
**(B) Before taking up his duties, the Deputy Registrar shall make a similar declaration before the President.**
**(C) Every staff member of the Registry shall make a similar declaration before the Registrar.**

**Rule 33—functions of Registrar**

**(A) The Registrar shall assist the Chambers, the Plenary Meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, he shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.**
**(B) The Registrar, in the execution of his functions, may make oral or written representations to Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary.**
**(C) The Registrar may, in consultation with the President of the Tribunal and the Presiding Judge of the Appeals Chamber, as the case may be, issue Practice Directions addressing particular aspects of the practice and procedure in the Registry of the Tribunal and in respect of other matters within the powers of the Registrar.**

**communication with prisoners**

The Registrar has a continuing obligation to ensure a channel of communication between the Tribunal and a convicted person at any time during his or her detention under the authority of the Tribunal and after he or her has been transferred to a State in which his or her sentence is to be served.[1421]

Registrar reminded of its obligation considering failure to serve decision on accused for two months.[1422]

**submission by Registrar**

Registrar ordered to make submission to Trial Chamber explaining circumstances of disclosure of defence *ex parte* filing to prosecution and steps taken to see that it did not recur.[1423]

Rule 33(B) allowed Registrar to make submissions on appeal in opposition to award of compensation for accused whose rights were violated.[1424]

**Rule 34—victims and witnesses support unit**

**(A) There shall be set up under the authority of the Registrar a Victims and**

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[1421] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-R, *Decision on Emmanuel Ndindabahizi's Motion of 1 December 2008* (17 December 2008) at p.3
[1422] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-R, *Decision on Emmanuel Ndindabahizi's Motion of 1 December 2008* (17 December 2008) at p.3
[1423] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order for the Registrar's Submission on the Defence Motion for Order Concerning Unlawful Disclosure of Confidential Ex Parte Filing and for Stay of Proceedings* (1 February 2006)
[1424] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Prosecutor's Notice of Appeal and Scheduling Order* (18 April 2007) at para. 7

**Witnesses Support Unit consisting of qualified staff to:**
**(i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;**
**(ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and**
**(iii) Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.**
**(B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.**

**Rule 35—minutes**

**(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to:**
**(i) Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute;**
**(ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and**
**(iii) Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.**
**(B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this Unit, to the employment of qualified women.**

**Rule 36—record book**

**The Registrar shall keep a Record Book which shall list, subject to Rule 53, all the particulars of each case brought before the Tribunal. The Record Book shall be open to the public.**

**Rule 37—functions of the Prosecutor**

**(A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by him. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer.**
**(B) The Prosecutor's powers under Parts Four to Eight of the Rules may be exercised by staff members of the Office of the Prosecutor authorized by him, or by any person acting under his direction.**

In exercising its powers, prosecution counsel must adhere to standards of professional conduct set out in Prosecutor's Regulation No. 2. In accordance with

Regulation No. 2, during investigations and judicial proceedings, prosecution counsel are required to adopt the highest standards of professional conduct and are expected to follow the prescribed standards in order to safeguard the interests of justice, including "the fundamental rights of suspects and accused."[1425]

In addition, as a staff member of the United Nations, a prosecutor also had a duty to act in accordance with the Charter of the United Nations, its Staff Rules and its Staff Regulations, which include a duty to act with integrity and honesty.[1426]

A prosecutor may exercise the powers under Rule 37(B) irrespective of whether he or she is in good standing with his or her own bar.[1427] Prosecutor's past professional conduct in the State of New York, the status of her license to practice law there, or her alleged untimely disclosure that her license to practice law in New York had been suspended, was not shown to have undermined the integrity of the trial or deprived the accused of the right to a fair trial.[1428]

**Rule 38—Deputy Prosecutor**

**(A) The Prosecutor shall make his recommendations to the Secretary-General of the United Nations for the appointment of a Deputy Prosecutor.**
**(B) The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of his absence or inability to act or upon the Prosecutor's express instructions.**

**Rule 39—conduct of investigations**

**In the conduct of an investigation, the Prosecutor may:**
**(i) Summon and question suspects, interview victims and witnesses and record their statements, collect evidence and conduct on-site investigations;**
**(ii) Take all measures deemed necessary for the purpose of the investigation and to support the prosecution at trial, including the taking of special measures to provide for the safety of potential witnesses and informants;**
**(iii) Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and**
**(iv) Request such orders as may be necessary from a Trial Chamber or a Judge.**

Trial Chamber declined to direct Registrar to provide photograph of accused and 5 other persons for photo line-up. Such a practice would place the Registrar in the position of assisting the prosecution in its investigation and compromise its neutral role.[1429]

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[1425] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 15
[1426] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 16
[1427] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 16
[1428] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 18
[1429] *Prosecutor v Rukundo*, No. ICTR-01-70-I, *Decision on the Prosecutor's Motion to Order the Registrar to Provide Photographs of the Accused for Purposes of Identification* (25 October 2002)

While Rule 39 allows the prosecution to take the necessary measures to provide for the safety of potential witnesses, only the Trial Chamber has the authority to order protective measures. Rule 39 cannot be used as an impediment to disclosure of identifying information with respect to Prosecution witnesses.[1430]

Rule 39 (ii) does not excuse the prosecution from disclosing exculpatory material. Exceptions to that obligation must be subject to the specific, judicially controlled provisions of Rule 68 (D). An independent power of the Prosecution to withhold information on unenumerated grounds could undermine the scope of Rule 68 (A).[1431]

While the warrant for arrest issued by the ICTR did not authorize search or seizure of the property of the accused, the domestic law of the State in which the accused was arrested provided sufficient grounds for a search and seizure of materials during or after an arrest.[1432]

**Rule 40—provisional measures**

**(A) In case of urgency, the Prosecutor may request any State:**
**(i) To arrest a suspect and place him in custody;**
**(ii) To seize all physical evidence;**
**(iii) To take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.**
**The State concerned shall comply forthwith, in accordance with Article 28 of the Statute.**
**(B) Upon showing that a major impediment does not allow the State to keep the suspect in custody or to take all necessary measures to prevent his escape, the Prosecutor may apply to a Judge designated by the President for an order to transfer the suspect to the seat of the Tribunal or to such other place as the Bureau may decide, and to detain him provisionally. After consultation with the Prosecutor and the Registrar, the transfer shall be arranged between the State authorities concerned, the authorities of the host Country of the Tribunal and the Registrar.**
**(C) In the cases referred to in paragraph B, the suspect shall, from the moment of his transfer, enjoy all the rights provided for in Rule 42, and may apply for review to a Trial Chamber of the Tribunal. The Chamber, after hearing the Prosecutor, shall rule upon the application.**
**(D) The suspect shall be released if (i) the Chamber so rules; or (ii) the Prosecutor fails to issue an indictment within twenty days of the transfer.**

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[1430] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 18; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion to be Relieved of the Obligation to Disclose the Identities of Certain Witnesses* (2 November 2007) at para. 8

[1431] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Identity of Prosecution Informant* (24 May 2006) at para. 8

[1432] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained Out of Court Pursuant to Rules 89(C) and (D)* (26 April 2006) at para. 24-25

**delay**

Eight days between the time of arrest and request for transfer is reasonable and is not to be considered as a violation of the rights of the Accused.[1433]

Considering the complexity of the charges faced by accused persons before this Tribunal, provisional detention of a suspect without being formally charged for a maximum of 90 days is warranted under the law of this Tribunal so long as the protections provided for the suspect's rights under Rules 40 and 40*bis* of the Rules are adhered to.[1434]

Although 90 days may be permissible for the finalizing of a formal indictment, 85 days of provisional detention without even an informal indication of the charges to be brought against the suspect is not reasonable under international human rights law, given that nothing less than an individual's fundamental right to liberty is at issue.[1435]

Detention in Benin for a total of 85 days without charge and without being brought promptly before a Judge was clearly unlawful and was in violation of his rights under the Tribunal's Statute and Rules as well as international human rights law. The prosecution is responsible for these violations because it failed to make a request within a reasonable time under Rules 40 and 40*bis* for the Appellant's provisional arrest and transfer to the Tribunal.[1436]

Where most delays, which resulted in the 221-day gap between the confirmation of the indictment and initial appearance, were occasioned by the accused himself or circumstances not attributable to the Tribunal, there was no violation of the accused's right to initial appearance without delay was violated.[1437]

**indictment**

Article 19(2) of the Statute does not require that an indictment be issued before an accused can be arrested. There is a need to allow for short, provisional detentions of persons under investigation by the Tribunal to, for example, preserve physical evidence, avoid escape of a suspect, and/or prevent injury to or intimidation of a victim or witness.[1438]

**jurisdiction**

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[1433] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Renewed Motion to Exclude his Custodial Statements from Evidence* (4 December 2003) at para. 27
[1434] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 229
[1435] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 231
[1436] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 231
[1437] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 31
[1438] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 22

The Trial Chamber lacks jurisdiction to review the legal circumstances attending the arrest of a suspect, under Rule 40 of the Rules, in so far as the arrest has been made pursuant to the laws of the arresting state.[1439]

**probable cause**

Probable cause is not required to arrest a suspect. All that is required is that the prosecution have reliable information which tends to show that a person may have committed a crime within the jurisdiction of the Tribunal.[1440]

**service on accused**

The legality of one's detention is not dependent on personal service to the Accused of a Decision confirming the Indictment 20 days, at the latest, after an Order for detention is issued.[1441] While a copy of the order and request by the prosecutor should be served upon the accused as soon as possible, the failure to do so did not result in a miscarriage of justice.[1442]

Although the Appellant was lawfully apprehended pursuant to Rule 40 of the Rules, the way the arrest was carried out was not according to due process of law because the Appellant was not promptly informed of the reasons for his arrest.[1443]

Even if accused was not informed of the reasons for his arrest for thirty days, he was not entitled to any relief since he failed to show any prejudice from this failure.[1444]

Failure to promptly provide the accused with the request for his arrest pursuant to after he was detained in Mali based on that request violated the accused's right to be

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[1439] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on the Defence Motion Challenging the Legality of the Arrest and Detention of the Accused and Requesting the Return of Personal Items Seized* (7 September 2000) at para. 27; *Prosecutor v Kajelijeli*, No. ICTR-98-44-I, *Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing* (8 May 2000) at para.35; *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion for Release of the Accused* (10 December 1999) at para. 4.3.3); *Prosecutor v Ngirumpatse*, No. ICTR-98-44-I, *Decision on the Defence Motion Challenging the Lawfulness of the Arrest or Detention and Seeking Return or Inspection of Seized Items* (10 December 1999) at para. 56

[1440] *Prosecutor v Kajelijeli*, No. ICTR-98-44-I, *Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing* (8 May 2000) at para. 32

[1441] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at paras. 34

[1442] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion for Release of the Accused* (10 December 1999) at para. 4.4

[1443] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 226

[1444] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 36

promptly informed of the reasons for his arrest. However, an adequate remedy was provided by excluding his statement given after his arrest.[1445]

**warrant of arrest**

A request for the arrest of the accused by the prosecutor may be oral or written.[1446] An accused may be arrested on a request, there is no need for a warrant of arrest.[1447]

**Rule 40 bis—transfer and provisional detention of suspects**

**(A) In the conduct of an investigation, the Prosecutor may transmit to the Registrar, for an order by a Judge assigned pursuant to Rule 28, a request for the transfer to and**
**provisional detention of a suspect in the premises of the detention unit of the Tribunal.**
**This request shall indicate the grounds upon which the request is made and, unless the**
**Prosecutor wishes only to question the suspect, shall include a provisional charge and a**
**summary of the material upon which the Prosecutor relies.**
**(B) The Judge shall order the transfer and provisional detention of the suspect if the following conditions are met:**
**(i) The Prosecutor has requested a State to arrest the suspect and to place him in custody, in accordance with Rule 40, or the suspect is otherwise detained by a State;**
**(ii) After hearing the Prosecutor, the Judge considers that there is a reliable and consistent body of material which tends to show that the suspect may have committed a crime over which the Tribunal has jurisdiction; and**
**(iii) The Judge considers provisional detention to be a necessary measure to prevent the escape of the suspect, physical or mental injury to or intimidation of a victim or witness or the destruction of evidence, or to be otherwise necessary for the conduct of the investigation.**
**(C) The provisional detention of the suspect may be ordered for a period not exceeding 30 days from the day after the transfer of the suspect to the detention unit of the Tribunal.**
**(D) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the request made by the Prosecutor under Sub-Rule (A), including the**

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[1445] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at paras. 62-64
[1446] *Prosecutor v Kajelijeli*, No. ICTR-98-44-I, *Decision on the Defence Motion Concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing* (8 May 2000) at para.33
[1447] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion for Release of the Accused* (10 December 1999) at para. 4.3.4

**provisional charge, and shall state the Judge's grounds for making the order, having regard to Sub-Rule (B). The order shall also specify the initial time limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43.**
**(E) As soon as possible, copies of the order and of the request by the Prosecutor are served upon the suspect and his counsel by the Registrar.**
**(F) At the Prosecutor's request indicating the grounds upon which it is made and if warranted by the needs of the investigation, the Judge who made the initial order, or**
**another Judge of the same Trial Chamber, may decide, subsequent to an inter partes**
**hearing and before the end of the period of detention, to extend the provisional detention for a period not exceeding 30 days.**
**(G) At the Prosecutor's request indicating the grounds upon which it is made and if warranted by special circumstances, the Judge who made the initial order, or another Judge of the same Trial Chamber, may decide, subsequent to an inter partes hearing and before the end of the period of detention, to extend the detention for a further period not exceeding 30 days.**
**(H) The total period of provisional detention shall in no case exceed 90 days after the day of transfer of the suspect to the Tribunal, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the State to which the request was initially made.**
**(I) The provisions in Rules 55(B) to 59 shall apply mutatis mutandis to the execution of the order for the transfer and provisional detention of the suspect.**
**(J) After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber, who shall ensure that his rights are respected.**
**(K) During detention, the Prosecutor, the suspect or his counsel may submit to the Trial Chamber of which the Judge who made the initial order is a member, all applications relative to the**
**propriety of provisional detention or to the suspect's release.**
**(L) Without prejudice to Sub-Rules (C) to (H), the Rules relating to the detention on remand of accused persons shall apply mutatis mutandis to the provisional detention of persons under this Rule.**

The suspect's right to be promptly charged, as set forth in Rule 40 *bis*, becomes effective as soon as a Rule 40 *bis* Order is filed.[1448]

No violation of the right of the accused to be brought before a judge without delay occurred where two detention hearings were held shortly after his arrival in Arusha and although he was not personally present, the accused had the right to raise issues

[1448] *Semanza v .Prosecutor*, No. ICTR-97-20-A, *Decision* (31 May 2000) at para.91.

concerning being informed of the charges, and his duty counsel neither raised such issues nor complained that the accused was not present.[1449]

**Rule 41—preservation of information**

**(A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigations.**
**(B) The Prosecutor shall draw up an inventory of all materials seized from the accused, including documents, books, papers, and other objects, and shall serve a copy thereof on the accused. Materials that are of no evidentiary value shall be returned without delay to the accused.**

Pursuant to Rule 41(B), the prosecution has an affirmative obligation to assess the evidentiary value of materials seized from an accused in a timely manner to justify the retention of any seized materials and to return the unnecessary materials without delay.[1450]

The Commander of the UNDF ordered to provide all personal effects of the accused to the prosecution, which was obligated to inventory the property, return all non-evidential material to the accused, and permit the accused to inspect any property retained. Copies of passports should be provided to the accused.[1451]

Pursuant to the Rules, the Prosecutor shall draw up an inventory of all materials seized from the accused and shall serve a copy thereof on the accused. To the extent that the Prosecution is in possession of materials seized from the accused, the Prosecutor is under an immediate obligation to return those materials of no evidentiary value.[1452]

Seized property may retain evidentiary value after the prosecution has closed its case for use in cross examining defence witnesses. Prosecution ordered to reassess whether property has evidentiary value at conclusion of prosecution case and return items now determined to have no evidentiary value.[1453]

Where the accused failed to establish that *laissez-passers* which would have established his alibi was seized from him by the prosecution as he claimed, there was no violation of the prosecution's duty to preserve evidence.[1454]

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[1449] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at paras. 54-55
[1450] *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on the Defence Motion for Return of Documents and Other Seized Personal Items* (20 November 2002) at para. 10; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Immediate Return of Seized Property* (26 November 2007) at para. 4
[1451] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka's Motion for Return of Personal Properties* (22 June 2004)
[1452] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Urgent Motion for the Disclosure of Evidence and for Return of Seized Items* (24 September 2001) at para. 6
[1453] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Immediate Return of Seized Property* (26 November 2007) at paras.7,9
[1454] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 19

**Rule 42—right of suspects during investigation**

**(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:**
**(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it;**
**(ii) The right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning; and**
**(iii) The right to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.**
**(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.**

**right to counsel**

To be adequately advised before questioning, the suspect must be informed that the right to counsel includes the right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective.[1455]

Any waiver of the right to counsel must be shown "convincingly and beyond reasonable doubt". It must be express and unequivocal and must clearly relate to the interview in which the statement in question is taken.[1456]

Where the accused stated three times that as soon as he is informed of the case against him, he would then "exercise" the right of, or "be entitled" to, the assistance of counsel, the investigators should have recognized that this was a confused attempt to invoke the right to counsel and ceased their questioning immediately.[1457]

Where investigators did not end the interview when the accused mentioned he would like to consult with counsel, but instead persuaded him to answer "non-

[1455] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 17
[1456] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 18
[1457] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 20

tendentious" questions, they violated his right to counsel, and the statement could not be admitted into evidence.[1458]

Failure of OTP investigator to advise suspect that a duty counsel had been appointed for him violated this rule and required that evidence of the statement be excluded.[1459]

Doubt as to whether the accused had any knowledge of the charges against him at the time of his interview entails substantial doubt as to whether he was able to make an informed waiver of his right to counsel or right to silence.[1460]

When asked if "[he] would like to waive [his] right to counsel?", the Accused stated "Not completely, but … for the moment, I… I accept to talk to you." This was an unequivocal waiver of right of counsel and the statements could be used at the trial of the accused.[1461]

**violation of rights**

Where there was evidence that the prosecution possessed some evidence that the accused had committed crimes over which the Tribunal had jurisdiction, he should have been treated as a suspect during his interrogation. Failure to provide him the warnings provided by this rule required that his statement be excluded.[1462]

For the procedural safeguards guaranteed under Rule 42 to be applicable in this case, the accused must show that he was a suspect and that, while such a suspect, he was questioned by the Prosecutor, following which the statement entitled CV was written, and which the Applicant was induced to offer, contrary to his wishes.[1463]

**voir dire**

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[1458] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 27

[1459] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Prosecutor's Application to Admit into Evidence the Transcript of the Accused's Interview as a Suspect and the Defence's Request to Hold a Voir Dire* (5 February 2007)

[1460] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 30

[1461] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Renewed Motion to Exclude his Custodial Statements from Evidence* (4 December 2003) at para. 17

[1462] *Prosecutor v Zigiranyirazo*, No. ICTR—2001-73-T, *Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae* (29 November 2006)

[1463] *Prosecutor v Zigiranyirazo*, No. ICTR—2001-73-T, *Decision on the Defence Motion for Disclosure of Voir Dire Evidence* (27 April 2006) at para. 12

The Trial Chamber is not required to hold a voir dire to determine the admissibility of a statement of the accused.[1464]

An evidentiary hearing would be required where it appeared that there were some discussions between the investigators and the accused that were not recorded. However, the statements were excluded on other grounds.[1465]

**Rule 43—recording questioning of suspects**

**Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:**
**(i) The suspect shall be informed in a language he understands that the questioning is being audio-recorded or video-recorded;**
**(ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;**
**(iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded;**
**(iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and**
**(v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.**

Rule 43 is silent on the procedure governing the unsealing of the tapes for the purpose of having it transcribed. Unsealing the tapes in the presence of the accused is implicit for fair trial and the interests of justice. However, no prejudice was shown.[1466]

**Rule 44—appointment and qualification of counsel**

**(A) Counsel engaged by a suspect or an accused shall file his power of attorney with the Registrar at the earliest opportunity. Subject to verification by the Registrar, a counsel shall be considered qualified to represent a suspect or accused, provided that he is admitted to the practice of law in a State, or is a University professor of**

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[1464] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Oral Motion to Cross Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997* (15 May 2006) at para. 56
[1465] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 22
[1466] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-DP, *Decision on the Defence Motion Seeking Release of the Accused Person and/or any Other Remedy on the Basis of Abuse of Process by the Prosecutor* (8 May 2002)

**law.**
**(B) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Conduct and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel.**

**Rule 44 bis—duty counsel**

**(A) A list of duty counsel who speak one or both working languages of the Tribunal and have indicated their willingness to be assigned pursuant to this Rule shall be kept by the Registrar.**
**(B) Duty counsel shall fulfill the requirements of Rule 44, and shall be situated within reasonable proximity to the Detention Facility and the Seat of the Tribunal.**
**(C) The Registrar shall at all times ensure that duty counsel will be available to attend the Detention Facility in the event of being summoned.**
**(D) If an accused, or suspect transferred under Rule 40 bis, is unrepresented at any time after being transferred to the Tribunal, the Registrar shall as soon as practicable summon duty counsel to represent the accused or suspect until counsel is engaged by the accused or suspect, or assigned under Rule 45.**
**(E) In providing initial legal advice and assistance to a suspect transferred under Rule 40 bis, duty counsel shall advise the suspect of his or her rights including the rights referred to in Rule 55 (A).**

It constitutes a violation of Rule 44*bis* of the Rules and provision 10*bis* of the Directive on the Assignment of Defence Counsel not to assign duty counsel, despite ongoing efforts to assign counsel of choice in light of the outstanding initial appearance. Such a duty exists from the very moment of transfer to the Tribunal and is not confined to purposes of the initial appearance only.[1467]

Rule 44 *bis* gives effect to one of the most important fair trial rights of the accused, the right to legal assistance. It is in the interests of justice that legal assistance be provided to an accused in international criminal law from the earliest stages of the proceedings, as it involves complex cases, concerns serious offences, and entails significant potential sentences.[1468]

**Rule 45—assignment of counsel**

**(A) A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least seven years' relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar.**
**(B) The criteria for determination of indigence shall be established by the Registrar**

[1467] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 245
[1468] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at para. 17

**and approved by the Judges.**
**(C) In assigning counsel to an indigent suspect or accused, the following procedure shall be observed:**
**(i) A request for assignment of counsel shall be made to the Registrar;**
**(ii) The Registrar shall enquire into the financial means of the suspect or accused and determine whether the criteria of indigence are met;**
**(iii) If he decides that the criteria are met, he shall assign counsel from the list; if he decides to the contrary, he shall inform the suspect or accused that the request is refused.**
**(D) If a request is refused, a further reasoned request may be made by the suspect or the accused to the Registrar upon showing a change in circumstances.**
**(E) The Registrar shall, in consultation with the Judges, establish the criteria for the payment of fees to assigned counsel.**
**(F) If a suspect or an accused elects to conduct his own defence, he shall so notify the Registrar in writing at the first opportunity.**
**(G) Where an alleged indigent person is subsequently found not to be indigent, the Chamber may make an order of contribution to recover the cost of providing counsel.**
**(H) Under exceptional circumstances, at the request of the suspect or accused or his counsel, the Chamber may instruct the Registrar to replace an assigned counsel, upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings.**
**(I) It is understood that Counsel will represent the accused and conduct the case to finality. Failure to do so, absent just cause approved by the Chamber, may result in forfeiture of fees in whole or in part. In such circumstances the Chamber may make an order accordingly. Counsel shall only be permitted to withdraw from the case to which he has been assigned in the most exceptional circumstances.**

**appeal**

In respect of a decision to assign or not assign counsel to represent an Appellant before the Appeals Chamber, a right of recourse to the Appeals Chamber is required for the effective exercise of the Appellant's rights.[1469]

**choice of counsel**

An accused does not have a right to choose his own publicly paid counsel.[1470] The present practice of assigning counsel is simply to accord weight to the accused's

[1469] *Akayesu v Prosecutor*, No. ICTR-96-4-A, *Decision Relating to the Assignment of Counsel* (27 July 1999).
[1470] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on the Extremely Urgent Motion by the Defence for Ntabakuze to Assign Andre Tremblay as Lead Counsel* (4 April 2003) at para. 10; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 21

preference, but that preference may always be overridden if it is in the interests of justice to do so.[1471]

Counsel may be assigned to an accused even against his will.[1472]

While an accused's choice of counsel should ordinarily be respected, the Registrar was reasonable in declining to appoint counsel on appeal who had a pending case at the ICTY.[1473]

Registrar ordered to assign counsel of accused's choice and to pay what it had originally agreed where assignment of other counsel would unduly delay the proceedings.[1474]

Counsel for a co-accused lacks standing to request assignment of a particular lead counsel for that co-accused.[1475]

**co-counsel**

Lead Counsel and Co-Counsel is each deemed to be capable of representing the interests of the Accused in the absence of the other. It is unacceptable that Co-Counsel would not be able to proceed with the defence of his client in the absence of Lead Counsel.[1476]

It is a co-counsel's duty to intervene where lead counsel fails to submit Rule 73 *ter* filings as directed by the Trial Chamber.[1477]

An accused has no absolute right to a Co-Counsel.[1478]

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[1471] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 21; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 10; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Motions Requesting Assignment of Counsel of Choice* (13 October 2008) at para. 18; *Prosecutor v. Nshogoza*, No. ICTR-2007-91-A, *Judgement* (15 March 2010) at para. 35

[1472] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 21

[1473] *Nahimana v Prosecutor*, No, ICTR-99-52-A, *Decision on Jean Bosco Barayagwiza's Motion Concerning the Registrar's Decision to Appoint Counsel* (19 January 2005)

[1474] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Motions Requesting Assignment of Counsel of Choice* (13 October 2008) at paras. 24,25

[1475] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on the Extremely Urgent Motion by the Defence for Ntabakuze to Assign Andre Tremblay as Lead Counsel* (4 April 2003) at para. 6

[1476] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Continuance of Trial Session* (13 October 2005) at para. 15

[1477] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Reconsider the Warning to Co-Counsel* (8 September 2008) at para. 6

**conflict of interest**

A conflict of interests between an attorney and a client arises in any situation where, by reason of certain circumstances, representation by such an attorney prejudices, or could prejudice, the interests of the client and the wider interests of justice.[1479]

**discharge of counsel**

An accused does not have the right to unilaterally destroy the trust between himself and his counsel in the hope that such actions will result in the withdrawal of his counsel by the Registrar.[1480]

The Registrar has the authority to withdraw the assignment of counsel pursuant to Article 19(A)(iii) of the Directive. The Trial Chamber has jurisdiction to review that decision to ensure a fair trial. The decision to remove Jean Degli for alleged fraud was not unreasonable. Prejudice to the accused can be remedied by continuance of the trial proceedings and immediate appointment of a new lead counsel.[1481]

The Chamber has the authority to order the withdrawal of counsel pursuant to Rule 45(H).[1482] The Chamber should first be satisfied that exceptional circumstances exist, and good cause has been shown to warrant withdrawal of counsel, and second, that the request is not designed to delay the proceedings.[1483]

Exceptional circumstances existed for the Trial Chamber to instruct the Registrar to withdraw lead counsel where lead counsel did not appear to be preparing for trial and

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[1478] *Barayagwiza v. Prosecutor*, No. ICTR-99-52-A, *Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel* (29 August 2006) at para. 8; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 10

[1479] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 158

[1480] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 21; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Motions Requesting Assignment of Counsel of Choice* (13 October 2008) at para. 20

[1481] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi* (19 January 2005)

[1482] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on Nzirorera's Motion for Withdrawal of Counsel* (3 October 2001); *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision on the Accused's Request to Instruct the Registrar to Replace Lead Counsel* (18 November 2003); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 17

[1483] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on Nzirorera's Motion for Withdrawal of Counsel* (3 October 2001); *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision on the Accused's Request to Instruct the Registrar to Replace Lead Counsel* (18 November 2003)

there was no agreement on defence strategy,[1484] or where there was a breakdown in communication and trust.[1485]

Exceptional circumstances to discharge counsel may exist upon a showing of compelling evidence of an obvious breakdown in communication between the accused and his counsel.[1486]

Exceptional circumstances for discharging counsel on the eve of closing arguments did not exist where there was no credible showing that lead counsel had not discharged his duties or had been ineffective.[1487]

Assignment of discharged lawyer as "pro bono" counsel for the accused denied where the lawyer would of necessity be supervising legal aid funds needed for payment of other defence team members and transportation and subsistence of witnesses. However, the lawyer could work in some capacity under the direction of lead counsel.[1488]

Rule 45(H) provides for a parallel procedure to that of Article 19(E) of the Directive on Assignment of Defence Counsel which allows the Trial Chamber to review the decision of the Registrar concerning withdrawal of co-counsel. Given the stage of the proceedings (defence case to commence in one month), the Trial Chamber chose to exercise its jurisdiction.[1489]

Although the Registrar has primary responsibility to assign counsel, the Trial Chamber has the inherent power to order the Registry to assign counsel where the accused's fair trial rights may be adversely affected.[1490]

**duties of counsel**

While Counsel should take full instructions about facts surrounding the case, this does not imply that Counsel must consult with the accused whenever any step in his defence is taken by the Counsel. Nevertheless, Counsel must keep the Accused informed

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[1484] *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision on the Accused's Request to Instruct the Registrar to Replace Lead Counsel* (18 November 2003)
[1485] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Withdrawal of Counsel* (22 June 2001) at para. 14; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Confidential and Extremely Urgent Defence Motion to Review the Registrar's Decision Dated 9 May 2007* (31 May 2007)
[1486] *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Decision on Hategekimana's Motion for Withdrawal of Counsel and Adjournment of Closing Arguments* (30April 2010) at para. 17
[1487] *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Decision on Hategekimana's Motion for Withdrawal of Counsel and Adjournment of Closing Arguments* (30April 2010)
[1488] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Private Representation of Gratien Kabiligi* (4 March 2005)
[1489] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Confidential and Extremely Urgent Defence Motion to Review the Registrar's Decision Dated 9 May 2007* (31 May 2007) at para. 7
[1490] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Order to Assign Counsel* (24 July 2008) at para. 14; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Motions Requesting Assignment of Counsel of Choice* (13 October 2008) at para. 19

of the steps taken to protect his interests and provide the Accused with a reasoned explanation as to why they took such steps.[1491]

**witness**

Where witness was no longer subject to criminal proceedings in Canada, he had no right to counsel paid by the Tribunal in connection with his testimony as a defence witness.[1492]

**Rule 45 bis—detained persons**

**Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.**

**Rule 45 ter—availability of counsel**

**(A) Counsel and Co-Counsel, whether assigned by the Registrar or appointed by the client for the purposes of proceedings before the Tribunal, shall furnish the Registrar, upon date of such assignment or appointment, a written undertaking that he will appear before the Tribunal within a reasonable time as specified by the Registrar.**
**(B) Failure by Counsel or Co-Counsel to appear before the Tribunal, as undertaken, shall be a ground for withdrawal by the Registrar of the assignment of such Counsel or Co-Counsel or the refusal of audience by the Tribunal or the imposition of any other sanctions by the Chamber concerned.**

Where co-counsel did not make herself available after being assigned to the case, claiming extraordinary circumstances, she would be discharged and struck from the list of persons eligible for appointment.[1493]

**Rule 45 quater—assignment of counsel in the interests of justice**

**The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.**

The Trial Chamber has the discretion to order that counsel be assigned to represent the interests of a fugitive accused, and ordered that counsel be assigned for Rule 11 *bis* proceedings.[1494]

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[1491] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Withdrawal of Counsel* (22 June 2001) at para. 23
[1492] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008) at para. 12
[1493] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision of Withdrawal of Ms. Tiphaine Dickson as Co-Counsel for Accused Augustin Ndindiliyimana* (13 October 2005)
[1494] *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on the Referral of the Application to Appoint Defence Counsel* (2 May 2008)

**Rule 46—misconduct by counsel**

**(A) A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable mutatis mutandis to Counsel for the prosecution.**
**(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission or, if a professor and not otherwise admitted to the profession, to the governing body of his University.**
**(C) If a counsel assigned pursuant to Rule 45 is sanctioned in accordance with Sub-Rule (A) by being refused audience, the Chamber shall instruct the Registrar to replace the counsel.**
**(D) The Registrar may set up a Code of Professional Conduct enunciating the principles of professional ethics to be observed by counsel appearing before the Tribunal, subject to adoption by the Plenary Meeting. Amendments to the Code shall be made in consultation with representatives of the Prosecutor and Defence counsel, and subject to adoption by the Plenary Meeting. If the Registrar has strong grounds for believing that Counsel has committed a serious violation of the Code of Professional Conduct so adopted, he may report the matter to the President or the Bureau for appropriate action under this rule.**

**appeal**

While sanctions themselves are not appealable, the Appeals Chamber has jurisdiction to determine whether the Rule itself authorizes a pecuniary sanction.[1495]

**defence**

**equality**

Sanctions imposed upon defence counsel would not be reconsidered considering failure to sanction prosecution for similar conduct. Imposition of sanctions against counsel stand on their own facts.[1496]

**failure to appear**

Defence counsel refused audience and ordered replaced where he refused to appear for oral hearing on appeal, claiming medical reasons and fear of arrest by Rwandan authorities.[1497]

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[1495] *Prosecutor v Nshogoza*, No. ICTR-01-97-A, *Decision on Appeal Concerning Sanctions* (26 June 2009) at para. 26
[1496] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009) at para. 9

Defence counsel warned for discourtesy to Trial Chamber during session where they and client boycotted trial session.[1498]

Defence counsel warned for their failure to appear for scheduled hearing and refusing to attend once contacted. Counsel cited problems with the Registrar and declared themselves only willing to continue to execute their duties under certain conditions. Such conduct was deemed contemptuous and disrespectful to the Tribunal, and an obstruction to the proceedings and contrary to the interests of Justice.[1499]

A financial dispute with the Registrar does not constitute an acceptable reason for refusing to appear on the scheduled trial date, which was fixed in agreement with the assigned counsel.[1500]

**language**

Defence counsel warned for using offensive and abusive language in motion which sought to have journalist held in contempt for revealing names of protected witnesses.[1501]

Defence counsel warned for language in motion lacking proper courtesy, decorum, and respect to the Trial Chamber in written pleading.[1502]

Defence counsel fined $500, and cited to her bar for misconduct, for refusing to commence her defence case and for her comportment during the proceedings.[1503]

**disclosure and submissions**

Defence counsel warned for not including the criteria for reconsideration and including irrelevant arguments in motion.[1504]

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[1497] *Ntabakuze v Prosecutor*, No. ICTR-98-41A-A, *Order Imposing Sanctions on Ntabakuze's Lead Counsel* (21 April 2011)
[1498] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on the Motions to Set Aside the Sanctions and to Appear as Amicus Curiae* (22 October 2004) at para. 14
[1499] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Issuance of Warning Against Defence Counsels* (19 March 1998).
[1500] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision Concerning a Replacement of an Assigned Defence Counsel and Postponement of the Trial* (31 October 1996).
[1501] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Request for Certification of Appeal from the Decision of Trial Chamber Dated June 13, 2004 (sic) Dismissing Applicant's Request for a Citation for Contempt of the Journalist Gatare of Radio Rwanda for Publishing the Names of Protected Witnesses* (1 July 2005)
[1502] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Proprio Motu Order Following the Registrar's Submission Regarding the Chamber's Scheduling Order of 16 February 2007* (11 May 2007) at para. 6
[1503] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Further Decision to Sanction Defence Counsel for Misconduct* (17 March 2009)

Defence counsel warned for making multiple submissions on the same issues.[1505]

Defence counsel warned for not disclosing identity of defence witnesses within time stipulated in Trial Chamber order.[1506]

Defence counsel sanctioned for failing to make required filings of witness list and making piecemeal applications for admission of written statements. Registrar ordered to report misconduct to bar association.[1507]

Defence counsel warned for representing that a witness had not been withdrawn from its list when witness had in fact been withdrawn.[1508]

Defence counsel would not be sanctioned for late filing of witness list where the filing was made shortly after the deadline and there was no pattern of violations of court orders.[1509]

Defence counsel sanctioned for obstructive conduct and comportment in the courtroom when she refused to commence her defence case alleging that defence witnesses had been interfered with.[1510]

**protected witnesses**

Defence counsel warned for encouraging investigator to solicit letter from protected witness who allegedly wanted to recant, in violation of protective measures.[1511]

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[1504] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005* (24 November 2005) at para. 25
[1505] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's 2nd Motion for Disclosure of Evidence, for Renewed Authorization to Interview Certain Prosecution Witnesses, and Postponement of the Testimony of Witnesses CNAA and CNAC* (17 December 2009) at para. 41
[1506] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on Prosecutor's Motion for Disclosure of Identifying Information Concerning Defence Witnesses Pursuant to Rules 69(C) and 73 ter* (9 November 2005) at para. 9; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Order on Disclosure on Identifying Information of Defence Witnesses* (18 July 2007); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Augustin Bizimungu Motion to Vary His Witness List* (24 October 2007) at para 25; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order to Joseph Nzirorera on Presentation of his Defence Evidence* (30 July 2008)
[1507] *Prosecutor v Karemera et al*, No. ICTR-98-44-T *Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas, Video Link and on Prosecution Motion for an Order to Nzirorera to Reduce his Witness List* (2 December 2008) at para. 24
[1508] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Nzuwonemeye's Very Urgent Third Motion to Vary his Witness List Pursuant to Rule 73 ter* (3 December 2008) at para. 5
[1509] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecution Motion for Sanctions* (25 April 2005)
[1510] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Further Decision to Sanction Defence Counsel for Misconduct* (17 March 2009)
[1511] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Haguma Report* (14 December 2007) at para. 16

Defence counsel would not be sanctioned for writing letter to government that was protecting witness even though it constituted a violation of the protective order where defence counsel was acting in good faith.[1512]

**warnings**

Sanctions cannot be imposed pursuant to Rule 46(A) absent a prior warning.[1513]

It is not required that the party be given an opportunity to be heard before the Chamber issues a warning under this section.[1514]

A warning is not a disciplinary measure, but only a notice intended to remind counsel of his duties.[1515]

Co-counsel could be validly warned for failure of lead counsel to file Rule 73 *ter* information as he has a duty to intervene to assure compliance.[1516]

The mere fact that a motion lacks merit is insufficient to warrant sanctions pursuant to Rule 46(A).[1517]

Trial Chamber deplores the flippancy with which the prosecution requested sanctions against defence counsel, particularly considering the lack of diligence demonstrated by the prosecution in this case.[1518]

**prosecution**

Rule 46(A) allows sanctions to be imposed upon individuals within the Office of the Prosecutor, not simply the prosecution itself.[1519]

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[1512] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Prosecution's Motions for Sanctions Against Counsel for Nzirorera for Violation of Witness Protection Order and for an Injunction Against Further Violations* (19 April 2005)
[1513] *Prosecutor v Karemera*, No. ICTR-98-44-PT, *Decision on Renewed Motion to Dismiss for Lack of Jurisdiction: United Nations Charter, Chapter VII Powers* (5 August 2005) at para. 7
[1514] *Prosecutor v Muvunyi*, No. ICTR-00-55A-PT, *Decision on the Prosecutor's Motion for Reconsideration of the Trial Chamber's Order to Comply with the Scheduling Order* (17 June 2009) at para. 21
[1515] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on the Motions to Set Aside the Sanctions and to Appear as Amicus Curiae* (22 October 2004) at para. 13
[1516] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Reconsider the Warning Issued to Co-Counsel* (8 September 2008) at para. 6
[1517] *Prosecutor v Karemera*, No. ICTR-98-44-PT, *Decision on Renewed Motion to Dismiss for Lack of Jurisdiction: United Nations Charter, Chapter VII Powers* (5 August 2005) at para. 7
[1518] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA* (27 February 2008) at para. 32

**contacts with witnesses**

Prosecution's "flagrant" violation of no-contact order did not warrant a remedy where the accused was not prejudiced. Warning under Rule 46 issued.[1520]

**disclosure**

Prosecution counsel sanctioned for failing to disclose unredacted statements after being ordered to do so by the Trial Chamber. The sanction was that the matter was formerly drawn to the attention of the Prosecutor himself, as the disciplinary body.[1521]

Prosecution counsel warned for failing to disclose exculpatory materials, and decision ordered to be served upon the Prosecutor.[1522]

Prosecution warned for failing to disclose witness statements until the witness had already begun his testimony and in representing that disclosure was complete.[1523]

Prosecution warned for several failures to disclose Rule 66(A)(ii) material in a timely manner.[1524]

Failure of prosecution to comply with Trial Chamber deadline for filing expert witness report, or to request an extension was strongly disapproved by the Trial Chamber, which referred to Rule 46(A).[1525]

Although the prosecutor had not been diligent when she represented herself concerning her possession of the documents and information relating to the detained witnesses she intends to use in the trial, this oversight does not amount to misconduct of counsel warranting the prescriptions of Rule 46(A).[1526]

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[1519] *Prosecutor v Muvunyi*, No. ICTR-00-55A-PT, *Decision on the Prosecutor's Motion for Reconsideration of the Trial Chamber's Order to Comply with the Scheduling Order* (17 June 2009) at para. 22

[1520] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka* (9 February 2009) at paras. 18-19

[1521] *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. 17

[1522] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 27

[1523] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision Relating to the Late Disclosure Regarding Witness T* (24 May 2006)

[1524] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-PT, *Decision on Defence Motion Alleging Breach of Prosecution's Disclosure Obligations…*(26 March 2009) at para. 34

[1525] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Exclusion of Testimony of Alison Des Forges and Granting Extension of Time for Disclosure of the Expert Report* (3 December 2005)

[1526] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Review of the Decision Regarding Communication of Documents and Information Relating to Prosecution Witnesses Detained in Rwanda* (14 December 2001) at para. 16

Prosecution counsel not sanctioned for representations that all statements for two witnesses had been disclosed, as subsequent discovery of the statements revealed a flaw in OTP database rather than deliberate misrepresentations by the prosecution. Trial Chamber strongly recommended that prosecution improve its management of disclosure in the future.[1527]

No sanction warranted where disclosure violation was inadvertent as prior statement was stored in box in Kigali and had not been entered into prosecution database. Prosecution reminded to be more diligent.[1528]

**frivolous motions**

Prosecutor warned for filing motion to compel disclosure of items which had already been disclosed.[1529]

**honesty**

It is, of course, essential that the Chambers of the Tribunal be able to rely on the integrity of counsel on both sides and that counsel be able to rely on each other's statements. Dereliction in the duty of honesty may, in appropriate cases, be cause for sanctions or for contempt proceedings. Such dereliction by Prosecution counsel may also be contrary to the Charter of the United Nations and a breach of the relevant Staff Regulations and Staff Rules.[1530]

Prosecution requested to refrain from making misleading submissions concerning identity of declarant of statement sought to be admitted and citing an ICTY Trial Chamber decision as coming from the Appeals Chamber.[1531]

**multiple violations**

Prosecution counsels warned for misconduct in making unauthorized amendments to the indictment[1532] in not segregating changes to indictment for the Trial Chamber,[1533]

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[1527] *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. 25
[1528] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence and for Other Relief* (1 July 2009) at para 41
[1529] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for Disclosure of Defence Witness Information* (10 February 2011) at para. 27
[1530] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 20
[1531] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Motion to Exclude Prosecution Exhibit No. 33* (13 June 2006) at para. 18
[1532] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment: Warning to Prosecutors Counsels Pursuant to Rule 46(A)* (25 January 2001) at para. 20
[1533] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Prosecutor's Motion Under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000* (26 March 2004) at para. 56

and in alleging in public filings that an investigator for one of the accused was a "former Interahamwe"[1534], and in contacting defence witnesses in violation of protective order.[1535]

**pleadings**

Warning issued to prosecution counsel for failing to provide citations to the trial record on multiple occasions after being ordered to do so.[1536]

**time**

Where Chamber was not delayed in its deliberations, no warning would be issued to prosecution because of repetitive violations of the time in which to file responses.[1537]

Late filing of submission by prosecution strongly disapproved, but submission would not be disregarded considering seriousness of offence.[1538]

Prosecution counsel warned for failing to file motion to transfer witnesses on time,[1539] and given a second warning for failure to obey scheduling order to file exhibit list and protective measures motion.[1540]

**witnesses**

Trial Chamber declined to request investigation where prosecution witness alleged that prosecutor told two third parties to give him a message, in violation of no-contact order with witnesses.[1541]

**scope**

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[1534] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel* (10 July 2001) at para. 31

[1535] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor* (29 August 2002) at para. 20

[1536] *Prosecutor v Ngirabatware*, No. IT-99-54-T, *Decision on Site Visit to the Republic of Rwanda* (3 April 2012) at para. 21

[1537] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Declaring Prior Decisions to be of "No Effect"* (24 May 2005) at para. 8

[1538] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Reasons for the Chamber's Oral Ruling of 17 April 2009 Denying Bizimungu's Motion Not to consider the Prosecution's Submissions Regarding the Site Visit to Rwanda* (14 May 2009)

[1539] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Order for the Transfer of Prosecution Witnesses from Rwanda* (22 May 2009) at para. 2

[1540] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Order to Comply with Scheduling Order* (26 May 2009) at para. 6

[1541] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Oral Motions for Sanctions Against Senior Trial Attorney for Violation of No-Contact Rule with Witness BTH* (15 July 2008)

The absence of explicit limitations on the sanctions deployed under Rule 46(A) does not mean that the Trial Chamber is free to pronounce any disciplinary measures it deems appropriate.[1542]

Pecuniary sanctions are not within the permitted scope of penalties which may be applied under Rule 46(A).[1543]

**Rule 47—submission of the indictment by the Prosecutor**

**(A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose.**
**(B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar**
**an indictment for confirmation by a Judge, together with supporting material.**
**(C) 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.**
**(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the scheduled date for review of the indictment.**
**(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.**
**(F) The reviewing Judge may:**
**(i) Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;**
**(ii) Confirm each count;**
**(iii) Dismiss each count; or**
**(iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.**
**(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.**
**(H) Upon confirmation of any or all counts in the indictment:**
**(i) The Judge may issue an arrest warrant, in accordance with Sub-Rule 55(A), and**

[1542] *Prosecutor v Nshogoza*, No. ICTR-01-97-A, *Decision on Appeal Concerning Sanctions* (26 June 2009) at para. 27
[1543] *Prosecutor v Nshogoza*, No. ICTR-01-97-A, *Decision on Appeal Concerning Sanctions* (26 June 2009) at para. 29; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera Motion for Reconsideration of Fine* (3 July 2009)

**any orders as provided in Article 19 of the Statute; and**
**(ii) The suspect shall have the status of an accused.**
**(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.**

The indictment may contain information about the context in which the charges are formed so that they may be better understood by the accused.[1544]

Failure to place the Seal of the Tribunal on copies of the indictment served upon the accused did not require that the indictment be dismissed.[1545]

**Rule 48—joinder of accused**

**Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.**

**co-accused benefit from decisions**

According to the principle of *beneficium cohaesionis*, if one co-accused files a motion, then the remedy shall be extended, where equal reasons apply, to other co-accused who did not file any motion.[1546]

Even if only one co-accused requests disclosure, the remaining defendants are entitled to have access to those statements and exhibits.[1547]

**factors**

A Trial Chamber considering a motion for joinder should consider (1) protection of the fair trial rights of the accused; (2) avoidance of conflicts of interests that might prejudice an accused; and (3) protection of the interests of justice.[1548]

Protection of the interests of justice includes consideration of (1) avoiding duplication of evidence; (2) promoting judicial economy; (3) minimizing hardship to witnesses and increasing the likelihood that they will be available to give evidence; and (4) ensuring consistency of verdicts.[1549]

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[1544] *Prosecutor v Nahimana*, No. ICTR-96-11-T, *Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence* (12 July 2000).
[1545] *Prosecutor v Mugenzi*, No. ICTR-99-50-I, *Decision on Mugenzi's Motion for Relief Under Rule 54* (18 October 2000)
[1546] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion* (23 May 2002) at para. 11
[1547] *Prosecutor v Kajelijeli*, No. ICTR-98-46A-T, *Decision on Motion for Defence for Casimir Bizimungu for Disclosure of Closed Session Testimony of Witness GAP and Exhibits Presented* (8 March 2004).
[1548] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 71
[1549] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 71

**same transaction**

For joinder to be granted under Rule 48, there must be acts of the accused, which are connected to an objectively punishable criminal offence, this offence must be capable of specific determination in time and space, and the acts of the accused must illustrate the existence of a common scheme, strategy or plan, in which the accused was involved.[1550]

The "same transaction" may be found to exist even where the alleged crimes of the accused are different or are carried out in different geographical areas or over different periods of time, if the acts or omissions of the accused whose cases are to be joined are alleged to form part of a common scheme, strategy, or plan.[1551]

If the requirements for joinder are met, the Trial Chamber must nevertheless, in the exercise of its discretion, weigh the overall interests of justice and the rights of the individual accused.[1552]

Where joinder is granted, the allegations in an indictment against one accused do not automatically apply to the other accused. To accomplish this, the prosecution is required to submit an amended indictment against the joined accused.[1553]

Joinder of trial denied where trial of one accused had commenced when co-accused had just been arrested.[1554]

**Rule 48 bis—joinder of trials**

**Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.**

**Rule 49—joinder of crimes**

**Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.**

**Rule 50—amendment of indictment**

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[1550] *Prosecutor v Bagosora et al*, No. ICTR-96-7-I, *Decision on the Prosecutor's Motion for Joinder* (29 June 2000) at para. 118; *Prosecutor v Bagambiki et al*, No. ICTR-98-36-I, *Decision on the Prosecutor's Motion for Joinder* (11 October 1999) at para 36

[1551] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 80

[1552] *Prosecutor v Bagosora et al*, No. ICTR-96-7-I, *Decision on the Prosecutor's Motion for Joinder* (29 June 2000) at para. 142

[1553] *Prosecutor v Ntagerura et* al, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 61

[1554] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative à la Requete de Gaspard Kanyarukiga en Jonction et en Suspension de Procès* (29 November 2004)

**(A) (i) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 bis apply mutatis mutandis to the amended indictment.**
**(ii) In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, mutatis mutandis, follow the procedures and apply the standards set out in Sub-Rules 47 (E) and (F) in addition to considering any other relevant factors.**
**(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.**
**(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.**

**burden of persuasion**

The prosecutor bears the burden of establishing that a proposed amendment of the indictment is in the interest of justice. The interest of justice includes consideration of the rights of the accused to be fully informed of the charges against him, have adequate time and resources for the preparation of his defence, and to be tried without undue delay.[1555]

**diligence of prosecution**

The lack of diligence of the prosecution in amending an indictment is a factor to be considered in whether to grant leave to amend. The prosecution cannot gain a strategic advantage by holding an amendment in abeyance while the defence spends time and resources preparing for allegations the prosecution no longer intends to pursue. "Strategic efforts to undermine the conduct of proceedings cannot be tolerated, especially if designed to disadvantage the ability of the defence to respond to the prosecution's case."[1556]

Rule 50 does not require that the prosecution amend an indictment as soon as it discovers new evidence, however, it may not delay giving notice to the defence to obtain

[1555] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 26-27
[1556] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment* (19 December 2003) at para 20

a strategic advantage.[1557] An amendment may be denied where the prosecution had knowledge of the new facts and did not act with diligence to amend the indictment.[1558]

Prosecution lacked diligence in failing to seek amendment of the indictment earlier. Jurisprudence requiring specificity in an indictment is not new and is not justification for delay in seeking an amendment.[1559]

One of the most important factors in deciding whether to grant leave to amend the indictment is whether the prosecution has been diligent or whether the new allegations could have been found and incorporated into the proposed indictment earlier.[1560] Another factor is whether allowing the indictment to be amended will result in an unjustifiable loss of time.[1561] An indictment which streamlines the charges and identifies them with greater precision does not prejudice the accused.[1562]

**during trial**

Addition of joint criminal enterprise form of liability during trial did not require that trial start *de novo,* particularly where judges allowed for possibility of recalling some witnesses.[1563]

Mid-trial amendment of indictment did not render earlier proceedings a nullity nor require trial de novo.[1564]

Upon death of an accused, it was proper to allow the allegations against him to remain in the indictment since he had been charged jointly with the co-accused under a joint criminal enterprise theory.[1565]

**factors**

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[1557] *Prosecutor v Mpambara*, No. ICTR-2001-65-I (4 March 2005) at para. 15
[1558] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 51
[1559] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at paras. 46-47
[1560] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (13 February 2004) at para. 25
[1561] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (13 February 2004) at para. 41
[1562] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (13 February 2004) at para. 46
[1563] *Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.3, *Decision on Interlocutory Appeal Against Decision of 13 February 2004 Partially Granting Prosecutor's Motion for Leave to Amend the Indictment* (27 August 2004) at para. 31.
[1564] *Ngirumpatse & Nzirorera v Prosecutor*, No. ICTR-98-44-AR73.2, *Decision on Interlocutory Appeal Regarding Motion for Declaration of Mistrial and on Motion to Suspend Trial* (8 April 2004)
[1565] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR50, *Decision on Interlocutory Appeal of Edouard Karemera and Matthieu Ngirumpatse Against Oral Decision of 23 August 2010* (24 September 2010) at para. 16

In deciding whether to grant leave to amend an indictment the Trial Chamber follows the procedures and applies the standards set out in Sub-Rules 47(E) and (F) of the Rules. This requires consideration of the establishment of a *prima facie* case, issues of unfair prejudice to the parties, the incidence of undue delay, and other relevant factors including the diligence of the Prosecutor.[1566]

Factors to consider in determining whether to amend an indictment include the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the prosecution in making the amendments in a timely manner that avoids creating an unfair tactical advantage; and the likely delay or other possible prejudice to the defence caused by the amendment.[1567]

Trial Chambers consider the prosecution's right to seek an amendment to the indictment, pursuant to Rule 50, balanced with the likely prejudice to an accused's right to a fair trial, through a case specific analysis of the totality of circumstances. The relevant circumstances, which include, but are not limited to: (i) the effect of the proposed amended indictment on the right to an expeditious trial, to prompt notices of the charges against them, and to adequate time and facilities in order to prepare their defence; (ii) whether any additional time can be granted to the accused for the preparation of their defence; (iii) reasonableness of resulting delays in the scheduled start day of trial, and the length of the trial itself; (iv) effect on the time spent by the Accused in pre-trial detention; (v) nature and scope of the proposed amendment; (vi) whether the accused and Trial Chamber had prior notice of the Prosecutor's intention to seek leave to amend the indictment", the nature of the notice, and any improper tactical advantage gained by the prosecution as a result of the proposed amended Indictment; (vii) the evidentiary basis of the new charges, if any, and the timing of their discovery; (viii) judicial economy; and (ix) whether the proposed amended indictment, through more specificity and accuracy, allows the accused to better respond and prepare for trial, or shortens the length of the trial proceedings, thus protecting rather than prejudicing the accused's rights to a fair trial.[1568]

The timeliness of a Prosecution request for leave to amend an indictment must be assessed in the context of Article 20 of the Statute which requires the Trial Chamber to ensure that a trial is fair.[1569]

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[1566] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-R50, *Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion Objecting to the Form of the Recast Indictment* (2 March 2003) at para. 12; *Prosecutor v Mpambara*, No. ICTR-2001-65-I (4 March 2005) at para. 8; *Prosecutor v Bagaragaza*, No. ICTR-05-86-I, *Decision on the Prosecutor's Application for Leave to Amend the Indictment* (30 November 2006) at para. 7

[1567] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Prosecution's Request to Amend the Indictment* (18 September 2007) at para. 6

[1568] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Prosecutor's Motion Under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000* (26 March 2004) at para. 42; *Prosecutor v Bisengimana*, No. ICTR-00-60-I, *Decision on the Prosecutor's Request for Leave to Amend the Indictment* (27 October 2005) at para. 16; *Prosecutor v Nsengimana*, No. IT-2001-61-PT, *Decision on Prosecution Motion for Leave to File Amended Indictment* (29 March 2007) at para. 40

[1569] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 23.

Where the proposed indictment provided a more detailed and comprehensive account of the criminal acts alleged and the Prosecution theory of criminal liability, aids the defence in knowing the nature of the case which it must meet and, accordingly, enhance the fairness of the trial, the motion for leave to amend was granted.[1570]

Leave to amend the indictment granted as to items which clarify existing allegations but denied as to new factual allegations and new counts because the prosecution was in possession of the information for more than a year and the delay would provide an unfair tactical advantage.[1571]

Although the prosecution put forth no evidence of its diligence, the amendment would nevertheless be granted where it would enhance the overall fairness of the trial by providing more particulars.[1572]

Leave to amend indictment granted to conform to changes in jurisprudence on war crimes and joint criminal enterprise and to include allegations based upon new information.[1573]

Encouraging a State to accept a possible transfer of a case is not a proper purpose for amending an indictment.[1574]

**leave required**

Once an indictment is confirmed any alteration to its content requires judicial leave. When leave is granted, the prosecution need not go beyond what is permitted or directed by the Trial Chamber.[1575]

**mid-trial**

Mid-trial amendment of indictment to add material facts to make evidence admissible rejected as prejudicial to the accused.[1576]

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[1570] *Prosecutor v Muhimana*, No. ICTR-95-1B-I, *Decision on Motion to Amend Indictment* (21 January 2004)
[1571] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Prosecution's Request to Amend the Indictment* (18 September 2007)
[1572] *Prosecutor v Mpambara*, No. ICTR-2001-65-I (4 March 2005) at para. 8
[1573] *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Décision Sur La Requete du Procureur Demandant L'Autorisation de Déposer un Acte d'Accusation Modifie* (18 March 2005)
[1574] *Prosecutor v Bagaragaza*, No. ICTR-05-86-I, *Decision on the Prosecutor's Application for Leave to Amend the Indictment* (30 November 2006) at para. 6
[1575] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment: Warning to Prosecutors Counsels Pursuant to Rule 46(A)* (25 January 2001) at para. 18
[1576] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Exclusion of Evidence* (29 June 2006) at para. 63

**nature of amendments**

Nothing in Rule 50 prohibits the prosecution from offering amendments which are substantial. The prosecution is not required to show that it cannot proceed on the existing indictment.[1577]

Where nature of amendments was to provide the specificity that the defence was seeking in its pre-trial motions, and where the trial had not yet commenced, leave would be granted to amend the indictment, including new charges.[1578]

**new charges**

New material facts may constitute "new charges" for purposes of Rule 50.[1579]

In determining whether a proposed amended indictment contains "new charges", the Trial Chamber is not limited to determining whether there are new "counts" but looks to whether there are new allegations. The following factors are considered: (1) whether the allegation could be grounds, of itself, for conviction; (2) whether the allegation converts a general allegation into a live factual issue; (3) whether the increased specificity radically transforms the existing pleading; (4) whether the additional allegation refers to the element or part of an element of a crime or rebuts a defence; and (5) whether the allegation constitutes an aggravating circumstance or rebut a plea in mitigation.[1580]

Expanded factual allegations amount to "new charges" even if no new counts are added to the indictment.[1581]

Even in the absence of new factual or evidentiary material, charges in the alternative or additional legal theories of liability are considered new charges.[1582]

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[1577] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment* (19 December 2003) at paras. 11-12

[1578] *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (22 September 2010) at para. 10

[1579] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 20

[1580] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at para. 39; *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (22 September 2010) at para. 12

[1581] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment: Warning to Prosecutors Counsels Pursuant to Rule 46(A)* (25 January 2001) at para. 30; *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (22 September 2010) at para. 14

[1582] *Prosecutor v Bagaragaza*, No. ICTR-05-86-I, *Decision on the Prosecutor's Application for Leave to Amend the Indictment* (30 November 2006) at para. 10; *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (22 September 2010) at para. 14

Adding superior responsibility allegations under Article 6(3) and the joint criminal enterprise form of liability constituted new charges.[1583]

Expanded theory of criminal responsibility and identification of additional subordinates and victims in amended indictment amounted to new charges.[1584]

Where the accused's involvement in an event is listed in section entitled "Concise Statement of Facts" it could give rise to liability for this event and constitutes new charges.[1585]

Claim that accused personally shot victim, as opposed to having been present during the attack, constituted a new charge.[1586]

Adding an allegation that the accused was shooting at refugees constituted a new charge.[1587]

New allegations in the indictment amounted to additional details of existing charges and did not constitute new charges.[1588]

The adding of superior responsibility and JCE to the indictment did not constitute new charges. However, it would be in the interests of justice for the accused to be able to plead anew to the amended indictment.[1589]

An allegation which simply expands the time frame in which the alleged acts were committed does not constitute "new charges".[1590] Similarly, an allegation which provides further details of the same attack does not constitute new charges.[1591] The adding of additional incidents in support of the same allegations of genocide also does not constitute new charges.[1592]

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[1583] *Prosecutor v Nsengimana*, No. IT-2001-61-PT, *Decision on Prosecution Motion for Leave to File Amended Indictment* (29 March 2007) at para. 44, 52
[1584] *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (22 September 2010) at paras. 16, 24
[1585] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 33
[1586] *Prosecutor v Uwinkindi*, No. ICTR-2001-75-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (23 November 2010) at para. 17
[1587] *Prosecutor v Ndahimana*, No. ICTR-2001-68-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (3 February 2010) at para. 9
[1588] *Prosecutor v Rukundo*, No. ICTR-01-70-PT, *Decision on the Prosecutor's Request for Leave to File an Amended Indictment* (28 September 2006) at para. 9
[1589] *Prosecutor v Nizeyimana*, No. ICTR-2001-55-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (25 February 2010) at para. 7
[1590] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 25
[1591] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 27
[1592] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 31

Facts in pretrial briefs cannot amount to "new charges" and therefore motion to strike new elements introduced in pretrial brief is inappropriate.[1593]

In an indictment, the prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the accused that give rise to that allegation of infringement of a legal prohibition (material facts).[1594]

Allegations of a joint criminal enterprise and a killing in support of the existing charge of murder are not new charges but represent significant and material facts that alter the Prosecution's case, which the Defence is to answer. Therefore. it is in the interests of justice that an initial appearance be held.[1595]

Where an amendment adds material facts which do not amount to "new charges", the accused is still entitled to file new preliminary motions challenging the form of the indictment, even if not required to enter a new plea to the amended indictment.[1596]

**prejudice to accused**

The fundamental issue in deciding whether to grant leave to amend an indictment is whether the amendment will unfairly prejudice the accused. [1597] The factors to be considered include (1) whether the amended indictment improves the clarity and precision of the case to be met; (2) the diligence of the prosecution in making the amendment; and (3) any delay or prejudice to the defence from the amendment.[1598]

Factors to be considered when determining the prejudice to the accused by amendment of the indictment are (1) the scope of the proposed amendments; (2) the timing of the amendment; and (3) any extension of time granted to the accused.[1599]

Accused not prejudiced by adding of JCE and aiding and abetting forms of liability where no trial date was set pending request for referral of case to Rwanda.[1600]

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[1593] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-PT, *Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief* (30 September 2005) at para. 2
[1594] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 19
[1595] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Motion for New Initial Appearance* (5 March 2004)
[1596] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 45
[1597] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 22
[1598] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment* (14 February 2005) at para. 35; *Prosecutor v Mpambara*, No. ICTR-2001-65-I (4 March 2005) at para. 8; *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Motion to Amend Indictment* (26 January 2004) at para. 9; *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on the Prosecutor's Request for Leave to File an Amended Indictment* (21 April 2005) at para. 3
[1599] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at paras. 118-22

Amendment of the indictment did not prejudice the accused where the trial did not commence for 11 months after the filing of the amended indictment.[1601]

The fundamental issue in whether to grant leave to amend an indictment is whether the amendment will prejudice the accused unfairly. There should be no injustice to the accused if he is given adequate time to prepare his defence to the amended case.[1602]

The right of an accused to be tried without delay is an appropriate factor in deciding whether to grant leave to amend an indictment. However, the Trial Chamber must consider the effect on the overall proceedings, not just any delay in commencement of the trial. Where the amended indictment would streamline the overall case, the Trial Chamber erred in denying leave to amend the indictment.[1603]

An amendment which only added an alternative charge of complicity, and three paragraphs of new facts, would not unduly prejudice the accused where the case was not yet scheduled for trial.[1604]

Any prejudice to the rights of the Accused to a fair trial arising from the proposed amendments is cured by giving the defence adequate time to investigate the new facts alleged and prepare for the trial based on the proposed amended Indictment.[1605]

The later in the proceedings the amendment is offered, the more likely it is to penalize the accused in the conduct of his defence.[1606]

Amendments that narrow the indictment, and thereby increase the fairness and efficiency of proceedings, should be encouraged, and usually accepted. However, where the amended indictment expands the theory of the accused's liability after the

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[1600] *Prosecutor v Uwinkindi*, No. ICTR-2001-75-PT, *Decision on Prosecutor's Request for Leave to File an Amended Indictment* (23 November 2010) at paras. 11,14

[1601] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 23

[1602] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-I, *Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment* (15 October 2003) at para. 19; *Prosecutor v Bisengimana*, No. ICTR-00-60-I, *Decision on the Prosecutor's Request for Leave to Amend the Indictment* (27 October 2005) at para. 18

[1603] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment* (19 December 2003)

[1604] *Prosecutor v Bikindi*, No. ICTR-2001-72-I, *Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and the Prosecutor's Motion Seeking Leave to File an Amended Indictment* (22 September 2003) at para. 29

[1605] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Prosecutor's Motion Under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000* (26 March 2004) at para. 55; *Prosecutor v Nsengimana*, No. IT-2001-61-PT, *Decision on Prosecution Motion for Leave to File Amended Indictment* (29 March 2007) at para. 70

[1606] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 343

confirmation of the original indictment, the risk of prejudice from such expansions is high. Motion for leave to amend was properly denied.[1607]

Amending the indictment on the eve of trial would cause substantial prejudice to the accused and his right to prepare his defence and would likely prolong his pretrial detention.[1608]

The fact that an amended indictment is based upon disclosures already made to an accused does not answer the question of prejudice. It is assumed that an accused will prepare his defence based upon material facts alleged in the indictment, not on the basis of all the material disclosed to him.[1609]

**confirmation of amended indictment**

Where leave is given to amend an indictment, and an indictment is filed pursuant to that leave, it is not required that the indictment be further confirmed.[1610]

The Trial Chamber does not review supporting material when deciding whether to confirm an amended indictment.[1611]

The amendment to Rule 50 requires that supporting material be provided for an amended indictment and that the material establish a *prima facie* case for each allegation of the amended indictment.[1612]

**withdrawal of counts**

Amendment of the indictment to withdraw counts is unnecessary. The prosecutor can simply announce in its opening statement that it does not intend to present evidence on those counts.[1613]

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[1607] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR50, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment* (12 February 2004)

[1608] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at para. 48

[1609] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 22

[1610] *Prosecutor v Bikindi*, No. ICTR-2001072-I, *Decision on Defence Urgent Application for Stay of Proceedings and for Suspension of the 30-dayPeriod Pursuant to Rule 50 (C) of the Rules of Procedure and Evidence* (24 March 2004)

[1611] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-I, *Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment* (15 October 2003) at para. 14

[1612] *Prosecutor v Kabuga*, No. ICTR-98-44B-PT, *Decision on the Amended Indictment* (24 June 2005) at para.5; *Prosecutor v Bisengimana*, No. ICTR-00-60-I, *Decision on the Prosecutor's Request for Leave to Amend the Indictment* (27 October 2005) at para. 24; *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Prosecution's Request to Amend the Indictment* (18 September 2007) at para. 6

[1613] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on the Prosecutor's Motion for Leave to Amend the Indictment* (24 February 2005) at para. 31

**Rule 51—withdrawal of indictment**

**(A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber pursuant to Rule 73.**
**(B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.**

**Rule 52—public character of indictment**

**Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.**

**Rule 53—non-disclosure**

**(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.**
**(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.**
**(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.**
**(D) Notwithstanding sub-rules (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to secure the possible arrest of an accused.**

**Rule 53 bis—service of indictment**

**(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into the custody of the Tribunal or as soon as possible thereafter.**
**(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47 (G).**

**Rule 54—general provision**

**At the request of either party or proprio motu, a Judge or a Trial Chamber may**

**issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.**

**accused as witness**

Whether or not to call an accused on exceptional basis to testify in a case other than their own, the relevance and probative value of the evidence required from the accused should be weighed against the prejudice that the obligation to appear as a witness could possibly cause the accused. A Defence request to compel other Accused to testify was not granted: "the Tribunal is of the opinion that compelling him or her to appear as a witness could perhaps violate his or her fundamental right not to be forced to testify against himself or herself or to confess guilt."[1614]

**closing briefs**

The Trial Chamber has the power to set a page or word limit on the parties' closing briefs.[1615]

Trial Chamber has power to order consecutive, rather than simultaneous briefs.[1616]

**conditions on testimony**

The Trial Chamber accepted, on an exceptional basis, request by French government that a current military officer testify in closed session, in the presence of a representative of the French government, limited to the subjects covered in the pre-trial interview, and that his identity and testimony not be revealed to others.[1617]

**counsel for witnesses**

Counsel for a detainee called as a witness shall be allowed to assist the witness while he is on the witness stand since the potential witness is an accused facing serious charges before this Tribunal, his testimony might be related to the charges against him, and the presence of his counsel holding a watching brief may be of great importance in advising him as to his rights set out in Article 20 of the Statute and Rule 90(E).[1618]

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[1614] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision on a Motion for Summonses and Protection of Witnesses Called by the Defence* (17 February 1998)
[1615] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Reconsideration of Chamber's Further Orders Regarding the Filing of Closing Briefs* (23 July 2008)
[1616] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Prosecution Motion for Equality of Arms Following the Trial Chamber Decision on the Defence Motion for an Extension of Time to File its Closing Brief* (19 February 2010)
[1617] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Modalities for Presentation of a Witness* (20 September 2006)
[1618] *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Decision on Bagambiki's Motion to Transfer an Accused from the ICTR Detention Facility to Testify for the Defence* (17 February 2003) at para. 9; *Decision on Ntagerura's Extremely Urgent Motion for an Order to Transfer the Accused from the*

**identification procedures**

Prosecution's proposal to show witnesses photo array before the testified, where a member of the defence could be present when the investigator chooses other pictures to create the matrix and when the witness is given an opportunity, outside court, to identify the accused, rejected by the Trial Chamber in the middle of the trial.[1619]

**inherent powers**

A Trial Chamber has inherent authority to take certain measures which may not be expressly provided for in the Statute or Rules.[1620]

**interviews**

**of opposing party witnesses**

Witnesses to a crime are not the property of a party and each party has the right to interview any witness if he or she consents.[1621]

Where the prosecution informed the Trial Chamber that a prosecution witness declined to meet with the defence, the Chamber directed the WVSS to: (a) explore, as a preliminary matter, the willingness of the witness to meet with the Defence Counsel; (b) supervise the resulting meeting, where the witness is agreeable to the meeting, subject to other applicable witness protection measures; and (c) permit the attendance of a representative of the Office of the Prosecutor.[1622]

When the defence is not fully aware of the nature and relevance of the testimony of a prospective witness it is in the interests of justice to allow the defence to meet the

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*Detention Facility in Order to Testify for the Defence, Pursuant to Rules 73 and 54 of the Rules of Procedure and Evidence* (16 April 2002) at para. 8

[1619] *Prosecutor v Kamuhanda*, No. ICTR-99-55A-T, *Decision on the Prosecution's Motion for an Order to the Registrar to Furnish the Prosecutor with a Copy of the Photograph of the Accused* ((1 February 2002) at para. 2

[1620] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007) at para. 5

[1621] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 Nov 2006) at paras. 8, 13; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet With Prosecution Witness GAP* (26 October 2007) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Order of 2 October 2003 Related to Access Jean Kambanda* (24 August 2004) at para. 18; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 3

[1622] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Testimony of Protected Witnesses in Military I Case* (3 November 2004) at para. 23

witness and assess his testimony. However, the defence must first demonstrate that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful. Additionally, the defence must have a reasonable belief that the prospective witness can materially assist in the preparation of its case. Order to UNAMIR officer from Ghana for defence interview granted.[1623]

The defence may meet with a potential prosecution witness outside of the presence of the prosecution when the witness states he will only meet the defence under those conditions.[1624] However, where the witness wished to meet with defence counsel without a representative of the Registry being present, Trial Chamber refused to vary conditions of its order so that defence could meet with witness alone.[1625] This condition was later removed after the close of the prosecution case.[1626]

The prosecution has no right to prevent the accused from interviewing a detained individual awaiting transfer to the ICTR.[1627]

The defence may have a legitimate interest in interviewing a prosecution witness in order to properly prepare its case.[1628]

The prosecution does not have the right to be present when the defence interviews potential prosecution witnesses who have been dropped from the prosecution's witness list.[1629]

However, the prosecution has a right to be present when the defence interviews the husband of a prosecution witness who has already testified.[1630]

When the defence is not fully aware of the nature and relevance of the testimony of a prospective witness, it is in the interests of justice to allow the defence to meet the witness and assess his testimony.[1631]

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[1623] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Request for Subpoena of Major General Yaache and Cooperation of the Government of Ghana* (23 June 2004)
[1624] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Extremely Urgent Motion to Vary Conditions of Interview with Jean Kambanda* (2 October 2003)
[1625] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Order of 2 October 2003 Related to Access Jean Kambanda* (24 August 2004)
[1626] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Motion to Vary Conditions on Interview With Jean Kambanda* (5 April 2006)
[1627] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Access to ICTR Indicted Prisoner Augustin Ngirabatware* (5 November 2007)
[1628] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet With Prosecution Witness GAP* (26 October 2007) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA* (21 April 2008) at para. 14
[1629] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Written Request to Interview Prosecution Witnesses* (20 September 2005) at para. 5
[1630] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Leave to Meet with the Husband of Witness ANAE and for Postponement of her Testimony* (28 October 2009) at para. 22

If the witness refuses a request to grant an interview, either party may apply to the Trial Chamber for issuance of a subpoena to meet with that party.[1632]

The mere fact that a person has agreed to testify for one party does not prohibit the other party from interviewing him provided there is no interference with the course of justice.[1633]

Defence interviews of prosecution witnesses should not take place immediately before the witness is to give testimony. WVSS should determine if the witness consents to be interviewed by the defence and if so, should facilitate the meeting. A representative of the prosecution should be present.[1634]

Witness who had already testified and indicated that he may have testified falsely could be met by the defence in the presence of the prosecution.[1635]

Where a party wishes to meet a witness who has already testified, WVSS must be present to prevent illegitimate efforts at obtaining recantations and to maintain the integrity of the process.[1636]

**subpoena for interview**

Under Rule 54, the Trial Chamber has the power to issue a subpoena to require a prospective witness to attend at a nominated time and place to be interviewed by the defence where the attendance is necessary for the preparation or conduct of the trial so as to ensure that the trial is informed and fair.[1637]

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[1631] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of The Netherlands Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Ghana Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of Togo Pursuant to Article 28 of the Statute* (13 February 2006) at para. 8

[1632] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 3

[1633] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Vary Restrictions in the Trial Chamber's Order of 2 October 2003 Related to Access Jean Kambanda* (24 August 2004) at para. 18

[1634] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures for Prosecution Witnesses* (30 October 2006) at para.

[1635] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Extremely Urgent Motion to Contact and Meet With Prosecution Witness GAP* (26 October 2007) ; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA* (21 April 2008) at para. 15

[1636] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures Orders* (16 October 2009)

[1637] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T,

Among the factors to be considered on a defence request to interview a prosecution witness are the reasonable likelihood that an order would produce the degree of cooperation needed for the defence to interview that witness and that the purpose of the interview goes beyond the scope of cross-examination.[1638]

If a witness for any reason declines to be interviewed, the requesting party does not have the power to compel the witness to attend an interview or respond to any question. To compel an unwilling witness to submit to an interview, it may seek a subpoena from the Trial Chamber.[1639]

A party must meet the same standards for requesting a subpoena for testimony as for a subpoena for an interview.[1640]

Rule 54 can be used to subpoena witnesses to cooperate with the defence. However, in view of the prosecution's witness' statement that he does not wish to speak to defence counsel, the Chamber was not satisfied that a subpoena would result in more information than could be obtained on cross-examination. Motion for subpoena was denied.[1641]

Prosecution witness subpoenaed for interview by defence counsel where prosecution' withholding of relevant impeachment material precluded cross examination on the topic and where the defence had the right to know what the witness would say before deciding whether to move to recall him.[1642]

While subpoena of prosecution witness for interview by defence counsel to prepare his cross examination is generally not appropriate, where cross examination had already taken place, and disclosure violation required consideration of whether the witness should be recalled, the subpoena would be issued under those circumstances.[1643]

It must be at least reasonably likely that an order would produce the degree of cooperation needed for the defence to interview the witness.[1644]

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*Decision on Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters* (21 April 2008) at para. 7

[1638] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 4

[1639] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures for Prosecution Witnesses* (30 October 2006) at para. 8

[1640] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka* (24 March 2009) at para. 5

[1641] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Motion for Subpoena to Witness G* (20 October 2003)

[1642] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview* (10 February 2009) at para. 8

[1643] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview* (10 February 2009) at paras. 11-12

[1644] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 10; *Prosecutor v Karemera*

Where the witness' lengthy statements had already been disclosed to the defence and the witness had met with defence counsel before he became a prosecution witness, Trial Chamber was not satisfied that interview by subpoena would materially advance the case of the defence or is necessary or appropriate for the conduct of the proceedings.[1645]

**orders**

An order issued by a Trial Chamber is a command, direction, or instruction given to the parties in relation to a subsidiary, collateral, or preliminary matter which arises from the proceedings before it.[1646]

An order must be clear, explicit, and unambiguous.[1647]

Trial Chamber committed error when it refused subpoena on grounds that application was filed late, when no order for filing was made, but Presiding Judge simply acquiesced in the date counsel suggested he would file application.[1648]

**orders to the prosecution**

The prosecution is ordered pursuant to Rule 54 to make all efforts to obtain copies of prior statements from the Rwandan authorities or from the prosecution witnesses themselves and to disclose them to the defence as soon as practicable before the appearance of the witness.[1649]

Orders issued pursuant to Rule 54 which are necessary for the conduct of the trial, should not be used to facilitate the work of one Party in the conduct of its investigations once the trial is on-going. Trial Chamber declined to order Registrar to prove prosecution with photograph of the accused.[1650]

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*et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka* (24 March 2009) at para. 4 ; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Rule 92 bis Witnesses or for Reconsideration* (26 April 2010) at para. 9

[1645] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para.5

[1646] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.7, *Decision on Jerome-Clement Bicamumpaka's Interlocutory Appeal on the Issuance of a Subpoena* (22 May 2008) at para. 10

[1647] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.7, *Decision on Jerome-Clement Bicamumpaka's Interlocutory Appeal on the Issuance of a Subpoena* (22 May 2008) at para. 10

[1648] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.7, *Decision on Jerome-Clement Bicamumpaka's Interlocutory Appeal on the Issuance of a Subpoena* (22 May 2008) at para. 10

[1649] *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003)

[1650] *Prosecutor v Kamuhanda*, No. ICTR-99-55A-T, *Decision on the Prosecution's Motion for an Order to the Registrar to Furnish the Prosecutor with a Copy of the Photograph of the Accused* ((1 February 2002) at para. 11

Prosecution investigators and interpreters would not be required to submit to interviews by defence counsel for the purpose of impeaching prosecution witnesses who denied the contents of their statements, as their signature on the statements and certification of the interpreter established a presumption that the statement was accurately recorded and read back to the witness.[1651]

**privilege**

While international law grants the ICRC the exceptional privilege of non-disclosure of information which is in the possession of its employees and which relates to the ICRC's activities, and consequently bars the Trial Chamber from admitting such information, such privilege is *not* granted to national Red Cross societies working in conjunction with the ICRC.[1652]

**production of documents**

Rule 54 can be used to make orders to individuals for production of documents. However, the defence has not shown that they had made sufficient efforts to obtain the documents from the witnesses or the prosecution.[1653]

Relevance of immigration documents not sufficiently established to require prosecution to obtain them from immigration authorities and disclose them to the defence.[1654]

The Trial Chamber declined to order prosecution witnesses to bring with them judicial or immigration records in their possession since it was not demonstrated that the contents are relevant or that the witnesses have such records in their possession.[1655]

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[1651] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters* (21 April 2008) at para. 15

[1652] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ* (15 July 2005); *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-T, *Decision on Nizeyimana's Extremely Urgent and Confidential Motion Challenging the Admissibility of Witness TQ's Testimony* (26 January 2011) at para. 4

[1653] *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003); *Prosecution v Nizeyimana*, No. IT-00-55C-PT (25 November 2010), *Decision on Defence Extremely Urgent Pre-Trial Motion for Issuance of Three Subpoenas* (25 November 2010)

[1654] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 12

[1655] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 5

**reconsideration**

**appeal**

An appellant cannot seek to challenge a decision of a Trial Chamber after the time for filing an appeal from that decision has expired by the simple expedient of seeking to have that decision reconsidered. The issue on appeal from a decision denying reconsideration is not whether the original decision was correct but whether the Trial Chamber correctly exercised its discretion not to reconsider it.[1656]

**exhibits**

The standard for reconsideration does not apply to exhibits refused admission but marked for identification. The Chamber may admit the exhibit upon the presentation of further information during the trial.[1657]

Reconsideration was warranted when it was discovered that the prosecution had misrepresented the fact that the statement admitted as an exhibit had been made by a witness who had already testified.[1658]

Reconsideration of admission of exhibits was warranted when it appeared that original decision to admit the exhibits was erroneous.[1659]

**intervening decision**

Reconsideration was warranted when an intervening decision of the Appeals Chamber in another case was contrary to the impugned decision.[1660]

Reconsideration was warranted when an intervening decision of another Trial Chamber provided a more expansive interpretation of the prosecution's disclosure requirements.[1661]

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[1656] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Interlocutory Appeal from Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction"* (2 May 2002) at para. 10

[1657] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89(C)* (2 September 2009) at para. 2

[1658] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Motion to Exclude Prosecution Exhibit No. 33* (13 June 2006) at para. 17

[1659] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision Dated 11 May 2007 Regarding Admission of Exhibits P132 and P135* (25 July 2007)

[1660] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Prosecution Motion for Variation, or in Alternative Reconsideration of the Decision on Protective Measures for Defence Witnesses* (2 November 2005) at para. 6

[1661] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008) at para. 13

Reconsideration warranted by intervening circumstance of an Appeals Chamber decision changing the criteria for judging admission of evidence outside of the indictment.[1662]

**President**

The President has the same power of reconsideration as a Trial Chamber.[1663]

**standard**

A Trial Chamber may reconsider its own decisions if a new fact is discovered that was not known to the Chamber at the time, if there is a material change in circumstances, or where there is reason to believe that a previous decision was erroneous and therefore prejudicial to either party.[1664]

A Trial Chamber has inherent power to reconsider its own decisions. However, reconsideration is an exceptional measure available only (1) when a new fact has been discovered that was not known to the Trial Chamber; (2) new circumstances have arisen which affect the premise of the decision; (3) where there was an error of law, or the Trial Chamber abused its discretion; or (4) an injustice has been occasioned.[1665]

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[1662] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision Reconsidering Exclusion of Evidence Related to Accused Kabiligi* (23 April 2007) at para. 3

[1663] *Prosecutor v Rutaganira*, No. ICTR-95-1C-R73, *Decision on the Motion for Reconsideration of the Denial of Early Release* (13 February 2008) at para. 4

[1664] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3 November 2004) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Consolidated Corrigendum to Prosecutor's Response to Defence Motions for Protection of Defence Witnesses and Request for Reconsideration of Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (7 July 2005) at para, 7; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision of 14 September 2005 on Admissibility of Witness XXO's Testimony in the Military I Case in Evidence* (10 October 2005) at para.11; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005* (24 November 2005) at para. 18; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JPFR3* (20 March 2007) at para. 2

[1665] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Modification of Protective Order: Timing of Disclosure* (31 October 2005) at para. 3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY* (28 September 2007) at para. 10

The criteria for reconsideration are not cumulative and only one of the factors need to be satisfied to trigger the reconsideration of a previous decision.[1666]

The Chamber may reconsider a previous interlocutory decision if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[1667]

Reconsideration is an exceptional measure available only in particular circumstances, including where new circumstances have arisen since the filing of the decision that affect the premise of that decision.[1668]

While the rules are silent as to reconsideration and a Chamber has inherent power to reconsider its own decisions, it should do so only in exceptional circumstances.[1669]

Even where the criterion for reconsideration is not met, the Trial Chamber may consider the issue *de novo* so as not to prejudice the accused for the failings of his counsel.[1670]

While a Trial Chamber may *proprio motu* decide to reconsider its own decision, this does not relieve it of its duty to hear a party whose rights may be affected by this reconsideration.[1671]

Trial Chamber violated right of accused to be heard before reconsidering its decision, but violation did not prejudice the accused and result was affirmed.[1672]

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[1666] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Urgent and Confidential Defence Motion Requesting Reconsideration of the 1 March 2007 Ruling Refusing a Subpoena for the Witness JPFR3* (20 March 2007) at para. 3

[1667] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 203; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimonies of Witnesses LMC, DX/ANM, BB, GS, CJ/ANL and GFO and for Reconsideration of the Chamber's Decision of 13 May 2005* (24 November 2005) at para. 19; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decisions on Motions for Reconsideration* (1 December 2006) at para. 6

[1668] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)* (14 July 2004) at para. 7

[1669] *Prosecutor v Ntahobali*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial* (22 February 2005) at para. 17; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Certification to Appeal the Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses and Reconsideration of That Decision as Regards Witness BK* (14 April 2005) at para. 16

[1670] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion to Reconsider Order of 2 June 2008 Denying Admission of Church and School Records* (23 July 2008) at para. 11

[1671] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*, *Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and the Motion for Leave to Appeal the President's Decision dated 5 May 2010* (20 September 2010) at para. 29

[1672] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*, *Decision on Callixte Nzabonimana's Interlocutory Appeal on the Order Rescinding the 4 March 2010 Decision and the Motion for Leave to Appeal the President's Decision dated 5 May 2010* (20 September 2010) at paras. 30-31

**subsequent events**

The Chamber has the authority to reconsider its decisions if satisfied that the underlying factual premise has changed substantially in a way that alters the original outcome.[1673]

Change in position by the prosecution did not constitute a new fact. Parties frequently change their positions on matters of importance to them as the landscape of their case changes.[1674]

Reconsideration was warranted where the earlier decision was based upon lack of efforts by the defence to contact witnesses and now those efforts had been made and were shown to be unsuccessful.[1675]

Reconsideration was warranted for decision denying request for cooperation to obtain judicial records when decision caused considerable problems with the management of the case.[1676]

Reconsideration of protective measures decision warranted when experience with those measures demonstrated that problems had arisen.[1677]

Failure of the defence to receive translation of the prosecutor's motion was a new material circumstance not known to the Trial Chamber when it decided the prosecution's motion for protective measures and justified giving the defence an opportunity for reconsideration.[1678]

Reconsideration was warranted where Chamber had never received defence reply brief from the Registry.[1679]

The Trial Chamber granted reconsideration of an order denying protective measures where the defence provided further information after the original decision.[1680]

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[1673] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 17
[1674] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Ex Parte Prosecution Submissions* (4 September 2008) at para. 13
[1675] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007) at para. 17
[1676] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of the Decision on his Motion for Cooperation of Rwanda to Obtain Statements of Prosecution Witnesses ALG and GK* (21 November 2007) at para. 6
[1677] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Protective Measures for Prosecution Witnesses* (30 October 2006) at para. 4
[1678] *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on Renzaho's Motion to Reconsider the Decision on Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (1 November 2005)
[1679] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Motion for Reconsideration of Fifth Review Decision* (25 March 2010) at para. 5

**Registrar**

An order for the provision of information by the Registrar may be appropriate under Rule 54 *bis* where the fairness of the trial so requires.[1681]

Registrar ordered to disclose to the defence information on OTP visits to a witness at UNDF prior to his testimony.[1682]

**reporters**

Subpoena would not be issued to New York Times reporter who interviewed the accused in exile after the events because the availability of contemporaneous evidence of the accused's state of mind from other prosecution witnesses made the testimony of the reporter not of direct and important value in determining a core issue in the case.[1683]

**subpoenas**

**co-accused**

A co-accused cannot prevent the subpoena of a defence witness on the grounds that the witness' testimony will prejudice him.[1684]

**efforts to obtain voluntary compliance**

Where witness made financial demands in response to request whether he was willing to testify, it would be deemed that he was unwilling to testify, and a subpoena would be issued.[1685]

A subpoena may be issued to compel the attendance of a witness before a Chamber for the purpose of giving testimony. The party requesting the subpoena must

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[1680] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Pauline Niyiramasuhuko's Ex-Parte Extremely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Niyiramasuhuko's Strictly Confidential Ex-Parte Under Seal Motion for Additional Protective Measures for Defence Witness WBNM Dated 17 June 2005* (4 July 2005)

[1681] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF* (28 April 2009) at para. 11

[1682] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF* (28 April 2009) at para. 16

[1683] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Admissibility of Newspaper Article and Subpoena to Journalist* (23 January 2006) at para. 10-11

[1684] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 3

[1685] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008) at para. 8

demonstrate that reasonable efforts have been made to secure the witness's voluntary attendance, and that the testimony is likely to be relevant to the trial.[1686]

Where witness refused to testify at the request of the defence, Trial Chamber ordered the Registrar to contact the witness to inquire as to his willingness to testify before issuing a subpoena.[1687]

The reluctance of a witness expressed on one occasion to testify does not satisfy the requirement that reasonable efforts be made to secure the witness' voluntary cooperation.[1688]

Witness' consistent refusal to testify was sufficient for issuance of a subpoena even when defence did not establish reason for witness' refusal.[1689]

E-mail correspondence with witness was sufficient to demonstrate that reasonable efforts were made to obtain his voluntary attendance. Subpoena issued for witness with material testimony who refused to testify due to the new responsibilities of his job.[1690]

Subpoenas issued pursuant to Rule 54 where the sworn witness statements indicate the individuals for whom the subpoenas were sought had knowledge of events relevant to the trial and refused to appear despite the best efforts of the prosecution and Registry to address their concerns.[1691]

To justify the issuance of a subpoena, it is not necessary that the defence substantiate threats against the witness. It need only show that it has made reasonable efforts to obtain the witness' testimony and has been unsuccessful.[1692]

Subpoena issued for a witness who refused to testify based on a lack of faith in the integrity of the Tribunal.[1693]

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[1686] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion Requesting Subpoenas to Compel the Attendance of Defence Witnesses DK 32, DK 39, DK 51, DK 52, DK 311, and DM 24* (26 April 2005); *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Confidential Ex Parte Motion for Subpoenas Directed to Defence Witnesses* (16 December 2005) at para. 3

[1687] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Interim Order on Joseph Nzirorera's Second Motion for Subpoena to Leon Mugesera* (8 April 2008)

[1688] *Prosecutor v Rukundo*, No. ICTR- 2001-70-T, *Decision on Defence Motion for Subpoena and Transfer of Detained Witness SJA* (21 September 2007) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at paras. 8-9

[1689] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Second Decision on Jerome Clement Bicamumpaka's Request for a Subpoena* (3 June 2008) at para. 7

[1690] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Subpoena for Witness GSC* (24 September 2007)

[1691] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Requests for Subpoenas* (10 June 2004)

[1692] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Request for Subpoenas* (4 May 2005) at para. 2

[1693] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoena for Witness BW* (24 June 2004)

Subpoena issued for witness in Rwanda who indicated to defence team that he refused to testify voluntarily, and who had relevant and necessary testimony to give.[1694]

Subpoena for witnesses in Rwanda who declined to come to testify in Arusha denied in lieu of offering the witnesses an opportunity to testify via video link.[1695]

Policy of Government of The Netherlands not to comply with any non-obligatory requests from the Tribunal demonstrated that the defence had made adequate efforts to obtain the cooperation voluntarily.[1696]

Defence would be deemed to have made reasonable efforts to obtain presence of witness at trial where witness delayed meeting defence counsel and the defence case was about to close. Subpoena for former Foreign Minister of Tanzania granted.[1697]

Trial Chamber erred in failing to enforce its subpoena after witness indicated he would only testify by video link, and this error prejudiced the accused. However, it was remedied by hearing the witness on appeal.[1698]

Belgian law requiring a subpoena before its officials could testify before the ICTR constituted adequate evidence that effort to obtain voluntary compliance would be futile.[1699]

**factors**

The Trial Chamber has the power to require a prospective witness to attend at a nominated place and time to be interviewed when the requesting party shows that (1) it has made reasonable attempts to obtain the voluntary cooperation of the witness; (2) the witness' testimony can materially assist its case; and (3) the witness' testimony is necessary and appropriate for the conduct and fairness of the trial.[1700]

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[1694] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Request for a Subpoena* (23 January 2008); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008)

[1695] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Confidential Ex Parte Motion for Subpoenas Directed to Defence Witnesses* (20 January 2006)

[1696] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion Requesting the Cooperation of the Government of The Netherlands Pursuant to Article 28 of the Statute* (13 February 2006) at para. 7

[1697] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoena for Ami R. Mpungwe* (19 October 2006)

[1698] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 536-46

[1699] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Request for a Subpoena* (23 January 2008) at para. 8

[1700] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para. 4; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T,

While Rule 54 grants the Tribunal the power to subpoena witnesses, this power should not be used lightly.[1701] The party seeking a subpoena must first show that it has made reasonable attempts to obtain the voluntary cooperation of the parties involved and has been unsuccessful. The party must also have a reasonable belief that the witness can materially assist its case.[1702]

Factors relevant to the issuance of a subpoena include the position held by the prospective witness in relation to the events in question, any relation the witness may have had with the accused that is relevant to the charges, any opportunity the witness may have had to learn about those events, and any statements the witness may have made about the events.[1703]

**government officials**

Government officials enjoy no immunity from a subpoena, even where the subject-matter of their testimony was obtained during government service.[1704]

The proper method for obtaining the testimony of a government official is by subpoena, rather than an order to the State pursuant to Article 28.[1705]

While not lightly issuing a subpoena to a serving Minister of a State, the Trial Chamber ordered that Rwandan Minister of Defence Marcel Gatsinzi be subpoenaed to testify on issues of importance to the accused Bagosora.[1706]

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*Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008) at para. 4; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview* (10 February 2009) at para. 4

[1701] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007) at para. 13; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Subpoena and Transfer of Detained Witness SJA* (21 September 2007) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008) at para 5

[1702] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Request for a Subpoena for Witness SHB* (7 February 2005); *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Bagosora Defence's Request for a Subpoena Regarding Mamadou Kane* (22 October 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 4; *Prosecutor v Rukundo, Decision on Defence Motion for Subpoena and Transfer of Detained Witness SJA* (21 September 2007) at para. 3

[1703] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Request for a Subpoena* (23 January 2008) at para. 5; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008) at para.4

[1704] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena for Major Jacques Biot* (14 July 2006) at para. 4; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 4

[1705] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 4

Subpoena to French community representative of Belgium in Burundi granted on request of defence.[1707]

Subpoena for President Kagame denied where issues of RPF assassination of President Habyarimana, Emmanuel Gapyisi, and Felicien Gatabazi were not clearly defined issues in the trial and therefore testimony of President Kagame would not materially assist the defence.[1708]

**necessity**

Subpoena for defence witness denied where other witnesses would testify to same events and where Chamber was not satisfied that issuance of subpoena would result in compliance.[1709]

The Trial Chamber accepted that a member of the UNAMIR force was able to neutrally observe events which are relevant to the present trial. Not only would his testimony be relevant, but it may be particularly valuable. In these circumstances, the Chamber found that a sufficient showing had been made that the prospective witness's testimony would materially assist the defence to justify issuance of a subpoena.[1710]

In considering whether the prospective testimony will materially assist the applicant, it is not enough that the information requested will be helpful or convenient for one of the parties, it must be of substantial or considerable assistance to the accused in relation to a clearly identified issue that is relevant to the trial.[1711]

It is not enough that the information would be helpful or convenient for one party. Nor is it enough that a subpoena would help discover whether the witness has any

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[1706] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 7

[1707] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Request for a Subpoena* (26 September 2007)

[1708] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para. 15

[1709] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Subpoena Paul Rusesabagina* (22 February 2010)

[1710] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena for Major Jacques Biot* (14 July 2006) at para. 3

[1711] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Request for a Subpoena* (26 September 2007) at para. 5; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Request for a Subpoena* (23 January 2008) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para13; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008) at para 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka* (24 March 2009) at para. 4

information which would help the moving party. The information of the requested witness must be of substantial or considerable assistance.[1712]

The Trial Chamber is vested with discretion in determining whether the applicant succeeded in making the relevant showing, this discretion being necessary to ensure that the compulsive and coercive mechanism of a subpoena is not abused. The use of subpoenas as a judicial power to compel must be balanced with the need to serve the overall interests of the criminal process.[1713]

The Trial Chamber should consider the specificity of the proposed testimony and whether the information can be obtained by other means.[1714]

It must also be shown that the witness' testimony is necessary and appropriate for the conduct of the proceedings.[1715]

Subpoena denied where the witnesses were not the only ones said to have attended the meeting in question.[1716]

It was not shown that evidence from witnesses who the prosecution's witness identified as having been present at a meeting with the accused would materially assist in the defence case as it would not show that the accused did not attend the meeting.[1717]

Witness who worked for accused in his Ministry and could testify that Ministry was not functioning during the war was sufficiently important to justify the issuance of a subpoena.[1718]

Defence subpoena for Interahamwe leader denied where testimony would be cumulative to that of other proposed witnesses.[1719]

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[1712] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch* (10 February 2009) at para. 5

[1713] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para. 5

[1714] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Subpoena Witness RWU* (19 May 2008) at para 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview* (10 February 2009) at para. 5

[1715] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Issuance of Subpoena to Witness T* (8 February 2006) at para. 4

[1716] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Rule 92 bis Witnesses or for Reconsideration* (26 April 2010) at para 9

[1717] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 14

[1718] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Second Decision on Jerome Clement Bicamumpaka's Request for a Subpoena* (3 June 2008) at para. 9

[1719] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Jean-Marie Vianney Mudahinyuka* (24 March 2009) at para. 7

Wife of President of Constitutional Court would be compelled to testify by issuance of a subpoena where she had information that could not reasonably be obtained elsewhere.[1720]

In consideration of whether to issue to a subpoena, it may also be considered whether the information sought can reasonably be obtained elsewhere.[1721]

**not a routine mechanism**

While a Trial Chamber should not hesitate to resort to a subpoena where it is necessary to elicit information of importance to the case and to ensure that the defendant has sufficient means to collect information necessary for the presentation of an effective defence, it should guard against the subpoena becoming a mechanism used routinely as a part of trial tactics.[1722]

**prosecution employees**

Subpoena for former OTP Investigator Michael Hourigan denied where, although the identity of the killers of President Habyarimana is undoubtedly a matter of contextual significance, the Chamber must exercise its discretion under Rule 89 (C) to ensure that the focus of the present trial is maintained. The admission of detailed evidence on what is, essentially, a matter of collateral and indirect relevance would not assist the Trial Chamber in determining the core issues of the trial.[1723]

**State cooperation**

A Trial Chamber, under Article 28 and Rule 54**,** has the authority to issue subpoenas of witnesses, but must rely primarily on state cooperation and state judicial mechanisms to execute and enforce subpoenas, short of referring a matter to the Security Council under Rule 7*bis*.[1724]

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[1720] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Motion for a Subpoena* (6 October 2006) at para. 14

[1721] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Motion for a Subpoena* (6 October 2006) at para. 13; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para. 13; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Subpoena Witnesses G and AWD for Interview* (10 February 2009) at para. 5

[1722] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007) at para. 13

[1723] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoenas of United Nations Officials* (6 October 2006) at para. 17

[1724] *Prosecutor v. Semanza*, No. ICTR-97-20-1, *Decision on Semanza's Motion for Subpoenas, Depositions, and Disclosure*.(20 Oct.2000) at para.23

States are obligated, when requested by the Tribunal, to effect service of a subpoena, and to provide any assistance that may be requested by the Registry to facilitate the attendance of the witness.[1725]

**timing**

The advanced nature of the case does not preclude a summons, but Counsel must make any application as soon as they become aware of the obstacles in the way of the witnesses required to testify within the relevant time frame.[1726]

A subpoena may be issued for testimony even after the case has closed where the party exercised diligence to obtain the testimony during the trial.[1727]

**United Nations personnel**

Subpoena to Kofi Annan and Ikbhal Riza of UNDPKO denied where they were not eyewitnesses and UN Office of Legal Counsel had offered to prepare a statement in lieu of testimony.[1728]

Subpoena to former UN Special Representative Shaharyar Kahn not warranted where his information was based on his participation after the Rwandan events. He has only indirect evidence of limited value which does not justify the issuance of a subpoena.[1729]

**transfer of detainees**

The Trial Chamber has the power to issue a request for the temporary transfer to the Tribunal of a detainee of a State.[1730]

**voice exemplars**

A party seeking an order under Rule 54, including an order that the witness provide voice exemplars, must satisfy the requirement of necessity, and demonstrate that

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[1725] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Request for a Subpoena Regarding Witness BT* (25 August 2004) at para. 8; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoena for Witness BW* (24 June 2004)

[1726] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses* (8 June 2000) at para. 10.

[1727] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Request for Subpoenas* (4 May 2005) at para. 4

[1728] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoenas of United Nations Officials* (6 October 2006) at paras. 5,7; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Reconsideration of Denial of Issuance of Subpoena to a United Nations Official* (12 December 2006)

[1729] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Subpoenas of United Nations Officials* (6 October 2006) at para. 10

[1730] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (31 August 2004)

there is no other way to obtain the evidence sought. Since the defence had not requested the cooperation of the witness in providing voice exemplars, the motion to compel voice exemplars was denied.[1731]

**Rule 55—execution of arrest warrants**

**(A) A warrant of arrest shall be signed by a Judge and shall bear the seal of the Tribunal. It shall be accompanied by a copy of the indictment, and a statement of the rights of the accused. These rights include those set forth in Article 20 of the Statute, and in Rules 42 and 43 mutatis mutandis, together with the right of the accused to remain silent, and to be cautioned that any statement he makes shall be recorded and may be used in evidence.**
**(B) The Registrar shall transmit to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, three sets of certified copies of:**
**(i) The warrant for arrest of the accused and an order for his surrender to the Tribunal;**
**(ii) The confirmed indictment;**
**(iii) A statement of the rights of the accused; and if necessary a translation thereof in a language understood by the accused.**
**(C) The Registrar shall instruct the said authorities to:**
**(i) Cause the arrest of the accused and his transfer to the Tribunal;**
**(ii) Serve a set of the aforementioned documents upon the accused;**
**(iii) Cause the documents to be read to the accused in a language understood by him and to caution him as to his rights in that language; and**
**(iv) Return one set of the documents together with proof of service, to the Tribunal.**
**(D) When an arrest warrant issued by the Tribunal is executed, a member of the Prosecutor's Office may be present as from the time of arrest.**
**Rule 55 bis—warrant of arrest to all States**

**(A) Upon the request of the Prosecutor, and if satisfied that to do so would facilitate the arrest of an accused who may move from State to State, or whose whereabouts are unknown, a Judge may without having recourse to the procedures set out in Rule 61, and subject to sub-rule (B), address a warrant of arrest to all States.**
**(B) The Registrar shall transmit such a warrant to the national authorities of such States as may be indicated by the Prosecutor.**

**Rule 56—cooperation of States**

**The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 28 of the Statute.**

**Rule 57—procedure after arrest**

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[1731] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Extremely Urgent Motion for Voice Exemplars by Witness Fidele Uwizeye* (27 September 2005)

**Upon the arrest of the accused, the State concerned shall detain him, and shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal, or to such other place as the Bureau may decide, after consultation with the Prosecutor and the Registrar, shall be arranged by the State authorities concerned, in liaison with the authorities of the host country and the Registrar.**

**Rule 58—national extradition provisions**

**The obligations laid down in Article 28 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.**

**Rule 59—failure to execute warrant of arrest or transfer order**

**(A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant of arrest or transfer order, it shall report forthwith its inability to the Registrar, and the reasons therefore.**
**(B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.**

**Rule 60—publication of indictment**

**At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio, transmission via Internet or television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.**

**Rule 61—procedure in case of failure to execute a warrant of arrest**

**(A) If, within a reasonable time, a warrant of arrest has not been executed, and personal service of the indictment has consequently not been effected, the Judge who confirmed the indictment shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:**
**(i) The Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the accused to be served resides or was last known to be; and**
**(ii) If the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisement pursuant to Rule 60, the Judge shall order**

**that the indictment be submitted by the Prosecutor to his Trial Chamber.**
**(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment and any other evidence submitted to him after confirmation of the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge.**
**(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in Sub-Rule (A) above.**
**(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or proprio motu, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties.**
**(E) If, during the hearing, the Prosecutor satisfies the Trial Chamber that the failure to effect personal service of the indictment was due in whole or in part to a failure or refusal of a State to co-operate with the Tribunal in accordance with Article 28 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as he thinks fit.**

**Rule 62—initial appearance of accused and plea**

**(A) Upon his transfer to the Tribunal, the accused shall be brought before a Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:**
**(i) Satisfy itself or himself that the right of the accused to counsel is respected;**
**(ii) Read or have the indictment read to the accused in a language he understands, and satisfy itself or himself that the accused understands the indictment;**
**(iii) Call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;**
**(iv) In case of a plea of not guilty, instruct the Registrar to set a date for trial;**
**(v) In case of a plea of guilty:**
**(a) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 (B); or**
**(b) if before a Trial Chamber, act in accordance with Rule 62 (B).**
**(B) If an accused pleads guilty in accordance with Rule 62 (A)(v), or requests to change his plea to guilty, the Trial Chamber shall satisfy itself that the guilty plea:**
**(i) is made freely and voluntarily;**
**(ii) is an informed plea;**
**(iii) is unequivocal; and**
**(iv) is based on sufficient facts for the crime and accused's participation in it, either**

**on the basis of objective indicia or of lack of any material disagreement between the parties about the facts of the case.**
**Thereafter the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing.**

Under Rule 62, the Appellant's right to be brought before a Trial Chamber without delay and be formally charged came into effect on the date of his transfer to the Tribunal.[1732]

One month delay in scheduling initial appearance violated Rule 62, but no prejudice inured to the accused.[1733]

The 28-day delay in holding the accused's initial appearance was too long and constituted a violation of the right to be brought before a judge without delay. But the failure to raise this challenge until the closing brief indicated that there was minimal, if any, prejudice. The appropriate remedy was formal recognition that it occurred.[1734]

In situations where the delay in an initial appearance has not caused prejudice to the accused, formal recognition of the violation may be considered an effective remedy.[1735]

The difficulties in assigning the Appellant counsel in this case should not have been an obstacle for the Tribunal to ensure that the Appellant's initial appearance was scheduled without delay.[1736] The 211-day delay between the Appellant's transfer to the Tribunal and the initial appearance before a Judge of this Tribunal constitutes extreme undue delay.[1737]

Four-month delay in initial appearance after indictment was reasonable where part of the time was necessary to organize appearance of co-accused and where accused requested delays so that his counsel could be present.[1738]

When the counsel for the accused explicitly requests postponement of the initial appearance, and the accused expresses his preference to delay the entry of his plea until counsel is present, the delay is not attributable to the Tribunal.[1739]

**Rule 62 bis—plea agreement procedure**

**(A) The Prosecutor and the Defence may agree that, upon the accused entering a**

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[1732] *Semanza v .Prosecutor*, No.ICTR-97-20-A,*Decision* (31 May 2000) at para.107
[1733] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for a Stay of Proceedings for Undue Delay* (26 November 2008) at para. 53
[1734] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 97.
[1735] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 42
[1736] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 248
[1737] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 250
[1738] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 65
[1739] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 49

**plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:**
**(i) apply to amend the indictment accordingly;**
**(ii) submit that a specific sentence or sentencing range is appropriate;**
**(iii) not oppose a request by the accused for a particular sentence or sentencing range.**
**(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).**
**(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (A) (v), or requests to change his or her plea to guilty.**

**Rule 63—questioning of the accused**

**(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.**
**(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A) (iii).**

The Trial Chamber did not err in refusing to hold a *voir dire* before admitting a statement of one accused at the request of another accused where it inquired into the circumstances surrounding the taking of the statement and found that there was nothing to suggest the interviews were conducted in an improper manner.[1740]

**Rule 64—detention on remand**

**Upon his transfer to the Tribunal, the accused shall be detained in facilities provided by the host country or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused.**

**appeal of detention issues**

Registrar violated Rule 86 by failing to promptly act on complaints of accused that his defence team was not allowed to bring two laptops to detention unit and to forward its decision to the President for review. However, having failed to do that, the

[1740] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-97-21-AR73, *Decision on Appeal of Accused Arsene Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997* (27 October 2006)

motion to the Trial Chamber was denied since administrative remedies were not exhausted.[1741]

**conjugal visits**

Detainees at UNDF have the right to marry, but no right to conjugal visits.[1742]

**privileged communications**

Visits by Defence investigators and assistants are not covered by the privilege of Rule 65 of the Rules of Detention, which is reserved for Defence Counsel. The Registrar may permit such confidential communication in "exceptional circumstances," such as when the lead and co-counsel are absent from Arusha.[1743]

Should correspondence or communications from Counsel to the Accused be brought by a member of a Defence team other than Counsel, such correspondence or communications, regardless of format, shall be considered privileged pursuant to Rule 65 of the Rules of Detention, and their contents neither examined nor censored, only if the correspondence is clearly identified as emanating from Counsel, and secured in such a manner as to prevent persons other than the intended recipient from seeing the contents of the communication or correspondence.[1744]

A detainee wishing to challenge the denial of privileged communications with legal assistants or investigators must first exhaust his administrative remedies within the UNDF and Registry before the Trial Chamber will act.[1745]

Appeals Chamber declines to order access to accused by legal assistant absent exhaustion of administrative remedies.[1746]

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[1741] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ndyambaje's Extremely Urgent Motion Regarding Permission for Each of Ndyambaje's Counsel to Bring a Laptop into the UNDF* (23 November 2007)
[1742] *Prosecutor v Nahimana et al*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Application for Review of the Registrar's Decision of 12 January 2005* (14 September 2005)
[1743] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-I, *Decision on the Defence Motion to Protect the Applicant's Right to Full Answer and Defence* (15 November 2002) at para.31; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for Access for Investigators and Assistants to the Accused in the Absence of Counsel* (20 November 2002)
[1744] *Prosecutor v Mugiraneza*, No. ICTR-99-50-T, *Decision on the Defence Urgent Motion for Relief Under Rule 54 to Prevent the Commandant of the UNDF from Obstructing the Course of International Criminal Justice* (19 September 2001) at para.12
[1745] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze's Motion Regarding Access to the United Nations Detention Facility* (10 June 2002)
[1746] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Jean Bosco Barayagwiza's Urgent Motion Requesting Privileged Access to the Appellant Without Attendance of Lead Counsel* (17 August 2006)

The Trial Chamber will not act on requests pertaining to hours of visitation between defence teams and the accused unless all avenues are exhausted with the Registrar.[1747]

The Commander of UNDF is not obliged to forward information from a detainee to the news media.[1748]

**segregation from other detainees**

It was not reasonable to segregate accused from other detainees on prosecutor's concern that other detainees would share witness statements with accused, whose case was not as far along as those of the other accused.[1749]

The Prosecutor is required to furnish the Registrar with reasons for requesting a prohibition of contact between the accused and his intended visitors. Such reasons should not constitute a mere repetition of the empowering rule but should specify the particular threat or prejudice that is feared and be substantiated by information to enable the Registrar to make an informed decision. Insufficient reasons were specified in this case.[1750]

President ordered that accused be allowed to meet with defence witness after his testimony provided they did not discuss the case.[1751]

Only a detainee can appeal to the President against a decision of the Registrar that the prosecution should be present at a meeting between the detainee and another defence team. The appeal of the defence team was inadmissible.[1752]

The Trial Chamber has the power to review the Registrar's decision pursuant to Rule 64 to require that a representative of the prosecution be present when the defence interviews a detainee who is a potential defence witness. This power stems from the Trial Chamber's duty to ensure a fair trial.[1753]

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[1747] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Extremely Urgent Motion for Greater Access to the Accused at the UNDF* (3 March 2006)
[1748] *Karemera v Prosecutor*, No. ICTR-98-44-T, *Decision on Complaint by Edouard Karemera* (28 May 2007) at para. 8
[1749] *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision of President on Request for Reversal of Decision Prohibiting Contact with Other Detainees* (15 February 2005)
[1750] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *The President's Decision on a Defence Motion to Reverse the Prosecutor's Request for Prohibition of Contact Pursuant to Rule 64* (25 November 2002) at para. 9
[1751] *Prosecutor v Ntagerura*, No. ICTR-96-10A-T, *The President's Decision on the Defence Application Made Pursuant to Rule 64 of the Rules of Detention* (21 May 2002)
[1752] *Prosecutor v Ntahobali*, No. ICTR-98-42-T, *The President's Decision on the Appeal Filed Against the Registrar's Refusal to Permit a Confidential Interview with Georges Rutaganda* (7 June 2005) at para. 5
[1753] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 4

The defence may meet with a detainee who it wishes to call as a witness only in the presence of a representative of the Registrar who would be bound by confidentiality and obligated to report any disclosures by the detainee of confidential information to the Trial Chamber.[1754]

The defence may meet with a detainee who it wishes to call as a witness in the absence of a representative of the prosecution or Registrar if the witness does not bring any documents to the interview. The situation is different than that when the detainee is listed as a prosecution witness.[1755]

The interview of a detainee has a direct bearing on the fair trial rights of the accused who may want to call him as a witness.[1756]

**Rule 65—provisional release**

**(A) Once detained, an accused may not be provisionally released except upon an order of a Trial Chamber.**
**(B) Provisional release may be ordered by a Trial Chamber only after giving the host country and the country to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.**
**(C) The Trial Chamber may impose such conditions upon the provisional release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused at trial and the protection of others.**
**(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. Subject to paragraph (F) below, an appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the appeal shall be filed within seven days of the oral decision unless:**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.**
**(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused.**
**(F) Where the Trial Chamber grants a stay of its decision to release an accused, the**

[1754] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Order Allowing Meeting with Defence Witness* (13 July 2005) at para. 10
[1755] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Décision on the Requete d' Arsene Shalom Ntahobali en Autorisation de Rencontrer le Détenu Georges Rutaganda en l'Absence d'en Représentant du Procureur et du Greffe* (21 September 2005)
[1756] *Prosecutor v Ntahobali*, No. ICTR-98-42-T, *The President's Decision on the Appeal Filed Against the Registrar's Refusal to Permit a Confidential Interview with Georges Rutaganda* (7 June 2005) at para. 8

**Prosecutor shall file his or her appeal not later than one day from the rendering of that decision.**
**(G) Where the Trial Chamber orders a stay of its decision to release the accused pending any appeal by the Prosecutor, the accused shall not be released until either:**
**(i) the time-limit for the filing of an appeal by the Prosecutor has expired, and no such appeal is filed;**
**(ii) the Appeals Chamber dismisses the appeal; or**
**(iii) the Appeals Chamber otherwise orders.**
**(H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been provisionally released or is for any other reason at large. The provisions of Section 2 of Part Five shall apply mutatis mutandis.**
**(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:**
**(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;**
**(ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and**
**(iii) special circumstances exist warranting such release.**
**The provisions of paragraphs (C) and (H) shall apply mutatis mutandis.**

**compelling circumstances**

In cases where provisional release has been granted, there have usually been some compelling circumstance, often family or health related, as well as undertakings from State authorities to monitor the accused and take measures to ensure that he would return for trial.[1757]

**imminence of trial**

Where trial was imminent, Trial Chamber did not abuse its discretion in refusing to order provisional release.[1758]

**length of detention**

Lengthy pre-trial detention does not constitute *per se* good cause for release. An assessment whether delay is *undue* requires regard to other factors in addition to the

[1757] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motion for Provisional Release* (17 December 2008) at para. 11
[1758] *Prosecutor v Muvunyi*, No. ICTR-00-55A-AR65, *Decision on Appeal Concerning Provisional Release* (20 May 2009) at para. 8

length of detention, such as the seriousness of the charges and the general complexity of the trial.[1759]

The period of pre-trial detention does not justify an order for provisional release.[1760]

Due to complexity of the case, the detention of the accused for more than five years does not amount to undue delay in bringing him to trial such as to warrant his provisional release.[1761]

**medical condition**

Trial Chamber erred in failing to consider humanitarian and medical grounds when deciding if accused was a flight risk.[1762]

**risk of flight**

Accused whose retrial on incitement to genocide count was imminent and who had not voluntarily surrendered was flight risk and therefore provisional release was denied.[1763]

**safe house**

Release to a safe house would be a variation of conditions of detention and not provisional release, and therefore would be within the discretion of the President under Rule 64 of the Rules of Detention.[1764]

**single judge**

Decisions on provisional release must be made by full Trial Chamber. It was error to designate a single judge to decide a motion for provisional release.[1765]

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[1759] *Prosecutor v Mugenzi et al*, No. ICTR-99-50-I, *Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)* (8 November 2002) at para. 36

[1760] *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on the Motion for Provisional Release of Father Emmanuel Rukundo* (15 July 2004) at para. 16

[1761] *Prosecutor v Ngirumpatse et al*, No. ICTR-98-44-PT, *Decision on the Motion by Ngirumpatse's Defence to Find the Accused's Detention Unlawful, or in the Alternative, to Order his Provisional Release* (18 August 2003); *Prosecutor v Kanyabashi*, No. ICTR-96-15-T, *Decision on the Defence Motion for the Provisional Release of the Accused* (21 February 2001)

[1762] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR65, *Decision on Matthieu Ngirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release* (7 April 2009) at para. 14

[1763] *Prosecutor v Muvunyi*, No. ICTR-00-55A, *Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release* (3 April 2009) at para. 15

[1764] *Prosecutor v Muvunyi*, No. ICTR-00-55A, *Decision on Defence Motion for Reconsideration of Decision Denying Provisional Release* (3 April 2009) at para. 16

[1765] *Rukundo v Prosecutor*, No. ICTR-2001-70-AR65, *Decision on Appeal from the Decision of Trial Chamber III of 18 August 2003 Denying Application for Provisional Release* (8 March 2004)

**stage of trial**

An application for provisional release brought after the close of the prosecution case should only be granted when sufficiently compelling humanitarian circumstances exist.[1766]

**State guarantees**

Provisional release for accused to be with his gravely ill son denied where not agreed to by the host country, Belgium.[1767]

Failure to provide guarantee of host country that accused would be allowed to reside there if released indicated that accused had not met his burden of showing that he would return for trial.[1768] Letter from Minister of Justice that if released, the government "would be willing to entertain the matter" was insufficient.[1769] Letter from religious order that accused could live under their supervision was insufficient.[1770]

While guarantees from the host country is not a pre-requisite to provisional release, Trial Chamber would inquire of States under Article 28 whether it would accept the accused if released, where accused was charged with contempt, and he would have been in detention for one year before his trial even commenced.[1771]

Trial Chamber erred in regarding the production of guarantees from a State as a prerequisite to obtaining provisional release.[1772]

It is advisable for an accused to provide guarantees from relevant governmental authorities.[1773]

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[1766] *Karemera et al v Prosecutor*, No. ICTR-98-44-T, *Decision on Matthieu Ngirumpatse's Appeal Against Decision on Remand on Provisional Release* (8 December 2009) at para. 7

[1767] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Augustin Ndindiliyimana's Emergency Motion for Temporary Provisional Release* (11 November 2003)

[1768] *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on Defence Motion to Fix a Date for Commencement of the Trial of Father Emmanuel Rukundo or in the Alternative to Request his Provisional Release* (18 August 2003) at para. 22; *Prosecutor v Nsengimana*, No. ICTR-0-69-I, *Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release* (11 July 2005) at para. 17

[1769] *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on the Motion for Provisional Release of Father Emmanuel Rukundo* (15 July 2004) at para. 17

[1770] *Prosecutor v Nsengimana*, No. ICTR-0-69-I, *Decision on Nsengimana's Motion for the Setting of a Date for a Pre-Trial Conference, a Date for the Commencement of Trial, and for Provisional Release* (11 July 2005) at para. 18

[1771] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motion for Review of Provisional Measures, or Alternatively, for Provisional Release* (17 November 2008)

[1772] *Karemera et al v Prosecutor*, No. ICTR-98-44-T, *Decision on Matthieu Ngirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release* (7 April 2009) at para. 12

[1773] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motion for Provisional Release* (17 December 2008) at para. 14

Provisional release of person charged with contempt refused where no State would accept the accused if released.[1774]

**voluntary surrender**

Trial Chamber was not convinced that accused was aware of the seriousness of the charges when he surrendered to the ICTR and therefore denied provisional release as a flight risk.[1775]

**appeal**

Leave to appeal denied where accused failed to show good cause—that being a showing that the Trial Chamber may have erred.[1776]

**release pending appeal**

The requirements of Rule 65(I), including the existence of special circumstances in favor of release, apply cumulatively.[1777]

The merit of the appeal is not an appropriate factor when considering provisional release.[1778]

Special circumstances in favor of release include the applicant's medical needs, extremely poor health of a close family member whose death is believed to be imminent, or a memorial service for a close family member immediately after his death.[1779]

Length of detention does not constitute a special circumstance.[1780]

**sentenced prisoners**

Motion for temporary provisional release by prisoner serving his sentence in Mali is properly brought before the State in which the prisoner is serving his sentence, and not

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[1774] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motion for Provisional Release* (17 December 2008)
[1775] *Prosecutor v Kalimanzira*, No. ICTR-05-88-I, *Decision on Defence Motion for Provisional Release* (8 June 2007)
[1776] *Prosecutor v Bizimungu*, No. ICTR-99-50-A, *Decision on the Application to Appeal Against the Provisional Release Decision of Trial Chamber II of 4 November 2002* (13 December 2002)
[1777] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File a Corrigendum* (2 September 2009) at para. 16
[1778] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File a Corrigendum* (2 September 2009) at para. 22
[1779] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File a Corrigendum* (2 September 2009) at para. 23
[1780] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File a Corrigendum* (2 September 2009) at para.23

before the ICTR, as the convicted person is no longer subject to the provisions of Rule 65(I), which pertains to convicted persons "pending an appeal".[1781]

**Rule 65 bis—status conference**

**(A) A status conference may be convened by a Trial Chamber or a Judge thereof. Its purpose is to organise exchanges between the parties so as to ensure expeditious trial proceedings.**
**(B) The Appeals Chamber or an Appeals Chamber Judge may convene a status conference.**
**(C) A status conference held pursuant to paragraph (B) of this Rule may be conducted with the participation of counsel via tele-conference or video-conference.**

**Rule 66—disclosure of exculpatory and other relevant material**

**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.**

**statements of accused**

Section 66(A)(i) applies to all statements of the accused in the prosecution's custody and control, whether these statements were collected by the prosecution or others.[1782]

[1781] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Motion for Provisional Release* (12 March 2009) at paras. 4, 7

**supporting material**

With respect to an amended indictment, the Trial Chamber has discretion when to order service of the supporting material. Disclosure ordered within 21 days.[1783]

Supporting material required to be disclosed to the accused does not include other material submitted to the confirming judge such as a brief of argument or statement of facts, or documents submitted to assist the Trial Chamber in adjudicating a motion for leave to amend the indictment.[1784]

The prosecution's "explanatory notes" submitted to the confirming judge need not be disclosed to the defence.[1785]

The prosecution acted improperly in redacting supporting material without a court order when disclosing it to the defence. However, it would be allowed to make a supplemental application for redacted disclosure.[1786]

There is no requirement that disclosure be made through the Registry. Prosecutor's provision of a CD Rom directly to defence counsel complied with Rule 66(A)(i).[1787]

**witness statements**

**burden of persuasion**

The burden rests on the prosecution to justify non-disclosure of items falling under Rule 66(A), not on the accused to justify disclosure.[1788]

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[1782] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003) at para 11, fn. 6; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-97-21-I, *Decision on Defence Motion for Disclosure of Evidence* (1 November 2000) at para. 36; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 20

[1783] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-I, *Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment* (15 October 2003) at para. 24

[1784] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at para. 7

[1785] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at paras. 6-9

[1786] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 13,19

[1787] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-PT, *Décision on Defence Requete en Urgence de la Defence Concernant les Manquements du Procurer à ses Obligations de Communiquer les Pieces et set Effets sur le Calendrier du Procès* (27 February 2009) at para. 11

[1788] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on Tharcisse Muvunyi's Motions for Disclosure of Exculpatory and Other Relevant Material and for Relief Pursuant to Rules 66 and 5 of the Rules* (9 February 2005) at para. 11

**certification**

Considering prosecution's late disclosure of a witness statement, the Chamber required the prosecution to certify that all Rule 66(A)(ii) disclosure was complete.[1789]

**confirmation statements**

Witness Reconfirmation Statements are required to be disclosed pursuant to Rule 66(A)(ii) and are not "internal documents" protected from disclosure by Rule 70.[1790]

**contents**

A record of a witness interview, ideally, is composed of all the questions that were put to a witness and of all the answers given by the witness. The time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee and other events that could have an impact on the statement or its assessment should be recorded as well.[1791]

An interview must be recorded in a language the witness understands. As soon as possible after the interview has been given, the witness must have the chance to read the record or to have it read out to him or her and to make the corrections he or she deems necessary and then the witness must sign the record to attest to the truthfulness and correctness of its content to the best of his or her knowledge and belief. A co-signature by the investigator and interpreter, if any, concludes such a record.[1792]

**coversheets**

Specific information on witness coversheets must be disclosed: the name(s) of the witness, his or her date and place of birth, his or her religion, nationality and ethnic origin, his or her residence and profession at the time of the events about which he or she is to testify, the languages spoken and written by him or her, the signature of the witness, the name of the investigator and the interpreter having conducted the interview, the date(s) of the statement(s), and, the language(s) used when the statement was taken. Any other information need not be disclosed.[1793]

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[1789] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-PT, *Décision on Defence Requete en Urgence de la Defence Concernant les Manquements du Procurer à ses Obligations de Communiquer les Pieces et set Effets sur le Calendrier du Procès* (27 February 2009) at para. 16

[1790] *Prosecutor v Karemera et al;*, No. ICTR-98-44-PT, *Decision on Disclosure of Witness Reconfirmation Statements* (23 February 2005)

[1791] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 31

[1792] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 32

[1793] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Disclosure of Information on the Coversheets of Prosecution Witness Statement* (8 March 2002)

Place of collection of statements allowed to be withheld until unredacted statements disclosed.[1794]

Names of investigators and interpreters who took statements from witnesses are material to the defence and must be disclosed, despite allegations of danger to these persons.[1795]

**good cause for delay**

A mere reference earlier to on-going investigations was not in itself a sufficient reason to admit new statements after the 60-day time limit set out in Rule 66 had lapsed.[1796]

The materiality of the anticipated testimony, the lack of the element of surprise to the defence, and no resultant delays to the trial proceedings, contribute to a finding of "good cause" in terms of Rule 66 A (ii).[1797]

Good cause existed for late disclosure of witness statement when statement was disclosed immediately after prosecution first learned of witness through testimony at Gacaca proceedings.[1798]

The prosecution's duty under the statute to present the best available evidence to prove its case must be balanced against the right of the accused to have adequate time and facilities to prepare his defence and his right to be tried without undue delay.[1799]

**possession of the prosecution**

Where prosecution witnesses advised defence counsel that they had signed statements for the prosecution which had not been disclosed, and the prosecution claimed it did not have such statements, the prosecution would be presumed to act in good faith and no remedy would be afforded to the defence.[1800]

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[1794] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecution's Motion for, Inter Alia, Modification of the Decision of 8 June 2001* (25 September 2001) at para. 22
[1795] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecution's Motion for, Inter Alia, Modification of the Decision of 8 June 2001* (25 September 2001) at para. 20
[1796] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 12.
[1797] *Prosecutor v Nahimana et al*, No. ICTR-99-52-I*, Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures* (14 September 2001) at para. 19.
[1798] *Prosecutor v Mpambara*, No.2001-65-T, *Decision on the Prosecution Request to Add Witness AHY* (27 September 2005) at para. 7
[1799] *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses* (26 June 2001) paras 18-20.
[1800] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notice of Violation of Rule 66(A)(ii) for Witnesses ALZ and AMC and Motion for Remedial and Punitive Measures* (11 July 2007) at para. 8

Prosecution was not obligated under Rule 66(A)(ii) to obtain and disclose statements of its witnesses in Rwandan proceedings that was not in its possession.[1801]

Mere fact that prosecution had met with witness did not establish that a "statement" of the witness from that meeting, within the meaning of Rule 66(A)(ii), had been taken. Motion for disclosure of interview notes or other memoranda of such meetings denied.[1802]

**prejudice**

An apparent contradiction between a witness' prior statement to the Tribunal and the witness' testimony in another court was not prejudicial where the statement was not included in the witness' trial testimony.[1803]

**prior testimony**

Transcripts of tape-recorded interviews of prosecution witnesses are prior statements pursuant to Rule 66(A)(ii).[1804] Witness statements in audio or video form also are required to be disclosed under this rule.[1805]

Prosecution was in flagrant breach of Rule 66(A)(ii) where it disclosed statements and transcripts after the 60-day period had expired.[1806]

Prior testimony of the witness in other trials at the ICTR must be disclosed pursuant to Rule 66(A)(ii).[1807]

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[1801] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents* (23 November 2009) at para. 24

[1802] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Defence Urgent Pre-Trial Motion for Disclosure Under Rule 66(A)(ii)…*(6 January 2011)

[1803] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 220

[1804] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Notification of Failure to Comply With Trial Chamber Order and Motion for Remedial Measures* (20 October 2003) at para. 5

[1805] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Notification of Failure to Comply With Trial Chamber Order and Motion for Remedial Measures* (20 October 2003) at para.11

[1806] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-PT, *Decision on Defence Motion Alleging Breach of Prosecution's Disclosure Obligations…*(26 March 2009) at para. 20

[1807] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 23; *Prosecutor v Kajelijeli*, No ICTR-99-44A-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Closed Session Testimony and Exhibits Received Under Seal* (7 October 2003) at para. 13; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA* (21 April 2008) at para. 12; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 22; *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial* (13 October 2009) at para. 20

Closed session testimony can be disclosed by the prosecution pursuant to Rule 75(F) without an order of the Trial Chamber. Therefore, prosecution was in breach of its disclosure obligation when it failed to timely disclose such testimony.[1808]

However, it is only when the witness is to testify on the same subject matter as his previous testimony that this previous testimony shall constitute a witness statement within the meaning of Rule 66(A)(ii) and is therefore subject to disclosure.[1809]

**recording**

A recording of an interview of a prosecution witness must be disclosed pursuant to Rule 66(A)(ii), even where a written transcript of the recording has been disclosed.[1810]

**remedy--adjournment**

Postponement of witness testimony until the end of the trial session was the appropriate remedy for the prosecution's violation of Rule 66(A)(ii). The Chamber found that the prosecution deliberately misled the Chamber by characterizing the witness statement as Rule 66(B) material.[1811]

Remedy for disclosure of large numbers of pages from Gacaca proceedings of prosecution witnesses on the eve of commencement of trial is not delay of trial, but postponement of testimony of affected witnesses until a second trial session.[1812]

The length of the delay granted for cross-examination depends on the extent of the new evidence, how incriminating it is, and its remoteness from any other incidents of which the Defence has notice. Two days was adequate where the new material was based on hearsay of limited probative value.[1813]

Trial Chamber abused its discretion in denying adjournment without determining whether the late-disclosed material affected the ability of the accused to fully cross examine the affected witness. However, on appeal, the accused failed to identify any

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[1808] *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial* (13 October 2009) at para. 20

[1809] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Require Strict Compliance with Rule 66(A)(ii)* (5 May 2004) at para. 8; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 22

[1810] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on the Defence Motion for the Prosecutor to Produce Video Tape of Interview with Witness BUC* (31 December 2008) at para. 7

[1811] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for Stay of Proceedings…*(13 November 2009) at paras. 49-50

[1812] *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial* (13 October 2009) at para. 43

[1813] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Evidence of Witness DP* (18 November 2003)

material in the non-disclosed material that would have been material to its cross-examination.[1814]

**remedy—exclusion**

Trial Chamber struck witnesses from witness list where prosecutor had not disclosed their statements as ordered and rejected prosecution application to delay disclosure until witnesses could be located or persuaded to testify.[1815]

Failure of prosecution to disclose immigration records of defence witness after they had been specifically requested violated Rule 66(B). The immigration records and all testimony related thereto was ordered stricken to ensure that the prosecution will comply with its Rule 66(B) obligations in the future.[1816]

Exclusion of witness' testimony is not preferred remedy for late disclosure of witness statements. Delay in testimony of witness to allow for adequate preparation by the accused is appropriate.[1817]

Exclusion of testimony for late disclosure is too strong a sanction and should only be used in exceptional circumstances. Postponement of the hearing and recalling the witness are more appropriate remedies.[1818]

Exclusion of expert testimony not warranted where report not filed within deadline set by Trial Chamber, however, no prejudice inured to the accused.[1819]

Deficiencies faced by the prosecution in research of documents are not satisfactory explanations for failure to comply with the time limits of Rule 66(A)(ii).

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[1814] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at paras. 193-94

[1815] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Stay Disclosure Until Protection Measures are Put in Place* (27 March 2002)

[1816] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defendant Bicamumpaka's Motion for Reconsideration of Oral Decision Regarding Violation of Prosecutor's Obligations Pursuant to Rule 66(B) of the Rules of Procedure and Evidence Dated 11 October 2007* (7 February 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Submission on Entering Into Evidence Exhibits Arising from the Prosecution Cross Examination of Karemera Defence Witnesses KBL, LSP, and TXL, and Joseph Nzirorera's Eighteenth Motion for Remedial and Punitive Measures for Violation of Rule 66* (10 November 2008) at paras. 20, 24

[1817] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Defence for Bagosora's Motion for Postponement or Quashing of the Testimonies of Witnesses Ruggiu, XAM, and ZF* (30 September 2002); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion to Preclude Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of DCH's Testimony, and for the Appointment of Defence Counsel for DCH* (29 March 2004)

[1818] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Prosecutor Ex Parte Confidential Application et al* (10 October 2005)

[1819] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Exclusion of Testimony of Alison Des Forges and Granting Extension of Time for Disclosure of the Expert Report* (3 October 2005)

However, where the defence had the material months before the witness testified, no prejudice from the late disclosure was shown and exclusion was not warranted.[1820]

Exclusion of evidence for failure of prosecution to use its best efforts to obtain prior statements to Rwandan authorities was not warranted. The defence can request the witness be recalled if it is established that the failure of disclosure warrants a remedy.[1821]

Exclusion of evidence is at the extreme end of measures available to the Chamber and would not be employed where witness statements are withheld from the defence absent the existence of prejudice to the defence.[1822]

Exclusion of evidence is at the extreme end of measures available to the Chamber and would not be employed where the non-disclosure was due to a mistake by the prosecution.[1823]

**remedy—recalling witness**

Where witness' Rwandan confession was disclosed after the witness testified, the witness ordered to be recalled for further cross-examination.[1824]

**statement, defined**

Records of questions put to witnesses by the prosecution and of the answers given constitute witness statements pursuant to Rule 66(A)(ii) of the Rules. It is necessary to disclose the questions put to the witness to make the statement intelligible.[1825]

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[1820] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness AMM* (15 June 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness GAY* (16 July 2007)

[1821] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joseph Nzirorera's Motions to Vacate the Decision on Defence Motions for Subpoenas to Prosecution Witnesses , to Exclude the Testimony of Witnesses AMB, ANU, AWD, AWE, FH, and KGV, and to Postpone the Testimony of Witness ANU* (14 June 2007) at paras. 20,24; *Prosecutor v Karemera et al*, No. ICTR-98- 44-T, *Decision on Joseph Nzirorera's Motion to Exclude Testimony of Witness AXA* (11 July 2007) at para. 7

[1822] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motions Under Rule 66(C) of the Rules* (15 February 2006) at para. 25; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Exclusion of Witness GK's Testimony or for Request for Cooperation of the Government of Rwanda* (27 Nov 2006) at paras. 3-4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Testimony of Witness QBG* (11 July 2007) at para. 6

[1823] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 6; *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. 20

[1824] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Elie Ndyambaje's and Alphonse Nteziryayo's Request for the Recall of Witness FAG Following the Disclosure of a New Confessional Statement* (18 June 2004)

[1825] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 33

Neither the Statute nor the Rules oblige the Prosecution to disclose a statement by a person contained in the supporting material if that person was not, by the relevant date, a person whom the Prosecution intended to call to testify.[1826]

The usual meaning of a "witness statement" in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure investigation into the crime.[1827]

Any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official during an investigation falls within the meaning of a "witness statement" under Rule 66.[1828]

The prosecutor must disclose previous statements of all prosecution witnesses, in whatever form, to the defence.[1829]

Audio recordings of interview with prosecution witness was a statement under Rule 66(A)(ii).[1830]

Failure to disclose notes of investigator of interview with prosecution witness violated Rule 66(A)(ii).[1831]

Notes reflecting questions or answers in an interview must be disclosed, even if repetitive to material already disclosed, but internal reflections of the notetaker may be redacted.[1832]

A record of an interview of a witness in which he reported contact from one of the defence teams was not subject to disclosure pursuant to Rule 66(A)(ii).[1833]

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[1826] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on an Oral Application by Defence Counsel Concerning Witness X* (19 January 2002), at para. 8.

[1827] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 20; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 22

[1828] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 35; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 20

[1829] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 24

[1830] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Order to Prosecutor to Comply With his Disclosure Obligations and Motion for Stay of Proceedings due to the On-Going Violation of the Prosecutor's Disclosure Obligations* (10 February 2009) at para. 15

[1831] *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

[1832] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Urgent Defence Motion for Disclosure of Prior Statements* (31 January 2011)

**taken by third parties**

Rule 66(A)(ii) applies to all statements of a witness under the prosecutor's custody or control regardless of whether such statements were obtained by the prosecutor or from other sources.[1834]

Rule 66(A)(ii) does not distinguish between statements taken by the Prosecutor and those taken by national authorities during other judicial proceedings involving a witness.[1835] The same criteria as those identified in respect of the accused's previous statements must apply *mutatis mutandis* to the previous statements of the witnesses also indicated in Sub-Rule 66(A).[1836]

The prosecutor bears the responsibility of obtaining the said statements from the Rwandan Authorities and of providing them to the defence, pursuant to Rule 66(A)(ii).[1837]

Statements made by the witness and recorded in the minutes of gacaca proceedings in Rwanda, when in the possession of the prosecution, come within the meaning of Rule 66(A)(ii).[1838]

Statements made by witness as reflected in the record of proceedings against him in Rwandan court did not constitute statements within the meaning of Rule 66(A)(ii).[1839]

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[1833] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 27

[1834] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 22; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 24; *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial* (13 October 2009) at para. 19

[1835] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 6

[1836] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 8

[1837] *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses* (15 November 2001) at para. 25; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 20

[1838] *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

[1839] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Witness GFJ* (20 September 2005)

Rule 66(A)(ii) does not obligate the prosecutor to disclose statements of persons not on its witness list, except where such statements fall within the category of exculpatory materials under Rule 68.[1840]

**timing**

Disclosure of witness statements pursuant to Rule 66 (A)(ii) is intended to assist the defence in its understanding of the case, in accordance with the accused's rights under Articles 20 and 21 of the Statute. Disclosure should thus be provided to the defence in advance of trial so to allow sufficient time for the preparation of their case and conduct the investigations deemed necessary.[1841]

The prosecutor is required to disclose to the defence as soon as possible and as they come into her possession, without waiting for a date to be set for the commencement of trial, copies of all prior statements of all the witnesses she intends to call.[1842]

The 60-day limit in Rule 66(A)(ii) is to be interpreted as a final date for disclosure. The Trial Chamber expects that disclosure will be made before that if possible. The obligation under this rule is a continuing one.[1843]

Where prosecution witnesses are added after the 60-day period before commencement of trial, the prosecution must disclose their statements as soon as possible.[1844]

The 60-day period does not apply to prosecution rebuttal witnesses.[1845]

Violations of the prosecutor's obligation to disclose witness statements should be brought to the attention of the Trial Chamber promptly. Belated motion would not be ruled upon and deemed frivolous and an abuse of process.[1846]

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[1840] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material* (1 December 2004) at para. 6

[1841] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions by Niyiramasuhuko, Ndayambaje, and Kanyabashi on, Inter Alia, Full Disclosure of Unredacted Prosecution Witness Statements* (13 November 2001) at para. 16

[1842] *Prosecutorv Niyiramasuhuko et al*, No. ICTR-97-21-I, *Decision on Defence Motion for Disclosure of Evidence* (1 November 2000) at para. 39

[1843] *Prosecutor v Bisengimana*, No. ICTR-2000-60-I, *Decision on Bisengimana's Motion for Disclosure of Materials* (28 March 2003)at para. 9; *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 24

[1844] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Notification of Failure to Comply With Trial Chamber Order and Motion for Remedial Measures* (20 October 2003) at para. 12

[1845] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Postpone the Hearing of Rebuttal Evidence* (5 March 2012) at para. 22

[1846] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66* (4 February 2005)

The purpose of the disclosure requirements set out in Rule 66 A (ii) is to enable the Defence to have sufficient notice of the case for which it must prepare. This aim is not frustrated by late disclosure where the Defence is not caught by surprise as to the nature of the evidence to be given by the witness and is not unduly prejudiced.[1847]

Where the prosecution comes into possession of a witness statement after the witness has testified, it need not disclose the statement pursuant to Rule 66(A)(ii) as the rule only applies to witnesses the prosecution *intends* to call to testify.[1848]

**items material to the defence**

**accused's property**

The defence is entitled to inspection of all items seized from him at the time of arrest and for return of those items not intended to be used by the prosecution.[1849]

Prosecution ordered to disclose all reports, memoranda, receipts, or inventories pertaining to the seizure or maintenance of property taken from the accused.[1850]

Items taken from or belonging to the accused must be offered for inspection with no further specificity required.[1851]

**contingent**

The prosecution's Rule 66(B) disclosure obligation is not contingent on defence compliance with other disclosure rules.[1852]

**copies**

Prosecution has a limited obligation to provide copies of items inspected pursuant to Rule 66(B) of the Rules. Should the prosecution have been unable, despite its best

[1847] *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures* (14 September 2001) at para. 17.
[1848] *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 paras. 49-51
[1849] *Decision on the Defence Motion Challenging the Lawfulness of the Arrest or Detention and Seeking Return or Inspection of Seized Items* (10 December 1999) at para. 76; *Prosecutor v Ntagerura et al*, No. ICTR-98-46-I, *Decision on the Defence Motion by Emmanuel Bagambiki for the Restitution of Documents and Other Personal and Family Property* (26 September 2000) at para. 7
[1850] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order* (13 October 2003) at para. 33
[1851] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Inspection of Materials in the Prosecution's Custody* (29 August 2011) at para. 39
[1852] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 6

efforts, to provide copies of all these items, the defence may make copies of the remaining items.[1853]

Prosecution should allow the defence to make copies of items inspected pursuant to Rule 66(B).[1854]

In the case of a videotape, which may reveal information at a speed too fast for Counsel to take cognisance of the information contained therein, the accused should be able to see the material.[1855]

A request by the defence to take photographic copies of prosecution witness' statements containing fingerprints and signatures, with a view to subsequently admitting them under Rule 92 *bis,* was deemed reasonable.[1856]

**exhibits**

Prosecution required to disclose videotapes of accused at political meetings and of his political party only to the extent that he intends to offer them into evidence at trial. Request for all such videotapes is too broad.[1857]

The prosecution would not be required to disclose those exhibits it intended to use during cross examination of defence witnesses considering its representation that it would not know which exhibits it would use until the end of direct examination.[1858]

Request for disclosure of exhibits the prosecution intended to use with defence witnesses was tantamount to a request for all relevant material for cross examination and was not sufficiently specific.[1859]

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[1853] *Prosecutor v. Nsabimana*, No. ICTR-97-29-T, *Decision on the Defence Motions for Disclosure of Copies of the Prosecutor's Exhibits* (18 September 2001) at para. 14

[1854] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003) at para 15; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka Motion to Inspect Documents Pursuant to Rule 66(B) of the Rules of Procedure and Evidence* (5 November 2007) at para. 14

[1855] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on the Motions of the Parties Concerning the Inspection and Disclosure of a Videotape* (28 April 2003) at para. 16.

[1856] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Compel the Prosecutor to Facilitate the Defence to take Photographs of Original Documents in Her Custody Containing GAO's Fingerprints and GDD's Signatures* (1 May 2003) at para. 10.

[1857] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Motion of the Defence of Joseph Nzirorera for Permission to Review the Videotapes Relating to the MRND and the Accused* (30 January 2004)

[1858] *Prosecutor v Bagosora et al* No. ICTR-96-7-T, *Decision on Kabiligi Motion for Inspection of Documents Under Rule 66(B)* (6 December 2006) at para. 4; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at para. 7

[1859] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Motion for Inspection of Defence Witness Information* (17 February 2009) at para. 4

**immigration records**

Nothing in Rule 66(B) limits an accused's right to inspection only of material related to the Prosecution's case-in-chief. Prosecution was obligated to disclose immigration records of defence witnesses upon request, and not simply at the commencement of cross examination.[1860]

Failure of prosecution to disclose immigration records of defence witness not grounds for exclusion where defence never requested disclosure, failed to object at the time the records were used, and would likely have called the witness regardless of the immigration records.[1861]

Failure of prosecution to disclose immigration records of defence witness after they had been specifically requested violated Rule 66(B). The immigration records and all testimony related thereto was ordered stricken to ensure that the prosecution will comply with its Rule 66(B) obligations in the future.[1862]

Prosecution ordered to allow inspection of immigration records of defence witness prior to witness giving testimony.[1863]

**impeachment**

Rule 66(B) cannot be interpreted as laying down a blanket obligation for the prosecution to disclose documents pertinent to its cross examination of defence witnesses.[1864]

Request for all documents relevant to accused's alibi too vague for order to be made for prosecution to produce such material prior to the testimony of the accused.[1865]

**interviews of defence witnesses**

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[1860] *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)
[1861] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Exclude Testimony Relating to Immigration Documents* (30 April 2007)
[1862] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defendant Bicamumpaka's Motion for Reconsideration of Oral Decision Regarding Violation of Prosecutor's Obligations Pursuant to Rule 66(B) of the Rules of Procedure and Evidence Dated 11 October 2007* (7 February 2008)
[1863] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Alphonse Nteziryayo's Motion for Inspection of Immigration Files and Prior Statements of Witnesses AND-36, AND-38, AND-50, AND-59, AND-75, and AND-23* (30 April 2007); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence…Second Motion for Inspection of Materials in the Prosecution's Custody* (27 September 2011) at para. 38
[1864] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses* (27 September 2005) at para. 6
[1865] *Prosecutor v Bagosora et al* No. ICTR-96-7-T, *Decision on Kabiligi Motion for Inspection of Documents Under Rule 66(B)* (6 December 2006) at para. 5

Where prosecution interviewed defence witnesses, their statements were material to the defence and inspection should be allowed.[1866]

Statements, immigration records, and judicial records of witnesses to be called by co-accused were material to the preparation of the accused and must be disclosed to the accused by the prosecution.[1867]

Interviews of defence witnesses by any person and Gacaca and immigration records pertaining to defence witnesses in the possession of the prosecution must be disclosed under Rule 66(B) as material to the defence.[1868]

Fact that request for disclosure was made after defence filed its witness list did not defeat materiality of defence witness interviews as a party does not make a final decision to call a witness simply by placing the witness' name on his witness list.[1869]

Prosecution was not required to disclose prior statements and immigration records of potential defence witnesses who were on defence "reserve" witness list.[1870]

The prosecution did not have a duty to disclose where, despite the existence of unsigned questions and answers between the prosecution and the defence witness , the defence had not demonstrated how the material would be exculpatory to the accused.[1871]

**material to the preparation of the defence**

The test for materiality is the relevance of the documents sought to the preparation of the defence case. Preparation is a broad concept. It includes evaluation of whether to call a particular witness.[1872]

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[1866] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 14-16; *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Disclosure of Witness Statements and Sanction of the Prosecutor* (29 August 2002) at para. 27; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 11; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence…Second Motion for Inspection of Materials in the Prosecution's Custody* (27 September 2011) at para. 42

[1867] *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); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fourth Motion for Inspection of Defence Witness Information* (22 August 2008) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka* (4 December 2008) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth Motion for Inspection of Defence Witness Information* (19 February 2009)

[1868] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007)

[1869] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at para. 12

[1870] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Matthieu Ngirumpatse's Motion for Disclosure* (25 October 2010) at para. 8

[1871] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Decision on Kajelijeli's Motion Seeking Disclosure of the Statements of Defence Detained Witnesses* (18 November 2002) at para 8.

Documents are material to the preparation of the defence if they are relevant to the preparation of the defence case, including preparation of the cross-examination of a witness.[1873]

Rule 66(B) includes disclosure of items which would be relevant to a breach of the accused's rights under the Statute and thus possibly warranting a remedy at sentencing.[1874]

Documents related to investigation in underlying case were material to the defence of an investigator charged with procuring false testimony in that case and were therefore material to the preparation of the defence.[1875]

The defence is not obligated to explain how the information will affect its evaluation of the credibility of the potential witness.[1876]

An interview of the potential witness by the defence is not a requirement for disclosure under Rule 66(B).[1877]

Preparation is a broad concept which is not limited to material to counter the prosecution evidence.[1878]

**possession of the prosecution**

Where prosecution represented that letter was not in its possession at the time of the request, that representation is entitled to be relied upon by the Chamber, despite the speculation by the defence that may have been a delay in entering the letter in the prosecution's database.[1879]

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[1872] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 3

[1873] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 26

[1874] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 9

[1875] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 December 2008 on Disclosure* (19 February 2009) at para. 28

[1876] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 8

[1877] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection: Michel Bagaragaza* (10 July 2008) at para. 9

[1878] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 26; *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 December 2008 on Disclosure* (19 February 2009) at para. 27

[1879] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 18

**remedy**

No remedy would be applied to prosecution's violation of Rule 66(B) where the withheld document was not admitted into evidence and its use in questioning of witnesses did not prejudice the accused.[1880]

**requirements**

To obtain an order pursuant to Rule 66(B), the defence must demonstrate *prima facie* materiality of the evidence in question, and secondly that the said evidence is in the custody or control of the prosecution. It must make also specific identification of any requested documentation.[1881]

Rule 66(B) imposes upon the prosecution the responsibility of making the initial determination of materiality of evidence in its possession and, if disputed, requires the defence to specifically identify evidence material to the preparation of the defence that is being withheld by the prosecutor.[1882]

The defence is only required to show one of the three conditions enumerated in Rule 66(B) exists to obtain inspection: (1) it is material to preparation of the defence; (2) it is intended for use by the prosecution as evidence at trial; or (3) it was obtained from or belonged to the accused.[1883]

Prosecution argument that Rule 66(B) only encompasses material disclosable under Rule 66(A) rejected. The relevant criterion is whether the documents are material to the defence.[1884]

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[1880] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Remand Following the Appeals Chamber Decision of 17 May 2010* (23 August 2010)

[1881] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 13; *Prosecutor v Bagosora et al*, No. ICTR-96-7-T, *Decision on the Motion by the Defence Counsel for Disclosure* (27 November 1997); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 23; *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. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel* (30 October 2007) at para. 4

[1882] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 21

[1883] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 22

[1884] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on the Motion for Inspection of Non-Rule 68 Material* (9 March 2006)

There is no requirement for the defence to make independent efforts to obtain material prior to receiving requested disclosure under the Rules. A request under Rule 66(B) is one of the methods available to the defence for carrying out investigations.[1885]

The prosecution's disclosure obligation under the Rules must be interpreted broadly in accord with their plain meaning.[1886]

Defence must have requested that material from the prosecution for the prosecution to be in violation of this rule.[1887]

Where defence came into possession of letter indicating it had been sent to the prosecution, defence was required to ask prosecution if it had indeed received this letter before filing a motion alleging that the prosecution had violated Rule 66(B) by failing to disclose it.[1888]

**Rwandan judicial proceedings**

The statements of prosecution detained witnesses, including any possible confessions, are material to the preparation of the defence, and for the eventual evaluation of the credibility of said witnesses.[1889]

Information or documents pertaining to the judicial proceedings in respect of prosecution witnesses are material to the defence and should be made available pursuant to Rule 66(B)[1890]

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[1885] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at para 15; *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) at para 11; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at para. 10; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 27

[1886] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel* (30 October 2007) at para. 6

[1887] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka* (4 December 2008) at para. 5

[1888] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Paul Bisengimana* (13 February 2009) at para. 5

[1889] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 6; *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Defence Motions for Disclosure Pursuant to Rule 66(A)(ii) and Commencement of Trial* (13 October 2009) at para. 29

[1890] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Defence Motion for the Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda and all Other Documents and Information Pertaining to the Judicial Proceedings in their Respect* (18 September 2001) at para. 13

Prosecution ordered to allow inspection of records of gacaca proceedings in Rwanda relating to specified potential defence witnesses.[1891]

Statements or documents pertaining to the present proceedings that have come into the custody or control of the prosecutor should be disclosed to the defence pursuant to Rule 66(A)(ii), and the defence should be allowed to inspect any other documents pertaining to the judicial proceedings of these detained witnesses pursuant to Rule 66(B).[1892]

**selective prosecution materials**

The accused failed to establish a *prima facie* case for the disclosure of selective prosecution materials where he failed to show that the decision to prosecute him, as opposed to the decision to refrain from prosecuting others, was discriminatory, and to show that there were legitimate distinguishing features between his case and others who were not prosecuted.[1893]

**specific items**

Prosecution must disclose all official correspondence between the MRND and the Interahamwe.[1894]

Internal OTP report on the history and formation of the Interahamwe was material to the defence and required to be disclosed pursuant to Rule 66(B).[1895]

Prosecution must disclose interview reports of persons mentioned by prosecution witness as having attended meetings which the accused deny participating in.[1896]

Hourigan report regarding assassination of President Habyarimana "could turn out to be useful to the defence" where the indictment charges events of the larger picture of the 1994 massacres in Rwanda and therefore inspection under Rule 66(B) granted.[1897]

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[1891] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence…Second Motion for Inspection of Materials in the Prosecution's Custody* (27 September 2011) at para. 43
[1892] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 18.
[1893] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 17-20
[1894] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003) at para. 14
[1895] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Report on Interahamwe* (28 June 2007) at para. 9
[1896] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on the Motion for Inspection of Non-Rule 68 Material* (9 March 2006)
[1897] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision: Defence Motion for Disclosure of Documents and Objections Regarding the Legality of Procedures* (28 February 2002) at para. 31; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence for an Order for Service of a United Nations Memorandum Prepared by Michael Hourigan, former ICTR Investigator* (8 June 2000) at para. 11

The defence has not shown the materiality of information concerning the assassination of President Habyarimana[1898] or that the prosecution is in possession of any materials related to the assassination.[1899]

Request for all MRND communiqués between 6 April and 17 July 1994 and request for all records of UNAMIR documenting meetings with any of the three MRND accused between November 1993 and July 1994 were too broad and were denied.[1900]

Prosecution ordered to allow inspection of diaries, statements, and notes of interviews with former Prime Minister Jean Kambanda.[1901] Prosecution ordered to allow inspection of statement of Kambanda that pertained to accused.[1902]

Request for 1200 pages out of the 23,000 page "Belgian files" granted where accused was one of people investigated in Belgium.[1903] Request for 3000 pages out of "Belgian files" granted where accused were charged with events in Butare prefecture.[1904]

Request for inspection of 28,000 pages of microfilm reviewed by expert witness Alison Des Forges from United States government collection denied as too broad.[1905]

Prosecution violated Rule 66(B) by failing to disclose statement of defence witness after request for statement had been made.[1906]

Prosecution violated Rule 66(B) by failing to disclose subsequent statement of one of its witnesses where the statement was requested pursuant to Rule 66(B) and subsequently came into possession of the prosecution.[1907]

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[1898] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Accused Nzirorera's Motion for Inspection of Materials* (5 February 2004) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 12
[1899] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003) at para. 21
[1900] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Accused Nzirorera's Motion for Inspection of Materials* (5 February 2004) at paras. 14-15
[1901] *Prosecutorv Niyiramasuhuko et al*, No. ICTR-97-21-I, *Decision on Defence Motion for Disclosure of Evidence* (1 November 2000) at para. 47
[1902] *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion for Disclosure* (25 September 2001) at para. 12; *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Decision on Bagambiki's Motion for the Disclosure of the Guilty Pleas of Detained Witnesses and the Statements of Jean Kambanda* (1 December 2000) at para. 18
[1903] *Prosecutor v Ndayambaje*, No. ICTR-96-8-T, *Decision on the Defence Motion for Disclosure* (25 September 2001) at para. 8
[1904] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 27
[1905] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003) at para. 17
[1906] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence and for Other Relief* (1 July 2009) at para. 21
[1907] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration: Statement of Prosecution Witness ALG* (3 September 2010) at para. 12

Documents showing efforts of a prosecution witness to convince Jean Kambanda to testify for the prosecution were material to the cross examination of the prosecution witness and should be made available for inspection by the defence.[1908]

Prosecution statement from Juvenal Uwilingiyimana, an alleged co-conspirator, was material to the defence and should be made available for inspection, as well as any other material from Uwilingiyimana which does not fall within Rule 70, and which relates to the allegations against the accused in the indictment.[1909]

Prosecution witness statement must be disclosed where it is material to defence decision whether to call person as defence witness.[1910]

If the defence requests to inspect documents pursuant to Rule 66(B) because their inspection may assist it in assessing the credibility of a witness before deciding to add him to the witness list, those documents are considered material under the Rule and must be disclosed by the prosecution.[1911]

Prosecution witness statements of prospective defence witnesses are material to the defence even if the defence has already interviewed the witness.[1912]

**specificity**

The defence must specifically identify the items sought and show the materiality of the items to the defence.[1913]

Request for correspondence from prosecution witnesses to prosecutor denied as insufficiently specific. General description of information is insufficient.[1914]

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[1908] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 15

[1909] *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 paras. 19-20

[1910] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 14-16; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para.12

[1911] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Submission on Entering Into Evidence Exhibits Arising from the Prosecution Cross Examination of Karemera Defence Witnesses KBL, LSP, and TXL, and Joseph Nzirorera's Eighteenth Motion for Remedial and Punitive Measures for Violation of Rule 66* (10 November 2008) at para. 15

[1912] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 15

[1913] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motion for Disclosure of Items Deemed Material to the Defence of the Accused* (29 September 2003) at para. 9

[1914] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 10

A request for production of documents must be sufficiently specific as to the nature of the evidence sought and its being in the possession of the prosecution.[1915]

Request for material from Belgian files was sufficiently specific where the documents were shown to involve Butare prefecture.[1916]

Request for receipts showing the chain of custody of documents to be offered during testimony of defence investigator was sufficiently specific.[1917]

Where request had been for all statements of the accused at MRND rallies, the prosecution was not obligated to disclose a statement made by one of the accused during a private conversation at such a rally.[1918]

Rule 66(B) is only triggered by a sufficiently specific request by the defence. Immigration-related material was sufficiently specific.[1919] Statements of prospective defence witnesses and Gacaca materials about such witnesses were also sufficiently specific, but request for "other impeachment material" of defence witnesses was not.[1920]

The defence may not rely on a mere general description of the requested information but is required to define the parameters of its inspection request with sufficient detail. Suitable parameters for such specification may be an indication of a specific event or group of witnesses which the request focuses on, a period and/or geographic location which the material refers to, or any other features defining the requested items with sufficient precision.[1921]

A request may also refer to a category of documents defined by criteria which apply to a distinct group of individuals. The scope of what constitutes a "discrete group of individuals" for the purpose of an inspection request, as well as the determination

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[1915] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Materials Relating to Immigration Statements of Defence Witnesses* (27 September 2005) at para. 3

[1916] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 26

[1917] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel* (30 October 2007) at para. 7

[1918] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 30

[1919] *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) at para 10; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at para. 8

[1920] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for Disclosure Under Rule 66(B) of the Rules* (21 February 2007) at paras. 8-9

[1921] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 32

whether the required level of specificity has been met, is considered considering the specific framework of the case. [1922]

A category of documents linking acts of *Interahamwe* with the accused and whether he planned, ordered, or otherwise aided and abetted those acts, or was responsible for them under Article 6(3). defined the request parameters with sufficient detail, particularly considering the broad nature of the charges against the accused.[1923]

Request seeking documents concerning the accused's knowledge, notice or responsibility for the acts of the Interahamwe, mindful of the broad nature of the charges against the accused, defined the parameters with sufficient detail.[1924]

Inspection of a precise category of documents is permitted.[1925]

Request for inspection of immigration records, prior statements, and Rwandan judicial and Gacaca records of prospective defence witnesses were sufficiently specific, [1926] insufficiently specific.[1927]

**statements or documents of the accused**

Statements of accused to immigration authorities and documents seized from the accused by ICTR investigators are material to the defence and should be disclosed.[1928]

**supporting material against witness**

The supporting material to an indictment against the prosecution witness in his own case was material to the preparation of the defence of the accused and ordered disclosed pursuant to Rule 66(B).[1929]

**timing**

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[1922] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 32
[1923] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 33
[1924] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 42
[1925] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel* (30 October 2007) at para. 6
[1926] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka Motion to Inspect Documents Pursuant to Rule 66(B) of the Rules of Procedure and Evidence* (5 November 2007) at paras. 11-12
[1927] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Inspection of Materials in the Prosecution's Custody* (29 August 2011) at para. 45
[1928] *Prosecutor v Bagosora et al* No. ICTR-96-7-T, *Decision on Kabiligi Motion for Inspection of Documents Under Rule 66(B)* (6 December 2006) at para. 6
[1929] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 47

Rule 66(B) material is not limited to items material to the prosecution's case-in-chief, but the obligation to disclose upon request, continues during the defence case.[1930]

Preparation is a broad concept and does not necessarily require that the material itself counter the Prosecution evidence.[1931] Indeed the immigration documents are material to the preparation of the defence because these documents may improve their assessment of the potential credibility of their witnesses before making a final selection of whom to call in their defence. There are few tasks more relevant to the preparation of the defence case than selecting witnesses [1932]

The use of the phrase "at trial" in the second category of Rule 66(B) signals its applicability throughout the proceedings. Documents intended as exhibits at trial, whether in the prosecution case-in-chief or through defence witnesses must be disclosed pursuant to Rule 66(B).[1933]

Disclosure at the time of cross-examination was insufficient to the extent, as in this case, that the requested materials are intended to assist the defence select its witnesses.[1934]

**witness material**

Prosecution must allow defence to inspect videotapes made during its investigation which contain statements of persons who will testify as prosecution witnesses.[1935]

Prosecution must disclose statements of rape victims relied upon by expert on rape in her report.[1936]

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[1930] *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) at para. 8

[1931] *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) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 8

[1932] *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) at para. 9

[1933] *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) at para. 9

[1934] *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) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Statement of Pierre Celestin Mbonankira* (20 September 2007) at para. 17

[1935] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Motion of the Defence of Joseph Nzirorera for Disclosure of Videotape Regarding Prosecution Witnesses* (1 December 2003)

[1936] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Urgent Pre-Trial Motion for Disclosure re Binaifer Nowrojee* (11 January 2011)

Rule 66(B) is the appropriate Rule under which an application should be made by the Defence for disclosure of copies of witness interviews, either in the form of original tape recordings, and/ or transcripts of the tape recordings.[1937]

Rule 66(B) applies to witness statements taken by prosecution investigators who the prosecution does not intend to call.[1938]

**nondisclosure**

Affidavit submitted in support of request for special witness protection measures would not be disclosed to the accused as it would compromise ongoing investigations and would not prejudice the preparation of the defence.[1939]

Rule 66(C) does not allow the prosecution to withhold unilaterally statements subject to disclosure. Rather, only a Trial Chamber may decide to relieve the prosecution from its obligation, under the conditions set forth in Rule 66(C).[1940]

When deciding whether to exempt material from disclosure pursuant to Rule 66(C) or Rule 68(D), the Trial Chamber must have access to the information and material sought to be kept confidential.[1941]

Rule 66(C) only exempts material from disclosure subject to a Trial Chamber's leave thereto. Since the prosecution had not sought leave to withhold disclosure of benefits provided to former Prime Minister Kambanda, it must disclose the information.[1942]

Temporary redaction of witness statements may be permitted by the Chamber.[1943]

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[1937] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Defence Motion Seeking to Interview Prosecutor's Witnesses or Alternatively to be Provided with a Bill of Particulars* (12 March 2001) at paras 11-12.

[1938] *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. 14

[1939] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and Karemera and Defence's Motion for Immediate Disclosure* (20 October 2003) at para 18

[1940] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Defence for Bagosora's Motion for Postponement or Quashing of the Testimonies of Witnesses Ruggiu, XAM, and ZF* (30 September 2002) at para. 12

[1941] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order for the Prosecutor for Filing Information and Material Ex Parte and Under Seal Regarding Witness ADE* (31 March 2006) at para. 2

[1942] *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. 18

[1943] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Prosecutor's Application for Continued Temporary Redaction of One Portion of the Transcripts of Witness X Pursuant to Rule 66(C)of the Rules of Procedure and Evidence* (6 February 2002).

Disclosure of material obtained from State withheld from accused to preserve the right of the witness to a fair trial in that State.[1944]

Prosecution's motion for non-disclosure of a videotape based on the submission that future investigations would be prejudiced should the defence identify officials from the Rwandan Government who were assisting/facilitating investigations, denied.[1945]

Withholding of disclosure under Rule 66(C) can be based upon ongoing investigations other than that of the accused. Therefore, disclosure of *ex parte* motions to withhold disclosure, as well as the disclosed material, need not be granted at the conclusion of the prosecution's case against the accused.[1946]

**Rule 67—reciprocal disclosure of evidence**

**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**

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[1944] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion to Report Government of a Certain State to the United Nations Security Council and on Prosecution Motions Under Rule 66(C) of the Rules* (15 February 2006) at para. 20; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions to Disclose a Prosecution Witness Statement and to Unseal Confidential Documents* (25 October 2006)

[1945] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on the Motions of the Parties Concerning the Inspection and Disclosure of a Videotape* (28 April 2003) at para. 14.

[1946] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials* (18 January 2008) at para. 3

**notify the other party and the Trial Chamber of the existence of the additional evidence or information or materials.**

**alibi**

**address of witnesses**

Rule 67(A) does not require the defence to provide the current address of its alibi witness. It may comply with the rule by providing the address of the witness in 1994 or the current city and country of residence.[1947]

Defence ordered to provide cellule, secteur, commune, and prefecture of residence of its witnesses during April 1994.[1948]

**assessment of alibi**

While it is feasible that the accused could have travelled from Kigali to Gikongoro and back during 6-13 April, the prosecution presented no evidence indicating the feasibility of traveling considering the prevailing conditions which likely included extensive roadblocks, checkpoints, and must have been a massive movement of people fleeing the resumption of hostilities.[1949]

Alibi evidence showing that the accused was in Kigali from 6-12 April did not exclude possibility that he could have been commuting to Gitarama to commit the crimes with which he was charged.[1950]

Trial Chamber erred in failing to issue a reasoned decision on whether it was feasible for accused to have travelled from Kigali to Gisenyi and back in the time that would be not covered by his alibi.[1951]

The crimes which the accused were charged with were very grave, meriting the most careful of analyses. Instead, the Trial Chamber misstated principles of law governing the distribution of the burden of proof with regards to alibi and seriously erred in its handling of the evidence. The convictions violated the most basic and fundamental principles of justice.[1952]

Alibi evidence which had no gaps and was "too neatly tailored" was not credible and was found to not have reasonably been possible to be true.[1953]

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[1947] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Motion for Further Alibi Particulars* (7 March 2006)
[1948] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on Prosecution Motion for Alibi Particulars* (19 October 2009) at para. 8
[1949] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 349
[1950] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Judgement and Sentence* (31 May 2012) at para. 393
[1951] *Zigiranyirazo v Prosecutor*, No ICTR-01-73-A, *Judgement* (16 November 2009) at para. 46
[1952] *Zigiranyirazo v Prosecutor*, No ICTR-01-73-A, *Judgement* (16 November 2009) at para. 75
[1953] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at para. 126

Fact that alibi witnesses were family members and close friends warranted finding that the alibi was not credible.[1954]

Facts from site visit concerning the time it took to travel the same route as the accused claimed to have travelled, allowing for stops and difficulties, showed that the journey would not have taken as long as claimed by the alibi witnesses and that the alibi had been fabricated.[1955]

Considering the totality of the circumstances and evidence, including: (1) that the defence's notice of alibi was filed late and in a piecemeal fashion; (2) the close relationship between Ngirabatware and many of the alibi witnesses; (3) the credibility or reliability issues surrounding each of the witnesses; and (4) the conclusions on travel times derived from the evidence with limited assistance from the site visit observations, the Chamber concludes that the alibi evidence is incredible and insufficient to raise a reasonable doubt in the prosecution's case with regards to 7 April 1994[1956]

**burden of proof**

The burden is on the prosecution to disprove an alibi beyond a reasonable doubt.[1957] If the alibi is reasonably possibly true, it will be successful.[1958]

When an alibi is properly raised, the prosecution must establish beyond reasonable doubt that despite the alibi, the facts are nevertheless true.[1959]

Where the alibi *prima facie* accounts for the accused's activities at the relevant time, the prosecution must eliminate the reasonable possibility that the alibi is true, such as, for example, by demonstrating that the alibi evidence is not credible.[1960]

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[1954] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at para. 128
[1955] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at paras. 133-35
[1956] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Judgement and Sentence* (20 December 2012) at para. 696
[1957] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 171; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 60; *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 201; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 107; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 42
[1958] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 38; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 166; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 300; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 98; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 32; *Zigiranyirazo v Prosecutor*, No ICTR-01-73-A, *Judgement* (16 November 2009) at para. 17; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 93; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 666
[1959] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 666
[1960] *Zigiranyirazo v Prosecutor*, No ICTR-01-73-A, *Judgement* (16 November 2009) at para.18; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 93

Trial Chamber erred in requiring that accused's alibi "exclude the possibility" that he was present at the scene of the crime.[1961]

The Trial Chamber's use of words indicating that the accused had not "negated", or "refuted" the evidence, or "exonerated" himself is not fatal to a determination that it had applied the correct burden of proof. Rather, the Appeals Chamber looks to whether the overall approach evinces a careful assessment of the alibi evidence, and its conclusion is reasonable when weighed against the evidence of participation in the crime.[1962]

The failure of the defence to submit credible and reliable evidence of the accused's alibi must not be construed as an indication of guilt.[1963]

**names of witnesses**

Rule 67(A) does not require the accused to disclose the persons he was with at the time in question.[1964]

Alibi notice which listed dozens of persons present with the accused at the French Embassy was insufficient to allow the prosecution to prepare to confront the alibi. Defence ordered to provide notice of persons it intended to call.[1965]

**notice requirement**

There is no requirement to give notice of alibi to the Trial Chamber—only to the prosecutor.[1966]

The purpose of the notice of alibi is to allow the prosecution to test the evidence upon which the accused relies in the notice of alibi.[1967]

An alibi notice is not required where the defence intends to lead evidence that the accused was not at the scene of the alleged crime. It is only where the defence intends to lead evidence that the accused was at a particular place at the time the crime was committed that an alibi notice is required.[1968]

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[1961] *Zigiranyirazo v Prosecutor*, No ICTR-01-73-A, *Judgement* (16 November 2009) at para. 42
[1962] *Zigiranyirazo v Prosecutor*, No ICTR-01-73-A, *Judgement* (16 November 2009) at para. 20
[1963] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 167.
[1964] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on Prosecution Request for Further Alibi Particulars* (26 November 2009) at para. 17
[1965] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecutor's Supplementary Motion to Compel the Accused to Disclose Particulars of his Alibi* (16 April 2010)
[1966] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 244
[1967] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Bicamumpaka's Notice of Alibi* (7 July 2005) at para. 3
[1968] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 16

The obligation to file a notice of alibi is triggered when the defence intends to rely on alibi as a defence.[1969] However, the Trial Chamber would not compel them to do so absent a showing by the prosecutor that the defence intends to rely on an alibi defence.[1970]

Motion for additional details of alibi denied where alibi notice was reasonably detailed, and prosecution failed to demonstrate that defence was in possession of additional information it sought.[1971]

Alibi evidence is evidence that the accused was elsewhere at the time he is alleged to have committed a crime. It includes witness testimony or documentary evidence. Alibi notices should be filed to allow the Prosecutor time to interview the witnesses.[1972]

It is immaterial that the prosecution was already in possession of information as to the accused's whereabouts. Mere possession of the material by the prosecution does not constitute notice under Rule 67(A). The defence is required to provide formal and categorical notice of the alibi and to describe the evidence underlying the alibi with sufficient particularity.[1973]

**remedy for failure to provide notice**

Failure of accused to provide adequate timely alibi notice warranted extension of time for prosecution's case-in-chief, as prosecution was expected to anticipate and rebut the alibi in its case-in-chief.[1974]

While the accused may not be required to file a notice of alibi, if a defence counsel receives instructions from his client that he was at a specific place at the time of the alleged crime, counsel has a professional obligation to file a notice of alibi and can be sanctioned pursuant to Rule 46(A) for failing to do so. However, no sanctions would be issued where defence counsel was unaware that their conduct was in violation of the rules.[1975]

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[1969] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for an Order to File Notice of Alibi* (22 March 2007) at para. 13; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Compliance With Rule 67 of the Rules* (5 April 2007) at para. 7

[1970] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for an Order to File Notice of Alibi* (22 March 2007) at para. 15

[1971] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Prosecutor's Urgent Second Motion for Disclosure of the Particulars of a Defence of Alibi…*(7 February 2011) at para. 7

[1972] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules* (17 January 2003) at para. 18.

[1973] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010* (27 January 2011) at para. 27

[1974] *Prosecutor v. Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion to Vacate the Trial Date* (24 May 2010) at paras 33-36.

[1975] *Prosecutor v Nchamihigo*, No. IT-2001-63-T, *Decision Following Defence Submissions on Compliance With Rule 67 of the Rules* (18 April 2007)

Late disclosure of alibi witnesses may affect the Trial Chamber's assessment of the reliability of the alibi.[1976]

Filing of numerous alibi 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 Chamber to conclude that the alibi was contrived.[1977]

Late finalization of alibi notice, by itself, did not support conclusion that alibi was contrived. However, combined with other evidence, such a conclusion was reasonable.[1978]

The fact that some information was elicited by judge's questions did not undermine finding that the alibi was contrived and "too neat".[1979]

Failure to provide alibi notice warranted postponement of the prosecution's cross examination of the accused on topics related to the alibi.[1980]

Where defence indicated intention to rely on defence of alibi but failed to provide details of alibi by the appointed time, Trial Chamber ordered information to be provided forthwith and explanation as to why defence should not be sanctioned.[1981]

Providing notice of alibi after the prosecution case closed deprived the prosecution of adducing evidence to rebut the alibi and raised the question whether the alibi was recently concocted to fit the evidence against the accused.[1982]

The way an alibi is presented may also impact its credibility. An alibi notice filed after trial has commenced may result in less weight being given to the alibi.[1983]

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[1976] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 115 *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Bicamumpaka's Notice of Alibi* (7 July 2005) at para. 5; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 97; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 56; *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at para. 123; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 664

[1977] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at paras. 124-25

[1978] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at paras. 101-102

[1979] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 109

[1980] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010* (27 January 2011) at para. 30

[1981] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Compliance With Rule 67 of the Rules* (5 April 2007)

[1982] *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Judgement and Sentence* (12 November 2008) at para. 20

[1983] *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 277

The way an alibi is presented may impact its credibility. It was within the Trial Chamber's discretion to consider the accused's failure to provide timely and adequate notice in assessing the alibi evidence.[1984]

The failure to provide notice does not limit the accused from relying on this defence, but the Chamber may attach less weight to the alibi.[1985]

An alibi can be presented for the first time on appeal. However, the Appeals Chamber may consider the failure to have raised it earlier in considering the weight to be given to the alibi evidence.[1986]

**time frame**

Alibi notice not required where indictment alleges crime was committed within a stated time frame, unless the evidence intended to be led by the defence covers the entire time frame.[1987]

Alibi notice which stated that accused was in a particular commune on the date alleged in the indictment was sufficiently specific where the indictment did not allege a time when the crime was committed.[1988]

**timing**

The defence may wait until protective measures are in place for its witnesses before providing the names and addresses in its notice of alibi.[1989]

Defence not required to provide names and addresses of its alibi witnesses until 21 days prior to the commencement of the defence case, like other defence witnesses.[1990]

**duress**

Finding that accused may have been present at meeting because of duress did not require notice of the special defence of duress but was properly considered by the Trial Chamber as a reasonable inference consistent with innocence.[1991]

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[1984] *Prosecutor v Munyakazi*, No. ICTR-97-36A-A, *Judgement* (28 September 2011) at para. 18; *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 29; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at paras. 664, 2856
[1985] *Prosecutor v Rukundo,* No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 539.
[1986] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 66; *Prosecutor v Munyakazi*, No. ICTR-97-36A-A, *Judgement* (28 September 2011) at para. 19
[1987] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 16
[1988] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 20
[1989] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Bicamumpaka's Notice of Alibi* (7 July 2005) at para. 7
[1990] *Prosecutor v Ndahimana*, No. ICTR-2001-68-PT, *Decision on the Prosecutor's Motion for Particulars of Alibi* (7 December 2010) at para. 22

**sanctions**

Failure of the Defence to provide notice under Rule 67(A) shall not limit the right of the accused to rely on the defence of alibi. Although this Rule prevails, failure to provide notice may be relevant to the judicial consideration of the merits of the defence.[1992]

There is a professional obligation on defence counsel to file a notice of alibi as soon as it is known that the accused intends to enter such a defence.[1993]

The Trial Chamber may take failure to comply with the alibi notice rules into account when weighing the credibility of alibi evidence.[1994]

Late filing of alibi notice was considered when evaluating the alibi but did not prevent the Chamber from otherwise considering the alibi evidence.[1995]

**reciprocal disclosure**

The obligation upon the defence for reciprocal disclosure is not triggered until the prosecution rests its case. It is only then that the defence can assess the evidence which it "intends to use at trial."[1996]

The reciprocal disclosure obligations of the defence under Rule 67(C) are not identical to the prosecution's obligation under Rule 66(B). Rule 67(C) requires reciprocal disclosure of defence documents which it intends to use at trial only, while Rule 66(B) requires prosecution disclosure which includes items material to the preparation to the defence.[1997]

The prosecution's desire to use defence disclosure to assess the credibility of its witnesses is not an interest which triggers any obligation to disclose under Rule 67(C).[1998]

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[1991] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 174
[1992] *Prosecutor v. Musema*, No.ICTR-96-13-T,*Judgement* (27 Jan.2000) at para.107
[1993] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 17
[1994] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules* (17 January 2003) at para. 19.
[1995] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Judgement and Sentence* (31 May 2012) at paras. 391-92
[1996] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Request for an Order Allowing the Inspection of Defence Materials and a Time Limit for Compliance Pursuant to Rules 66(B), 67(C), and 73* (2 March 2004)
[1997] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 8
[1998] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Cross-Motion for Enforcement of Reciprocal Disclosure* (21 September 2007) at para. 9

When making a request for inspection pursuant to Rule 67(C), the prosecution must show that the defence intends to use the requested materials as evidence at trial. It made no such showing in this case.[1999]

The defence must disclose witness statements in its possession which it intends to use as evidence at trial, but not notes taken during interviews.[2000]

There is no basis to order the defence to disclose statements of its alibi witnesses in connection with its notice of alibi.[2001]

**continuing duty of disclosure**

**"**Will say" statements are a legitimate method for a party to comply with its obligation to continually disclose material which comes to its attention. The normal remedy for late disclosure of a will-say statement is postponement of the testimony.[2002]

Will-say statements are in conformity with the prosecution's obligations under Rule 67(D) which requires each party to promptly notify the opposing party and the Trial Chamber of the discovery and existence of additional evidence, information and materials that should have been produced earlier. The use of will-say statements is different from the method of giving notice through a written and signed statement disclosed pursuant to Rule 66. The Trial Chamber declined to require such statements to be signed by the witness.[2003]

The fact that the will-say statement is not signed does not limit the right of the accused to cross-examine the witness and show inconsistencies with his testimony at trial.[2004]

Will say" statements must be full and comprehensive and lay out the scope of what the witness' testimony will cover in clear terms.[2005]

Since the sole purpose of the will-say statement is to enable the other party or the other parties to prepare and to raise issues, it must be clear enough to cover the scope of the proposed testimony of the witness. Accordingly, will-say statements must be full and

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[1999] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.11, *Decision on the Prosecutor's Interlocutory Appeal Concerning Disclosure Obligations* (23 January 2008) at paras. 22,24

[2000] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures* (6 May 2009) at para. 12

[2001] *Prosecutor v. Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion to Vacate the Trial Date* (24 May 2010) at para. 39

[2002] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on the Admissibility of Witness KDD* (1 November 2004) at paras. 10,17

[2003] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on the Defence Motion Regarding Will-Say Statements* (14 July 2005) at paras. 4-5

[2004] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on the Defence Motion Regarding Will-Say Statements* (14 July 2005) at para. 5

[2005] *Prosecutor v Niyiramasuhuko et al*, No. IT-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005* (27 January 2006) at para. 24

comprehensive, not in the sense of giving all the details, but at least laying out the scope of what the witness is expected to cover in clear terms.[2006]

Although it is not acceptable for the prosecution to mould its case against the accused during the trial, it must be admitted that a witness may recall and add details to his or her prior statements. In this situation, several remedies are possible such as providing additional time to the defence for its preparation or, where appropriate, the exclusion of the evidence. The Trial Chamber will apply the appropriate remedy on a case-by-case basis in conformity with the rights of the accused, including the right to be tried without undue delay.[2007]

The prosecution cannot wait for the last moment to give notice of what the witness will additionally testify to at the trial. It is expected that this additional information will be disclosed as soon as possible after the arrival of a witness at the seat of the Tribunal, and not immediately before the presentation of a witness.[2008]

The prosecution is under no continuing duty to disclose statements of its witnesses which come into their possession after the witness testifies, since it no longer "intends" to call the witness and therefore Rule 66(A)(ii) no longer applies.[2009]

There is a continuing obligation upon the prosecution to make Rule 66(B) material available for inspection even if it is not in its possession at the time of the request.[2010]

**Rule 68—disclosure of exculpatory and other relevant material**

**(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**

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[2006] *Prosecutor v Niyiramasuhuko et al*, No. IT-98-42-T, *Decision on Pauline Niyiramasuhuko's Extremely Urgent Motion for Exclusion of Evidence or Subsidiarily for Further Disclosure Regarding Witness DEDE's Expected Testimony* (19 September 2006) at para. 7
[2007] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on the Defence Motion Regarding Will-Say Statements* (14 July 2005) at para. 6
[2008] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on the Defence Motion Regarding Will-Say Statements* (14 July 2005) at para. 7
[2009] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 23rd Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG* (30 March 2009) at para. 7; *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 paras. 49-51
[2010] *Karemera et al v. Prosecutor*, No. ICTR-98-44-AR73.18, *Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66(B) Violation* (17 May 2010) at para. 24

**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 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.**

**alibi**

Prosecution breached Rule 68 by failing to disclose documents which supported alibi of accused once it learned of the specifics of the alibi.[2011]

Prosecution violated Rule 68 by failing to disclose testimony in unrelated case of witness who contradicted prosecution witness and supported alibi of the accused.[2012]

**benefits to witnesses**

Information and records relating to benefits or promises made to Prosecution witnesses or their families would fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence.[2013]

Payments to witnesses by the prosecution need only be disclosed when they are beyond reasonable payments required for the management of witnesses such as expenses for transportation in connection with investigation and hearings.[2014]

Benefits conferred by WVSS need not be disclosed, even if they involved extraordinary benefits such as payments for relocation of the witness.[2015]

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[2011] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (7 March 2007) at para. 29
[2012] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 26
[2013] *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. 16
[2014] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses* (23 August 2005) at para. 6
[2015] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Benefits to Prosecution Witness ZF* (21 October 2009) at para. 4

OTP budget for payments to and for benefit of insider witness ADE ordered disclosed to the defence.[2016]

Record of payments made to protected witness for expenses in witness protection program and other reasons ordered to be submitted to Trial Chamber *in camera* for determination of whether they should be disclosed to the defence.[2017]

Prosecution ordered to disclose to the defence amounts paid for witness protection for witness as well as future payments.[2018]

The mere fact that witness for whose benefit payments were made was in prison and the benefits were paid for his family does not justify withholding amount of payments from disclosure.[2019]

Request to withhold dates and amounts of benefits paid to witness and his family denied. Prosecution concern that other witnesses would use it as bargaining tool could be addressed by disclosure of the material on a confidential basis.[2020]

**burden of persuasion**

The burden is on the prosecution to refute the possibility that disclosure of prior testimony of a witness in another case at the Tribunal contains exculpatory evidence or affects the credibility of prosecution witnesses. It did not discharge that burden in this case and disclosure was ordered.[2021]

The burden of showing that undisclosed benefits have been paid to witnesses is on the defence. That burden was not discharged in this case.[2022]

Under Rule 68, the Prosecutor is responsible for making the initial determination about the exculpatory nature of the evidence. The Trial Chamber will not interfere with

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[2016] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence and Prosecution Motions Related to Witness ADE* (31 January 2006) at para. 23
[2017] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D* (28 September 2006)
[2018] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Records of all Payments Made Directly or Indirectly to Witness D* (18 February 2008)
[2019] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008) at para. 15
[2020] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family* (21 June 2006) at paras. 7-8
[2021] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Juvenal Kajelijeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits, and Pre-Trial Statements of Prosecution Witnesses GBU and GFA* (24 November 2004)
[2022] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses* (23 August 2005) at para. 7

this determination absent indication that the prosecution did not properly exercise its discretion in determining what evidence falls under Rule 68.[2023]

**categories of documents**

Disclosure of an entire category of documents under Rule 68 will only be ordered where the category is tailored to the exculpatory content. Request for all evidence of actions of members of the RPF was too broad.[2024]

**certification**

The Trial Chamber will not require the prosecution to certify that it has complied with its Rule 68 obligations unless the defence can show that the obligations under this rule have not been complied with.[2025]

Prosecution ordered to disclose exculpatory material related to witness who had given inconsistent testimony in subsequent trial, or to certify that none of the materials related to the witness contained exculpatory information.[2026]

Prosecution ordered to certify that it had complied with Rules 66 and 68 after earlier disclosure violations.[2027]

**continuing duty**

The prosecution's duty to disclose exculpatory evidence continues after trial and after appeal.[2028]

The prosecution's obligation under this rule is of a continuous nature.[2029]

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[2023] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Request for Additional Disclosure of Investigative Reports and Statements* (25 August 2004)
[2024] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Disclosure of Prosecution Files* (6 October 2006) at para. 6; *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. 8
[2025] *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure* (15 January 2004) at para. 8; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence* (10 June 2008) at para. 24
[2026] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at pg. 6
[2027] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Order to the Prosecution to Conduct a Thorough Review and Certify that it has Complied with its Disclosure Obligations* (5 February 2009)
[2028] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on the Prosecutor's Motion to Move for Decision on Niyitegeka's Requests for Review Pursuant to Rules 120 and 121* (28 September 2005) at page 8; *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
[2029] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI* (14 September 2004) at para. 8

The prosecution's duty to disclose Rule 68 material did not end after the witness testified but is ongoing.[2030]

**contradictory information**

Information which contradicts that provided by a Prosecution witness is exculpatory within the meaning of Rule 68.[2031]

Where prosecution witness did not recall the exact date of events at which Colonel Setako and Colonel Bagosora were present, information showing their presence at other places on 7 April 1994 was not exculpatory and need not be disclosed under Rule 68.[2032]

Appeals Chamber finds prosecution claim that it is not obliged to search for material impacting the credibility of its own witnesses disconcerting.[2033]

Information contradicting the testimony of a prosecution witness, even if that testimony was later excluded, was required to be disclosed because it nevertheless affects the credibility of the prosecution witness.[2034]

Prosecutor's failure to disclose testimony in subsequent trial of witness which contradicted his trial testimony violated Rule 68.[2035]

**criminal records**

Information on prosecution witnesses' prior criminal activity, and criminal records of prosecution witnesses, similarly fall under Rule 68 of the Rules in that they may affect the credibility of prosecution evidence.[2036]

The character of the witness, including evidence of involvement in crimes, is relevant to and therefore "may affect" that witness' credibility. Moreover, a desire to obtain lesser punishment or shift blame for one's crimes to another are motives which

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[2030] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 16
[2031] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006); *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
[2032] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion for Exculpatory Evidence from Ephrem Setako and Bagosora et al Cases* (25 January 2006)
[2033] *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. 9, fn. 31
[2034] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 8
[2035] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at paras . 146, 148
[2036] *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. 19

may affect a witness' credibility. The prosecution violated its Rule 68 obligation by failing to disclose such evidence.[2037]

**duty to record**

The Rules do not explicitly impose upon the prosecutor an obligation to record information obtained during investigations. Trial Chamber did not decide whether rule 41(A), combined with Rules 66(B) and 68, created such an obligation.[2038]

A witness' claim that he provided exculpatory information to the prosecution is insufficient to establish the fact that exculpatory material was in the possession of the prosecution where the prosecution claims to have no record of the information.[2039]

**electronic disclosure**

Rule 68(B) creates no new disclosure obligation on the prosecution. The provision does not give the defence the right to conduct an unrestricted search of the electronic databases of the prosecution. It merely provides for the use of modern technology to discharge existing obligations of the prosecution under Rules 66 and 68.[2040]

Just because the prosecution has placed a particular piece of material on the EDS, it has not necessarily made that piece of materially reasonably accessible to a particular accused.[2041]

Rule 68(B) disclosure is merely the digital equivalent of disclosure under Rule 68(A). It does not provide license to fail to identify for the defence the exculpatory material.[2042]

EDS does not relieve the Prosecution from complying with its obligations under Rule 68(A) of the Rules as soon as practicable.[2043]

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[2037] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009) at para. 8

[2038] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures* (13 November 2007) at para.11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures* (6 May 2009) at para. 6

[2039] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 24th Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures* (6 May 2009) at para. 7

[2040] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material* (1 December 2004) at para. 9

[2041] *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. 15

[2042] *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

[2043] *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

The prosecution's Rule 68 obligation extends beyond simply making available its entire evidence collection in searchable format.[2044]

The prosecution must actively review the material in its possession for exculpatory material, and, at the very least, inform the accused of its existence.[2045]

The prosecution cannot use its failure to update its electronic records as an excuse for failing to comply with its Rule 68 obligations.[2046]

Disclosure on EDS is insufficient where the defence has not consented. Prosecution ordered to disclose Rule 68 material on CD Rom.[2047]

Accused was not entitled to be given access to the EDS where he was represented by counsel.[2048]

**exceptions**

Statements could be redacted to excise names of targets of ongoing investigations while providing the accused with the substance of the exculpatory material.[2049]

Rule 68(D) does not authorize withholding of exculpatory material on the ground of concern for the safety of the witness.[2050]

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2006) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 8

[2044] *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. 10

[2045] *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. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 8

[2046] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 61

[2047] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Oral Decision on Disclosure Motion* (29 June 2009) at p.3

[2048] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Defence Urgent Pre-Trial Motion for Disclosure* (7 January 2011)

[2049] *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 para. 8

[2050] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family* (21 June 2006) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 7

Permitting the prosecution to withhold exculpatory information on un-enumerated grounds undermines the scope of Rule 68(A) and would be contrary to the interests of justice, given the importance of exculpatory information to trial fairness.[2051]

Materials withheld from disclosure pursuant to Rule 68(D) on the grounds that they may prejudice witness' right to fair trial in State were ordered disclosed once the trial of the witness in the State had concluded.[2052]

**exculpatory nature**

**conclusiveness of material**

Document bearing on, but not conclusive of, date that Virunga Force was established was exculpatory and should have been disclosed to the defence for use in cross examination of witnesses who claimed it was established in 1992.[2053]

The determination of exculpatory nature of material is to be made on a prima facie basis, and not on an evaluation of the weight of the material.[2054]

Information from sources who have neither witnessed themselves the events in question nor explained the source of their assumptions apart from a general reference to rumours does not constitute a *prima facie* showing of evidence that may affect the credibility or the testimony of the witnesses.[2055]

Statements of witnesses that it was general knowledge in the commune that the weapons had been brought by a certain Rumende was not sufficiently definite to constitute Rule 68 material contradicting a prosecution witness who claimed that it was the accused who brought the weapons.[2056]

**contradicts prosecution evidence**

Another indictment which reflects an inconsistent position with the indictment of an accused is not "evidence" but a procedural necessity to prosecute the accused. Nevertheless, the office of the Prosecutor is considered an undivided body. Where

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[2051] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 7
[2052] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Witness T Material* (16 April 2010)
[2053] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Augustin Bizimungu's Motion for Disclosure of a Contested Document* (31 August 2009) at para. 9
[2054] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation* (16 April 2008) at para. 9
[2055] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 19
[2056] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 18

another indictment reflects an inconsistent position with the indictment of an accused, particularly in relation to matters as serious as crimes, this material would be relevant to the defence of the accused. This finding is supported by the fact that the indictment confirmation process requires the review of supporting material, which can be used to rebut Prosecution evidence or raise credibility concerns in relation to its witnesses.[2057]

The mere omission of a reference to a meeting in a statement does not mean that these witnesses could not have attended the meeting or that the meeting could not have taken place.[2058]

Radio Rwanda broadcasts which showed the accused attended meetings in Kigali on dates he was alleged to have been in Gisenyi were exculpatory and prosecution's failure to disclose them was a breach of its disclosure obligations.[2059]

Statement of Kigali prefet in which he described efforts to stop the killing should have been disclosed pursuant to Rule 68 as it contradicted testimony of prosecution witnesses that he made no efforts to stop the killing.[2060]

Statement of witnesses who refuted prosecution witness testimony concerning a meeting at the house of the accused's mother and the whereabouts of the witness at the time he claimed to have witnessed the events were exculpatory and should have been disclosed.[2061]

Statement of witness who contradicted prosecution witness as to presence of the accused at a meeting should have been disclosed under Rule 68.[2062]

Prosecution violated Rule 68 by failing to disclose testimony of witnesses who provided information that, contrary to prosecution's case, the prefet of Butare was not removed because he was a Tutsi and the President had not encouraged the population to kill Tutsis at a speech in Butare.[2063]

**credibility of prosecution evidence**

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[2057] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 48
[2058] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notice of Violation of Rule 68 and Motion for Remedial Measures* (12 July 2006) at para. 4
[2059] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Disclosure of Additional Exculpatory and Other Relevant Material…*(1 April 2011) at para. 30
[2060] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 17
[2061] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 15
[2062] *Prosecutor v Ndindiliyimana 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. 33
[2063] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Niyiramasuhuko's First Motion for Relief from Rule 68 Violations and to Present Additional Evidence* (9 April 2015) at paras. 26,30-33

Letter written by individual in which he complained that testimony of prosecution witness was "rote" and fact that the individual had told defence that prosecution witness was lying was not sufficient to demonstrate that the information given by this individual to the prosecution would be exculpatory.[2064]

Subsequent statement of prosecution witness in which he made accusations against the accused which he never made during his testimony was not exculpatory, as his testimony may not have exhaustively detailed all his knowledge concerning the relevant events.[2065]

Information that a prosecution witness had been working for the RPF was exculpatory in nature because, if true, it would taint his testimony.[2066]

Information that witnesses had fabricated testimony in underlying case was not exculpatory in trial of investigator alleged to have bribed witness to recant.[2067]

Information which contradicted prosecution witness testimony that a person was a member of a certain organization, even if it covered only part of the relevant period was exculpatory and should have been disclosed.[2068]

Statement of witness requesting the investigator to inform Rwandan authorities of his cooperation may affect the credibility of the witness and should have been disclosed pursuant to Rule 68.[2069]

Where witness' testimony in subsequent trial was inconsistent with his trial testimony, any statements or will-say filings related to that testimony may affect his credibility and was required to be disclosed.[2070]

Records of the detention of the witness in Rwanda may affect his credibility where he may have sought a benefit by cooperating with the Tribunal, and such records ordered disclosed pursuant to Rule 68.[2071]

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[2064] *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. 10
[2065] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 23rd Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG* (30 March 2009) at para. 17
[2066] *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 para.11
[2067] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence and for Other Relief* (1 July 2009) at para. 16
[2068] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 10
[2069] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 11
[2070] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 17
[2071] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 17

The prosecution is not free to determine that a witness' criminal record, guilty plea, confession to crimes, or inconsistent statement is not something that may affect the credibility of the witness' testimony. These matters are exculpatory as a matter of law and must be disclosed to the defence.[2072]

Letter from prosecution witness expressing concerns about his security was material which may affect the credibility of prosecution evidence and was required to be disclosed to the accused.[2073]

Where witnesses whose redacted statements had been disclosed described the same events as a prosecution witness, the unredacted statements of those witnesses constituted Rule 68 material and disclosure was required since discrepancies between the versions would allow the defence to challenge the credibility of the prosecution's witness.[2074]

The names of the prosecution investigator(s) who collected a witness' prior inconsistent statement(s) qualify as exculpatory material within the meaning of Rule 68, in the sense that this information may affect the credibility of prosecution evidence.[2075]

That potential witnesses may have made prior or later statements or testimony does not automatically render such material exculpatory, nor does an assumption arise that such material automatically affects the credibility of the potential witness.[2076]

**efforts to prevent crimes**

Information from witness who attended meeting where the accused claimed he ordered the Interahamwe to stop the killing was exculpatory in nature and should be disclosed.[2077]

Information that alleged subordinates of the accused were in fact working for RPF was exculpatory in nature.[2078]

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[2072] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009) at paras. 9-10
[2073] *Niyitegeka v Prosecutor*, No. ICTR-96-14, *Decision on Eliezer Niyitegeka's Request for Disclosure* (19 August 2011) at para. 11
[2074] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Disclosure Under Rule 68* (1 March 2004) at fn. 5; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Scheduling Order* (30 March 2006) at para. 6-7
[2075] *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. 20
[2076] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motions on Rule 68 Disclosure* (5 October 2007) at para. 6
[2077] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006)
[2078] *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 para.10

**exceptions**

The Trial Chamber noted its concern that the Prosecution would consider the Defence's intention to call an individual as a witness -- expressed during the early stages of the Prosecution's case -- as in some way relieving it of its obligations to disclose materials under Rule 66 and/or 68. Rules 66 and 68 outline the Prosecution's obligations to disclose material falling within the ambit of those rules. Such obligations can in no way be limited by an expression of intention, by the Defence, to call an individual as a witness.[2079]

**failure to implicate the accused**

Failure to mention the presence of the accused at a particular event was not exculpatory.[2080]

The absence of any reference to the accused in the testimony on the same events from another trial is potentially exculpatory.[2081]

Document indicating that United States government was not aware of evidence that genocide was planned was exculpatory considering that United States government conducted active intelligence gathering in Rwanda, and failure to disclose it violated Rule 68.[2082]

**mixed exculpatory and inculpatory material**

Rule 68, as a rule of disclosure rather than admissibility of evidence, imposes a categorical obligation to disclose any document or witness statement that contains exculpatory material. Consequently, this obligation is not subject to a balancing test.[2083]

The Trial Chamber, by reasoning that exculpatory material in a document could be rendered nugatory by the existence of inculpatory material, applied an incorrect legal standard resulting in an abuse of its discretion. A document containing both exculpatory and inculpatory material should have been disclosed pursuant to Rule 68.[2084]

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[2079] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006)
[2080] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 70; *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Oral Decision on Defence Motion to Exclude Evidence or Recall Witnesses Filed on 9 February 2009* (13 February 2009)
[2081] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 20
[2082] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation* (16 April 2008) at para. 10
[2083] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 2
[2084] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12

**public material**

Prosecution has a duty to disclose open session testimony from another trial when it is exculpatory even though transcripts may be publicly available., unless it can show that accused was put on notice of the testimony.[2085]

**scope**

Material relevant to the defence of the accused, in the context of Rule 68, should be understood to be material which may tend to dispute a material fact against the accused, undermine the credibility of evidence intended to prove these material facts, or even serve to sustain a valid excuse or justification for the alleged criminal conduct. Information which may or may not be useful for the defence case is better treated under Rule 66.[2086]

The standard for disclosure of exculpatory evidence under Rule 68 is much higher than the standard for admissibility of evidence under Rule 89(C).[2087]

**importance of duty**

The onus on the prosecution to comply with Rule 68 to the best of its ability is not a secondary obligation and is as important as the obligation to prosecute.[2088]

The disclosure of exculpatory evidence is one of the most onerous responsibilities of the prosecution and shall be interpreted broadly since it is essential to a fair trial.[2089]

The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal.[2090]

The obligation to disclose exculpatory material is essential to a fair trial. This obligation has always been interpreted broadly.[2091]

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[2085] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 27
[2086] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 19
[2087] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony* (15 July 2009) at para. 106
[2088] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 72
[2089] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 7
[2090] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 172
[2091] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 7; *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. 9; *Prosecutor v Karemera et al*, No. ICTR-98-

The Appeals Chamber firmly emphasizes that the prosecution's disclosure . obligation is as important as its obligation to prosecute and exhorts the Prosecution to act in good faith and in full compliance with its positive and continuous disclosure obligations. The Appeals Chamber also underscores that any further violations of the prosecution's disclosure obligation under Rule 68 of the Rules could lead to appropriate sanctions, if warranted in the circumstances.[2092]

The Prosecution's repeated violations of its obligations under Rule 68 of the Rules in this case negatively impacted the conduct of the proceedings and prejudiced the interests of justice. The Appeals Chamber therefore firmly reminds the prosecution of the fundamental importance of its positive and continuous obligation to disclose exculpatory material under Rule 68 of the Rules.[2093]

**in camera inspection**

Trial Chamber declined to examine disputed statement *in camera* and instead determined from the briefs whether the accused had made a showing sufficient to warrant disclosure of the statement.[2094]

Given that the prosecution has the primary responsibility for determining whether material falls within Rule 68, the Trial Chamber did not err in declining to conduct an *in camera* inspection of the disputed material.[2095]

**investigator's notes**

Since it can be admitted that the investigator's report reflects the investigator's recollection of his interview with a prosecution witness, there is no need to order disclosure of the investigator's handwritten notes of that interview on the grounds that they contain material which contradicts the witness' testimony.[2096]

Investigator's mission report was not required to be disclosed where it listed the topics of the interview with a potential defence witness, but not the information provided by the witness.[2097]

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44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6

[2092] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at para. 40

[2093] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para, 63

[2094] *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. 7

[2095] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at para. 20

[2096] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Disclosure or Inspection of Hand-Written Notes from OTP Investigator* (26 April 2006)

[2097] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka* (9 February 2009) at para. 10

**language**

The prosecution was obligated to disclose the translation of a Kinyarwandan document into a working language of the Tribunal once it became available, and it was no excuse that the accused spoke and understood Kinyarwandan. However, no prejudice from this failure was shown.[2098]

**possession of the prosecution**

**duty to acquire material**

The prosecution has a duty to attempt to bring exculpatory material within its control or possession where that the Defence specifically identifies the requested material, demonstrates that it has made prior efforts to obtain the material, and shows that the Prosecution is in a better position than the Defence to procure the material. This showing was not met by the accused in this case.[2099]

**duty to make a record**

Disclosure under Rule 68 is required for exculpatory material whether they have been reduced to a statement or not.[2100]

Document that witness showed to the prosecutor, and which was returned to the witness on a subsequent day, was not shown to be in the possession of the prosecutor for disclosure purposes where the prosecution claimed it had not made a copy or recognized the significance of the document.[2101]

A prima facie case is made out by the defence when it avers that an individual has told them he was interviewed by the prosecution, the interviewers took notes, and the information contradicts that of a prosecution witness. However, when the prosecution avers that it has no materials in its possession, the Trial Chamber must reject the motion.[2102]

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[2098] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at paras. 68,69

[2099] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence* (15 December 2004) at para. 22; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files)* (17 November 2004)

[2100] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Disclosure of Material from Joseph Serugendo* (30 May 2006)

[2101] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 25

[2102] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Fifth Notice of Rule 68 Violation and Motion for Remedial and Punitive Measures* (13 November 2007) at para. 8

**exhibits**

Prosecution is obligated to disclose sealed exhibits from other cases if the contents are exculpatory.[2103]

**in general**

The obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the said evidence. The Prosecutor cannot disclose that which she does not have.[2104]

For Rule 68 to apply, the Prosecution must not only know of the existence of the evidence, but it must also have sufficient knowledge of the material to be able to determine that it tends to exculpate the accused or affect the credibility of its evidence. In the absence of possession of the evidence in question, knowledge of the exculpatory character of evidence will seldom be imputed to the Prosecution.[2105]

The prosecution has a duty to actively review material in its possession and at a minimum inform the defence of the existence of any exculpatory material.[2106]

Accused failed to establish that laissez-passers he claimed were in his property at the time of his arrest were in the possession of the prosecution where the prosecution and national authorities claimed they could not locate the documents among the seized items.[2107]

It is the duty of the prosecution to disclose exculpatory material arising from related cases and this duty is a continuous obligation without distinction to the public or confidential character of the evidence concerned.[2108]

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[2103] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-76-T, *Decision on Bizimungu's Motion for Reparation Following the Prosecution's Failure to Disclose Documents Affecting the Credibility of Prosecution Witness AOE* (18 February 2009) at para. 8

[2104] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA* (8 June 2000).at para. 8.

[2105] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (16 December 2003) at para. 4

[2106] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 32; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 9

[2107] *Kanyarukiga v Prosecutor*, No. ICTR-2002-78-AR73, *Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents* (19 February 2010) at para. 19; *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on Defence Motion for Disclosure and Return of Exculpatory Documents Seized from the Accused* (30 October 2009) at para. 19

[2108] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 9

The obligation on the Prosecutor to disclose possible exculpatory evidence would be effective only when the Prosecutor is in actual custody, possession, or has control of the evidence. An unequivocal statement by the Prosecutor that it was not in possession of the items was deemed sufficient to satisfy this requirement.[2109]

Where Rwandan Prosecutor General claimed he had turned over videotape to Office of the Prosecutor, and Office of the Prosecutor stated it had no record of receiving the videotape, the videotape could not be said to have been in the possession of the prosecution such that Rule 68 was violated.[2110]

Completed questionnaires used by prosecution expert which were never furnished to the prosecution were not in the possession of the prosecution for purposes of Rule 68.[2111]

Prosecution claim that document sought by defence was not in its possession must be accepted absent proof to the contrary.[2112]

There is no presumption of possession—the accused must show that a document claimed to be exculpatory is in the possession of the prosecution.[2113]

Witness' recollection that he provided exculpatory information to the prosecution is insufficient to overcome representation to the contrary by the prosecution.[2114]

**Office of the Prosecutor as a whole**

The claim that the existence of exculpatory evidence is not known to the prosecution "trial team" is unsatisfactory. The prosecution must actively review the material in the possession of the Office of the Prosecutor and not only the documents in possession of this trial team.[2115]

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[2109] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66(B) and Rule 68 of the Rules of Procedure and Evidence* (5 July 2001) at para. 14.
[2110] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Motion to Strike Paragraph 25.2 of the Amended Indictment and Evidence of MRND Meeting in Gisenyi* (11 July 2007) at para.13
[2111] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Request for a Disclosure Order* (23 July 2008)
[2112] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 14
[2113] *Kanyarukiga v Prosecutor*, No. ICTR-2002-78-AR73, *Decision on Kanyarukiga's Interlocutory Appeal of Decision on Disclosure and Return of Exculpatory Documents* (19 February 2010) at para. 16
[2114] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka* (9 February 2009) at para. 12
[2115] *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

The Office of the Prosecutor, in relation to its disclosure requirements, must be seen as a whole. It is irrelevant whether the prosecutor in charge of the case may have had actual knowledge of the material.[2116]

**public material**

Open session transcript must be disclosed pursuant to Rule 68 regardless of fact that it may be publicly available to the accused—or at the least the attention of the accused must be drawn to the testimony by the prosecution.[2117]

The Chamber disagrees with, and finds absolutely lacking in merit, the prosecution's contention that it does not have to abide by established Rule 68 obligations when it feels that the accused might be able to find the information on his own.[2118]

**remedies for violation**

**acknowledgement of the violation**

Where the prejudice to the accused is minimal, acknowledgement of the violation by the Chamber is an appropriate remedy.[2119]

**adjournment**

The prosecution's obligation to disclose potentially exculpatory material is essential to a fair trial. However, not every violation of this important obligation warrants a remedy. If the Rule 68 disclosure is extensive, parties are entitled to request an adjournment to properly prepare themselves. The Appeals Chamber will defer to the judgement of the Trial Chamber on whether a party has adequate time for cross-examination.[2120]

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[2116] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para, 8; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-76-T, *Decision on Bizimungu's Motion for Reparation Following the Prosecution's Failure to Disclose Documents Affecting the Credibility of Prosecution Witness AOE* (18 February 2009) at para. 7

[2117] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire 's Evidence in the Ndindiliyimana Proceedings* (4 November 2008) at paras. 10, 19

[2118] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 21

[2119] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 August 2011) at para. 61

[2120] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at para. 7

**admission into evidence**

Considering the relatively low probative value of the evidence that was untimely disclosed by the prosecution, the admission of the withheld exculpatory material into evidence was sufficient to remedy the prejudice suffered.[2121]

Remedy for prosecution's failure to disclose exculpatory statements until late in the trial was admission of those statements into evidence, even though they went to the acts and conduct of the accused and did not meet the requirements of Rule 92 *bis*.[2122]

Exculpatory statement would be admitted under Rule 92 *bis* as a remedy for the prosecution's violation of Rule 68 where the witness could not be located, even though the statement went to the acts and conduct of the accused and was therefore did not meet the requirements of Rule 92 *bis*.[2123]

Withheld document would be admitted into evidence as remedy for prosecution's Rule 68 violation.[2124]

The Rule 92 *bis* requirements for admissibility of written evidence should not be relied upon to preclude the accused from seeking to admit relevant and probative evidence in circumstances where such a request would not be necessary had the evidence been disclosed pursuant to Rule 68. Rigid adherence to the Rule 92 *bis* requirements would adversely impinge of the rights of the accused to a fair trial.[2125]

Recall of witnesses whose testimony may have been impeached with contradictory evidence withheld in violation of Rule 68 not required. The withheld statements could be admitted as exhibits as a remedy if the accused so wished.[2126]

**adverse inference**

Failure to disclose subsequent testimony which contradicted prosecution evidence until case was in final deliberations warranted remedy that Chamber would draw adverse inference against the prosecution when reviewing the allegations affected by the

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[2121] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 830

[2122] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Admission of Written Statements Disclosed by the Prosecutor Pursuant to Rule 68(A)…*(12 April 2011)

[2123] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Urgent Motion for Admission of Witness CN's Statement into Evidence* (20 March 2009) at para. 11

[2124] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Augustin Bizimungu's Motion for Disclosure of a Contested Document* (31 August 2009) at para. 12; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at paras. 433,442

[2125] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Urgent Motion for Admission of Witness CN's Statement into Evidence* (20 March 2009) at para. 11

[2126] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at paras. 33,34

disclosure violations.[2127] However, another Chamber was justified in refusing to grant this remedy for the same material.[2128]

Trial Chamber would take disclosure violation into account when weighing the evidence of the witness for whom the violation occurred, including the lack of opportunity the defence was given to confront the witness.[2129]

Given the late stage of the proceeding at which the Rule 68 violation was discovered, the Chamber would apply the remedy of considering the recently disclosed material when assessing the credibility of the witness.[2130]

**dismissal**

Dismissal of the charges is not necessarily appropriate even where prejudice to the accused has been demonstrated.[2131]

**exclusion of evidence**

Exclusion of evidence for disclosure violations is an extreme remedy and would not be imposed where defence did not demonstrate sufficient prejudice to justify such a remedy.[2132]

**factors**

The choice of a remedy is a matter falling within the Trial Chamber's discretion and must be determined on a case-by-case basis, considering (1) the scope and significance of the violation vis-a-vis the allegations in the indictment; (2) the persistence of the prosecution's non-compliance; and (3) the timing of any late disclosure considering the stage of the proceedings.[2133]

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[2127] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Judgement* (30 September 2011) at para. 174
[2128] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 440
[2129] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Urgent Motion for Disclosure of Exculpatory Material* (9 February 2009) at para. 12
[2130] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for the Recall of Witness GAP* (5 March 2009) at para. 20
[2131] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 23
[2132] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 437; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 22; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude the Testimony of Prosecution Witness Upendra Baghel* (30 October 2007) at para. 12 ; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 30; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY,SJ, and Others* (3 December 2008) at para. 20
[2133] *Prosecutor v Ndindiliyimana 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. 14

**in general**

Among the remedies available to the Trial Chamber are sanctions under Rule 46(A), recalling prosecution witnesses or calling additional defence witnesses, or drawing adverse inferences from the late-disclosed material.[2134]

Recalling witnesses and admitting new evidence are appropriate remedies where disclosure violations have resulted in prejudice to the accused.[2135]

Trial Chamber found numerous violations of Rule 68 by the prosecution which prejudiced the defence and violated their right to a fair trial. Such a violation cannot go without a remedy.[2136]

Dismissal of charges, exclusion of evidence, stay of proceedings, and drawing adverse inferences from evidence are severe forms of remedy that should be invoked only in exceptional circumstances where less severe measures reasonably capable of remedying the prosecution's violations are unavailable.[2137]

**prejudice**

In determining whether the defence was prejudiced by the late disclosure or non-disclosure of exculpatory material, relevant considerations include: the potentially low probative value of the evidence; whether the defence had sufficient time to analyse the material and the opportunity to challenge it during cross-examination; whether the defence could seek admission of the material as additional evidence; and whether the defence could call the relevant witnesses to testify. Also relevant is the extent to which the defence knew about the exculpatory evidence and was able to access it.[2138]

No remedy for Rule 68 violation where inability to put material to prosecution witnesses who testified on that subject did not prejudice accused, since he could provide his own testimony on the issue and since the questions based on the undisclosed documents would not have substantially affected the credibility of the witnesses.[2139]

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[2134] *Prosecutor v Ndindiliyimana 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. 14

[2135] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 23

[2136] *Prosecutor v Ndindiliyimana 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. 59

[2137] *Prosecutor v Ndindiliyimana 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. 62

[2138] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 818

[2139] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand on the Interpretation of Rule 68(A) of the Rules of Procedure and Evidence in Relation to Mixed Documents* (29 May 2008)

Where the undisclosed material would not have made a difference in the decision, there was no prejudice from the prosecution's violation of Rule 68.[2140]

The defence must demonstrate that the accused suffered material prejudice because of the late disclosure.[2141]

The accused suffered marginal prejudice from non-disclosure of a prior statement in which he made accusations about the accused which were not charged in the indictment. The accused would be allowed to question him on this statement if the witness was recalled for other reasons.[2142]

No material prejudice shown where putting the undisclosed material to prosecution witnesses whose testimony it contradicted was unlikely to have significantly affected their testimonies.[2143]

Although prosecution was not diligent in failing to search for exculpatory evidence by inquiring with other teams investigating related cases, the accused was not prejudiced by the late disclosure of Rule 68 material.[2144]

Prosecution found by Appeals Chamber to have violated Rule 68, but no prejudice was shown.[2145]

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[2140] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 57; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Decision on Motions for Relief for Rule 68 Violations* (24 September 2012) at paras. 15,22,27,33,38

[2141] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 17; *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 para. 21; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 18; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009) at para. 3

[2142] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009) at para. 6

[2143] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 20

[2144] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 12

[2145] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at paras. 43,54,61; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 88; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Niyiramasuhuko's First Motion for Relief from Rule 68 Violations and to Present Additional Evidence* (9 April 2015) at paras. 36-40

**recalling witnesses**

It cannot be determined at the interlocutory appeal stage whether recalling a witness was an effective remedy for late disclosure where the defence had not yet requested the witness be recalled and where the Trial Chamber's evaluation of the witness' evidence was not known.[2146]

Defence was prejudiced by Rule 68 violation since it lost opportunity to confront prosecution witnesses with the information and had to divert resources to investigate information produced during defence case. However, if it made motion to recall witnesses, that would be sufficient remedy.[2147]

Trial Chamber did not err in refusing to recall prosecution witness whose immigration proceedings in Canada had resulted in a decision relative to her credibility after the witness had testified at the ICTR and did not err in refusing to order production of a transcript of the immigration proceedings.[2148]

Recalling prosecution witnesses and calling additional defence witnesses was appropriate remedy for prosecution's Rule 68 violations discovered near the end of the trial.[2149]

**retrial**

Motion for mistrial denied where disclosure problems did not substantially handicap the defence.[2150]

**sanctions**

Disciplinary sanctions can be imposed on the prosecution for violation of its disclosure obligations even if no prejudice or deliberate breach of the prosecutor's obligations have been established if the case demonstrates a pattern of continuous lack of diligence in the exercise of the prosecutor's disclosure obligations which amount to obstructing the proceedings or are contrary to the interests of justice.[2151]

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[2146] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at para. 10

[2147] *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. 23-24, 32

[2148] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 293

[2149] *Prosecutor v Ndindiliyimana 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

[2150] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Mistrial* (19 March 2008) at para. 18

[2151] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 26; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 31

A decision by the prosecutor can only be sanctioned if it be demonstrated that his determination pursuant to Rule 68 has clearly not been made in good faith.[2152]

No sanction on prosecution where there was limited jurisprudence on the standards to be followed under Rule 68.[2153]

No sanction where prosecution's violation was inadvertent and it apologized for violation, even though prosecution had been sanctioned for previous violations concerning the same witness.[2154]

No sanctions on prosecution where failure of disclosure resulted from weaknesses in the prosecution's filing system, not attributable to prosecution counsel.[2155]

No sanction where non-disclosure was due to error in logging document into prosecution database. However, Trial Chamber noted that prosecution was not diligent in failing to search the original source material when defence counsel inquired as to existence of document.[2156]

Trial Chamber noted concern that it again had to remind prosecution to be more diligent in administration of its disclosure obligation, and in making representations to the Trial Chamber about the existence of exculpatory material, it declined to impose any sanction where failure to disclose was not intentional.[2157]

Although Trial Chamber noted with great concern that this was 13th violation of Rule 68 by prosecution in the case, no sanctions, appointment of special master, nor stay of proceedings were warranted, Prosecution advised that further violations would be dealt with more seriously.[2158]

**special master**

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[2152] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 31

[2153] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 31

[2154] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 25th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Witness T* (24 March 2009) at para. 8

[2155] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Sixth, Seventh, and Eighth Notices of Disclosure Violations and Motions for Remedial, Punitive, and Other Measures* (29 November 2007) at para. 35

[2156] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation* (16 April 2008) at para.16

[2157] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion for Partial Reconsideration of the Decision on Joseph Nzirorera's Tenth Notice of Rule 68 Violation* (16 April 2008) at para. 17

[2158] *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

Appointment of special master to supervise disclosure not an appropriate remedy for Rule 68 violations.[2159]

**stay of proceedings**

Stay of proceedings until Rule 68 fully complied with not appropriate remedy for disclosure violations, as it is understood that Rule 68 material may appear as the trial proceeds.[2160]

**violations by defence**

The consequences for a violation of Rule 66(A)by the prosecution may be to strike the witness. However, this remedy is not available for defence violations of disclosure requirements.[2161]

**request by the defence**

Failure of the defence to request that prosecution search its database for transcripts of radio broadcasts which supported his alibi did not relieve the prosecution of its affirmative obligation to produce exculpatory evidence.[2162]

Disclosure of an entire category of documents will only be ordered under Rule 68 where the category is narrowly tailored to the exculpatory content.[2163]

**requirements**

To allege a breach of Rule 68, the Defence must first establish that the evidence was in the possession of the prosecution, and then must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.[2164]

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[2159] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 32

[2160] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 31

[2161] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Urgent Motion to Compel Disclosure of Unredacted Witness Statements by Nsabimana's Defence* (29 June 2006) at para. 14

[2162] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 55

[2163] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence* (10 June 2008) at para. 22

[2164] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 262; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him* (31 October 2005) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at para. 11; *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motions on Rule 68 Disclosure* (5 October 2007) at para. 5

When bringing a motion pursuant to Rule 68, the defence is expected to: (i) identify the materials sought; (ii) if disputed, to satisfy the Chamber on a *prima facie* basis of the Prosecutor's custody or control of the materials requested; and (iii) if disputed, to satisfy the Chamber on a *prima facie* basis of the exculpatory or potentially exculpatory character of the materials requested.[2165]

It is the Prosecutor who determines *ab initio* whether an item of evidence is exculpatory or not. If it has not been shown that the Prosecutor's judgement in that respect, is wrongful, the Appeals Chamber shall not intervene in the Prosecutor's exercise of his freedom in such matters.[2166]

The determination of what material falls within Rule 68 is a fact-based judgement falling within the responsibility of the prosecution. The Trial Chamber is entitled to assume that the prosecution is acting in good faith.[2167]

In the absence of a showing to the contrary, the Trial Chamber must accept the prosecution's representation that it had reviewed the category of material requested and did not locate any exculpatory material.[2168]

A Trial Chamber would be within its discretion to order disclosure of material upon representation by defence counsel that he has interviewed individuals who said that they told the prosecution about information which contradicted a prosecution witness. However, it was not error for the Trial Chamber to refuse to do so.[2169]

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[2165] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 9; *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. 11; *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; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notice of Violation of Rule 68 and Motion for Remedial Measures* (12 July 2006) at para. 2; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (6 October 2006) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Motion to Strike Paragraph 25.2 of the Amended Indictment and Evidence of MRND Meeting in Gisenyi* (11 July 2007) at para. 9

[2166] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Decision On the Motion for a Review of the Decision by the President of the Appeals Chamber; on the Motion Pursuant to Article 73 of the Rules of Procedure and Evidence Praying the Chamber to Order the Prosecutor to Disclose to the Defence the Tapes Containing the Recordings of Radio Muhabura; On the Motion for a Review of the Decision by the President of the Appeals Chamber* (6 February 2002)

[2167] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at paras. 16-17; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (6 October 2006) at para. 2; *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motions on Rule 68 Disclosure* (5 October 2007) at para. 5

[2168] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Ntabakuze Motion for Disclosure of Various Categories of Documents Pursuant to Rule 68* (6 October 2006)

[2169] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.6, *Decision on Joseph Nzirorera's Interlocutory Appeal* (28 April 2006) at para. 17

**Rwandan judicial proceedings**

Prior statements of prosecution witnesses to Rwandan authorities are potentially exculpatory materials pursuant to Rule 68.[2170] However, a blanket request for all "previous and subsequent statements" of certain witnesses amounts to fishing for information and does not meet the requisite standard for requiring the prosecution to use its best efforts to obtain material from third parties.[2171]

Where the prosecution disclosed a Rwandan statement of an individual which is exculpatory, it was obligated to obtain information to help the defence identify and locate the witness.[2172]

**scope**

Rule 68 requires the prosecution not merely to disclose to the Defence the existence of exculpatory evidence, but to disclose any such evidence in its control or custody.[2173]

The prosecution is under an obligation to disclose to the defence any material known to him, and which is favourable to the accused in the preparation of his defence, regardless of the nature and type of the materials.[2174]

Prosecution cannot excuse its failure to comply with Rule 68 by claiming that documents it did disclose were more compelling contradictions of its witness than the document it withheld.[2175]

Information which contradicts or calls into doubt the information provided by any prosecution witness, or which affects their credibility, as well as any information tending to show that the accused attempted to stop the killings would qualify as exculpatory

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[2170] *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *Decision on Defence Motion for an Order to the Prosecution Witnesses to Produce, at their Appearance, their Diaries, and Other Written Materials from 1992 to 1994 and their Statements Made Before the Rwandan Judicial Authorities* (24 November 2003) at para. 8

[2171] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion for Accused Bicamumpaka for Disclosure of Exculpatory Evidence* (23 April 2004) at para. 10

[2172] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence* (25 May 2004)

[2173] *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. 8

[2174] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI* (14 September 2004) at para. 8

[2175] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 25

evidence, but the defence needs to identify its request for such materials with specificity.[2176]

Whether information "may suggest the innocence or mitigate the guilt of the accused" must depend on an evaluation of whether there is any possibility, considering the submissions of the parties, that the information could be relevant to the defence of the accused.[2177]

Rule 68 is applicable where there is any *possibility* that the material could be relevant to the defence of the accused.[2178]

Statement which witness said he was out of the country for much of the period was exculpatory within the meaning of Rule 68 because it raised the possibility that the witness was not present at certain events as claimed by prosecution witnesses.[2179]

**specific items**

**assassination of President**

Records and documents concerning the assassination of President Habyarimana need not be disclosed pursuant to Rule 68 where the accused is not charged with taking part in the assassination.[2180]

Request for disclosure of "Bruguière report" denied where identity of those who assassinated President Habyarimana was not relevant to the charges against four Ministers of the Interim Government.[2181]

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[2176] *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. 12-13; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 15

[2177] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12; *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 para. 5; *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 para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 12

[2178] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.13, *Decision on Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion* (14 May 2008) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures* (25 October 2007) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 3

[2179] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 14

[2180] *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; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Disclosure of Prosecution Files* (6 October 2006) at para. 5

Information about the assassination of President Habyarimana and description of infiltration into areas of government control by RPF soldiers disguised as civilians could provide background and context which may assist the Chamber in understanding some of the conduct which was the subject of the prosecution's case. On the other hand, description of crimes committed by the RPF against civilians in geographic areas under its control are too remote to be relevant.[2182]

**influence on testimony**

Testimony that RPF coached witnesses to come to Arusha and give false testimony was not exculpatory when not mentioning the particular accused and need not have been disclosed under Rule 68.[2183]

**informants**

Disclosure of identity of informant ordered where his statement contained exculpatory material. The witness' identity is inextricably connected with the substance of the statements. The statement cannot be properly understood without knowing the author's ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given. Providing the author's identity does not merely assist the Defence to carry out further investigations but is essential to the content of the statement itself.[2184]

**RPF crimes**

Evidence of widespread RPF infiltration by operatives dressed as civilians or operating in specific locations relevant to the indictment could be germane to charges against the accused or those under his command. However, RPF activities which have only a remote connection to the crimes charged are not exculpatory.[2185]

Evidence of RPF operations at times and places unrelated to the crimes alleged in the indictment is not exculpatory.[2186]

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[2181] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière report and the Cooperation of France* (25 September 2006) at para. 20
[2182] *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
[2183] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 16th Notice of Rule 68 Violation: Testimony of RPF Insiders* (3 July 2009) at para. 16
[2184] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Identity of Prosecution Informant* (24 May 2006) at para. 5
[2185] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Disclosure of Prosecution Files* (6 October 2006) at paras. 4-5; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Defence Motions Concerning Disclosure of Exculpatory Evidence* (22 October 2008) at para. 4
[2186] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Defence Motions Concerning Disclosure of Exculpatory Evidence* (22 October 2008) at para. 6; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion for Disclosure Pursuant to Rule 68* (25 February 2009)

Evidence of crimes by RPF "technicians" in killings at locations where crimes were alleged to have been committed by the accused were within Rule 68 and should have been disclosed to the defence.[2187]

Evidence of crimes by RPF "technicians" in Gitarama was not exculpatory because they lacked specificity demonstrating that the crimes charged against the accused may have been committed by the RPF.[2188]

Evidence of RPF crimes which were blamed on the MRND, Interahamwe, or Habyarimana regime, including killing of Tutsi, were exculpatory and failure to disclose them violated Rule 68.[2189]

Where prosecution had disclosed some documents pertaining to RPF crimes in areas and times relevant to the charges against the accused, in view of its representations that it had disclosed all such exculpatory material, no further disclosure would be ordered.[2190]

Statements of witnesses as to RPF infiltrations and crimes in Kigali were unrelated to the charges against the accused involving Butare prefecture and were not therefore "exculpatory" within the meaning of Rule 68.[2191]

Statements of witnesses as to RPF infiltration and killings were not exculpatory as to Interim Government activities with which former Ministers were charged and were not required to have been disclosed.[2192]

Information that RPF and not MRND was responsible for assassination of Minister Gatabazi was not exculpatory where the accused was not charged with that crime.[2193]

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at para. 28; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's 2nd Motion Alleging Disclosure Violations* (25 February 2009) at para. 14

[2187] *Prosecutor v Ndindiliyimana 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. 27

[2188] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's 2nd Motion for Disclosure of Evidence, for Renewed Authorization to Interview Certain Prosecution Witnesses, and Postponement of the Testimony of Witnesses CNAA and CNAC* (17 December 2009) at para. 34

[2189] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Rule 68(D) Application and Joseph Nzirorera's 12th Notice of Rule 68 Violation* (26 March 2009) at para. 16

[2190] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Disclosure of Prosecution Files* (6 October 2006) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Disclosure of Specific Exculpatory Evidence* (20 November 2006)

[2191] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Disclosure of Documents Under Rule 68 and for Re-Opening of her Case* (29 April 2008) at para. 44-45

[2192] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence* (10 June 2008) at paras. 13-16

[2193] *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 para. 14

While information concerning RPF activities may be exculpatory, such a determination must be individualized as it depends on the nature of the charges and evidence heard against the accused.[2194]

Information that RPF "technicians" assassinated political leaders and planted bombs which were blamed on MRND and Interahamwe was not required to be disclosed pursuant to Rule 68 where it was not concrete enough to be relevant to the crimes charged against the accused leaders of the MRND party.[2195]

**redactions**

Where the identity of the maker of the exculpatory statement is so closely linked to the contents of the statement as to render the latter meaningless without the former, it would be impermissible to redact the identity of the witness.[2196]

The redacted versions of Rule 68 material must be sufficiently cohesive, understandable, and usable by the defence.[2197]

Where redacted statement of witness not to be called by prosecution appears to contain exculpatory information, the prosecutor ordered to provide the unredacted statement as well as the accompanying cover sheet containing the contact details for the witness.[2198]

When deciding whether to relieve the prosecution of its obligation to disclose unredacted statements of witnesses containing exculpatory information, the Trial Chamber must balance the rights of the accused, the need to protect informants and witnesses, and the interests of the public and prosecution to carry out investigations efficiently.[2199]

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[2194] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 16th Notice of Rule 68 Violation: Testimony of RPF Insiders* (3 July 2009) at para. 12

[2195] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 16th Notice of Rule 68 Violation: Testimony of RPF Insiders* (3 July 2009) at para. 14

[2196] *Prosecutor v Ndindiliyimana 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. 23

[2197] *Prosecutor v Ndindiliyimana 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. 24

[2198] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Decision Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68* (10 December 2003); *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 20; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorization to Interview Him* (31 October 2005) at para. 4

[2199] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion to be Relieved of the Obligation to Disclose the Identities of Certain Witnesses* (2 November 2007) at para. 7

Identity of witnesses in possession of exculpatory information is related to the content of those statements and should be disclosed to the defence.[2200]

**timing**

Lapse of two years and disclosure of exculpatory material only after defence requested it violated was not "as soon as practicable". Trial Chamber disagreed with prosecution "in the strongest possible terms" that Rule 68 had been complied with.[2201]

Rule 68 requires vigilance on the part of the prosecution. The violation commences at the time of the prosecution's receipt of material of an exculpatory nature and persists until disclosure takes place.[2202]

Prosecution's failure to promptly disclose Rule 68 material to a convicted person constituted a violation of Rule 68 and caused the Appeals Chamber to be "seriously concerned" about the prosecution's violations of its disclosure obligations towards the accused. However, in the absence of prejudice, no remedy was ordered.[2203]

**voluminous nature**

The voluminous nature of materials in the possession of the prosecutor may give rise to delays in disclosure but does not excuse the prosecution from its obligation to review and assess it.[2204]

Voluminous material is no excuse for failing to disclose exculpatory material.[2205]

The fact that the prosecution has disclosed many documents does not excuse its specific violation of Rule 68.[2206]

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[2200] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Application Pursuant to Rules 39,68, and 75 of the Rules of Procedure and Evidence for an Order for Conditional Disclosure of Witness Statements and Other Documents Pursuant to Rule 68(A)* (4 July 2006) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion to be Relieved of the Obligation to Disclose the Identities of Certain Witnesses* (2 November 2007)

[2201] *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 para. 17

[2202] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution Motion to Vary the Chamber's Order Concerning the Prosecutor's Rule 68 Disclosure Obligations* (24 October 2008) at para. 5

[2203] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R68, *Decision on Motion for Disclosure* (4 March 2010) at paras. 45-46

[2204] *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. 10, fn. 33

[2205] *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 para. 19

[2206] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 13th, 14th, and 15th Notices of Rule 68 Violation and Motions for Remedial and Punitive Measures: ZF, Michel Bakuzakundi, and Tharcisse Renzaho* (18 February 2009) at para. 24

The voluminous nature of materials in the possession of the prosecution may give rise to delays in disclosure.[2207]

**warning**

Prosecution's failure to disclose transcript of radio broadcast in which accused appealed for calm violated Rule 68. "The prosecution should take this as a clear warning that in the future, the Appeals Chamber may impose appropriate sanctions should it be found to be in violation of its Rule 68 obligations.[2208]

**Rule 69—protection of victims and witnesses**

**(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.**
**(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witness Support Unit.**
**(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence.**

**accommodation at the seat of the Tribunal**

The matter of a witness' accommodation while in Arusha to testify does not require modification of a protective order and should be determined by the Registry in consultation with the parties. The Trial Chamber should only be petitioned when an agreement cannot be reached, or the fairness of the trial may be impaired.[2209]

**deceased witnesses**

Trial Chamber declined to lift protective measures of witness who had died absent evidence that the witness consented to the lifting of protective measures prior to his death or that the security of family members is not at stake.[2210]

**defence interview of prosecution witness**

Defence may interview potential prosecution witnesses if it notifies the prosecution in writing, on reasonable notice, of its wish to contact the witness. Should the

[2207] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 21
[2208] *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 37
[2209] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nteziryayo's Motion for Variation of Protective Measures for Witnesses AND-36, AND-38, and AND-50* (20 April 2007) at para. 10
[2210] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on the Prosecution's Motion for Variation of Witness LLK's Protective Measures* (25 March 2011) at para. 3

witness or potential witness concerned agree to the interview, the prosecution shall immediately undertake all necessary arrangements to facilitate the interview.[2211]

With respect to a request of the defence to interview a prosecution witness, the Trial Chamber directed the WVSS to (a) explore, as a preliminary matter, the willingness of the witness to meet with the Defence Counsel; (b) supervise the resulting meeting, where the witness is agreeable to the meeting, subject to other applicable witness protection measures; and (c) permit the attendance of a representative of the Office of the Prosecutor.[2212]

Defence allowed to meet protected prosecution witnesses not called by the prosecution if the witness consents.[2213] The prosecutor must furnish information as to the whereabouts of these witnesses to the defence.[2214]

Where a witness initiates contact with one of the parties, this does not amount to a waiver of the protective measures already in place by order of the Chamber.[2215]

Regardless of who initiates contact, the Parties must abide by applicable protective measures.[2216]

When a protected prosecution witness approached defence counsel, counsel was under an obligation to inform the prosecution before he entered into contact with the witness.[2217]

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[2211] *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion on the Modification of a Decision of 12 July 2000 on Protective Measures for Prosecution Witnesses* (7 October 2003); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Allegations of Contempt, the Harmonisation of the Witness Protection Measures and Warning to the Prosecutor's Counsel* (10 July 2001) at para. 19

[2212] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Sagahutu's Motion for Reconsideration of 19 March 2004 Decision on Disclosure of Prosecution Materials, for Leave to Contact a Prosecution Witness, and for Access to Protected Testimony of Witnesses in the Military I Trial* (3 November 2004) at para. 23

[2213] *Prosecutor v Kanyabashi*, No. ICTR-96-15-T, *Decision on Joseph Kanyabashi's Request to Meet SW and FAT and all Other Persons Whose Identities Were not Disclosed to the Defence* (23 November 2004) at para. 13

[2214] *Prosecutor v Seromba*, No, ICTR-2001-66-T, *Decision Relative a la Requete de la Defence Aux Fins de Permission de Contact Avec Les Temoins CBO, CBQ, CBU, CBV et CBM non Retenus Sur La Liste Finale du Procureur* (8 February 2005) ; *Prosecutor v Seromba*, No, ICTR-2001-66-T, *Decision Relative a la Requete de la Defence Aux Fins d'Obtenir la Divulgation de l'Identite et L'Addresse des Temoins de l'Accusation* (16 December 2005)

[2215] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at para. 169

[2216] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at para. 169

[2217] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules* (17 January 2003) at para. 16.

Defence counsel did not violate protective measures pertaining to all prosecution witnesses by contacting an individual who was not on the prosecution's witness list, but whose statement was disclosed as part of the supporting material for the indictment.[2218]

**in general**

**burden of proof**

The burden of justifying the protection of witnesses lies on the party seeking such protection.[2219]

It is for the moving party to clearly delineate the dangers that its witnesses and potential witnesses face and the situation which warrants such protective measures. The defence must provide independent justifying elements attesting to the fears of its witnesses instead of merely relying on the specific circumstances of Prosecution witnesses. However, out of an abundance of caution, protective measures operative for prosecution witnesses will be extended to the defence.[2220]

**defence witnesses**

Same protection provided to defence witnesses as prosecution witnesses.[2221]

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[2218] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecution Motion for Appointment of Amicus Curiae to Investigate Breach of Protective Measures…*(29 March 2011) at para. 32

[2219] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (2February 2005) at para. 13; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK* (15 June 2005) at para. 17; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for No Contact Order and…*(21 August 2008) at para. 8

[2220] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Protection of Defence Witnesses* (2February 2005) at para. 13; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Defence Motion for Protective Measures for Defence Witnesses* (16 May 2007); *Prosecutor v Kanyarukiga*, No. ICTR-02-78-I, *Decision on the Defence Motion for Witness Protection Measures* (3 September 2009)

[2221] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motion for Protective Measures for Defence Witnesses* (8 June 2004); *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Decision on Defence Motion for Protective Measures for Defence Witnesses* (6 July 2004); *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Protection of Witnesses* (25 August 2004) at para. 9; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses* (27 June 2005); *Prosecutor v Rwamakuba*, No. ICTR-98-44C, *Decision on Defence Motion for Protective Measures* (21 Sept 2005) at para. 10; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007) at para. 7; *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on Defence Motion for Protection of Witnesses* (10 April 2007) at para. 2; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Defence Motion for Protective Measures for Defence Witnesses* (16 May 2007) at para. 8; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Defence Request for Protective Measures* (14 December 2007) at para. 3; *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Protective Measures for Defence Witnesses* (28 February 2008); *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Defence Motion for Protective Measures* (11 May 2009) at para. 14

**fear must be objective**

Established jurisprudence requires that the witnesses for whom protective measures are sought must have a real fear for the safety of the witness or her or his family, and there must be an objective justification for this fear. Measures for protection of witnesses are granted on a case-by-case basis.[2222]

The appropriateness of protective measures for witnesses should not be based solely on the representations of the parties. Indeed, their appropriateness needs also to be evaluated in the context of the entire security situation affecting the concerned witnesses.[2223]

Generalized fears are not in themselves sufficient to establish a real likelihood of danger without an objective basis to substantiate those fears.[2224]

Prosecution motion for protective measures for all witnesses denied when supported only by a generalized affidavit that did not allow the Chamber to assess the need for protective measures on a case-by-case basis.[2225]

Efforts of the Rwandan government to arrest a defence witness in the *Ndindabahizi* case, the disappearance of a witness in the *Simba* case, and the report of Amnesty International on Rwandan refugees provides proof of the objective element of the fear expressed by some defence witnesses.[2226]

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[2222] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Protection of Witnesses* (25 August 2004) at para. 5; *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (12 July 2000) at para. 9; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses* (27 June 2005) at para. 9; *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005) at para.10; *Prosecutor v Karera*, No. ICTR-01-74-PT, *Order for Submission* (21 November 2005); *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007) at paras. 3-4; *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Prosecution Motion for Protective Measures* (18 September 2007) at para. 4; *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses* (24 November 2008) at para. 6

[2223] *Prosecutor v Bagilishema*, No. ICTR-95-1A-I, *Decision on the Prosecutor's Motion for Witness Protection* (17 September 1999) at para. 6.

[2224] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses* (24 November 2008) at para. 7

[2225] *Prosecutor v Nizeyimana*, No. ICTR-2001-55C-PT, *Decision on Prosecutor's Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment* (9 June 2010) at para. 6; *Prosecutor v Nizeyimana*, No. ICTR-2001-55C-PT, *Decision on Prosecutor's Second Motion for Protective Measures for the Victims and Witnesses to Crimes Alleged in the Indictment* (3 September 2010)

[2226] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 28

Fact that witnesses testify openly and without pseudonyms in Rwandan Gacaca proceedings did not warrant conclusion that protective measures, including pseudonyms, were unnecessary at ICTR.[2227]

A non-disclosure order may be based on fears expressed by persons other than the witness.[2228] A further consideration is trial fairness, which favours similar or identical protection measures for Defence and Prosecution witnesses.[2229]

For a witness to qualify for the protection of his identity from disclosure to the public and media, there must be real fear for the safety of the witness or her or his family, and that there must always be an objective basis to underscore this fear. The judicial concern motivating a non-disclosure order may be based on fears expressed by persons other than the witness.[2230]

Protective measures for witnesses living outside Rwanda denied absent specific showing by the prosecution of the information justifying fear on behalf of the witnesses.[2231]

Evidence of the volatile security situation in Rwanda, and of potential threats against Rwandans living in other countries, indicates that witnesses could justifiably fear that disclosure of their participation in the Tribunal's proceedings would threaten their safety and security.[2232]

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[2227] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005) at para. 11

[2228] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on the Prosecutor's Motion for Protective Measures for Witnesses* (12 July 2000) at para. 9; *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on Defence Motion for Protection of Witnesses* (10 April 2007) at para. 2

[2229] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Motion for Protection of Witnesses* (1 September 2003) at para. 2; *Decision on Bagosora Motion for Protection of Witnesses* (1 September 2003)*; Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Protective Measures for Defence Witnesses* (14 February 2007); *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on Defence Motion for Protection of Witnesses* (10 April 2007) at para. 2

[2230] *Prosecutor v Ferdinand Nahimana*, No. ICTR-1996-11-T, *Decision on the Defence's Motion for Witness Protection* (25 February 2000) at para. 11.

[2231] *Prosecutor v Rukundo*, No. ICTR-2001-70-PT, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses* (24 October 2002) at para. 16; *Prosecutor v Rukundo*, No. ICTR-2001-70-PT, *Decision on Prosecutor's Motion for Protective Measures for Witnesses CCF, CCJ, BLC, BLS, and BLJ* (28 November 2006)

[2232] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses* (27 June 2005) at para. 10; *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005) at para.11; *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005) at para. 9; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Defence Request for Protective Measures* (14 December 2007)

There is an objective fear held by defence witnesses in and outside of Rwanda and there has been frequent violent incidents perpetrated against potential witnesses such as o justify protective measures for all defence witnesses.[2233]

The migration of large numbers of potential Gacaca accused persons to countries neighboring Rwanda and the fact that supporters and family members of the accused or indicted persons might be living in those countries adds to the risk that potential victims and witnesses may face if their identities are revealed.[2234]

**least restrictive measure**

When a Trial Chamber adopts a witness protection measure, it is adopting the least restrictive measure necessary to provide for the protection of victims or witnesses and its order should be interpreted in that light.[2235]

**rights of accused v victims**

The rights of the accused are the first consideration and the need to protect victims and witnesses is a secondary one.[2236]

In granting protective measures, the Chamber must also take into consideration the fairness of the trial and the equality of the parties.[2237]

If the Accused is to make effective use of his or her right to cross-examine witnesses against him he must be aware of the identity of the person he seeks to question, otherwise he is deprived of the very facts that would enable defence counsel to demonstrate that a witness is hostile, prejudiced, or otherwise unreliable to impugn the witness's credibility. All this identifying data opens valuable avenues for in-court cross-examination and out-of-court investigation before the witness is to appear to testify.[2238]

The adoption of protective measures requires a careful balancing between the need to secure the safety of victims and witnesses and the rights of the accused to a fair and public hearing.[2239]

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[2233] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Urgent Motion for Witness Protective Measures* (9 February 2010) at para. 22
[2234] *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005) at para.11
[2235] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 19
[2236] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 68
[2237] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for No Contact Order and…*(21 August 2008) at para. 5
[2238] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses* (5 December 2001) at para. 15
[2239] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Prosecutor's Motion for Protective Measures for Victims and Witnesses* (24 November 2008) at para. 8

Request for condition that accused not possess any documents which identify the witnesses at the UNDF is not strictly necessary and intrudes upon the rights of the accused.[2240]

**Victims and Witnesses Support Section**

Defence request that identity of witness not be disclosed by WVSS outside of the immediate team working on the matter denied as unworkable.[2241]

**investigation of witnesses**

A party may make use of the name of the witness to make reasonable inquiries without breaching a protective order. However, it is prohibited from doing so where by the very nature of the inquiry would disclose that the person is a witness. [2242]

Though an inquiry about a person certainly signals interest, it does not necessarily reveal that the person is a witness. The object of the inquiry may, for instance, be a prosecution source or prospective witness, whose prior statements the prosecution is under an obligation to obtain and disclose to the defence. The inquiring party must scrupulously avoid, expressly or impliedly, suggesting that the person is a witness for, or otherwise associated with, one side or the other. If the third party demands explanations which would require revealing that information, then the investigation must cease. Inquiries conducted within these parameters do not give rise to a breach of the witness protection order.[2243]

Prosecution breached protective order when it communicated identities of potential defence witnesses to Rwandan government while requesting judicial records for those witnesses. However, no sanctions would be imposed because need to obtain judicial records which the defence could not obtain constituted extenuating circumstances.[2244]

**modification**

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[2240] *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005) at para.14
[2241] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Confidential Motion for Protection of Defence Witnesses* (27 June 2005) at para. 12
[2242] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 18,21
[2243] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 11
[2244] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses* (9 August 2007) at para. 8

Review of a decision on protective measures for witnesses, can always be requested on the basis of new information, notably in regard of a change in the circumstances surrounding the initial decision.[2245]

Withdrawing the use of a pseudonym for a witness requires a showing that the initial grant of protection was an error in law or an abuse of discretion, or that new circumstances called into question the basis for the initial decision.[2246]

Protective measures for defence witnesses ordered in earlier cases would not be modified at the request of the defence unless the witness provided a written consent.[2247]

Husband of prosecution witness, covered by non-contact orders applicable to family members, would be contacted by WVSS to determine if he wishes to meet with the defence.[2248]

**prosecution access**

Trial Chamber erred in restricting access to protected witness information to prosecution team working on the specific case. Doing so improperly precluded the prosecution from discharging its obligation under Rule 68 to disclose exculpatory evidence in other cases.[2249]

It would not be appropriate to limit access to defence protected witness information to those within the prosecution with a need to know. It is up to the prosecution, not the Trial Chamber, to establish the modalities for disclosing such information within its office.[2250]

**prosecution interview of defence witnesses**

Prosecution alleges an absence of good faith based on the small number of positive responses from Defence witnesses to requests for interviews through defence

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[2245] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecution's Motion for, Inter Alia, Modification of the Decision of 8 June 2001* (25 September 2001) at para. 11

[2246] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on the Defence Motion to Unseal the Identity of Witness XAM* (15 October 2004); *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision on Protection of Defence Witnesses* (4 May 2005) at para. 2

[2247] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Vary Protective Measures for Witnesses MEM, REM, and JK-2 in the Kajelijeli case and for Witness DC in the Ndindabahizi Case* (3 September 2009)

[2248] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration of the Decision Rendered on 28 October 2009* (15 October 2010) at para. 34

[2249] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR73, *Decision on Interlocutory Appeals of Decision on Witness Protection Orders* (6 October 2005) at para. 46; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73, *Decision on Prosecution Appeal of Witness Protection Measures* (16 November 2005)

[2250] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision Amending Defence Witness Protection Orders* (2 December 2005)

counsel do not justify modification of procedures to funnel such requests through Registry.[2251]

While coincidental and inadvertent contact with a Defence witness is an unavoidable possibility, the Prosecution can fulfil its obligations simply by asking its interviewees whether they are already a Defence witness. If the witness answers affirmatively, then the interview must terminate and the usual procedure and channels for requesting an interview must be followed.[2252]

The prosecution should not have contact with potential defence witnesses except through WVSS even though the witnesses had not sought protective measures, since the same regime had applied to prosecution witnesses and since there was a legitimate fear that witnesses might be dissuaded from testifying if approached directly by the prosecution.[2253]

Defence ordered to facilitate interview by prosecution with its witnesses, upon reasonable notice, if the witness consents to be interviewed.[2254]

**pseudonyms**

There was no violation of the letter or spirit of protective measures to refer to the pseudonym of a protected witness in another trial, where the same witness had been given different pseudonyms.[2255]

**refugee status**

The ICTR has no power to grant the witness refugee status in any State as part of witness protection.[2256]

The prosecution is not precluded from obtaining and using statements made by defence witnesses to immigration authorities in the countries where they have sought asylum.[2257]

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[2251] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 18
[2252] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 21
[2253] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Emergency Motion for No Contact Order and …*(21 August 2008)
[2254] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007) at para. 15
[2255] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on the Prosecutor's Confidential Motion Requesting Callixte Kalimanzira's [Reply] be Filed Confidentially* (4 February 2010) at para. 5
[2256] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 46; *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK* (15 June 2005) at para. 38
[2257] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 14

**Rwandan authorities**

Trial Chamber ordered Registry to conduct review of procedures concerning informing Rwandan Office of Prosecutor General details of protected witnesses travelling to Arusha.[2258]

**safe conduct**

Decision of Trial Chamber to guarantee safe conduct of defence witnesses was properly made on an *ex parte* basis where advance disclosure to the prosecution would have frustrated the purposes for which the motion was made.[2259]

Fear of criminal prosecution is not a legitimate ground for protective measures but may be addressed by a grant of "safe conduct".[2260]

If a witness fears being arrested and extradited to the Rwandan authorities, it is appropriate for the Chamber to *proprio motu* issue a certificate of safe conduct to that witness.[2261]

It is not required that the witness already be the subject of a prosecution—it is sufficient if s/he fears to be arrested.[2262]

An order for safe conduct is limited to immunity from prosecution for crimes which are within the jurisdiction of the ICTR, and which were committed before coming to the ICTR.[2263]

The immunity provided for a safe conduct certificate is only valid for the time during which the witness is present at the ICTR to give testimony.[2264]

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[2258] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Stay of Proceedings* (22 May 2009) at para. 22

[2259] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-T, *Decision on Prosecutor's Urgent Motion for Reconsideration or Certification to Appeal Trial Chamber II's Decision on Niyiramasuhuko's Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses Dated 1 March 2005* (14 April 2005) at para. 18

[2260] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK* (15 June 2005) at para. 32

[2261] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Certificate of Safe Conduct* (17 February 2009) at para. 2

[2262] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disqualification of Judge Byron and Stay of Proceedings* (20 February 2009) at para. 4

[2263] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Certificate of Safe Conduct* (17 February 2009) at para. 7

[2264] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Certificate of Safe Conduct* (17 February 2009) at para. 7

Since the purpose of a safe conduct certificate is to ensure that the witness would not be prosecuted or arrested by authorities in the requesting State, this same purpose means that the witness' protection when coming to testify at the Tribunal is limited to not being arrested or prosecuted for crimes within the jurisdiction of the Tribunal.[2265]

**special protective measure**

Special protective measures require a showing by the moving party that (1) the testimony is relevant and important to the party's case; (2) there must be a real, objective fear for the safety of the witness, and (3) only the least restrictive measure should be applied.[2266]

The requirement of relevance and importance of the testimony is met where the elements of the proposed testimony provide some relevance and some importance to the defence case, bearing in mind that the defence must be free to design its own strategy.[2267]

The subject fear of the witness is insufficient to justify special protective measures. The fear must be underscored by objective considerations.[2268]

Fear of being arrested because the witness is living in his country under misrepresentation does not justify special protective measures since measures cannot be implemented to prevent a lawful arrest by a State.[2269]

Fear of not being allowed back into witness' country of residence after traveling to Arusha not objectively substantiated where the defence failed to prove that the witness was subject to an expulsion order.[2270] However, decision reconsidered when defence provided additional information substantiating its claims.[2271]

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[2265] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Certificate of Safe Conduct* (24 March 2009) at para. 8

[2266] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at paras. 19-20; *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK* (15 June 2005) at para. 15

[2267] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 23

[2268] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 26; *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision on Protection of Defence Witnesses* (4 May 2005) at para. 2

[2269] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 32

[2270] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness WBNM* (17 June 2005) at paras. 19-20

[2271] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Pauline Niyiramasuhuko's Ex-Parte Extremely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Niyiramasuhuko's*

Fear of divorce if the witness' spouse learns that he testified is insufficient grounds for special protective measures.[2272]

Special protective measures for defence witness granted to include no communication of his identity by e-mail, caution by prosecution and other parties when conducting their investigations not to reveal status of witness directly or indirectly, and order that WVSS not communicate witness' identity to government of Rwanda.[2273]

**termination of protective measures**

A protection order remains in force even in respect of witnesses the prosecutor or the defence has not called. They may be called at a later stage of proceedings (e.g., Appeal) or may still need protection.[2274]

Witnesses not called or withdrawn by the prosecution or defence remain covered by protective orders as "potential" witnesses.[2275]

Protective orders remain in place even after the witness has testified.[2276]

**time for disclosure**

Trial Chamber decision delaying disclosure of identities of protected witnesses violated Rule 65(C) which required that disclosure take place prior to trial. However, the accused did not demonstrate prejudice from this error.[2277]

Disclosure of the identity of protected witnesses ordered 35 days prior to the beginning of the trial session at which the witness will testify,[2278] and in an earlier decision, "rolling" disclosure 35 days before the witness is to testify.[2279]

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*Strictly Confidential Ex-Parte Under Seal Motion for Additional Protective Measures for Defence Witness WBNM Dated 17 June 2005* (4 July 2005)

[2272] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 33

[2273] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion for Additional Protective Measures for Witness D-2-21-T* (7 May 2008) at paras. 27,29-30

[2274] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Prosecutor's Urgent Motion for an Immediate Restraining Order Against the Defence's Further Contact with Witness RM-10 and for Other Relief Based on the Ngeze Defence's Violations of Court Decisions and Rules* (17 January 2003) at para. 14.

[2275] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 21; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Protection of Edouard Karemera's Witnesses* (24 October 2008) at para. 7

[2276] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 8

[2277] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at paras. 85.86

[2278] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Reconsideration of the Chamber's 19 March 2004 Decision on Disclosure of Prosecution Materials* (3

Defence ordered to complete disclosure of the witness statements to the Prosecution, without redactions to protect the identity of the witness, thirty days prior to the commencement of its case.[2280]

Rolling disclosure of 21 days before witness testifies ordered,[2281] and 30 days ordered.[2282]

Rolling disclosure twenty-one days prior to the testimony of the witness has not crystallized as the Tribunal's practice. Full disclosure before trial is still often required.[2283] Defence ordered to disclose identity of witnesses 21 days before commencing its case.[2284]

Disclosure of unredacted statements 30 days before the beginning of the trial session at which the witness is to testify will not result in injustice.[2285]

For a single accused case, all unredacted statements ordered to be disclosed no later than 30 days before trial.[2286]

Defence in a single accused case ordered to disclose identities of its witnesses 30 days before commencement of defence case[2287] and 21 days before commencement of defence case.[2288]

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November 2004); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Urgent Motion Requesting an Adjournment and a Review of the Protective Measures Granted to Prosecution Witnesses* (7 April 2005) at para. 31

[2279] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses* (5 December 2001) at para. 22

[2280] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Protection of Witnesses* (25 August 2004) at para. 7

[2281] *Prosecutor v Renzaho*, No. ICTR-97-31-I, *Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment* (17 August 2005) at para.16

[2282] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007) at para. 12

[2283] *Prosecutor v Aloys Simba*, No. ICTR-2001-76-I, *Decision on Prosecution Request for Protection of Witnesses* (4 March 2004) at para. 6.

[2284] *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on Defence Motion for Protection of Witnesses* (10 April 2007) at para. 4; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Defence Motion for Protective Measures for Defence Witnesses* (16 May 2007)

[2285] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Motions for Reconsideration of Protective Measures for Prosecution Witnesses* (29 August 2005) at para. 11

[2286] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Prosecution Motion for Protective Measures* (18 September 2007) at para. 6; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Prosecution Motion for Protective Measures* (8 November 2007) at para. 6; *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Defence Motion for the Disclosure of Identifying Information in Relation to Witnesses to be Called by the Prosecution at Trial* (11 September 2009) at para. 15

[2287] *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Defence Request for Protective Measures* (14 December 2007) at para. 6

[2288] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Defence Motion for Protective Measures* (11 May 2009) at para. 17

As an exceptional measure for a particularly vulnerable witness, defence allowed not to disclose identity of witness until he arrived in Arusha ten days before he was scheduled to testify.[2289]

Protective measures do not pre-empt the right of the accused to have adequate time and facilities for the preparation of his defence. The disclosure of more than one thousand pages of witness statements raises doubt as to whether thirty days' notice gives the Defence adequate time to prepare, as required by Rule 69(C). Forty-five days' notice of the identity of the witness required.[2290]

Given the fact that the prosecution had reduced the number of witnesses and the duration of the trial would not be if originally expected, disclosure of the identity of all remaining witnesses was ordered, along with a list of the order in which the witnesses would be called.[2291]

Witness safety concerns did not justify modification of the time of disclosure of the witness' identity to the other parties in the case.[2292]

Defence witness safety concerns justified delayed disclosure of his identity until 14 days prior to his testimony.[2293]

Rule 66A(ii) provides that copies of statements of all witnesses the Prosecutor intends to call to testify at trial shall be made available to an accused no later than sixty days before the date set for trial. The Tribunal, however, pursuant to Rules 75 and 69, may order disclosure of witness statements to be in a redacted form until the witnesses come under the protection of the Tribunal or until a certain number of days before their testimony. Identities of witnesses and their non-redacted statements shall be disclosed to the Defence in sufficient time prior to the trial pursuant to Rule 69(C).[2294]

**video-link**

**alternatives to video-link**

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[2289] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Defence Request for Special Protective Measures for Witness HIN* (14 June 2007)
[2290] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Modification of Special Protective Measures for Witness BY (*15 March 2004)
[2291] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion for Reconsideration of the Trial Chamber's Decision and Scheduling Order of 5 December 2001* (18 July 2003)
[2292] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 39
[2293] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion for Additional Protective Measures for Witness D-2-21-T* (7 May 2008) at para. 24
[2294] *Prosecution v.Semanza*,No.ICTR-97-20-I,*Decision on Defence Extremely Urgent Application Ex parte for a Subpoena to Compel Consistent Disclosure, Better and Further Particulars* (23 August 2000) at para.17

Testimony by video link denied. Testimony of insider witness to be heard in The Hague. The accused has a right to confront his accuser. The Chamber was concerned whether it was possible to accurately assess the testimony and demeanour of a witness testifying via video link.[2295]

Trial Chamber erred by taking testimony of important prosecution witness in The Hague while the accused remained in Arusha and observed the proceedings by video-link. Inadequate reasons existed while the witness could not be brought to Arusha with extra security measures.[2296]

Upon reconsideration, the Trial Chamber reaffirmed that adequate security measures were available to have the witness testify live in Arusha.[2297]

However, with the same witness, another Trial Chamber held that it could adequately assess the witness' credibility and demeanour in testimony given via video-link.[2298]

**burden of proof**

The burden is on the party seeking the video-link to demonstrate the importance of the testimony, the inability or unwillingness of the witness to attend, and the existence of good reasons therefore.[2299]

Prosecution's failure to determine if witness would be willing to testify by video link, whether subpoena could be employed to compel the witness to appear, and whether witnesses were advised of security arrangements in Arusha, required that application for video-link testimony be denied.[2300]

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[2295] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence and Prosecution Motions Related to Witness ADE* (31 January 2006) at paras 32-33

[2296] *Zigiranyirazo v Prosecutor*, No. ICTR-2001-73-AR73, *Decision on Interlocutory Appeal* (30 October 2006)

[2297] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Prosecution Joint Motion for Reopening Its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza by Video-Link* (16 November 2006)

[2298] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE* (3 May 2006) at para.5

[2299] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Extremely Urgent Motion for Video-Link Testimony for Witness WDUSA in Accordance With Rule 71(A) and (D) of the Rules of Procedure and Evidence* (15 February 2006) at para. 8; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Sylvain Nsabimana's Extremely Urgent Strictly Confidential Under Seal Motion to Have Witness AGWA Testify via Video Link* (17 August 2006) at para. 8

[2300] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Prosecution Motion to Have Prosecution's Witnesses QCM and NN Testify by Closed Video Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence* (23 May 2005)

Video link denied where prosecutor failed to provide enough material to determine that health situation and security concerns were objectively justifiable.[2301]

**employment obligations**

Testimony by video-link of defence witness ordered *proprio motu* where witness was active-duty military officer and France contended that his travel to Arusha would be disruptive.[2302]

Testimony by video-link of prosecution witness denied where fear of losing employment was not credible basis for refusing to testify in Arusha.[2303]

Testimony of defence witnesses by video-link allowed where professional responsibilities made it inconvenient to travel to Arusha for testimony.[2304]

Where witness was reluctant to travel from Europe due to professional obligations and trauma of flight from Rwanda, Trial Chamber denied request for testimony by video-link in the absence of showing of refusal to testify in Arusha after being informed of legal and moral obligations and efforts to accommodate problems of the witness.[2305]

Practical inconveniences related to family or work, do not in themselves justify testimonies through video-link. However, a loss of the source of income of a refugee who supports a family is more than a "practical inconvenience". Video link authorized.[2306]

Where defence witness cited other commitments but failed to explain why others could not cover those commitments for him, request for video link was denied.[2307]

Video-link for defence witness authorized where witness had difficulty leaving place of work to travel to Arusha.[2308]

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[2301] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Prosecutor's Urgent Motion for Witnesses BPA, BLR, and BLN to Give Testimony via Video-Link* (14 February 2007); *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Decision on the Prosecution's Confidential Motion for Leave to Vary the Witness List, for Protective Measures for Witness BRW, and for the Testimony of Witness BRW via Closed Video Link* (7 April 2009) at para. 21

[2302] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion Under Article 28 and for Video-Conference Testimony Under Rule 54 of Colonel de St. Quention* (11 September 2006)

[2303] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-T, *Decision on Prosecutor's Extremely Urgent Motion for Testimony via Video-Link* (14 February 2011) at para. 8

[2304] *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Defence Request for Video-Link Testimony* (10 June 2008)

[2305] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion to Allow Witness DK-52 to Give Testimony by Video Conference* (22 February 2005)

[2306] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Testimony by Video Link* (29 June 2006) at para. 6

[2307] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on the Extremely Urgent Defence Motion for Witness KG-15 to Testify by Means of Video Link* (13 January 2010)

[2308] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decisions on Defence Motion for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List, and for Video-Link Testimony and on the Prosecution's Motion for Sanctions* (11 September 2007) at para. 25

Video-link testimony allowed for prosecution witness where there were travel restrictions on the witness by his employer.[2309]

**factors**

Witness protection matters, including testimony by video-link, are matters of great importance requiring the Trial Chamber to carefully weigh the security concerns expressed by the witnesses vis-à-vis the rights of the accused, especially the right to confront witnesses against him. Such a balancing exercise cannot be carried out in a vacuum.[2310]

There is a strong preference for live testimony. However, testimony by video link will be authorized when in the interests of justice. Factors to be considered include the importance of the testimony, the inability or unwillingness of the witness to attend, and whether good reason has been adduced for the inability or unwillingness to attend.[2311]

A Trial Chamber may authorize testimony by video-link when it is in the interests of justice based upon a consideration of (i) the importance of the testimony; (ii) the inability or unwillingness of the witness to attend; and (iii) a good reason adduced for the witness' inability or unwillingness to attend. A refusal to attend must be genuine and well-founded, giving the Chamber reason to believe that the testimony would not be heard unless the video-link is authorized.[2312]

Testimony by video link allowed where the testimony was important, the defence would be in a fair position to confront the witness, and the witness was unable or unwilling to come to the Tribunal.[2313]

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[2309] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Prosecution Motion to Hear the Testimony of Witness LM by Video-Link* (25 January 2007)

[2310] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Prosecutor's Urgent Motion for Witnesses BPA, BLR, and BLN to Give Testimony via Video-Link* (14 February 2007) at para. 11

[2311] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision Authorizing the Taking of the Evidence of Witnesses IMG, ISG, and BJK1 by Video-Link* (4 February 2005); *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Testimony by Video Conference* (20 December 2004); *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence and Prosecution Motions Related to Witness ADE* (31 January 2006) at para. 31; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Amended Motion to Have Defence Witnesses M005, M015, M036,M046, and M073 Testify by Closed Video-Link Pursuant to Rules 54 and 71(D)of the Rules of Procedure and Evidence* (7 February 2006) at para. 18; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Supplemental Motion to Have Defence Witness MO72 Testify by Closed Video-Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence* (21 February 2006) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Confidential Motion for Special Protective Measures for Witness ADE* (3 May 2006) at para. 4

[2312] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for a Hearing by Video-Link for Witness BNZ60* (13 March 2007) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion to Hear Witness NKM's Testimony by Video Conference* (13 August 2008) at para. 3

[2313] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Special Protective Measures for Witness G and T and to Extend the Decision on Protective Measures for the Prosecutor's Witnesses in the Nzirorera and Rwamakuba Cases to Co-Accused Ngirumpatse and*

When ruling on a request for testimony by video conference, the Trial Chamber must ensure that the parties' ability to assess the testimony and confront the witness is not impaired by the fact that the testimony is taken by video-link.[2314]

Whenever testimony by video-link has been granted, it has been only when it was an absolute necessity. Each time the security concerns of a witness could be satisfied by less restrictive measures, this measure was favored.[2315]

In ruling on an application for testimony by video-link, the Trial Chamber must consider the interests of justice, whether the accused would be in a fair position to confront the witness, and whether the witness was unable or unwilling to come to Arusha and testify.[2316]

**fear of RPF reprisals**

Testimony of defence witnesses by video link granted where witness refugee status precluded travel and second witness was in ill health, but fear of reprisal from RPF was not sufficient for other witnesses to justify video link.[2317]

Witness with pending asylum application in the United States and who feared harassment by the government was not shown to have objectively reasonable fears and request for video link testimony was denied.[2318]

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*Karemera and Defence's Motion for Immediate Disclosure* (20 October 2003) at para. 13; *Prosecutor v Muvunyi*, No. ICTR-2000-5A-T, *Decision on Prosecutor's Extremely Urgent Motion Pursuant to Trial Chamber II Directive of 23 May 2005 for Preliminary Measures to Facilitate the use of Closed Video-Link Facilities* (20 June 2005)

[2314] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion to Hear Witness NKM's Testimony by Video Conference* (13 August 2008) at para. 4

[2315] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 40; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Extremely Urgent Motion for Video-Link Testimony for Witness WDUSA in Accordance With Rule 71(A) and (D) of the Rules of Procedure and Evidence* (15 February 2006) at para. 7; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Defence Witness BK* (15 June 2005) at para. 29-31

[2316] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Prosecution Motion to Have Prosecution's Witnesses QCM and NN Testify by Closed Video Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence* (23 May 2005) at para. 20; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Confidential Motion for the Testimony of Defence Witness 1.15 to be Taken by Video Link* (8 December 2005) at para. 3

[2317] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Extremely Urgent and Confidential Request for Video-Link Testimony of Witnesses Y1, S2, Y3, F10 and F11* (9 June 2008)

[2318] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Extremely Urgent Strictly Confidential Motion to Have Witness NMBMP Testify Via Video-Link* (2 March 2006)

Testimony by video link does not solve the problem of potential harassment of the witness' relatives living in Rwanda, or retaliation against the witness after giving the testimony. With respect to fear of being arrested by Rwandan authorities, this can be addressed by providing safe-conduct to the witness rather than by video-link testimony.[2319]

Video link for defence witnesses who were members of the Habyarimana family denied for insufficient reason to believe their security would be endangered in Arusha.[2320]

**health issues**

Video link denied where witness had medical certificate that advised against travelling but did not specify the nature or gravity of the illness.[2321] Decision later reversed where additional details were provided showing that witness had serious illness.[2322]

Video link denied for 78-year-old witness where defence failed to submit medical evidence supporting claim that travel to Arusha was not possible due to advanced age.[2323]

Video link granted for 78-year-old man suffering from hypertension.[2324]

Video link granted for elderly witness with hypertension, on an exceptional basis, even where medical certificate was lacking.[2325]

Video link denied for ill witness where defence failed to advise Trial Chamber of need for video-link when applying to add witness to the witness list.[2326]

Testimony of defence expert witness Strizek allowed by video-link where his health did not permit travel to Arusha.[2327]

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[2319] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses* (1 March 2005) at para. 42-43

[2320] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Testimony by Video-Link: Habyarimana Family* (25 November 2009)

[2321] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Sylvain Nsabimana's Extremely Urgent Strictly Confidential Under Seal Motion to Have Witness AGWA Testify via Video Link* (17 August 2006) at para. 10

[2322] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Sylvain Nsabimana's Extremely Urgent Motion to Reconsider Decision on Sylvain Nsabimana's Extremely Urgent Strictly Confidential Under Seal Motion to Have Witness AGWA Testify via Video Link* (5 September 2006)

[2323] *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Defence Motion for Testimony of Witness DIH via Video-Link* (5 September 2007)

[2324] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Authorize Witness DWAN-7 to Testify via Video-Link* (12 April 2011) at para. 12

[2325] *Prosecution v Nsengimana*, No. ICTR-2001-69-T, *Decision on Request for Video Link Testimony (Witness XFR38)*, (5 September 2008)

[2326] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu Request for Video-Link Testimony of Witness DE11-4* (9 November 2007)

Defence witness with health problems and employer who forbid travel allowed to testify from Rwanda by video-link.[2328]

Medical grounds normally justify allowing video-link testimony.[2329]

Witness confined to nursing home would be heard by video-link.[2330]

General Dallaire authorized to testify by video link where his medical condition might require care and resources which are not available in Arusha.[2331]

Witness who just gave birth allowed to testify by video-link considering tender age of baby.[2332]

Witness caring for ailing spouse allowed to testify by video-link.[2333]

Witness who had sole care and custody of 5-year-old child allowed to testify by video-link.[2334]

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[2327] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Confidential Motion Requesting the Chamber to Hear Expert Witness Helmut Strizek in The Hague or Alternatively to Authorize Testimony by Video-Link* (11 September 2006); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Sagahutu's Request to Hear Expert Witness Dr. Helmut Strizek by Video-Link* (22 August 2008)

[2328] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Defence Motion to Hear the Testimony of Witness RLN by Video-Link* (17 July 2007)

[2329] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition* (9 February 2005); *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Testimony by Video Conference* (20 December 2004); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Extremely Urgent Motion for Video-Link Testimony for Witness WDUSA in Accordance With Rule 71(A) and (D) of the Rules of Procedure and Evidence* (15 February 2006) at para. 10; *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Prosecution Request for Video-Link Testimony* (14 February 2007); *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Prosecution's Urgent Motion for Witnesses BPA and BLR to Give Testimony via Video-Link* (1 March 2007) at para. 13; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Video-Link Testimony from Witness LJ-1* (27 April 2007); *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Decision on the Prosecution Requests for the Video-Link Testimonies of Witness QX,BYO, and BS* (6 April 2009) at para. 12

[2330] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Video Link Testimony of Jean Baptiste Butera* (19 March 2008)

[2331] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution Request for Reconsideration of the Chamber's Decision of 15 September 2006 Concerning the Testimony of Witness Romeo Dallaire by Video-Link* (20 October 2006)

[2332] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Supplemental Motion to Have Defence Witness MO72 Testify by Closed Video-Link Pursuant to Rules 54 and 71(D) of the Rules of Procedure and Evidence* (21 February 2006)

[2333] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Request for Video-Link Testimonies of Witnesses DC2-2 and DE8-6* (31 October 2007) at para. 5

[2334] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Extremely Urgent and Confidential Motion to Have Witness WDK Testify via Video-Link* (7 December 2006)

**immigration issues**

Testimony by video link allowed where attorney for defence witness advised him not to undertake foreign travel to jeopardize his residency status.[2335]

Video link denied for defence witness where witness lacked travel documents to leave Belgium. Trial Chamber instead issued order for cooperation to Belgium.[2336]

Witness subject to deportation proceedings in Canada whose lawyer represented that he could not leave that country made sufficient showing for testimony by video link.[2337]

Testimony by video link allowed where witness could not return to Belgium if he travelled to Arusha due to expulsion order issued by the Belgian government or other refugee status issues.[2338]

Defence witness allowed to testify via video-link where South African authorities would not give permission to travel until after the scheduled close of the defence case.[2339]

Defence witness allowed to testify by video link where she was subject to immigration proceedings in the United States and would not be allowed to return if she left the country.[2340]

**importance of testimony**

Testimony of defence witnesses by video link denied where proposed testimony was cumulative to other evidence.[2341]

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[2335] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Testimony of Witness Amoudou Deme by Video Link* (29 August 2006); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Confidential Motion from Mr. Bicamumpaka to Allow Video-Link Testimony for Witness CF-1* (23 January 2008)
[2336] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for a Hearing by Video-Link for Witness BNZ60* (13 March 2007)
[2337] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion for Subpoena to Leon Mugesera* (29 May 2008) at para. 6
[2338] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Pauline Niyiramasuhuko's Ex-Parte Extremely Urgent Motion for Reconsideration of Trial Chamber II's Decision on Niyiramasuhuko's Strictly Confidential Ex-Parte Under Seal Motion for Additional Protective Measures for Defence Witness WBNM Dated 17 June 2005* (4 July 2005); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Décision on Casimir Bizimungu's Requete en Extrême Urgence en Strictement Confidentielle Ex Parte Sous Scelles en vue d'Entendre le Témoin WAA par voie de Vidéoconférence* (11 December 2006); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Request for Video-Link Testimonies of Witnesses DC2-2 and DE8-6* (31 October 2007) at para. 7
[2339] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on the Defence Motion for the Deposition of Witness PS2 to be Taken by Video-Conference* (20 April 2006)
[2340] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Reconsideration of the Motion of 2 March 2006* (11 June 2007)
[2341] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion for a Hearing by Video-Link for Protected Witness BNZ-60 and Mr. Gaspard Musabyimana* (9 November 2007)

Evidence which goes directly to prove the alibi of the Accused as important to the Defence case to be heard by video-link evidence.[2342]

Despite incomplete statements as to the substance of the witnesses' testimony, it was in the interests of justice to grant video-link testimony for defence witnesses.[2343]

Trial Chamber not shown to have erred in denying video link where accused failed to demonstrate that testimony from that witness would be different from that of other defence witnesses who were heard.[2344]

**presence of counsel at site of testimony**

Representation by the parties at the point of transmission ensures that the conditions of testimony are impartial and fair.[2345]

Although it would have been preferable for both parties to be present, taking of video link testimony where prosecution but not defence was represented at the site of the witness was not error where no showing of impropriety was made, the Registry was present at the video link, and there was insufficient explanation for the defence failure to appear at the site of the witness.[2346]

**refusal to travel**

Although it is not necessary that the reason for the refusal to attend be objectively justified, a showing must at least be made that the witness has a credible basis for the refusal, and that those grounds are genuinely held.[2347]

Testimony by video link allowed where witness refused to testify in Arusha and Belgian law did not allow for subpoenas to testify outside of the country.[2348]

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[2342] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Testimony by Video Link* (29 June 2006) at para. 3

[2343] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Amended Motion to Have Defence Witnesses M005, M015, M036,M046, and M073 Testify by Closed Video-Link Pursuant to Rules 54 and 71(D)of the Rules of Procedure and Evidence* (7 February 2006) at para. 22

[2344] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 26

[2345] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecution Request for Testimony of Witness BT via Video Link* (8 October 2004) at para. 12; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Prosecution's Urgent Motion for Witnesses BPA and BLR to Give Testimony via Video-Link* (1 March 2007) at para. 15

[2346] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 26

[2347] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Video Conference Testimony for Kabiligi Witnesses KX-38 and KVB-46* (5 October 2006); *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-T, *Decision on Prosecutor's Extremely Urgent Motion for Testimony via Video-Link* (14 February 2011) at para. 6

[2348] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecution Request for Testimony of Witness BT via Video Link* (8 October 2004)

Where the witness is unwilling to attend, his refusal must be genuine and well-founded, giving the Chamber reason to believe that the testimony would not be heard unless the video conference is authorized.[2349]

Where defence had explained security procedures and witness nevertheless refused to testify, sufficient showing was made authorizing video link testimony.[2350]

**security issues**

Testimony by video-link of defence witness denied where witness' fear for her security could adequately be addressed by other protective measures.[2351]

Testimony of prosecution witness by video link denied where no affidavit was submitted by the witness outlining his security fears and no report from the Witnesses and Victims Support Section verified a security risk to the witness. The Chamber must be sure that all appropriate alternatives have been explored before authorizing testimony by video link.[2352]

Testimony of defence witness by video-link denied where insufficient information provided to justify witness' fear for his security were he to testify in Arusha.[2353]

Witness who refused to come to Arusha to testify for safety reasons and whose testimony was important allowed to testify via video link.[2354]

Defence witnesses had well-grounded fears for their security if forced to testify at the seat of the Tribunal and guarantee of safe passage was insufficient to refuse video-link testimony.[2355]

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[2349] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Testimony by Video Link* (29 June 2006) at para. 2; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motions for Video-Link Hearings for Witnesses BNZ-104 and JFPR-2* (21 February 2007)

[2350] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Witness Z-06 to Give Testimony by Video Link* (20 June 2006)

[2351] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Video-Link Testimony of Witness SLB* (3 October 2007)

[2352] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Prosecutor's Motion for Testimony via Video-Link* (6 October 2010)

[2353] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu Request for Witness DE4-12 to Testify via Video-Link* (2 November 2007)

[2354] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Prosecution Motion for Witness BPP to Testify via Video Link* (27 March 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Witness Z-06 to Give Testimony by Video Link* (20 June 2006); *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Prosecution's Urgent Motion for Witnesses BPA and BLR to Give Testimony via Video-Link* (1 March 2007) at para. 14; *Prosecutor v Renzaho*, No. IT-97-31-T, *Decision on Defence Request for Video-Link Testimony* (27 June 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion to Allow Defence Witnesses to Testify via Video Link* (2 April 2008) at para. 8

[2355] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motions for Video-Link Hearings for Witnesses BNZ-104 and JFPR-2* (21 February 2007)

Video link in Rwanda on account of safety concerns of prosecution witnesses granted.[2356]

Video link in Europe on account of safety concerns of defence witnesses granted.[2357]

Video link authorized for defence witness who feared for his safety due to arrest of defence investigator in Rwanda and disclosure of identity of witness.[2358]

Video-link for defence witnesses granted where witness were high profile individuals who were anxious about their security in Arusha. While the Trial Chamber could not determine if the fears were objectively justified, it was convinced they were genuinely held.[2359]

French officers allowed to testify by video-link for the defence where French government expressed security concerns.[2360]

Trial Chamber did not err in refusing video link for defence witness who feared for her safety and could not leave her family for a long period of time.[2361]

Video link for defence expert denied where fears for her safety were not documented.[2362]

**travel difficulties**

Testimony by video link of defence witness denied where witness lived in remote area of Rwanda and travel to Arusha would be inconvenient were found to be insufficient reasons to justify testimony by video link.[2363]

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[2356] *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Decision on the Prosecution Requests for the Video-Link Testimonies of Witness QX,BYO, and BS* (6 April 2009) at para. 11
[2357] *Prosecutor v Setako*, No. ICTR-04-81-T, *Decision on Defence Motions for Video-Link Testimony* (28 May 2009)
[2358] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decisions on Defence Motion for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List, and for Video-Link Testimony and on the Prosecution's Motion for Sanctions* (11 September 2007) at para. 24
[2359] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Video Conference Testimony for Kabiligi Witnesses KX-38 and KVB-46* (5 October 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Video Conference Testimony for Kabiligi Witnesses YUL-39 and LAX-23 and to Hear Testimony in Closed Session* (19 October 2006)
[2360] *Prosecution v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Request for Reconsideration of the Chamber's Decision dated 9 June 2008* (16 July 2008); *Prosecution v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Urgent Application to Hear Witness Michael Robardey by Video Link* (17 July 2008)
[2361] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 224
[2362] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Urgent Motion to Hear Testimony of Expert Witness Dr. Susan Thomson via Video Link* (9 March 2011)
[2363] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Confidential Motion for Video Link Testimony of Witness RWU* (5 May 2008)

Testimony by video link allowed where defence witness was incarcerated in Belgium and Belgian law did not allow prisoner to leave country.[2364]

Defence witness needed for his own trial in Rwanda allowed to testify by video-link.[2365]

Senegalese officials allowed to testify by video-link where they were unavailable to testify in Arusha due to Senegalese elections.[2366]

Video link for person serving sentence of house arrest in Belgium denied where no showing was made that witness could not be transferred to Tanzania and where witness' subjective fears of testifying in Arusha were not substantiated.[2367]

**Rule 70—matters not subject to disclosure**

**(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.**
**(B) If the Prosecutor is in possession of information which has been provided to him on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.**
**(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance.**
**(D) If the Prosecutor calls as a witness the person providing or a representative of the entity providing information under this Rule, the Trial Chamber may not compel the witness to answer any question the witness declines to answer on grounds of confidentiality.**
**(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to limitations contained in Sub-Rules (C) and (D).**

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[2364] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva's Motion for Witness Higaniro to Testify by Video Conference* (29 August 2006)
[2365] *Prosecutor v Nchamihigo ,* No. ICTR-2001-63-T, *Decision on the Defence Motion to Hear the Testimony of Witness RAN by Video-Link* (5 September 2007)
[2366] *Prosecutor v Ngirabatware,* No. ICTR-99-54-T, *Decision on Prosecution Motion for Testimony via Video Link of Prosecution Rebuttal Witnesses…*(5 March 2012) at para. 28
[2367] *Prosecutor v Nizeyimana,* No. ICTR-2000-55C-T, *Decision on Defence Motion to Reconsider the Decision on Defence Motion for a Hearing by Video-Link for Witness BEJ01* (6 May 2011)

**(F) Nothing in Sub-Rule (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (C) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.**

**prosecutor's internal documents**

Because of the prosecutor's duty to assist the Tribunal to arrive at the truth and to do justice, the provisions of Rule 70(A) must be restrictively interpreted.[2368]

Oral communications between Counsel and a witness while preparing a witness for testimony fall outside the scope of documents protected under Rule 70(A).[2369]

Memoranda or reports prepared by a special counsel retained to investigate allegations of false testimony were covered by Rule 70(A).[2370]

Rule 70(A) does not cover information sought from the Registry.[2371]

Investigator's mission report was protected from disclosure by Rule 70(A).[2372]

When a document had been disclosed to the defence in another case, the prosecution could not claim it to be an internal document and protected from disclosure under Rule 70(A).[2373]

When a document has been disclosed to a party who is not a member of the Office of the Prosecutor, it can no longer be regarded as an internal document.[2374]

Comments and observations of prosecution, recorded on a videotaped interview, did not amount to "reports, memoranda, or other internal documents prepared by a party

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[2368] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Report on Interahamwe* (28 June 2007) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 11

[2369] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing* (1 April 2005) at para. 30

[2370] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Motions for Disclosure Under Rules 66 and 68 of the Rules of Procedure and Evidence* (22 December 2008) at para. 36; *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch* (10 February 2009) at para. 10

[2371] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF* (28 April 2009) at para. 6

[2372] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 19th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Jean-Marie Vianney Mudahinyuka* (9 February 2009) at para. 10

[2373] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Inspection of Report on Interahamwe* (28 June 2007) at para. 14

[2374] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 10

or its assistants or representatives in connection with the investigation or preparation of its case."[2375]

A question once put to a witness is not an internal note anymore; it does not fall within the ambit and thereby under the protection of Rule 70(A) of the Rules.[2376]

Investigator's notes or memoranda of interview with witness are covered by Rule 70(A) and are exempt from disclosure.[2377]

Materials concerning policy of non-prosecution of RPF did not relate to a "case" and therefore did not fall within the protection of Rule 70(A).[2378]

Any written report arising from the visit between a staff member of OTP and a prosecution witness, as well as any memoranda of the purpose of the visit, would be exempt from disclosure under Rule 70(A).[2379]

**information from third parties**

Although there is no express provision allowing limited disclosure to the defence pursuant to Rule 70, the interest of fairness and equality of arms requires that these provisions also be extended to the defence so that it could obtain information from the United States government.[2380]

Identity of RPF insiders, who had been promised by prosecution that their identities would not be revealed, were protected from disclosure by Rule 70(B).[2381]

**Rule 71—depositions**

**(A) At the request of either party, a Trial Chamber may, in exceptional circumstances and in the interests of justice, order that a deposition be taken for use**

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[2375] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on the Motions of the Parties Concerning the Inspection and Disclosure of a Videotape* (28 April 2003) at para. 15.
[2376] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 34
[2377] *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. 16
[2378] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents* (30 September 2009) at para. 11
[2379] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Further Motion for Order to Registrar to Provide Information to the Defence Regarding Prosecution Visits to Witness GAA at UNDF* (8 June 2009) at para. 19
[2380] *Prosecutor v. Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Very Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence by the United States Government* (11 December 2006); *Prosecutor v. Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Confidential Urgent Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence by the United States Government* (28 May 2007) at para. 4
[2381] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's 2nd Motion for Disclosure of Evidence, for Renewed Authorization to Interview Certain Prosecution Witnesses, and Postponement of the Testimony of Witnesses CNAA and CNAC* (17 December 2009) at para. 33

**at trial, and appoint, for that purpose, a Presiding Officer.**
**(B) The motion for the taking of a deposition shall be in writing and shall indicate the name and whereabouts of the witness whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the exceptional circumstances justifying the taking of the deposition.**
**(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the witness.**
**(D) The deposition may also be given by means of a video-conference.**
**(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Trial Chamber.**

**admission into evidence**

Entire transcript of deposition of ill witness and related exhibits admitted into evidence by Trial Chamber after determining that objections during course of deposition were not well founded.[2382]

**counsel**

Duty Counsel could represent interest of accused at deposition while new lead counsel was being appointed.[2383]

**cross examination**

The accused in all cases in which the deposition of the witness might be offered have a right to be present and cross examine the witness at the deposition.[2384]

**health issues**

The advanced age, frailty, and poor health of the witness constitute an exceptional circumstance.[2385]

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[2382] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Admit Portions of the Deposition of Witness RDG* (23 July 2008)
[2383] *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision on the Request of the Accused for Certification to Appeal Against the Decision Authorising the Deposition of Prosecution Witness QX* (27 November 2003)
[2384] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Decision on Urgent Motion for the Deposition of Joseph Serugendo* (8 June 2006) at para. 5
[2385] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for Deposition of Witness OW* (5 December 2001) at para. 12; *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision on Prosecutor's Extremely Urgent Motion for the Deposition of Witness QX* (11 November 2003); *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on the Defence's Extremely Urgent Motion for a Deposition* (11 March 2004) at para. 7

Deposition would not be ordered where witness' psychiatric state was such that it could jeopardize witness' mental health.[2386]

Deposition of prosecution witness in poor health was authorized.[2387]

The rapidly deteriorating health of the witness constituted exceptional circumstances for the taking of his deposition.[2388]

Witness whose health did not allow him to travel to Arusha, and who might not live much longer, would be heard by the Trial Chamber by video-link on an exceptional basis, rather than having his deposition taken.[2389]

However, upon receipt of medical information that witness could not travel to location of video-link, deposition was authorized.[2390]

**importance of testimony**

The prosecutor failed to establish that this witness' testimony is sufficiently important to make it unfair to proceed without it, where the prosecution intends to call more than two hundred witnesses.[2391]

**presence of the accused**

The accused are permitted to attend the deposition of a witness taken pursuant to this Rule.[2392]

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[2386] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion to Allow Witness DBO to Give Testimony by Means of Deposition* (25 August 2004)
[2387] *Prosecutor v Munyakazi*, No. ICTR-97-36A-T, *Decision on Prosecutor's Extremely Urgent Motion for the Deposition of Witness BWW* (20 May 2009) at para. 5; *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on Callixte Nzabonimana's Motion for Protection Measures and Deposition for Witness RW-2* (27 October 2009)
[2388] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Decision on Urgent Motion for the Deposition of Joseph Serugendo* (8 June 2006) at para. 4
[2389] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Urgent Decision on Prosper Mugiraneza's Motion for the Testimony of Witness RDG to be Taken by Deposition and Chamber's Order for Video-Link Testimony* (24 January 2008) .
[2390] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Extremely Urgent Decision Reconsidering Trial Chamber's Decision of 24 January 2008 and Order for the Testimony of Witness RDG to be Taken by Deposition* (28 January 2008); *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, *Extremely Urgent Decision to Reconsider the Trial Chamber's Decision of 6 April 2009 and to Order the Testimony of Witness QX to be Taken by Deposition* (15 April 2009)
[2391] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for Deposition of Witness OW* (5 December 2001) at para. 15
[2392] *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision on the Request of the Accused for Certification to Appeal Against the Decision Authorising the Deposition of Prosecution Witness QX* (27 November 2003) at para. 7

**proprio motu**

A Trial Chamber does not have the power to order a deposition in the absence of a request by one of the parties.[2393]

**requirements**

Criteria in determining the "interests of justice" prong include: 1) that the testimony of the witness is sufficiently important to make it unfair to proceed without it; 2) that the witness is unable or unwilling to come to the Tribunal; 3) that the Accused will not thereby be prejudiced in the exercise of his right to confront the witness; and 4) that the practical considerations (including logistical difficulty, expense, and security risks) of holding a deposition in the proposed location do not outweigh the potential benefits to be gained by doing so.[2394]

**security concerns**

The Trial Chamber is vested with discretion to order a deposition only where there are exceptional circumstances, *and* the deposition would be in the interests of justice. Applications for depositions based exclusively on a witness's security concerns have been consistently denied. For an important witness, his credibility should be tested before the Trial Chamber which can then directly observe the witness's demeanour.[2395]

**statement of matters for examination**

Information provided by the defence was vague and not sufficiently precise to constitute a statement of the matters for examination. The other party, in deposition applications in particular, is entitled to know what the witness will testify to, given that deposition is an exceptional measure.[2396]

**unavailability of a judge**

The unavailability of a judge constitutes an exceptional circumstance and may allow testimony by deposition. However, a ruling on a deposition motion can only be made by a full Chamber, and so Rule 71 can only be used where the Accused consents.[2397]

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[2393] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion Under Article 28 and for Video-Conference Testimony Under Rule 54 of Colonel de St. Quention* (11 September 2006) at para. 5
[2394] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion to Allow Witness DBO to Give Testimony by Means of Deposition* (25 August 2004) at para. 8
[2395] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecution Request for Deposition of Witness BT* (4 October 2004)
[2396] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on the Defence's Extremely Urgent Motion for a Deposition* (11 March 2004) at para. 8
[2397] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on the Prosecutor's Request for Depositions of Ngeze Witnesses* (7 March 2003), para. 7.

**unwilling witnesses**

A deposition is an alternative method, from live in-court testimony, of hearing a party's witness, and is not a means by which to compel witnesses who do not wish to testify.[2398]

**video-link**

It would not be in the interests of justice to authorize a deposition where video-link testimony is feasible; this is a more direct form of evidence and allows the full bench to observe the witness's demeanour.[2399]

Certain factors to be considered for deposition by video-link include: (1) the importance of the testimony; (2) whether it is in the interests of justice to grant the application to use video link; (3) the prejudice to the Accused in his right to confront a witness; (4) whether the witness is unable or unwilling to come to Arusha. The Trial Chamber should avoid testimonies outside Arusha unless such a solution is absolutely necessary.[2400]

**Rule 71 bis—preservation of evidence by special depositions for future trials**

**(A) If within a reasonable time, a warrant of arrest has not been executed, the Prosecutor may submit a request to the President that evidence relating to the indictment be preserved for a future trial by special deposition recorded in a proceeding conducted by a single Judge.**
**(B) If a warrant of arrest has been executed, but the accused has not yet been transferred to the Tribunal, the Prosecutor or the accused's Counsel, if any, may submit a request to the President that the evidence of particular witnesses be preserved for a future trial by special deposition recorded in a proceeding conducted by a single Judge.**
**(C) Upon receiving a request pursuant to Sub-Rule (A) or (B), the President shall refer the matter to a Trial Chamber and, if the accused is not represented by counsel, shall instruct the Registrar to appoint Duty Counsel pursuant to Rule 44 bis to represent the interests of the accused.**
**(D) The Trial Chamber shall hear the Prosecutor and Counsel representing the interests of the accused in a closed session and may, where appropriate, receive ex parte information from the Prosecutor on the whereabouts of the accused.**
**(E) The Trial Chamber may grant a request pursuant to Sub-Rule (A), if satisfied that:**

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[2398] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Extremely Urgent Defence Motion for the Deposition of Alibi Witnesses* (14 June 2004) at para. 8
[2399] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Request for Taking the Evidence of Witness FMP1 by Deposition* (9 February 2005) at para. 4
[2400] *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures* (12 September 2001) at paras 35-37.

**(i) Reasonable efforts have been made to execute the warrant of arrest;**
**(ii) The execution of the warrant of arrest is not likely to take place within a reasonable time; and**
**(iii) It is in the interests of justice to do so.**
**(F) The Trial Chamber may grant a request pursuant to Sub-Rule (B), if satisfied that exceptional circumstances exist and that it is in the interests of justice to do so.**
**(G) When granting a request pursuant to Sub-Rules (A) and (E) or (B) and (F), the Trial Chamber shall:**
**(i) With respect to a decision pursuant to Sub-Rules (A) and (E), request the Registrar to issue a public notice of the decision and the arrest warrant against the accused.**
**(ii) Request the Registrar to assign Counsel representing the interests of the accused such staff as the Registrar deems necessary.**
**(H) The Registrar shall transmit the notice pursuant to Sub-Rule (G)(i) to the national authority of the State of Rwanda and any other State or States, where the accused and/or his or her family may be known or believed to be or to have, at any time, resided, for publication in newspapers or for broadcast via radio, transmission via internet or television, or by any other appropriate means notifying the public including, if possible, the family of the accused, that, pursuant to a decision of the Tribunal, the taking of special depositions for the preservation of evidence will commence after the expiry of 30 days from the date of this notification.**
**(I) Upon a decision from a Trial Chamber granting a request pursuant to Sub-Rules (A) and (E), Counsel representing the interests of the accused may submit a request to the President that evidence relevant to the case of the accused be preserved by way of special deposition. Sub-Rules (C), (D), (E) and (G)(ii) shall apply mutatis mutandis.**
**(J) The President shall designate which single Judge shall conduct the special deposition proceedings.**
**(K) Rules 46, 54, 56, 66-70, 73-73 ter, 75-77, 80-81, 90-91, 93 and 95-97 shall apply, mutatis mutandis, to the special deposition proceedings with the following modifications:**
**(i) The single Judge shall have the same powers as a Trial Chamber.**
**(ii) The Duty Counsel shall have the same rights and duties as a Defence Counsel.**
**(iii) Disclosure pursuant to Rule 66 (A) (i) and (ii) shall be made no later than 60 days before the time set for the commencement of the taking of depositions. Notwithstanding, the single Judge may exceptionally allow that a particular witness be deposed at an earlier date upon a showing that the deposition might not otherwise be possible.**
**(iv) The special deposition proceedings shall take place in closed sessions.**
**(v) The taking of depositions shall be video-recorded, in addition to other forms of recording, unless, under extraordinary circumstances, a special deposition is taken in a place where video-recording facilities are not available or for other reasons, cannot be organized.**
**(L) If a party has obtained a written statement that it wishes to tender into evidence pursuant to Rule 92 bis, the single Judge shall make a preliminary finding, if required, whether the witness shall appear for cross-examination or whether to**

**request the Registrar to proceed pursuant to Rule 92 bis (B)(i)(a).**
**(M) Exhibits used in connection with the examination of witnesses and written statements that have given rise to cross-examination pursuant to Sub-Rule (L) shall be marked for identification and kept on the file.**
**(N) At the subsequent trial of an accused before a designated Trial Chamber, the Registrar shall as soon as practicable transmit copies of the file of the record of the special depositions and exhibits kept on the file to the parties. On the application of either party, the Trial Chamber may admit special depositions and exhibits from the file that are relevant and of a probative value not outweighed by their prejudicial effect.**
**(O) Notwithstanding Sub-Rule (N), a special deposition may only be admitted into evidence in lieu of live testimony if:**
**(i) The opposite party does not oppose the admission, or**
**(ii) Rule 92 bis (D), as read in conjunction with Rule 92 bis (A) and (E), is applicable, or**
**(iii) The Chamber is satisfied that the deponent is deceased, can no longer with reasonable diligence be traced, is by reason of bodily or mental condition unable to testify orally, or in exceptional circumstances is unwilling to testify following threats or intimidation, and**
**(iv) It is in the interests of justice to do so.**

The prosecution demonstrated that reasonable efforts had been made to execute the warrant of arrest for Felicien Kabuga and that the execution of the warrant was not likely to take place within a reasonable time.[2401]

While the lack of instructions from the accused and fact that accused did not choose the duty counsel may affect the fairness of the procedure, the taking of depositions in the case of a fugitive were in the interests of justice because it would be for a Trial Chamber hearing the case of the accused after he was apprehended to decide whether to admit the deposition evidence.[2402]

Disclosure of unredacted witness statements to Duty Counsel for Rule 71 *bis* depositions was required.[2403]

**Rule 72—preliminary motions**

**(A) Preliminary motions, being motions which:**
**(i) challenge jurisdiction;**
**(ii) allege defects in the form of the indictment;**
**(iii) seek the severance of counts joined in one indictment under Rule 49 or seek**

[2401] *Prosecutor v Kabuga*, No. ICTR-98-44B-R71*bis*, *Decision on the Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial* (15 March 2011) at paras. 9,12
[2402] *Prosecutor v Kabuga*, No. ICTR-98-44B-R71*bis*, *Decision on the Prosecutor's Request for Preservation of Evidence by Special Deposition for a Future Trial* (15 March 2011) at paras. 15-16
[2403] *Prosecutor v Kabuga*, No. ICTR-98-44B-R71*bis*, *Order for Disclosure and Protective Measures* (16 March 2011)

**separate trials under Rule 82 (B); or**
**(iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)**
**shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. The Trial Chamber may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.**
**(B) Decisions on preliminary motions are without interlocutory appeal, save:**
**(i) in the case of motions challenging jurisdiction, where an appeal by either party lies as of right;**
**(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.**
**(C) Appeals under paragraph (B)(i) shall be filed within fifteen days and requests for certification under paragraph (B)(ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.**
**If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.**
**(D) For purposes of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:**
**(i) any of the persons indicated in Articles 1, 5, 6 and 8 of the Statute;**
**(ii) the territories indicated in Articles 1, 7 and 8 of the Statute;**
**(iii) the period indicated in Articles 1, 7, and 8 of the Statute; or**
**(iv) any of the violations indicated in Articles 2, 3, 4 and 6 of the Statute.**
**(E) Objections to the form of the indictment, included an amended indictment, shall be raised by a party in one motion only, unless otherwise allowed by a Trial Chamber.**
**(F) Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.**

**contempt**

It is not possible to challenge the jurisdiction of the Tribunal to prosecute individuals for contempt under Rule 72.[2404]

**Decision**

The Trial Chamber must dispose of preliminary motions in *limine litis*; which means that the Chamber shall address a preliminary motion it is seized of before proceeding to trial.[2405]

Trail Chamber must decide jurisdictional challenges before trial and cannot defer a decision because the charge is in the alternative, or the count alleges several modes of liability.[2406]

The Trial Chamber need not dispose of preliminary motions before resuming a trial which has already commenced.[2407]

**evidentiary issues**

Objections to the indictment based on errors of fact, lack of evidence, and lack of impartiality are objections to the substance of the indictment, rather than its form, and cannot be the subject of a preliminary motion.[2408]

**interlocutory appeals**

**jurisdictional**

Challenge that joint criminal enterprise liability does not apply to genocide concerns the correct application of Article 6 and whether the indictment as pleaded falls within it and thus raises an issue of jurisdiction under Rule 73(D)(iv).[2409]

Challenge that joint criminal enterprise liability does not apply to enterprises of nationwide scope raises an issue of jurisdiction under Rule 73(D)(iv).[2410]

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[2404] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment* (17 December 2008) at para. 17

[2405] *Prosecutor v. Semanza*, No.ICTR-97-20-1,*Decision on the Defence Motion for the Adjournment of the Trial Proceedings.*(30 Oct.2000) at para.4

[2406] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR72.5&6, *Decision on Jurisdictional Appeals: Joint Criminal Enterprise* (12 April 2006) at para. 23

[2407] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Motion to Continue Trial filed by the Defence for Joseph Nzirorera* (29 March 2004) at para. 8

[2408] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at para. 12

[2409] *Rwamakuba v Prosecutor*, No. ICTR-98-44-AR72.4, *Decision on Validity of Appeal of Andre Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 73(E) of the Rules of Procedure and Evidence* (23 July 2004)

Challenge that joint criminal enterprise liability does not apply to complicity is a challenge to jurisdiction within the meaning of Rule 72(D)(iv).[2411]

If the competence and legality of the composition of the Trial Chambers are challenged, it raises an issue of the Trial Chamber to exercise the jurisdiction that the Tribunal possesses and is an issue of jurisdiction capable of interlocutory appeal as of right.[2412]

**not jurisdictional**

Challenge that the extended form of joint criminal enterprise liability does not apply in internal armed conflicts not subject to interlocutory appeal where the prosecution agreed not to pursue that form of liability.[2413]

Challenges to failure to charge mens rea for joint criminal enterprise and widespread and systematic attack for crimes against humanity did not relate to jurisdiction and were not subject to appeal of right.[2414]

Challenge to the charge of "violence to life, health, and physical and mental well-being of persons" as being too vague to have existed in customary international law is a challenge to the grant of jurisdiction in Article 4 itself, rather than a challenge which "relates to" Article 4. Therefore, it is not subject to an appeal of right under Rule 72(D).[2415]

There is no basis under Rule 72 to challenge the prosecutor's authority to investigate and prosecute the accused—this does not amount to a challenge to jurisdiction within the meaning of Rule 72(D).[2416]

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[2410] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR72.5, *Decision on Validity of Joseph Nzirorera's Appeal of Decision on Defence Motion Challenging the Jurisdiction of the Tribunal—Joint Criminal Enterprise* (14 October 2005)

[2411] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR72.6, *Decision on Validity of Joseph Nzirorera's Appeal of Decision "Reserving" Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise and Complicity* (11 November 2005)

[2412] *Kanyabashi v Prosecutor*, No. ICTR-96-15-A, *Joint and Separate Opinion of Judge McDonald and Judge Vorah to Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I* (3 June 1999) at para. 4

[2413] *Nzirorera v Prosecutor*, No. ICTR-98-44-AR72.3, *Decision on Validity of Appeal by Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72(E) of the Rules of Procedure and Evidence* (11 June 2004) at para. 12

[2414] *Prosecutor v Simba*, No. ICTR-2001-76-AR72.3, *Decision on Validity of Appeal Pursuant to Rule 72(E) of the Rules of Procedure and Evidence* (30 September 2004)

[2415] *Nzirorera v Prosecutor*, No. ICTR-98-44-AR72.3, *Decision on Validity of Appeal by Joseph Nzirorera Regarding Joint Criminal Enterprise Pursuant to Rule 72(E) of the Rules of Procedure and Evidence* (11 June 2004) at para. 18

[2416] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment* (17 December 2008) at para. 17

Allegations concerning the legality of the arrest and detention of the accused are not matters relating to jurisdiction such as to allow an interlocutory appeal of right.[2417]

Challenges to charges in the indictment as being against an entity rather than against an accused individually, and for lack of specificity in the indictment do not raise issues of jurisdiction.[2418]

Interlocutory appeals of right under this Rule are limited to situations where the indictment arguably reaches beyond the power that the Statute confers upon the Tribunal. Whether the statute itself is subject to external restrictions, such as Chapter VII of the Charter of the United Nations, is not an issue subject to interlocutory appeal of right.[2419]

**lack of specificity**

Objections based upon lack of specificity in the indictment are admissible as part of preliminary motions based upon defects in the form of the indictment.[2420] However, the defence is obligated to look to facts in the pre-trial brief when preparing for trial.[2421]

Objections based on lack of specificity of how the crimes were carried out by the accused are matters for trial and not preliminary motions.[2422] Objections to alleged surplusage in the indictment are not objections to form covered by the Rule.[2423]

Contradictions between allegations set out in an indictment constitute defects in the form of an indictment, if without dwelling into their substance, these allegations appear to be mutually exclusive. Allegations are also defective in their form if they are not sufficiently clear and precise to enable the accused to fully understand the nature and the cause of the charges brought against him.[2424]

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[2417] *Rwamakuba v Prosecutor*, No. ICTR-98-44-A, *Decision: Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention* (11 June 2001)
[2418] *Karemera v Prosecutor*, No. ICTR-98-44-AR72.2, *Decision on Validity of Appeal of Preliminary Motion of Edouard Karemera Pursuant to Rule 72(E) of the Rules of Procedure and Evidence* (11 June 2004)
[2419] *Nzirorera v Prosecutor*, No. ICTR-98-44-AR72, *Decision Pursuant to Rule 72(E) of the Rules of Procedure and Evidence on Validity of Appeal of Joseph Nzirorera Regarding Chapter VII of the Charter of the United Nations* (10 June 2004)
[2420] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Accused Karemera's Preliminary Motion Alleging Defects in the Form of the Amended Indictment* (23 April 2004) para. 16
[2421] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Accused Karemera's Preliminary Motion Alleging Defects in the Form of the Amended Indictment* (23 April 2004) para. 17
[2422] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Preliminary Defence Motion to Dismiss the Amended Indictment for Defects in Form* (7 April 2004) at para. 8
[2423] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Preliminary Defence Motion to Dismiss the Amended Indictment for Defects in Form* (7 April 2004) at para 14
[2424] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at paras. 14-16

**omissions**

The omission of specific facts in the indictment may constitute a defect in the form of an indictment if the Trial Chamber is satisfied that the omission does not enable the Accused to fully understand the nature and the cause of the charges brought against him.[2425]

**prima facie case**

Allegations of insufficiency of the supporting material cannot be entertained by preliminary motion.[2426] The finding of a Trial Chamber that a *prima facie* case has been made out to allow amendment of an indictment cannot be challenged by preliminary motion.[2427]

A preliminary motion does not permit the Trial Chamber to revisit the decisions of the confirming judge that the supporting materials establish a prima facie case for the allegations of the indictment.[2428]

**severance**

A motion for severance because of undue delay in the trial need not be brought within the time limits of Rule 72(A)(iii).[2429]

**time limits**

The thirty-day time limit on filing preliminary motions may be excused for good cause. Replacement of the lead counsel constituted good cause.[2430]

While replacement of the defence team did not warrant extension of time for preliminary motions, Trial Chamber exercised its discretion to consider motions out of time where indictment was important to the fair and expeditious conduct of the trial.[2431]

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[2425] *Prosecutor v Karemera*, No. ICTR-98-44-I, *Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, Inter Alia, Lack of Jurisdiction and Defects in the Form of the Indictment* (25 April 2001) at para. 18

[2426] *Prosecutor v Nzuwonemeye*, No. ICTR-2000-56-T, *Decision on Defence Preliminary Motions* (12 December 2002) at para. 23

[2427] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at para. 15

[2428] *Prosecutor v Rukundo*, No. ICTR-2001-70-I, *Decision on Preliminary Motion* (26 February 2003) at para. 25

[2429] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance* (14 June 2007) at para. 8

[2430] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motion Concerning Defects in the Indictment* (3 March 2008) at para. 3

[2431] *Prosecutor v Gatete*, No. ICTR-00-61-I, *Decision on Defence Motion Concerning Defects in Amended Indictment* (3 July 2009) at para. 9

The thirty-day period for filing of preliminary motions would run from the latest day of disclosure of all supporting material or from the date of certification by the prosecution that it had disclosed all supporting material.[2432]

**timeliness**

An appellant cannot seek to challenge a decision of a Trial Chamber after the time for filing an appeal from that decision has expired by the simple expedient of seeking to have that decision reconsidered.[2433]

**Rule 73—motions**

**(A) Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open Court.**
**(B) Decisions rendered on such motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.**
**(C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Trial Chamber has indicated that a written decision will follow, in which case**
**the time-limit shall run from filing of the written decision.**
**If certification is granted, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify.**
**(D) Where a date has been set for the hearing of a motion, including a preliminary motion, any additional motions to be heard on that date and any supporting material to the motions must be filed at least ten days before the hearing of the motion. Failure to observe this Rule will mean that the later motion will not be considered on the hearing date, nor will any adjournment of the original motion be granted on the basis of subsequent motions filed, save in exceptional circumstances.**
**(E) A responding party shall, thereafter, file any reply within five days from the**

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[2432] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Motions for Disclosure of Supporting Materials and Clarification on Rule 72 30-day Period* (1 October 2008) at para. 11
[2433] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Interlocutory Appeal From Refusal to Reconsider Decisions Relating to Protective Measures and Application for a Declaration of "Lack of Jurisdiction"* (2 May 2002) at para. 10

**date on which Counsel received the motion.**
**(F) In addition to the sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion, including a preliminary motion, that, in the opinion of the Chamber, is frivolous or is an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof.**
**(G) Notwithstanding the time limits in Rule 72(A), the time limit in the present Rule applies.**

**corrigendum**

A party may, without requesting leave, file a corrigendum to a previously filed motion or brief whenever a minor or clerical error in the pleading is subsequently discovered and where correction of the error is necessary to provide a clarification.[2434]

Leave to file corrigendum denied where more than minor clerical errors were corrected. Defence should have withdrawn previously filed motion and filed corrected motion subsequently.[2435]

**defects in indictment**

A challenge alleging a defect in the indictment cannot be brought pursuant to Rule 73 (or Rule 54) but must be brought prior to trial pursuant to Rule 72, at the close of the prosecution's case pursuant to Rule 98 *bis*, or during closing submissions. Therefore, the request to declare that joint criminal enterprise was not contained in the indictment was denied.[2436]

**factual assertions**

While it is preferable for factual assertions in a motion to be supported by objective evidence such as a signed statement of the witness or letters or e-mails, the Trial Chamber recognizes that it is not always possible to do so. In such case, assertions made in a declaration by counsel will be sufficient.[2437]

**replies**

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[2434] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File a Corrigendum* (2 September 2009) at para. 8
[2435] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Aloys Ntabakuze's Motions for Provisional Release and Leave to File a Corrigendum* (2 September 2009) at para. 12
[2436] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Bicamumpaka's Request for a Declaration that the Indictment Does Not Allege that he is Liable for any Form of Joint Criminal Enterprise* (23 March 2006)
[2437] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Subpoena to Leon Mugesera and President Paul Kagame* (19 February 2008) at para. 7

A moving party may not introduce new requests or issues of fact in its reply. If it does, the responding party is entitled to file a rejoinder.[2438]

The purpose of a reply brief is to answer matters raised by the opposing party in its response.[2439]

It is procedurally improper to raise new issues for the first time in a reply brief, as it deprives the opposing party of the right to respond.[2440]

**interlocutory appeals**

**certification granted**

Certification to appeal granted for issues involving amendment of the indictment[2441], form of indictment,[2442] scope of indictment,[2443] exclusion of evidence,[2444]

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[2438] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness* (4 March 2008) at para. 10

[2439] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 23rd Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG* (30 March 2009) at para 4

[2440] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 23rd Rule 66 Violation and Motion for Remedial and Punitive Measures: Witness ALG* (30 March 2009) at para 4

[2441] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision Granting the Defence Certification to Appeal Against the Decision of 13 February 2004 Amending the Indictment and the Oral Decision of 23 February 2004 Ruling the Amended Indictment to be in Compliance with the Decision of 13 February 2004* (19 March 2004); *Prosecutor v Muvunyi*, No. ICTR-200-55A-T, *Decision on the Prosecutor's Motion Pursuant to Rule 73(B) to Appeal the Decision Denying Leave to Amend the Indictment and for Stay of Proceedings* (16 March 2005); *Prosecutor v Nizeyimana*, No. ICTR-2001-55C-PT, *Decision on Ildephonse Nizeyimana's Motion for Certification* (12 August 2010); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative aux Requetes de Mathieu Ngirumpatse et de Joseph Nzirorera en Certification d'Appel Contra la Décision on the Defence Motion for Déclaration of a Mistral du 19 Février 2004* (8 March 2004)

[2442] *Prosecutor v Uwinkindi*, No. ICTR-01-75-PT, *Decision on Defence Application for Certification to Appeal Decision on Preliminary Motion Alleging Defects in the form of the Amended Indictment* (28 March 2011)

[2443] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification of Decision on Exclusion of Evidence* (14 July 2006)

[2444] *Prosecutor v Bagosora et* al, No. ICTR-98-41-T, *Decision on Prosecution's Request for Certification of Appeal on Admission of Testimony of Witness DBY* (2 October 2003); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Accused Mugiraneza's Motion for Certification to Appeal the Chamber's Decision of 5 February 2004* (24 March 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 5 February 2004* (24 March 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004* (20 February 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 26 January 2004* (20 February 2004); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's and Niyiramasuhuko's Motions for Certification to Appeal the Decision on Defence's Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible* (18 March 2004); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification of Decision on Exclusion of Evidence* (14 July 2006)

admission of evidence,[2445] disclosure of witness statements[2446], reciprocal disclosure.[2447] continuance of the trial,[2448] proceeding in the absence of the accused,[2449] treatment of the indictment and evidence after the death of a co-accused,[2450]binding orders to States,[2451]judicial notice,[2452] admission of statement pursuant to Rule 92 *bis*,[2453] witness proofing issue,[2454] Rule 70 conditions,[2455] subpoenas,[2456] limit on number of witnesses,[2457] proceedings under Rule 15 *bis*,[2458] disclosure of exculpatory evidence[2459],

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[2445] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on Defence Motion for Certification to Appeal the Trial Chamber's 15 January 2010 Decision on Stay of Proceedings and Exclusion of Evidence* (9 February 2010)

[2446] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Pierre Celestin Mbonankira and Decision on Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure* (2 October 2007)

[2447] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Certification to Appeal the Chamber's Decision on Joseph Nzirorera's Motion for Inspection of Pierre Celestin Mbonankira and Decision on Prosecutor's Cross-Motion for Enforcement of Reciprocal Disclosure* (2 October 2007)

[2448] *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision of 25 March 2009 on Defence Motion to Vary Trial Date* (15 April 2009) ; *Prosecutor v Bagosora et* al, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal from Decisions on Severance and Scheduling of Witnesses* (11 September 2003)

[2449] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Stay of Proceedings While he is Unfit to Attend Trial or Certification to Appeal* (11 July 2007) at para. 25

[2450] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Reasons for Oral Decision of 23 August 2010 and on Oral Applications for Certification to Appeal* (26 August 2010) at para. 15

[2451] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007)

[2452] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Certification of Appeal Concerning Judicial Notice* (2 December 2005); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Admit Testimony of Elizaphan Ntakirutimana* (24 March 2009)

[2453] *Prosecutor v Nizeyimana*, No.ICTR-2000-55C-PT, *Decision on Prosecution's Motion for Certification to Appeal Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi* (2 December 2010)

[2454] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing* (14 March 2007)

[2455] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Request for Certification to Appeal the Decision on Casimir Bizimungu's Motion in Reconsideration of the Trial Chamber's Decision Dated February 8, 2007 in Relation to Condition (B) Requested by the United States Government* (22 May 2007)

[2456] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on Bicamumpaka's Request for a Subpoena of 12 February 2008* (19 March 2008); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for Reconsideration and/or Certification to Appeal the Decision of 26 August 2011* (15 Sep 2011)

[2457] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyabashi's Motion for Certification to Appeal the Decision of 21 March 2007* (3 May 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision on the Requête en certification d'appel de la décision du 17 septembre 2008 relative à la présentation de la preuve de Mathieu Ngirumpatse* (24 October 2008)

[2458] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Application for Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK* (4 April 2007)

[2459] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Certification of the Oral Decision of 16 February 2006 for Stay of Proceedings* (26 February 2006); *Prosecutor v Karemera et al*, No. ICTR-

disclosure of items material to the defence,[2460] admissibility of pre-1994 events,[2461] admissibility of statement of accused,[2462] witness protection,[2463] expert witnesses,[2464] disqualification of judge or staff,[2465] severance of accused,[2466] motion for judgement of acquittal,[2467]

Certification may be appropriate where, in particular, "broad categories of evidence" are affected by a decision.[2468]

Certification has been granted where a decision may concern broad categories of evidence or where it determines particularly crucial matters of procedure or evidence.[2469]

Avoiding the serious consequences that could result from proceeding throughout the remainder of the Defence case on an incorrect legal footing justifies granting certification.[2470]

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98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 10th Rule 68 Motion* (4 March 2008); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Decision of 30 October 2009* (20 November 2009)

[2460] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements* (22 May 2006) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 27th Rule 66 Violation* (9 February 2010)

[2461] *Prosecutor v Bagosora et* al, No. ICTR-98-41-T, *Certification of Appeal on Admission of Testimony of Witness DP Concerning Pre-1994 Events* (3 November 2003); *Decision on Prosecution Request for Certification of Appeal on Admission of Evidence of Testimony of Witness DBY* (2 October 2003)

[2462] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews* (1 June 1997)

[2463] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses* (21 July 2005)

[2464] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Reconsideration of the Decision or Prospective Experts Guichaoua, Nowrojee, and Des Forges or for Certification* (16 November 2007) at para. 34

[2465] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal; Disclosure of Letter of Recommendation* (27 February 2009) at para. 5; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mugiraneza Request for Certification to Appeal and Mugenzi's and Bizimungu's Requests for Reconsideration of the Decision on the Objections of Mugiraneza and Bicamumpaka to the Engagement of Mr. Everard O'Donnell as a Chamber's Consultant Dated 28 August 2009* (23 September 2009) at para. 16

[2466] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 61

[2467] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on Motion for Certification to Appeal: Decision on Motion for Judgement of Acquittal* (2 September 2009)

[2468] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements* (22 May 2006) at para. 5

[2469] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame* (15 May 2008) at para. 2

[2470] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Interlocutory Appeal Concerning Prosecution Disclosure of Defence Witness Statements* (22 May 2006) at para. 6

The Chamber accepts that if it were to base a conviction partly on evidence which is found on a subsequent appeal to have been inadmissible, and partly on admissible evidence, then finding an appropriate remedy at that stage might pose significant difficulties for the Appeals Chamber. Considering the complexity and importance of the issues involved, clarification of the principles applicable to motion would materially advance the proceedings.[2471]

Where similar issues may arise during the trial, the issue affects the fair and expeditious conduct of the trial and a decision by the Appeals Chamber would materially advance the proceedings.[2472]

**certification refused**

Certification for interlocutory appeal denied concerning decision to defer transfer of accused[2473], motion to amend indictment[2474], ruling on defects in the indictment[2475], denial of speedy trial[2476], severance of accused[2477] ,variation of prosecutor's witness list[2478] , refusal to require additional particulars in the indictment[2479], scope of cross

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[2471] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification of Decision on Exclusion of Evidence* (14 July 2006)

[2472] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali's 1997 Custodial Interviews* (1 June 2006) at para. 27

[2473] *Prosecutor v Kayishema*, No. ICTR-01-67-R11*bis*, *Decision on Prosecutor's Request for Reconsideration and, in the Alternative, for Certification of Interlocutory Appeal* (3 February 2011); *Prosecutor v Sikubabwo*, No. ICTR-95-1D-R11*bis*, *Decision on Prosecutor's Request for Reconsideration and, in the Alternative, for Certification of Interlocutory Appeal* (3 February 2011)

[2474] *Prosecutor v Nizeyimana*, No. ICTR-2001-55C-PT, *Decision on Nizeyimana's Motion for Certification* (1 April 2010)

[2475] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Request for Certification to Appeal the Chamber's Decision of 29 February 2008* (22 May 2008); *Prosecutor v Gatete*, No. ICTR-2000-61-I, *Decision on Defence Application for Certification to Appeal the Chamber's Decision on Defects in the Indictment* (19 August 2009)

[2476] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Leave to Appeal from the Trial Chamber's Decision of 3 November 2004* (25 February 2005); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mugiraneza's Request for Reconsideration or Alternatively Certification to Appeal the Decision on Mugiraneza's Fourth Motion to Dismiss Indictment…*(31 August 2010)

[2477] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification on Severance of Three Accused* (22 May 2006)

[2478] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu Motion for Certification to Appeal from the Trial Chamber's Decision of 3 September 2004 Concerning Rule 73 bis of the Rules and for Other Appropriate Relief* (9 March 2005); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Request for Certification to Appeal the Chamber's Decision Dated 21 September 2005* (26 October 2005); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Decision on Variation of Prosecution Witness List* (22 February 2010)

[2479] *Prosecutor v Bagosora et al*, No, ICTR-98-44-T, *Decision on Certification of Appeal from Decision Denying Request for Further Particulars of the Indictment* (10 February 2006); *Prosecutor v Renzaho*, No. ICTR-97-31-PT, *Décision Relative à la Demande aux Fin de Certification d'Appel de la Décision du 5 Septembre 2006 en Vertu de l'Article 72(B)* (25 October 2006)

examination[2480], admission of acts occurring outside of the ICTR's temporal jurisdiction[2481], admission of acts outside the allegations of the indictment[2482], admission of written statements of a witness[2483] , admission of testimony of an expert witness[2484], the taking of judicial notice[2485], exclusion of evidence[2486], deposition of a witness,[2487],

[2480] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Andre Rwamakuba's Request for Certification to Appeal Ruling of 5 December 2003 Limiting Cross Examination* (5 February 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 73(B) for Leave to Appeal the Trial Chamber's Oral Rulings of 17 June 2004* (30 September 2004); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal of Oral Decisions on the Scope of Cross-Examination of Jean Kambanda* (17 October 2006)

[2481] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Application for Certification of Appeal by the Accused Against the Oral Decision of 4 December 2003 on Admission of Evidence of Acts That Occurred Prior to 1994 Cited by Witness GBV* (19 February 2004); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Request for Certification to Appeal the Oral Decision Dated 8 June 2005* (30 June 2005); *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Application for Certification to Appeal the Chamber's Decision of 3 November 2009* (8 December 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Evidence Falling Outside the Tribunal's Temporal Jurisdiction* (10 May 2011)

[2482] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Leave to Appeal from the Trial Chamber's Decision of 4 October 2004* (8 December 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Request* Pursuant *to Rule 73 for Certification to Appeal the 24 November 2004 Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Admissible* (25 February 2005); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Application for Certification to Appeal Decision on Exclusion of Testimony* (10 February 2006); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Motion for Certification of Appeal Against the Decision of 2 December 2005 on the Admissibility of the Testimony of Witness AOF* (13 March 2006); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Decision on Exclusion of Material Facts Not Charged in the Indictment or the Pre-Trial Brief* (10 May 2011)

[2483] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO* (11 December 2003); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Motion for Certification of Appeal Against the Trial Chamber's Decisions of 28 October 2005 on the Admissibility of the Testimonies of Witnesses AP and TN* (16 November 2005); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification Concerning Admission of Statement of Witness LG-1/U-03* (14 February 2007); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of Witness B-06's Statement* (8 May 2007); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Request for Reconsideration or Certification Concerning Admission of Statement of Amadou Deme* (23 May 2007); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Bicamumpaka's Application for Certification to Appeal the Trial Chamber's Decision on the Rule 92 bis Admission of Faustin Nyagahima's Written Statement* (22 August 2007); *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Application for Reconsideration or Certification to Appeal the Decision of 24 June 2010* (14 July 2010)

[2484] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Prosecutor's Request for Certification to Appeal Decision Dated 14 July 2004 Denying the Admission of Testimony of an Expert Witness* (16 August 2004); *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Extremely Urgent Motion for Reconsideration or Certification of the Decision on Defence Urgent Motion to Hear Testimony of Dr. Susan Thomson via Video Link…*(30 March 2011) at para. 41

[2485] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Application for Certification for Interlocutory Appeal of the Decision on the Prosecution's Motion for Judicial Notice* (11 December 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice* (22 March 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal Decision on Appeals Chamber Remand of Judicial Notice* (26 September 2007); *Prosecutor v Nizeyimana*,

issuance of a defence subpoena to a prosecution witness[2488], order for cooperation to the governments of Rwanda and France[2489] , disclosure of supporting material[2490], disclosure of items material to the defence[2491], disclosure of evidence of RPF crimes[2492], access to

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No. ICTR-00-55C-T, *Decision on Defence Motion for Certification of the Trial Chamber 12 July 2011 Decision on Defence Motion to Take Judicial Notice of Adjudicated Facts* (8 August 2011)

[2486] *Prosecutor v Nadyambaje*, No. ICTR-96-8-T, *Decision on Elie Ndyambaje's Motion Requesting Certification to Appeal the Decision on Ndyambaje's Confidential Motion to Have Detainee Testimony Declared Inadmissible Issued on 25 October 2004* (1 December 2004)*;Prosecutor v Ndindiliyimana et al*, No. ICTR 00-56-T, *Decision on Sagahutu's Request for Certification to Appeal the Decision Dated 13 May 2005 Dismissing Applicant's Request for Exclusion of Witnesses LMC,DX,BB,GS,CJ, and GFO* (9 June 2005); *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Prosecutor's Motion for Reconsideration of the Oral Decision Excluding Evidence of the Meeting of 22 November 1992 or for Certification to Appeal the Same* (31 January 2006); *Prosecutor v Nadyambaje*, No. ICTR-96-42-T, *Decision on Elie Ndyambaje's Motion Requesting Certification to Appeal the Decision on Ndyambaje's Motion for Exclusion of Evidence* (5 October 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Certification of Appeal Decision on Exclusion of Evidence* (18 October 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Request for Certification to Appeal Decision on Exclusion of Evidence* (6 November 2006); *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Certification for Appeal Concerning Exclusion of Testimony and Admission of Exhibit* (7 May 2007); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of Correspondence* (8 May 2007); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification or Reconsideration Concerning the "Bagosora Agenda"* (8 May 2007); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Certification Concerning Exclusion of Evidence* (23 May 2007); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Ntahobali's Motion for Certification to Appeal the Decision of 29 June 2007* (20 August 2007); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Certification to Appeal the Decision of 5 November 2007 and Ntahobali's Motion for Certification to Appeal the Decisions of 5 and 12 November 2007* (7 December 2007); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion for Reconsideration or Certification to Appeal the Oral Decision Rendered on 9 February 2011* (10 May 2011)

[2487] *Prosecutor v Muvunyi et al*, No. ICTR-2000-55-I, *Decision on Accused Hategekimana's Motion for Review of Decision of 27 November 2003 (*10 February 2004)

[2488] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Request for Certification of Appeal the Decision on the Defence Motion for Subpoena to Witness G* (17 February 2004)

[2489] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on the Defence Request for Certification to Appeal Against the Decision on the Defence Motion to Order the Government of Rwanda to Show Cause* (23 September 2003); *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Cooperation to Government of France* (31 March 2005)

[2490] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motion for Reconsideration or Certification the Chamber's Decision on Defence Requests to Lift Confidentiality of Filings* (17 June 2008)

[2491] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative la Requete d'André Rwamakuba en Certification d'Appel Contre la Décision du 15 Janvier 2004 Relative à la Divulgation de Certains Éléments de Preuve par le Procureur* (3 March 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Request for Certification to Appeal the Decision on Accused Nzirorera's Motion for Inspection of Materials* (26 February 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Sur la Requete d'Edouard Karemera aux fins de Certification d'Appel* (10 March 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Requests for Certification to Appeal Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66(C)* (14 March 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification of Appeal on Disclosure and Investigations Concerning the Assassination of President Habyarimana* (12 December 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Certification Concerning Inspection of Documents Pursuant to Rule 66(B)* (12

prosecution's electronic disclosure system[2493],duty of prosecution to record exculpatory information[2494], translation of documents [2495],disclosure of witness statements[2496], timing of disclosure of identities of protected witnesses[2497], disclosure of closed session testimony from another case[2498], obligation of prosecution to obtain Rwandan judicial

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December 2006); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nteziryayo's Motion for Certification to Appeal the Oral Decisions of 19 and 23 April 2007* (10 May 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Disclosure Decision on Witness ALG* (29 April 2009) ; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Selective Prosecution Documents* (9 November 2009); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Oral Decision on 26th Notice of Rule 66 Violation and 17th Notice of Rule 68 Violation* (25 November 2009); *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on the Request of Edouard Karemera for Certification to Appeal the Decision of 18 November 2010…*(17 December 2010)

[2492] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Certification to Appeal the Decision on Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence* (23 July 2008); *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 16th Notice of Rule 68 Violation* (8 September 2009)

[2493] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material"* (4 February 2005)

[2494] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Issue of Prosecution's Obligation to Record Exculpatory Information* (26 November 2007); *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Mudahinyuka Disclosure* (18 February 2009); *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 24th Rule 66 Violation* (20 May 2009)

[2495] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Leave to Appeal Decision on Defence Motion for Extension of Time and Oral Decision* (25 June 2004) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision sur la Requete d'Edouard Karemera en Certification d'Appel* (20 January 2006)

[2496] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion Pursuant to Rule 73(B) for Certification to Appeal the Trial Chamber's Oral Decision of 20 February 2004* (12 May 2004); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal Concerning Will-Say Statements of Witnesses DBQ, DP, and DA* (5 December 2003); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion for Certification of Appeal from the Trial Chamber's Oral Decision of 10 May 2005* (10 June 2005); *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Defence Motion for Certification to Appeal the Decision on Defence Motions for Rule 68 Disclosure* (8 November 2007); *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal the Chamber's Decision of 22 December 2008 on Disclosure* (19 February 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification of the Chamber's Oral Rulings of 29 and 30 September 2009* (2 December 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Oral Decisions Rendered on 24 and 25 August 2010* (12 April 2011)

[2497] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Request for Leave to Appeal Against Decision of 3 November 2004* (25 January 2005); *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-T, *Decision on Prosecutor's Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the Prosecution Motion for Disclosure of Evidence of the Defence* (4 February 2005)

[2498] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion for Reconsideration of Decision on Motion from Eliezer Niyitegeka for Disclosure of Closed Session Testimony and Evidence Under Seal, or Alternatively for Certification to Appeal* (13 May 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-

records[2499], remedies for disclosure violations[2500], justification for protective measures[2501], disclosure of protected witnesses by a journalist[2502],scope of referral for contempt[2503], refusal of admission of unauthenticated prior statements of a witness[2504], admission of written statements pursuant to Rule 92 *bis*[2505], admission of exhibits[2506] , admission of expert testimony[2507], limitations on cross examination[2508], admission of

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T, *Decision on Eliezer Niyitegeka's Motion for Reconsideration of the Decision of 25 February 2008* (1 April 2008) at para. 15

[2499] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on the Prosecutor's Motion for Reconsideration, and/or Certification of the Decision Rendered on 29 October 2009 Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses* (27 November 2009)

[2500] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Eleventh Rule 68 Motion* (10 November 2008); *Prosecutor v Kanyarukiga*, No. ICTR-02-78-T, *Decision on the Defence Motion for Certification to Appeal the Trial Chamber's Decision on the Extremely Urgent Defence Motion for a Stay of the Proceedings* (16 September 2009)

[2501] *Prosecutor v Setako*, No. ICTR-04-81-T, *Decision on Defence Motion for Certification to Appeal Protective Measures* (5 October 2007)

[2502] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Request for Certification of Appeal from the Decision of Trial Chamber Dated June 13, 2004 (sic) Dismissing Applicant's Request for a Citation for Contempt of the Journalist Gatare of Radio Rwanda for Publishing the Names of Protected Witnesses* (1 July 2005)

[2503] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 17 December 2008 on Defence Preliminary Challenges* (4 February 2009)

[2504] *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-T, *Decision on Defence Motions: Request for Certification to Appeal Rulings Disallowing Cross-Examination on Prior Inconsistent Statements* (4 February 2004)

[2505] *Prosecutor v Nshogoza*, No. ICTR-2007-91-T, *Decision on Defence Motion for Certification of the Trial Chamber's Decision on the Admission of Evidence Pursuant to Rule 92 bis* (8 June 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal the Trial Chamber's Rule 92 bis Decision of 22 September 2011* (25 November 2011); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Decision of 14 May 2012 on the Admission of Written Statements* (21 June 2012)

[2506] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Admission of Prosecution Exhibits 27 and 28* (31 January 2005) at para 16; *Prosecutor v Ndindiliyimana et al*, No. IT-00-56-T, *Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Oral Decision of 2 February 2006 Admitting Part of Witness GFA's Confessional Statement into Evidence* (27 February 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417* (15 November 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of School Documents* (9 May 2007) ; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Request of Mathieu Ngirumpatse for Certification to Appeal Decision of the Chamber to Admit Exhibits IP5 and IP6* (29 November 2007); *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Decision on Defence Motion for Certification to Appeal Chamber's Decision of Prosecution Motion for Admission of Certain Materials* (26 August 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Application for Certification to Appeal the Decision on the Prosecutor's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89(C)* (24 September 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for Certification to Appeal the Decision on Reconsideration of Oral Decisions Rendered on 23 September 2009* (24 August 2010); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration or Certification to Appeal the Oral Decisions Rendered on 20 and 21 June 2011* (22 September 2011)

[2507] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Application for Certification to Appeal the Decision Denying his Motion for Admission of an Expert Witness* (1 July 2009)

pattern evidence under Rule 93[2509], propriety of holding status conferences in closed session[2510], denial of reinstatement of counsel.[2511] , sanctions imposed on defence counsel[2512], proceeding in the absence of a judge[2513] continuance of the trial[2514], stay of proceedings after arrest of defence investigator[2515], closure of the prosecution case[2516], issuing subpoenas for defence witnesses[2517], denying motion for binding order,[2518]

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[2508] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Motion for Reconsideration or Certification of the Trial Chamber's Oral Decision of 6 July 2010 on Witness T134's Testimony* (16 September 2010) at para. 36; *Prosecution v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for Leave to Appeal the Trial Chamber's Decision on the Defence Request to Call Prosecution Investigators* (10 May 2011)

[2509] *Prosecutor v Nshogoza*, No. ICTR-07-92-PT, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 2 January 2009* (3 February 2009)

[2510] *Prosecutor v Nzirorera et al*, No. ICTR-98-44-T, *Décision Relative à la Demande de Certification de Appel Contre la Décision Orale du 30 Octobre 2003 Portant Tenue à Huis Close Law Conférence Préalable au Procès* (15 January 2004)

[2511]*Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on the Defence Requests for Certification of the Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi* (2 February 2005); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification of Appeal Concerning Private Representation* (25 March 2005)

[2512] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision Denying Defence Request for Certification to Appeal* (20 October 2003); *Decision on Joseph Nzirorera's Application for Certification to Appeal the Decision Denying his Motion to Vacate Sanctions* (26 May 2005)

[2513] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Oral Decision to Proceed Under Rule 15 bis Dated 11th July 2007* (24 August 2007)

[2514] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Request for Certification* (4 May 2005); *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Oral Decision of 9 February 2009 Denying an Adjournment of the Proceedings* (18 February 2009); *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision Denying a One Week Postponement of the Defence Case* (11 March 2009); *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Oral Decision of 9 February 2009 Denying an Adjournment of the Proceedings* (18 February 2009); *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 31 July 2009* (14 August 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision on Defence Extremely Urgent Motion for Reconsideration of the Trial Chamber's Decision on the Trial Date Rendered on 15 July 2009* (10 August 2009); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Trial Chamber Decision of 17 September 2009); Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for Stay of Proceedings…*(13 November 2009) at paras. 39-40; *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision of 19 October 2009* (10 November 2009)

[2515] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Defence Motion for Certification to Appeal the Chamber's Decision of 4 July 2007* (25 July 2007)

[2516] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Application to Certify an Appeal and Joseph Nzirorera's Application to Certify an Appeal and/or Reconsider Decision on the Prosecution Motion to Reopen Its Case and on the Defence Motion to File Another 98 bis Motion* (25 June 2008) at paras. 5, 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Motion for Certification to Appeal the Decision of 16 June 2008…* (16 July 2008) ; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion to Vacate the Trial Date* (29 June 2010)

[2517] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence*

denying recall of prosecution witnesses by the defence[2519], limiting number of witnesses called by the defence[2520], granting safe conduct to defence witnesses[2521], disclosure of country of residence of defence witnesses[2522] suspension of time for seeking certification to appeal[2523], order of cross-examination of defence witnesses[2524], defence meetings with witnesses of co-accused[2525], permission for re-examination of defence witnesses by other defence teams[2526], reopening of defence case[2527], denial of motion for judgement of acquittal[2528], testimony by video-link[2529], denial of investigation for false testimony[2530],

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*Witnesses NZ1, NZ2, and NZ3* (30 October 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification to Appeal Decision on Request for Assistance Pursuant to Article 28* (6 November 2006) ; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Ruling or Certification Concerning Subpoena Issued to General Marcel Gatsinzi* (23 May 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame* (15 May 2008); *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Certification of the Trial Chamber's Decision on the Defence's Urgent Motion for a Subpoena to Ms. Loretta Lynch* (19 February 2009)

[2518] *Prosecution v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for Certification to Appeal the Decision on Third Urgent Defence Motion Requesting an Order Directed at France* (14 July 2010)

[2519] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Motion for Certification to Appeal the Chamber's Decision on Defence Motion to Recall Prosecution Witness AOE for Additional Cross Examination* (10 May 2007)

[2520] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 Rendered on 26 March 2010* (7 May 2010) at para. 45; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Defence Motion for Reconsideration or Certification to Appeal the Oral Decision of 13 July 2011 and on the Reduction of the Defence Witness List* (26 August 2011) at para. 52

[2521] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-T, *Decision on Prosecutor's Urgent Motion for Reconsideration or Certification to Appeal Trial Chamber II's Decision on Niyiramasuhuko's Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses Dated 1 March 2005* (14 April 2005) at paras. 19-21; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Certification to Appeal the Decision on Niyiramasuhuko's Strictly Confidential Ex Parte Under Seal Motion for Additional Protective Measures for Some Defence Witnesses and Reconsideration of That Decision as Regards Witness BK* (14 April 2005) at para. 16

[2522] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries* (21 July 2005)

[2523] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on Prosecutor's Request for Certification under Rule 73 with Regard to Trial Chamber's "Decision on Prosecutor's Request for Suspension of Time Limit"* (14 July 2004)

[2524] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Application for Certification Concerning Defence Cross Examination After Prosecution Cross Examination* (2 December 2005)

[2525] *Prosecution v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Request for Certification of the Chamber's Proprio Motu Decision of 30 November 2007* (6 February 2008)

[2526] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification Concerning Additional Questioning of Witness LE-1* (22 February 2006)

[2527] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Request for Certification to Appeal or in the Alternative Reconsideration of the Chamber's Decision of 30 November 2007* (14 December 2007)

[2528] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis* (20 March 2006); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98 bis* (24 April 2007); *Prosecutor v*

scheduling of defence case[2531], rebuttal evidence by the prosecution[2532], rejoinder evidence by the defence,[2533] medical treatment of an accused[2534], page limitations on closing briefs[2535], schedule for closing briefs and argument[2536]

**correctness of decision**

Trial Chambers have a responsibility to screen out requests for certification with no prospect of success.[2537] The appropriate inquiry is whether a showing has been made that the appeal can succeed. That threshold is met by showing some basis to believe that the Trial Chamber committed an error as to the applicable law; that it made a patently incorrect conclusion of fact, or that it was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[2538]

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*Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Decision on Defence Motion for Judgement of Acquittal* (11 November 2010)

[2529] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Certification to Appeal the Decision on Arsene Shalom Ntahobali's Extremely Urgent Strictly Confidential Under Seal Motion to have Witness NBPMP Testify by Video Link* (4 April 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Requests for Certification to Appeal Decision Granting Special Protective Measures to Witness ADE* (7 June 2006); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Defence Requests for Certification to Appeal the Chamber's Decision of 20 October 2006* (7 November 2006); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on the Defence Motion for Certification to Appeal the Chamber's Decision on Video Link Testimony* (3 February 2010)

[2530] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal Decision on False Testimony* (23 March 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal Decision on False Testimony* (27 September 2007)

[2531] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Order of 17 April 2008 on the Presentation of the Defence Case* (14 May 2008)

[2532] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Defence Motion for Certification of the Trial Chamber's 7 June 2010 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence* (30 June 2011); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration and/or Certification to Appeal the Trial Chamber's Decision of 14 November 2011 on Rebuttal Evidence* (13 December 2011); *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Certification to Appeal the Decision Granting Leave to Reopen the Prosecution Rebuttal Case* (4 June 2012)

[2533] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Reconsideration of or Certification to Appeal the Decision on Leave to Present Rejoinder Evidence* (21 June 2012)

[2534] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Request for Certification to Appeal the Consolidated Decision of 4 December 2009* (4 February 2010)

[2535] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Composite Motion Concerning Page Limits on Closing Briefs* (2 September 2008) at para. 12

[2536] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Nizeyimana Defence Motion for Certification of the 19 August 2011 Scheduling Order* (14 September 2011); *Prosecutor v Ngirabatware*, No, ICTR-99-54-T, *Decision on the Defence Motion for Certification to Appeal the Decision on the Scheduling of Closing Arguments* (18 June 2012)

[2537] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98 bis* (24 April 2007) ; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal* (17 February 2006) at para. 4

[2538] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Reconsideration Concerning Standards for Granting Certification of Interlocutory Appeal* (17 February 2006) at para. 4

Where the Trial Chamber was not in doubt as to the correctness of its decision, it considered this as a factor in which certification could be denied.[2539]

Allegations of errors of law are not relevant in considering a motion for certification of appeal.[2540]

**dicta**

Certification is not appropriate to appeal issues which are dicta or not matters upon which the decision was based.[2541]

**scope of certification**

As a corollary of the Trial Chamber's discretion to certify an interlocutory appeal in the first place, it also has the discretion to limit the scope of the certification to certain issues.[2542]

When determining whether a Trial Chamber certified one issue or the entire appeal, the Appeals Chamber must determine the intent of the Trial Chamber.[2543]

A Trial Chamber may certify an entire decision for interlocutory appeal based on one issue which satisfies the Rule 73(B) criteria. The Trial Chamber is not obligated to limit consideration of an interlocutory appeal to the one issue which meets the criteria for certification.[2544]

Once an issue is identified which meets the criteria for certification, allowing the Appeals Chamber to resolve additional issues at the same time may cause little additional interruption and may ultimately serve the goals of fairness and expeditiousness.[2545]

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[2539] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Motion for Subpoena to President Paul Kagame* (15 May 2008) at para. 9

[2540] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Requests for Certification to Appeal Decision on Defence Motion to Report Government of a Certain State to United Nations Security Council and Prosecution Motions Under Rule 66(C)* (14 March 2006) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Certification to Appeal the Chamber's Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (30 October 2006) at para. 7

[2541] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on 10th Rule 68 Motion* (4 March 2008) at para. 4; *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Application for Certification to Appeal Decision on Mudahinyuka Disclosure* (18 February 2009) at para. 3

[2542] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 13

[2543] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 20

[2544] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 16

[2545] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 17

Certification to one accused does not allow co-accused to appeal related issues. Submissions of co-accused considered only as they relate to the issue certified for appeal.[2546]

**standard for certification**

Certification to appeal is not available for minor or trivial matters which may arise during the trial. Whether there was an error of law or abuse of discretion is irrelevant to the decision of whether to grant certification to appeal.[2547]

The adjective 'significantly' has a value that must be considered in each case. In each of these tests, the applicant must show how significantly the decision in question affects (a) a fair and expeditious conduct of the proceedings, or (b) how significantly the decision would affect the outcome of the trial.[2548]

Certification is not an appropriate vehicle to advance new grounds in support of the original motion. Such grounds can only be considered in the context of the two criteria for certification.[2549]

Certification of an appeal is the absolute exception when deciding on the admissibility of the evidence.[2550] However, certification has been granted where the decision may concern the admissibility of broad categories of evidence, or where it determines particularly crucial matters of procedure or evidence.[2551]

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[2546] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List* (21 August 2007) at para. 14

[2547] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material"* (4 February 2005) at paras. 26,28; *Prosecutor v Muvunyi*, No. ICTR-200-55A-T, *Decision on the Prosecutor's Motion Pursuant to Rule 73(B) to Appeal the Decision Denying Leave to Amend the Indictment and for Stay of Proceedings* (16 March 2005) at para. 14-15

[2548] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's and Niyiramasuhuko's Motions for Certification to Appeal the Decision on Defence's Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible* (18 March 2004) at para. 16

[2549] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries* (21 July 2005) at para. 5

[2550] *Niyiramasuhuko v Prosecutor*, No. ICTR-98-42-AR73.2, *Decision on Pauline Niyiramasuhuko's Appeal on the Admissibility of Evidence* (4 October 2004) at para. 5; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Request for Certification to Appeal a Decision on 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of Testimony of Witnesses GFA, GKB, and GAP* (17 November 2004) at para. 13

[2551] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses* (21 July 2005) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification Concerning Admission of Prosecution Exhibit P-417* (15 November 2006)

Absent abuse, the exercise of discretion by a Trial Chamber in determining the admissibility of evidence is not amenable to review by the Appeals Chamber.[2552]

The issue of whether resolution by the Appeals Chamber may materially advance the proceedings requires consideration not only of the effect on proceedings assuming that there would be a reversal or modification of the Trial Chamber's decision, but also whether there is serious doubt as to the correctness of the legal principles at issue.[2553]

Decision on motion for withdrawal of counsel not appealable by accused as appeal of right, but Registrar should consider complete breakdown in communication between the accused and his counsels when deciding how to proceed.[2554]

Decision on motion for judgement of acquittal pursuant to Rule 98 *bis* is a "decision" for which certification to appeal may be granted pursuant to Rule 73.[2555]

**time for filing certification**

Where counsel had not requested extension of time in which to apply for certification to receive French translation, his subsequent application for certification to appeal was untimely.[2556]

Under Rule 73, there is no provision for a waiver upon a showing of good cause.[2557]

Certification granted despite late filing where delay was short, and no party was prejudiced.[2558]

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[2552] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Motion for Certification of Appeal Against the Trial Chamber's Decisions of 28 October 2005 on the Admissibility of the Testimonies of Witnesses AP and TN* (16 November 2005) at para. 11

[2553] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO* (11 December 2003) at para. 6; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Application for Certification Concerning Defence Cross Examination After Prosecution Cross Examination* (2 December 2005)

[2554] *Nzirorera v Procureur*, No. ICTR-98-44-A, *Decision: Interlocutory Appeal Against the3 October 2001 Trial Chamber II Decision on the Motion for Withdrawal of Assignment of Counsel* (1 February 2002)

[2555] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis* (20 March 2006) at para. 6

[2556] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Ndindiliyimana's Request for Certification of Appeal from the Decision Dated 24 September 2004 Dismissing Applicant's Request for Transfer of his Trial to a National Jurisdiction* (6 April 2005)

[2557] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Leave to Appeal Decision on Defence Motion for Extension of Time and Oral Decision* (25 June 2004) at para. 5

[2558] *Prosecutor v Uwinkindi*, No. ICTR-01-75-PT, *Decision on Defence Application for Certification to Appeal Decision on Preliminary Motion Alleging Defects in the form of the Amended Indictment* (28 March 2011) at para. 2

The different wording in Rules 72 and 73 makes it doubtful whether the Chamber may grant a suspension of the time-limit for the filing of an application for certification to appeal.[2559]

Certification must be applied for within seven days of filing, not receipt.[2560]

Seven-day period for applying for certification includes the date the decision on the motion is filed.[2561]

Where defence counsel did not receive actual notice of the decision within seven days of its filing, the interest of justice required that it be given an extension of time to file an application for certification.[2562]

**stay pending appeal**

An appeal does not suspend the application of the decision appealed unless an injunction or a stay is ordered.[2563]

**timing of motions and decisions**

The five-day limit for filing responses to motions includes Saturdays and Sundays. When the due date falls on a weekend, the response is due on Monday.[2564]

A motion for extension of time to respond must be filed within the five-day period after receipt of the motion.[2565]

The five-day period of Rule 73(E) is the minimum period a Chamber must wait before deciding a motion. A party is at liberty to respond to a pending motion until the Chamber files its decision.[2566]

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[2559] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on Prosecution's Request for Suspension of the Time Limit Under Rule 73(C) in Respect of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)* (16 June 2004)

[2560] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Certification to Appeal the Decision on the Defence Motion to Modify the List of Defence Witness for Arsene Shalom Ntahobali* (26 September 2005)

[2561] *Prosecutor v Nsengimana*, No. ICTR-2001-69-I, *Decision on Hormisdas Nsengimana's Motion for Certification to Appeal the Decision of 29 March 2001* (26 April 2007)

[2562] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion for Extension of Time to File a Request for Certification* (7 October 2005)

[2563] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance by Accused Kabiligi* (25 March 2005) at para. 15; *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Request for Leave to Appeal Decision on Defence Motion for Extension of Time and Oral Decision* (25 June 2004) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Motion to Continue Trial filed by the Defence for Joseph Nzirorera* (29 March 2004) at para. 8

[2564] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis(E) of the Rules* (11 February 2005) at para. 2

[2565] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis(E) of the Rules* (11 February 2005) at para. 4

Rule 73 (E) does not bar the filing of a submission after the five-day time limit. Therefore, the only consequence the Chamber attaches to the failure to meet the deadline is that after it has lapsed, a ruling may be handed down without awaiting the belated submission. If, on the contrary, a submission is filed after the deadline but before the motion is considered, as is presently the case, such submission may still be considered.[2567]

Response by prosecution filed one day after expiration of period in Rule 73(E) was inadmissible and would not be considered.[2568]

Response by prosecution filed 7 days late would not be taken into consideration.[2569]

Response by prosecution filed three months late due to oversight was admissible given the importance of the issues of witness protection to the Tribunal.[2570]

Trial Chamber erred in not deciding disclosure motion filed three days before judgement. Validly filed motions are not implicitly dismissed with the filing of the trial judgement.[2571]

**frivolous motions**

**appeal**

No appeal of right lies from an order imposing sanctions on counsel under this section as there is no potential imprisonment involved.[2572] The President has no authority to review the imposition of sanctions imposed by the Trial Chamber under this rule.[2573]

A decision to impose sanctions is subject to independent review by the Appeals Chamber where one of the judges was the subject of the motion for disclosure at issue.[2574]

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[2566] *Prosecutor v Mpambara*, No. ICTR-2000-65-I, *Decision on the Defence Preliminary Motion Challenging the Amended Indictment* (30 May 2005) at fn. 1
[2567] *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Decision on the Defence Motion for Leave to Present Evidence in the Form of a Written Statement Pursuant to Rule 92 bis* (13 March 2003) at para. 10
[2568] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion for Disclosure of Documents* (31 January 2006) at para. 20
[2569] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, Notice of 15th Violation of Rule 72(E), and Motion to Strike the Prosecution's Response* (19 November 2008) at para. 5
[2570] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Motion for Permission to Convey Protected Information to Defence Experts* (11 September 2006) at para, 6
[2571] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 41
[2572] *Nzirorera v Prosecutor*, No. ICTR-98-44-AR73(F), *Decision on Counsel's Appeal from Rule 73(F) Decisions* (9 June 2004)
[2573] *Prosecutor v Nzirorera et al*, No. ICTR-98-44-I, *The President's Decisions on Lead Counsel's Applications for Review of Sanctions Imposed Under Rule 73(F)* (26 January 2004)

Sanctions may be appealed when certification to appeal is granted.[2575]

**cautiously imposed**

Sanctions under this section should be imposed cautiously, bearing in mind the interests of justice and the right to a fair trial and the absence of appellate review.[2576]

**chilling effect**

Abuse of process is not in the interest of an accused and therefore the denial of fees for the filing of frivolous motions has no impact on the accused's rights.[2577]

**denied**

While counsel's failure to satisfy many of the requirements of Rule 115 was highly problematic, it did not amount to professional negligence such as to warrant sanctions under Rule 73(F).[2578]

**duplication of pleadings**

Failure to make related contentions in a single motion, rather than multiple motions, runs counter to the interests of judicial economy and may result in the forfeiture of fees.[2579]

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[2574] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 21

[2575] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.19, *Decision on Mathieu Ngirumpatse's Appeal Against a Sanction Imposed on Counsel…*(21 March 2011) at para. 14

[2576] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 21; *Karemera & Nzirorera v Prosecutor*, No. ICTR-98-44-AR73.4, *Decision on Interlocutory Appeals Regarding Participation of Ad Litem Judges* (11 June 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Vacate Sanctions* (23 February 2005) at para. 6; *Prosecutor v. Kanyarukiga*, No. ICTR-2002-78-AR11bis, *Decision on the Request to Admit Additional Evidence of 1 August 2008* (1 September 2008) at para. 11; *Karera v Prosecutor*, No. ICTR-01-74-A, *Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (29 October 2008) at para. 14; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.19, *Decision on Mathieu Ngirumpatse's Appeal Against a Sanction Imposed on Counsel…*(21 March 2011) at para. 17

[2577] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (21 August 2007) at p. 4

[2578] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal* (27 September 2010) at para. 40

[2579] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Tenth Notice of Disclosure Violations and Motion for Remedial and Punitive Measures* (5 February 2008) at para. 7

Sanctions on defence counsel for filing motion for reconsideration of Rule 92 *bis* motion vacated where order that all Rule 92 *bis* applications be filed in a single motion did not apply to reconsideration of the omnibus Rule 92 *bis* decision and where the motion for reconsideration was neither frivolous nor an abuse of process.[2580]

**equality of arms**

Rule 73(F) does not violate equality of arms because sanctions under this section are available against both defence counsel and prosecution counsel.[2581]

Where motions of the defence and counter motion of the prosecution were frivolous, parties were warned, and sanctions imposed only on the defence by withholding their fees and costs.[2582]

**notice**

Neither the Statute nor the Rules provide for counsel to be heard prior to the imposition of sanctions pursuant to Rule 73(F).[2583]

**on defence**

Sanctions imposed on defence for frivolous motion[2584]and abuse of process.[2585]

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[2580] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Vacate Sanctions: Rule 92 bis* (26 April 2010)
[2581] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Vacate Sanctions* (23 February 2005) at para. 7
[2582] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion* (23 May 2002) at para. 18
[2583] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (21 August 2007) at p. 3; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.19, *Decision on Mathieu Ngirumpatse's Appeal Against a Sanction Imposed on Counsel…*(21 March 2011) at para.17
[2584] *Prosecutor v Muvunyi*, No. ICTR-2000-55ª-T, *Decision on Muvunyi's Additional Objections to the Deposition Testimony of Witness QX* (31 May 2006); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Ex Parte Motion to Seal Registry Decision as a Violation of a Defence Team's Right to Privacy* (22 May 2006); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Appropriate Relief for Violation of Rule 66* (4 February 2005)*; Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Motion Appealing the Registrar's Denial of Marriage Facilities* (20 January 2005); *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material* (1 December 2004); *Prosecutor v. Ndindiliyimana et* al, No. ICTR-2000-56-T, *Decision on Defence Motion to Lift the Chamber's 19 September 2004 Order Assigning Defence Counsel to the Accused Augustin Bizimungu* (3 November 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Adjournment of 13 September Trial Session* (3 September 2004) ; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu Urgent Motion Opposing the Testimony of Witness GKD* (17 June 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi and Jerome Bicamumpaka's Motion to Have the Chamber Inquiring into the Matter of the Testimony of Jean Kambanda* (17 June 2004); *Prosecutor v Karemera*, No. ICTR-98-44-T, *Décision*

*Relative à la Requete Exception Préjudicielle au Nzirorera aux fins de Rejet de l'acte d'Accusation Pour Default de Compétence: Chapitre VII de la Charte des Nations Unies* (29 March 2004); *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision Relative a la Requetes de Karemera et Nzirorera aux fins d'Invalidation de l'Acte d'Accusation Pour Vices de Procedure et de Forme* (29 March 2004); *Prosecutor v Mugiraneza*, No. ICTR-99-50-I, *Decision on Prosper Mugiraneza's Motion for Equality of Arms Related to Access to Witnesses* (23 October 2003); *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. 21; *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Request for Leave to Interview Potential Prosecution Witnesses Jean Kambanda, Georges Ruggiu, and Omar Serushago* (29 September 2003); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion by Bagosora, Kabiligi, and Ntabakuze for the Preservation of their Rights* (13 May 2002); *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Defence Motion to Lift the Chamber's 19 September 2004 Order Assigning Defence Counsel to Accused Augustin Bizimungu* (3 November 2004); *Prosecutor v Nchamihigo*, No. ICTR-2001-63-DP, *Decision on the Defence Motion Seeking Release of the Accused Person and/or any Other Remedy on the Basis of Abuse of Process by the Prosecutor* (8 May 2002); *Prosecutor v Ntagerura et al*, No. ICTR-98-46-I, *Decision on Imanishimwe's Motion Objecting to Non-Compliance With the Rules and Material Prejudice to the Accused* (10 July 2000); *Prosecution v. Semanza*, No. ICTR-97-20-I,*Decision on the Defence Motion for Dismissal of the Entire Proceedings Due to Persistent and Continuing Violations of the Rights of the Accused, Rules of Procedure and Statute of the Tribunal and Abuse of Process* (11 Sept.2000) at para.31; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Limit the Scope of Cross-Examination of Witness JN* (12 November 2002) at para. 8; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 84; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115* (5 May 2006) at para. 10; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Pauline Niyiramasuhuko's Extremely Urgent Motion for Extension of Time Within Which to File a Response* (17 August 2006); *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006); *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Jean Bosco Barayagwiza's Urgent Motion Requesting Privileged Access to the Appellant Without Attendance of Lead Counsel* (17 August 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (3 July 2007) at para, 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (21 August 2007); *Prosecution v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Request for Certification of the Chamber's Proprio Motu Decision of 30 November 2007* (6 February 2008) at para. 5; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Expedited Translation of the Media Judgement from the Appeals Chamber* (27 February 2008); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Motion to Vary Witness List* (12 June 2008) at para. 12; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Judicial and Administrative Deferral in Favour of the ICTR* (5 November 2008) at para. 31; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Motion to Examine on Affidavit* (20 November 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Vacate Oral Hearing on Severance* (21 November 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, Notice of 15th Violation of Rule 72(E), and Motion to Strike the Prosecution's Response* (19 November 2008) at para. 3,14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 20th Notice of Violation of Rule 66 and Motion for Remedial and Punitive Measures: Colonel Felicien Muberuka* (4 December 2008) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's 22nd Notice of Rule 66 Violation and Motion for Remedial and Punitive Measures: Paul Bisengimana* (13 February 2009) at para. 6; *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Motion for Clarification and Request for an Extension of Time* (3 February 2009); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T,

**on the prosecution**

No sanctions imposed on the prosecution despite five filings for certification and reconsideration after denial of motion to vary witness list. The Trial Chamber simply "urges Counsel to exercise judgment in these matters, and to make informed and reasoned choices in the conduct of their cases."[2586]

Prosecutor "censured" for failing to comply with Trial Chamber order for disclosure of witness statements, but not sanctioned.[2587]

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*Decision on Jerome-Clement Bicamumpaka's Submissions for Stay of Proceedings and Motion for Disclosure Concerning Witness GKB* (19 May 2009); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on the Defence Motion for Certification to Appeal the Chamber's Decision on Video Link Testimony* (3 February 2010); *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion to Strike Portions of the Prosecution Closing Brief* (30 September 2010); *Prosecutor v Karemera & Ngirumpatse*, No, ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Motions Relating to his Witnesses and the Admission of Written Statements* (27 October 2010) at para. 33

[2585] *Prosecutor v Karemera et al*, No. ICTR-98-44-I, *Decision on the Defence Motion to Order the Government of Rwanda to Show Cause* (4 September 2003); *Prosecutor v Nchamihigo*, No. ICTR-2001-63-DP, *Decision on the Defence Motion Seeking Review of the Decision of 8 May 2002* (10 July 2002); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Proprio Motu Order Following the Registrar's Submission Regarding the Chamber's Scheduling Order of 16 February 2007* (11 May 2007); *Prosecutor v Karemera et al*, No. ICTR-98-44-AR11*bis*, *Decision on Motion for Reconsideration of Decision on Joseph Nzirorera's Appeal from Denial of a Request for Designation of a Trial Chamber to Consider Referral to a National Jurisdiction* (21 August 2007) ; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness HH for False Testimony* (26 September 2007) at para. 9; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Sanctions* (3 October 2007); *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Request for Certification to Appeal or in the Alternative Reconsideration of the Chamber's Decision of 30 November 2007* (14 December 2007) at para. 10; *Prosecution v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Request for Certification of the Chamber's Proprio Motu Decision of 30 November 2007* (6 February 2008) at para. 5; *Prosecution v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Supplemental Motions on Alleged Defects in the Form of the Indictment* (15 July 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas, Video Link and on Prosecution Motion for an Order to Nzirorera to Reduce his Witness List* (2 December 2008) at paras. 11,14,15,25; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Decision on Bisengimana Disclosure* (24 March 2009) at para. 8; *Prosecutor v Nshogoza*, No ICTR-07-91-T, *Decision on Defence Motion for Access to Confidential Kamuhanda Defence Motion* (14 May 2009); *Prosecutor v Karemera et al*., No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of the Chamber's Decision on Admission of Written Statements* (7 April 2010) at para. 25; *Prosecution v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Third Urgent Defence Motion Requesting an Order for Cooperation Directed at France* (4 June 2010) at para. 16; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.19, *Decision on Mathieu Ngirumpatse's Appeal Against a Sanction Imposed on Counsel…*(21 March 2011)

[2586] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)* (14 July 2004) at para 10

[2587] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Defence for Bagosora's Motion for Postponement or Quashing of the Testimonies of Witnesses Ruggiu, XAM, and ZF* (30 September 2002)

**requests for sanctions**

The parties should exercise their discretion in calling for sanctions against the opposing party.[2588]

**reversed**

Sanctions on defence counsel for filing motion for disclosure of Judge's assessment of prosecution counsel was unreasonable and reversed on appeal.[2589]

**Rule 73 bis—pretrial conference**

**(A) The Trial Chamber shall hold a Pre-Trial Conference prior to the commencement of the trial.**
**(B) At the Pre-Trial Conference the Trial Chamber or a Judge, designated from among its members, may order the Prosecutor, within a time limit set by the Trial Chamber or the said Judge, and before the date set for trial, to file the following:**
**(i) A pre-trial brief addressing the factual and legal issues;**
**(ii) Admissions by the parties and a statement of other matters not in dispute;**
**(iii) A statement of contested matters of fact and law;**
**(iv) A list of witnesses the Prosecutor intends to call with:**
**(a) The name or pseudonym of each witness;**
**(b) A summary of the facts on which each witness will testify;**
**(c) The points in the indictment on which each witness will testify; and**
**(d) The estimated length of time required for each witness;**
**(v) A list of exhibits the Prosecutor intends to offer stating, where possible, whether or not the Defence has any objection as to authenticity.**
**The Trial Chamber or the Judge may order the Prosecutor to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call to testify.**
**(C) The Trial Chamber or the designated Judge may order the Prosecutor to shorten the examination-in-chief of some witnesses.**
**(D) The Trial Chamber or the designated Judge may order the Prosecutor to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.**
**(E) After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.**
**(F) At the Pre-Trial Conference, the Trial Chamber or the designated Judge may order the Defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set**

[2588] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief* (30 November 2004) at para. 36
[2589] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.15, *Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team* (5 May 2009) at para. 22

**for trial.**

**admission of facts**

Rule 73 *bis* provides a mechanism by which a party may seek to admit non-contentious matters. If asked to admit facts, an accused might quite properly decide to admit nothing and put the Prosecutor to proof on every issue and neither a Trial Chamber nor the Prosecutor can compel an accused to do otherwise.[2590]

**admission of written statements**

The purpose of Rule 73 *bis*, under which the Chamber has authority to require the filing of a witness list, is to circumscribe in-court testimony. This includes witnesses who may be called for cross-examination under Rule 92 *bis*. Persons who are deceased, however, can never be "called" to testify, as that term is used in Rule 73 *bis*. Accordingly, the absence of these individuals from the witness list does not preclude the filing of the motion, or the admission of their written statements.[2591]

**exhibit lists**

The prosecution is required to provide the defence with copies of all exhibits contained in its exhibit list.[2592]

The fact that the prosecution tenders an exhibit which does not feature on its list submitted in conformity with Rule 73 *bis* (B)(v) does not preclude its admission into evidence. The Tribunal's practice reflects that a party is not exclusively bound by its initial list submitted at the pre-trial stage.[2593]

Leave granted under Rule 54 for the prosecution to vary its exhibit list submitted pursuant to Rule 73 *bis* (B)(v).[2594]

**informal meetings**

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[2590] *Prosecution v. Semanza,* No.ICTR-97-20-1,*Decision on the Defence Motion for Dismissal of the Entire Proceedings Due to Persistent and Continuing Violations of the Rights of the Accused, Rules of Procedure and Statute of the Tribunal and Abuse of Process* (11 Sept.2000) at para.19

[2591] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admission of Statements of Deceased Witnesses* (19 January 2005) at para. 13

[2592] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision Relative a la Requete de L'Accuse Nzirorera aux fins de la Divulgation d'Une Copie de Chacune des Pieces a Conviction du Procureur* (2 April 2004); *Prosecutor v. Nsabimana,* No. ICTR-97-29-T, *Decision on the Defence Motions for Disclosure of Copies of the Prosecutor's Exhibits* (18 September 2001) at para. 22

[2593] *Prosecutor v Simba,* No. ICTR-01-76-T, *Decision on the Admission of Prosecution Exhibits 27 and 28* (31 January 2005) at para. 13

[2594] *Prosecutor v Nyirimasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecutor's Motion to Modify her List of Exhibits* (14 December 2001) at para. 11

For the benefits of informal meetings to be retained, the parties should refrain from referring to the content of these meetings in the course of formal pleadings or proceedings.[2595]

**pre-trial brief**

A pre-trial brief is not a substitute for an amended indictment but provides notification and a means for the parties to clarify their strategies before trial. The Trial Chamber declined to strike the pre-trial brief which contained new material not contained in the indictment.[2596]

Prosecution ordered to file pre-trial brief in contempt case.[2597]

**reduction of witness list**

Prosecution witness list found to be excessive and ordered to be drastically reduced with respect to the number of witnesses proposed to give evidence of rapes.[2598]

Trial Chamber declined to find number of witnesses for sexual assault evidence excessive where only the witness' statements would be admitted under Rule 92 *bis* and any cross examination would be on limited areas.[2599]

**varying witness list**

**denied**

It would be unreasonable to allow parties to vary their witness lists every time they consider that a witness may have been discredited. Therefore, it was not in the interest of justice to allow prosecution to vary its witness list after one of its witnesses had recanted.[2600]

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[2595] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for an Order to File Notice of Alibi* (22 March 2007) at para. 9

[2596] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Motion for the Defence of Ngirumpatse for Dismissal of the Prosecutor's Pre-Trial Brief* (24 November 2003); *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Defence Motion to Strike or have Declared Irrelevant Parts of the Pre-Trial Brief* (13 December 2010) at para. 7

[2597] *Prosecutor v Nshogoza*, No. ICTR-2007-91-PT, *Decision on Defence Motion to have Witness BLP Removed from Prosecution List of Witnesses and for the Prosecution to File a Pre-Trial Brief* (10 November 2008) at para. 8

[2598] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 28

[2599] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY* (28 September 2007) at para. 32

[2600] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File Another Rule 98 bis Motion* (19 April 2008) at para. 13

Addition of expert witnesses Allison Des Forge and Anastase Gasana denied where no summary of their testimony appeared in the pretrial brief, their statements were barely disclosed within the 21-day limit of Rule 94 *bis* and their testimony as to the background of the events was not necessary to discharge the prosecution's burden of proof.[2601]

Rule 73*bis*(E) is an exceptional measure where the interests of justice mandate a departure from Rule 66. It would be unfair to the defence to be faced with entirely new witnesses when their reasonable expectation would be that the prosecution is closing its case and the defence is already aware of all the evidence to be called. If the witnesses were to be added, the defence would have been deprived of the opportunity to use the evidence of these new witnesses to cross-examine previous prosecution witnesses who testified to similar issues, to test the totality of the evidence and the credibility of all the witnesses testifying to similar issues.[2602]

**factors**

The final decision as to whether it is in the interests of justice to allow the Prosecution to vary its list of witnesses rests with the Trial Chamber.[2603]

The Tribunal should adopt a flexible approach in the exercise of its discretion relating to the matter of adding witnesses to a witness list. Among the factors to be considered are (1) the reasons for adding witnesses; (2) date on which the Prosecution declared its intention to call the proposed witnesses; (3) the stage of the trial proceedings; (4) whether the late discovery of the witnesses arose from fresh investigations: (5) and whether the Defence will have adequate time to make an effective cross-examination.[2604]

Factors to determine if the prosecution should be given leave to add a witness to its witness list include the sufficiency and time of disclosure of witness information to the Defence; the probative value of the proposed testimony in relation to existing witnesses and allegations in the indictments; and the ability of the Defence to make an effective cross-examination of the proposed testimony, given its novelty or other factors; and the justification offered by the Prosecution for the addition of the witnesses. The credibility of the witness is not a factor since this cannot be assessed in advance.[2605]

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[2601] *Prosecutor v Nchamihigo,* No. ICTR-01-63-T, *Decision on the Prosecution Motion for Leave to Amend the Witness List* (9 January 2007) at paras. 9-11

[2602] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Second Motion for Reconsideration of the Trial Chamber's "Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)* (14 July 2004) at para. 9

[2603] *Prosecutor v Ntiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses* (22 January 2003) at para. 14

[2604] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis(E) of the Rules* (11 February 2005) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)* (26 June 2003) at para. 14

[2605] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Very Urgent Motion Pursuant to Rule 73 bis (E) to Vary the Prosecutor's List of Witnesses Filed on 25 May 2004* (3 September

The "interests of justice" and "good cause" to grant the addition of a witness requires an assessment of the materiality of the testimony, the complexity of the case, prejudice to the defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence , and the presentation of the best available evidence balanced against the right of the accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay.[2606]

Factors considered in determining whether to allow the prosecution to add a witness in an ongoing trial include (1) materiality of the testimony; (2) complexity of the case; (3) prejudice to the defence including elements of surprise ; (3) ongoing investigations; (4) replacements; (5) corroboration of evidence; (6) the justification for adding witnesses; (7) date on which the application was made; (8) stage of trial proceedings; (9) whether the witness resulted from fresh investigations; and (10) adequate time for cross-examination.[2607]

The Prosecutor must demonstrate why the variation of the list is in the interests of justice.[2608]

Prejudice from the addition of a witness can be ameliorated by permitting the defence to introduce evidence at a later stage that may impeach the witness's testimony, or to recall witnesses whose cross-examination might be needed considering information subsequently discovered.[2609]

There is no requirement that the prosecution remove witnesses who were expected to testify to the same facts when seeking to vary its witness list to add witnesses.[2610]

**granted**

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2004); *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Prosecution's Motion to Vary the Witness List* (27 August 2004) at para. 7

[2606] *Prosecutor v Kamuhanda*, No. ICTR-99-55A-T, *Decision on the Prosecutor's Motion to Add Witness DAL* (15 February 2002) at para. 4; *Prosecutor v Nahimana et al*, No. ICTR-99-52-I, *Decision on the Prosecutor's Application to Add Witness X to Its List of Witnesses and for Protective Measures* (14 September 2001) at para. 11, *Prosecutor v Nahimana et al*. Case No. ICTR-99-52-I, *Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses* (26 June 2001) at paras 19-20; *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Prosecution Motion for Varying the Witness List* (4 February 2008) at paras. 3-4

[2607] *Prosecutor v Mpambara*, No.2001-65-T, *Decision on the Prosecution Request to Add Witness AHY* (27 September 2005) at para. 4; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution's Motion Dated 9 August 2005 to Vary Its List of Witnesses Pursuant to Rule 73 bis (E)* (21 September 2005) at para. 32

[2608] *Prosecutor v. Musema*, No.ICTR-96-13-T,*Decision on the Prosecutor's Request for Leave to Call Six New Witnesses* (20 April 1999) at para.1

[2609] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Objection to Elements of Testimony of Witness XBH* (3 July 2003) at para. 14

[2610] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 178

A seven-month delay purportedly between the taking of a statement by OTP's investigation section and its being brought to the attention of the prosecution section is unacceptable. However, given the early stage of the procedure and the next reduction of the number of witnesses, the prosecution's motion was granted.[2611]

Addition of one witness for whom disclosure was provided in a timely manner was in the interests of justice.[2612]

Addition of newly discovered witness to authenticate recording of which accused already had notice was not unduly prejudicial and would be granted.[2613]

Expert witness allowed to be added where his testimony would be probative of an important issue and the defence could be given adequate time to prepare.[2614]

Calling the three new witnesses at the end of the prosecution's case, or in a subsequent session, provided the defence sufficient time to prepare for the cross-examination.[2615]

Prosecution allowed to add witness to testify on same events as earlier witnesses where the testimony was intended to corroborate or supplement previous testimony without being repetitive.[2616]

**timing**

The prosecution only needs permission to vary its witness list after the commencement of the trial.[2617]

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[2611] *Prosecutor v Ndindiliyimana et al*, No. 2000-56-T, *Decision on Prosecution Motion to Vary its List of Witnesses: Rule 73 bis(E) of the Rules* (11 February 2005)

[2612] *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Motion for Protective Measures, Variation of the Witness List, and Transfer of Detained Witness BUY* (5 February 2007) at para. 8

[2613] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Prosecution Motion to Vary Witness List* (16 February 2007)

[2614] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecutor's Motion for Leave to Add a Handwriting Expert to his Witness List* (14 October 2004) at para. 18; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Prosecutor's Motions for Variation of Witness List and Protective Measures for Witnesses BUW, CCF, CCJ, and BLJ* (14 February 2007) at para. 12

[2615] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecutor's Motion to Drop and Add Witnesses* (30 March 2004) at para. 36; *Decision on the Prosecutor's Motion for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses* (24 July 2001) at para. 13; *Prosecutor v Kamuhanda*, No. ICTR-99-55A-T, *Decision on the Prosecutor's Motion to Add Witnesses GKI, GKJ, and GKL* (6 February 2002); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution's Motion Dated 9 August 2005 to Vary Its List of Witnesses Pursuant to Rule 73 bis (E)* (21 September 2005) at para 36

[2616] *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Prosecution Motion for Varying the Witness List* (4 February 2008) at para. 8

[2617] *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on the Defence Motions Objecting to the Prosecution's Pre-Trial Brief* (25 June 2009) at para. 34

There is no time limit for the prosecution to file a motion to vary its witness list, but the stage of the proceedings and the prejudice to the accused are factors which the Trial Chamber must consider in deciding on such a motion.[2618]

**withdrawal of witnesses**

The prosecution is obligated to file a motion to vary its witness list with the Trial Chamber when withdrawing witnesses. The accused and the Trial Chamber are entitled to a precise picture of the remaining witnesses to be heard.[2619]

**witness list**

The prosecution's witness list should include the factual points of the indictment to which the witness' testimony relates, not simply the counts.[2620]

Rule 92 *bis* witnesses are to be included in the prosecution's witness list and counted as part of the limitation on the number of witnesses.[2621]

The Trial Chamber ordered the prosecution to reduce its witness list from 182 to 100 witnesses. Including witnesses on the list which the prosecution does not firmly intend to call places an unmanageable burden on the Trial Chamber and the defence.[2622]

The Tribunal may, *inter alia*, order the Prosecutor to shorten the examination-in-chief of some witnesses.[2623]

The Rule requiring the prosecution to specify which paragraphs in the indictment a witness will testify about applies to all witnesses, not only factual witnesses.[2624]

**Rule 73 ter—pre-defence conference**

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[2618] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 174

[2619] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera and the Prosecutor on the List of Prosecution Witnesses for the Fifth Session and the Final List of Prosecution Witnesses* (12 June 2007) at paras. 19,21

[2620] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motions of Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter Motion* (23 May 2002) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative à la Requete de L'Accuse Nzirorera aux fins d'Une Ordonnance Enjoignant au Procureur de Préciser les Paragraphes de l'Acte de Accusation au Regard Desquels les Timons A Charge Viendront Déposer* (2 April 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka and Mugenzi's Motion for Specificity in the Pre-Trial Brief* (30 November 2004)

[2621] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Compel the Prosecution to Comply With The Chamber's Decision of 1 March 2004* (21 May 2004)

[2622] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Order for Reduction of Prosecutor's Witness List* (8 April 2003)

[2623] *Prosecutor v. Musema*, No.ICTR-96-13-T,*Decision on the Prosecutor's Request for Leave to Call Six New Witnesses* (20 April 1999) at para.10

[2624] *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision on the Defence Motions Objecting to the Prosecution's Pre-Trial Brief* (25 June 2009) at para. 35

**(A) The Trial Chamber may hold a Conference prior to the commencement by the Defence of its case.**
**(B) At that Conference, the Trial Chamber or a Judge, designated from among its members, may order that the Defence, before the commencement of its case but after the close of the case for the prosecution, file the following:**
**(i) Admissions by the parties and a statement of other matters which are not in dispute;**
**(ii) A statement of contested matters of fact and law;**
**(iii) A list of witnesses the Defence intends to call with:**
**(a) The name or pseudonym of each witness;**
**(b) A summary of the facts on which each witness will testify;**
**(c) The points in the indictment as to which each witness will testify; and**
**(d) The estimated length of time required for each witness;**
**(iv) A list of exhibits the Defence intends to offer in its case, stating where possible whether or not the Prosecutor has any objection as to authenticity.**
**The Trial Chamber or the Judge may order the Defence to provide the Trial Chamber and the Prosecutor with copies of the written statements of each witness whom the Defence intends to call to testify.**
**(C) The Trial Chamber or the designated Judge may order the Defence to shorten the estimated length of the examination-in-chief for some witnesses.**
**(D) The Trial Chamber or the designated Judge may order the Defence to reduce the number of witnesses, if it considers that an excessive number of witnesses are being called to prove the same facts.**
**(E) After commencement of the Defence case, the Defence, if it considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary its decision as to which witnesses are to be called.**

**defence preparation**

Defence would not be allowed additional time for filing of pre-defence materials. It should have been lining up defence witnesses from the beginning of the case, or at least since the close of the prosecution case.[2625]

Rule 73 *ter* witness lists should have been made without regard to the order in which the accused would be presenting their defences, and therefore change in order of presentation of defence cases did not warrant reconsideration of the number of witnesses allowed to an accused.[2626]

**limits on number of witnesses**

[2625] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2001-56-T, *Decision on Bizimungu's Motion to Reconsider the Scheduling Order of 16 February 2007* (13 March 2007) at para. 6
[2626] *Decision on Joseph Nzirorera's Motions for Reconsideration of 24 October 2008 Order, for Extension of Time, Subpoenas, Video Link and on Prosecution Motion for an Order to Nzirorera to Reduce his Witness List* (2 December 2008) at para. 14

Trial Chamber did not err in ordering reduction of number of witnesses to be called by accused after reviewing Rule 73 *ter* submissions and concluding that several witnesses were being called to address the same factual allegations.[2627]

Right to present full defence was not abridged by ordering the accused to reduce his witness list from 56 to 30 witnesses considering Trial Chamber's determination that this number of witnesses would still allow the accused to present an adequate defence.[2628]

Right to equality of arms was not violated where prosecution called 59 witnesses for 6 accused and accused was allowed to call 30 witnesses.[2629]

Accused ordered to substantially reduce his witness list. Shifting witnesses from live testimony to Rule 92 *bis* witnesses was not a reduction of the witness list, since the witnesses may have to be called for cross examination or may be found not to be appropriate for Rule 92 *bis*.[2630]

Accused ordered to limit defence case to 40 days considering scope of prosecution case, pre-defence filings, and repetition in subject of testimony to be offered. However, Trial Chamber promised to be flexible.[2631]

Accused ordered to reduce time of examination of its witnesses so 30 witnesses could be heard in 20 trial days.[2632]

Where 20 prosecution witnesses were called, defence would be limited to 30 witnesses.[2633]

Order limiting defence to 30 witnesses would be modified to allow them to call up to 14 additional witnesses for those paragraphs of the indictment addressed by less than four defence witnesses.[2634]

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[2627] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List* (21 August 2007) at para. 16

[2628] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List* (21 August 2007) at para. 24

[2629] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List* (21 August 2007) at para. 26

[2630] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Leave to File Documents Out of Time and Order for Further Reduction of Witness List* (20 February 2008)

[2631] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motions to Vary his Witness List and for Extension of Protective Measures* (2 June 2008) at para.10

[2632] *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Consolidated Decision on Prosecution Motion Concerning Defence Compliance with Rule 73 ter and Defence Motions to Vary Witness List* (13 November 2008)

[2633] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010* (26 March 2010) at para. 16

Defence was allowed to file reserve list of witnesses who would be substituted if any of the witnesses on his witness list could not be called.[2635]

**pre-defence brief**

The pre-defence brief is for the purpose of presenting the defence theory of the case. It is not necessary to strike any parts of the brief even if irrelevant since they would simply not be considered by the Trial Chamber.[2636]

**testimony of accused**

Accused would not be required to provide a summary of his testimony with the pre-defence brief.[2637]

**varying witness list**

**denied**

Motion to vary witness list denied where proposed testimony would both impeach and bolster the credibility of a defence witness.[2638]

Motion to vary defence witness list denied where witness' information appeared cumulative to evidence already presented, it was not certain whether witness was willing to testify for defence, and motion was not made until after the last defence witness had been called.[2639]

Motion to vary witness list after close of defence case denied where witness' importance to the case was not demonstrated and showing was not made that witness' testimony could not have been obtained earlier.[2640]

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[2634] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Extremely Urgent Motion for Reconsideration and/or Certification to Appeal the Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010 Rendered on 26 March 2010* (7 May 2010) at para. 44

[2635] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Motion by Mathieu Ngirumpatse for the Admission of Statements Pursuant to Rule 92 bis of the Rules and for the Protection of Witnesses* (11 November 2009) at para. 4

[2636] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Prosecution Motion for Severance and Exclusion of Parts of the Pre-Defence Brief* (13 October 2006) at para. 8

[2637] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Prosecution Motion for Severance and Exclusion of Parts of the Pre-Defence Brief* (13 October 2006) at para. 12

[2638] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Motion to Vary Witness List* (12 June 2008)

[2639] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Accused's Motion to Expand and Vary the Witness List* (28 March 2006)

[2640] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Vary Its Witness List and Tender a Witness Statement Under Rule 92 bis* (12 December 2006)

Trial Chamber did not err in denying request to add two defence witnesses where accused failed to demonstrate the testimony of those witnesses would be different from that of other defence witnesses who were heard.[2641]

**factors**

The Defence may seek to vary its list of witnesses after the commencement of the Defence case if it can show that this is in the interest of justice.[2642]

In evaluating a motion to vary the witness list, the Trial Chamber considers the materiality and probative value of the proposed testimony, the complexity of the case, the level of prejudice to the opposing party, the stage the proceedings have reached, and the reason for the late discovery of the witness.[2643]

The decision on whether to vary a witness list requires a close analysis of (1) the sufficiency and time of disclosure of the information regarding the witness, (2) the materiality and probative value of the proposed testimony in relation to existing testimony and allegations in the indictment; (3) the ability of the other party to conduct an effective cross examination; and (4) the justification offered for the addition of the witness.[2644]

Where the defence seeks to add a witness, it must provide an indication of the proposed testimony, demonstrating that it is relevant, as well as the proposed length of the examination in chief. The witness list will be allowed to be varied where the testimony is relevant and has probative value and the prosecution is not prejudiced.[2645]

There is a need to scrutinize each proposed new witness, including the sufficiency and time of disclosure of the witness information, the probative value of the testimony in relation to existing witnesses and allegations in the indictment, and the justification

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[2641] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 20
[2642] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses* (8 June 2000) at para. 10.
[2643] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Accused's Motion to Expand and Vary the Witness List* (28 March 2006) at para. 11; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion for Leave to Amend Witness List* (6 June 2006) at para. 3; *Prosecutor v Karera*, No. ICTR 01-74-T, *Decision on Variation of Defence Witness List* (13 July 2006) at para. 3; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decisions on Defence Motion for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List, and for Video-Link Testimony and on the Prosecution's Motion for Sanctions* (11 September 2007) at para. 10; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana* (13 April 2007) at para. 2; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Defence Motion for Leave to Amend its Witness List and for Admission of a Judgement Rendered by a Rwandan Court* (7 September 2007) at para. 3; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Vary his List of Witnesses Pursuant to Rule 73 ter* (15 February 2008) at para. 30
[2644] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motions to Vary his Witness List and for Extension of Protective Measures* (2 June 2008) at para. 5
[2645] *Prosecutor v Niyiramasuhuko et al*, No. IT-98-42-T, *Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses* (14 July 2006)

offered for the addition of witnesses, including the justification for the late discovery of the witnesses.[2646]

The decision to vary the witness list and add defence witnesses must consider the deadlines set for completion of the defence case and such leave will be granted only exceptionally near the end of the case.[2647]

**granted**

Motion to vary defence witness list granted despite failure of accused to file notice of alibi listing the witnesses sought to be added.[2648]

Where witnesses would be the only ones to testify on an element relevant to the defence, motion to vary witness list would be granted.[2649]

Motion to vary witness list granted despite failure of defence to indicate when it became aware of these witnesses.[2650]

Motion to vary witness list granted where co-accused had listed witnesses and decided not to call them.[2651]

Motion to vary witness list granted to add eyewitness to theft of accused's original passports where prosecution had ample notice of testimony and it related to a distinct issue which would not delay the proceedings.[2652]

Motion to vary witness list granted to add witness recently discovered,[2653] or where other witnesses refused to testify after arrest of the defence investigator.[2654]

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[2646] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Vary his List of Witnesses Pursuant to Rule 73 ter* (15 February 2008) at para. 31

[2647] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Present Additional Witnesses and Vary its Witness List* (17 November 2006)

[2648] *Prosecutor v Niyiramasuhuko et al*, No. IT-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion to Amend his Witness List and to Reconsider the Decision of 26 August 2005* (27 January 2006) at paras.31,33; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ndyambaje's Motion to Vary his List of Witnesses* (16 April 2008) at para. 16

[2649] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ndyambaje's Motion to Vary his List of Witnesses* (16 April 2008)

[2650] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion to Add Six Witnesses to its Witness List* (11 September 2006) at para. 3

[2651] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Variation of his Witness List* (7 April 2010)

[2652] *Prosecutor v Bizimungu et al*, No. ICR-99-50-T, *Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony* (1 May 2008) at para. 14

[2653] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Defence Motion for Leave to Amend its Witness List and for Admission of a Judgement Rendered by a Rwandan Court* (7 September 2007)

[2654] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decisions on Defence Motion for Additional Time to Disclose Witnesses' Identifying Information, to Vary its Witness List, and for Video-Link Testimony and on the Prosecution's Motion for Sanctions* (11 September 2007) at paras 13-15

Motion to vary witness list granted where witness belatedly came to attention of defence counsel.[2655]

Defence allowed to add witness to its witness list where it had difficulty locating and interviewing the witness,[2656] or where prosecution would not be prejudiced.[2657]

Defence allowed to add witness as fact witness after he was rejected as expert.[2658]

Defence allowed to add witnesses not discovered at the time of filing its witness list and where the prosecution was not prejudiced. Trial Chamber rejected prosecution request that no witness be added until prosecution has certified that it has received full disclosure.[2659] Disclosure thirty-five days before the witness appeared was adequate notice to the prosecution.[2660]

Defence allowed to add a witness and call him at the end of its case where information was important and material to defence case.[2661]

Defence allowed to substitute some witnesses for others, but testimony limited to new elements rather than that which repeated evidence given by other witnesses.[2662]

Defence allowed to vary witness list to replace witnesses who had refused to testify.[2663]

Defence allowed to add 4 witnesses and delete 14 others in the middle of defence case where new witnesses were discovered during mission to Rwanda.[2664]

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[2655] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Sagahutu's Request to Vary His Witness List* (26 May 2008)
[2656] *Prosecutor v. Ntagerura et al*, No. ICTR-98-46-T, *Decision on Defence for Ntagerura's Motion to Amend its Witness List Pursuant to Rule 73 ter (E)* (4 June 2002)
[2657] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Extremely Urgent Motion for Leave to Vary the List of Defence Witnesses* (15 April 2003); *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on Motion to Vary the Defence Witness List* (9 October 2007)
[2658] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Defence Motion to Vary the Defence Witness List to Add M. Gaspard Musabyimana* (13 April 2007)
[2659] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motions to Amend the Defence Witness List* (17 February 2006); *Prosecutor v Karera*, No. ICTR 01-74-T, *Decision on Variation of Defence Witness List* (13 July 2006)
[2660] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion for Leave to Amend Witness List* (6 June 2006); *Prosecutor v Karera*, No. ICTR 01-74-T, *Decision on Variation of Defence Witness List* (13 July 2006)
[2661] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-97-42-T, *Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses* (17 August 2006) at para. 16; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Modify its Witness List* (11 September 2006)
[2662] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Vary his List of Witnesses Pursuant to Rule 73 ter* (15 February 2008)
[2663] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Defence Request to Amend Witness List* (12 July 2007)

Defence would not be allowed to add witness whose testimony was solely directed at the veracity of the prosecution witnesses.[2665]

Defence allowed to substitute two witnesses when bureaucratic procedures imposed by government of France rendered availability of other witnesses in a timely manner problematic.[2666]

**timing**

The defence is not required to seek permission to vary its witness list until its defence case has commenced.[2667]

However, where the defence case is imminent, the Trial Chamber may require the defence to request leave to add any witnesses to its list.[2668]

In a multiple accused case, an accused must seek permission to vary his witness list after the filing of pre-defence submissions regardless of when his particular defence is scheduled to commence.[2669]

**witness information**

To comply with the order of the Trial Chamber in respect of this Rule, the defence only need consider and note which witnesses it intends to call during the trial, not their present whereabouts or availability to testify at trial.[2670]

The defence would not be required to disclose the current residential address of its witnesses.[2671]

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[2664] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Modification of Defence Witness List* (15 August 2007)
[2665] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Augustin Bizimungu Motion to Vary His Witness List* (24 October 2007) at para. 6
[2666] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecution Motion to Order the Defence to Drop Witnesses T171 and T400* (3 May 2011)
[2667] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony* (15 July 2009) at para. 5
[2668] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Defence Motion for Leave to Vary its Witness List to Add Three Witnesses and Extend Protective Measures; and the Chamber's Further Order to Reduce the Defence Witness List* (30 September 2009) at para. 10
[2669] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Alphonse Nteziryayo's Motion to Modify His Witness List* (14 July 2006) at para. 24
[2670] *Prosecutor v. Semanza*, No.ICTR-97-20-1, *Decision on the Defence Motion for Extension of Time for Filing the List of Defence Witnesses (Rule 54 of the Rules of Procedure and Evidence)* (4 Sept.2001) at para.6
[2671] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecution Motion for Full Compliance With Rule 73 ter and Variation of Chamber's Decision of 27 June 2005* (20 November 2006) at para. 15

Defence can be required to provide detailed summaries of its witnesses. The amount of detail will vary on a witness-by-witness basis and no blanket rule should be imposed. The information should include the witness' place of residence.[2672]

Witness summaries need not include details of how the witness knew the accused, and whether there is a kinship between the witness and the accused.[2673]

Defence ordered to provide for each witness the name, date and place of birth, names of parents, ethnicity, religion, occupation in April 1994, address in April 1994, and current address.[2674]

Defence ordered to provide for each witness the name, date and place of birth, occupation in April 1994, address in April 1994, and current address.[2675]

Defence ordered to provide current address for each witness.[2676]

The Trial Chamber has the power under Rule 73 *ter* and 54 to require disclosure of the country of residence of defence witnesses and such disclosure is required to allow for adequate investigation by the prosecution.[2677]

Defence is obligated to provide the same information to the prosecution as the prosecution had disclosed for its witnesses including (1) name; (2) date and place of birth; (3) Sex; (4) ethnicity or nationality; (5) full names of both parents; (6) marital status and name of spouse ; (7) residence in 1994 and current residence; and (8) occupation in 1994 and current occupation.[2678]

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[2672] *Prosecutor v Bagosora et al*, No. ICTR-96-7-T, *Decision on Sufficiency of Defence Witness Summaries* (5 July 2005)
[2673] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA* (27 February 2008) at para. 20
[2674] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on Prosecutor's Motion for Disclosure of Identifying Information Concerning Defence Witnesses Pursuant to Rules 69(C) and 73 ter* (9 November 2005); *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Protection of Defence Witnesses* (20 March 2007) at para. 14
[2675] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010* (26 March 2010) at para. 24
[2676] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Prosecutor's Extremely Urgent Motion for Disclosure of Further Identifying Information Relating to Defence Witnesses* (17 April 2007)
[2677] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Certification Concerning Sufficiency of Defence Witness Summaries* (21 July 2005) at para. 10
[2678] *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Order for Complete Disclosure of Identifying Information* (6 September 2007)

Failure of defence to comply with requirements for personal information of its witnesses when filing pre-defence brief resulted in witnesses being struck off its list.[2679]

"Will-say" statements must be clear enough to cover the scope of the proposed testimony of the witness. They need not give all the details of the testimony but lay out the scope of what the witness will cover in clear terms.[2680]

"Will say" statement that defence witness will contradict certain allegations of the prosecution witness is too imprecise and further particulars must be provided.[2681]

**witness statements**

Defence ordered to disclose its unredacted witness statements to prosecution no later than 21 days before commencement of defence case.[2682]

Defence ordered to have witnesses sign statements and disclose those statements to the prosecution.[2683]

The defence should disclose the statements of all defence witnesses but is not obliged to disclose that which it does not have, including internal documents covered by Rule 70(A).[2684]

Failure of defence to disclose unredacted statements of its witnesses, while negligent, did not require that the witnesses be precluded from testifying.[2685]

Defence can only be required to disclose those statements of its witnesses which are in its possession.[2686]

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[2679] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Consolidated Decision on Prosecutor's Second and Third Motions to Compel Defence to Comply with Trial Chamber Decision of 3 February 2010* (26 March 2010) at paras. 18-20

[2680] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Urgent Motion to Compel Disclosure of Unredacted Witness Statements by Nsabimana's Defence* (29 June 2006) at para. 15

[2681] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-97-42-T, *Decision on Sylvain Nsabimana's Extremely Urgent Motion to Drop and Add Witnesses* (17 August 2006) at para. 18

[2682] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative à la Requete du Procureur aux Fins de Communications des Déclarations Aux Témoins de la Defence* (13 April 2005) ; *Prosecutor v Rwamakuba*, No. ICTR-98-44C, *Decision on Prosecution Motion for Disclosure of Witness List and Witness Statements* (4 October 2005)

[2683] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative à la Requete du Procureur aux Fins de Communications des Déclarations Signées des Témoins de la Defence* (7 April 2006)

[2684] *Prosecutor v Rwamakuba*, No. ICTR-98-44C, *Decision on Prosecution Motion for Disclosure of Witness List and Witness Statements* (4 October 2005) at para. 7

[2685] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Urgent Motion to Compel Disclosure of Unredacted Witness Statements by Nsabimana's Defence* (29 June 2006)

[2686] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA* (27 February 2008) at para.27

Notes of interviews of defence witness need not be disclosed so long as they are not witness statements.[2687]

The defence is expected to obtain the prior judicial records of its witnesses and to disclose such records which are in its possession.[2688]

**Rule 74—amicus curiae**

**A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber.**

**factors**

The primary criterion in determining whether to grant leave to an amicus curiae to submit a brief or oral argument is whether such submissions would assist the Chamber in considering the questions at issue.[2689]

Impartiality is not a pre-condition for an amicus curiae.[2690]

**denied**

The Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization, or person to appear as *amicus curiae* before it and make submissions on any issue specified by the Chamber. For leave to be granted, the proposed submissions must be relevant to the case and assist the Chamber in the proper determination of it. Request of Rwandan government to make submissions concerning restitution of property from the accused and to present evidence of their crimes was denied.[2691]

Amicus curiae status has been granted when the applicant (i) has strong interests in or views on the matter before the Chamber; (ii) can enlighten the Chamber on the

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[2687] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA* (27 February 2008) at para. 28

[2688] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion for Postponement of the Commencement of his Case as well as on the Prosecutor's Cross Motion for Enforcement of Rule 73 ter and Remedial and Punitive Measures and the Prosecutor's Request for Temporary Transfer of Witness AXA* (27 February 2008) at para. 29

[2689] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on the Admissibility of the Amicus Curiae Brief Filed by the Open Society Justice Initiative and on its Request to be Heard at the Appeals Hearing* (12 January 2007); *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on ADAD's Motion for Reconsideration of Request for Leave to Appear as Amicus Curiae* (1 July 2008) at para. 10

[2690] *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on ADAD's Motion for Reconsideration of Request for Leave to Appear as Amicus Curiae* (1 July 2008) at para. 12

[2691] *Prosecutor v Bagosora et al*, No. ICTR-96-7-T, *Decision on Amicus Curiae Request by Rwandan Government* (13 October 2004)

events in Rwanda; and (iii) can provide legal views on an issue before the Chamber. Application of accused in related case to appear as amicus curiae rejected.[2692]

Request of organization "African Concern" to appear as amicus curiae to address issues relating to the unlawful taking of property denied where the accused were not charged with the unlawful taking of property.[2693]

Request of Coalition of Women's Human Rights in Conflict Situations to appear as amicus curiae to address issues relating to rape denied where accused were not charged with rape.[2694]

Defence request to invite non-governmental organizations to submit amicus curiae briefs on issue of transfer to Rwanda denied where the organizations themselves did not apply for amicus curiae status.[2695]

Request of Association of Defence Counsel to appear as amicus curiae on motion to reconsider sanctions imposed against defence counsel denied.[2696]

Request for Bar Committee on Human Rights to appear as amicus curiae on issue of functional immunity of defence counsel denied where that issue was not before the Appeals Chamber.[2697]

Request of Association of Defence Counsel to appear as amicus curiae in cases involving transfer to Rwanda denied due to duplication of the arguments of assigned defence counsel.[2698]

Request of survivors' groups Ibuka and Avega to appear as amicus curiae in cases involving transfer to Rwanda denied due to submissions from other amicus on the same issues[2699] and their lack of expertise on the Rwandan judicial system.[2700]

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[2692] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Motion of Tharcisse Muvunyi for Leave to Make Submissions as Amicus Curiae in the Butare Trial* (8 June 2001)
[2693] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Amicus Curiae Request by African Concern* (23 March 2004)
[2694] *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Huma Rights in Conflict Situations* (24 May 2001)
[2695] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on Defence Request to Grant Amicus Curiae Status to Four Non-Governmental Organizations* (22 February 2008)
[2696] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Sur Les Requetes en Annulation de Sanction et Intervention en Qualité d'Amicus Curiae* (22 October 2004) at para. 21
[2697] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on the Request of the Bar Human Rights Committee for Leave to Appear as Amicus Curiae* (24 March 2011)
[2698] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on Amicus Curiae Request by the Organization of Defence Counsel (ADAD)* (22 February 2008); *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on ADAD's Motion for Reconsideration of Request for Leave to Appear as Amicus Curiae* (1 July 2008)
[2699] *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision on the Request by Ibuka and Avega for Leave to Appear as Amicus Curiae* (13 February 2008)

**granted**

The general definition of amicus curiae does not call for impartiality on the part of the filing party. Belgian government allowed to appear as *amicus curiae* and make submissions on issue of murder of Belgian peacekeepers.[2701] However, in a later decision, the Trial Chamber reconsidered and decided submissions from Belgium were no longer necessary for a fair determination of the case.[2702]

Request of Legal Counsel to the Secretary-General of the Organisation of the United Nations to be heard as Amicus Curiae to explain the scope of the lifting of the immunity of Major-General Dallaire granted.[2703]

Request of Norway to file amicus brief in case of proposed transfer under Rule 11 *bis* granted.[2704]

Request of Human Rights Watch to appear as amicus curiae in case of proposed transfer to Rwanda granted.[2705]

Request of International Criminal Defence Attorneys Association to appear as amicus curiae in case of proposed transfer to Rwanda granted.[2706]

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[2700] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on Amicus Curiae Request by Ibuka and Avega* (22 February 2008); *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on Amicus Curiae Requests (Ibuka, Avega, and ICDAA)* (30 June 2008) at para. 4; *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on the Request by Ibuka and Avega for Leave to Appear and Make Submissions as Amicus* (1 July 2008)

[2701] *Prosecutor v Bagosora et al*, No. ICTR-96-7-T, *Decision on the Amicus Curiae Application by the Kingdom of the Government of Belgium* (6 June 1998)

[2702] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Reconsideration of Earlier Decision on Amicus Curiae Application by Kingdom of Belgium* (13 February 2007)

[2703] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Order Granting Leave for Amicus Curiae to Appear* (12 February 1998).

[2704] *Prosecutor v Bagaragaza*, No. ICTR-05-86-AR11*bis*, *Decision on Rule 11 bis Appeal* (30 August 2006) at para. 7

[2705] *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on the Request of Human Rights Watch for Leave to Appear as Amicus Curiae in the Proceedings for the Referral of the Indictment Against Fulgence Kayishema to Rwanda* (8 November 2007); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on Defence Request to Grant Amicus Curiae Status to Four Non-Governmental Organizations* (22 February 2008); *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision on the Request of Human Rights Watch for Leave to Appear as Amicus Curiae* (10 March 2008); *Prosecutor v Hategekimana*, No. ICTR-00-55B-R11*bis*, *Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions* (20 March 2008)*; Prosecutor v Uwinkindi*, No. ICTR-2001-75-I, *Decision on Human Rights Watch Request for Leave to Appear as Amicus Curiae…*(18 January 2011)

[2706] *Prosecutor v Kayishema*, No. ICTR-2001-67-I , *Decision on the Request for Permission to File an Amicus Curiae Brief, International Criminal Defence Attorney's Association Concerning the Prosecutor's Request for Referral of the Case of Fulgence Kayishema to Rwanda Pursuant to Rule 11 bis of the Rules* (6 December 2007); *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision on the Application of the International Criminal Defence Attorney's Association for Leave to File a Brief as Amicus Curiae* (6 December 2007); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on Amicus Curiae Request by the International Criminal Defence Attorney's Association* (22 February 2008); *Prosecutor v*

Request of Kigali Bar Association to appear as amicus curiae in case of proposed transfer to Rwanda granted.[2707]

Request of ICTR Association of Defence Attorneys to appear as amicus curiae in case of proposed transfer to Rwanda granted.[2708]

Request of Government of Rwanda to appear as amicus curiae in case of proposed transfer to Rwanda granted.[2709]

Government of Rwanda allowed to reply to *amicus curiae* briefs where it had special status as referral state in motions for transfer pursuant to Rule 11 *bis*.[2710]

Request of Open Society Justice Initiative to file brief concerning issues of freedom of expression granted where the issues were relevant to the case. Request to participate in oral argument denied.[2711]

Request of International Criminal Bar to appear as *amicus curiae* in request for injunction against Rwandan prosecution of defence counsel rejected.[2712]

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*Hategekimana*, No. ICTR-00-55B-R11*bis*, *Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions* (20 March 2008); *Prosecutor v Gatete*, No. ICTR-2001-61-I, *Decision on Amicus Curiae Requests (Ibuka, Avega, and ICDAA)* (30 June 2008) at para. 6; *Prosecutor v Uwinkindi*, No. ICTR-2001-75-R11*bis*, *Decision on Request by International Criminal Defence Attorneys' Association (ICDAA) for Leave to Appear as Amicus Curiae* (1 February 2011)

[2707] *Prosecutor v Kayishema*, No. ICTR-2001-67-I, *Decision on the Application by the Kigali Bar Association for Leave to Appear as Amicus Curiae* (6 December 2007); *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision on the Application by the Kigali Bar Association for Leave to Appear as Amicus Curiae* (6 December 2007); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on Amicus Curiae Request by the Kigali Bar Association* (22 February 2008); *Prosecutor v Hategekimana*, No. ICTR-00-55B-R11*bis*, *Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions* (20 March 2008)

[2708] *Prosecutor v Hakegetimana*, No. ICTR-00-55B-R11*bis*, *Decision on Amicus Requests and Pending Defence Motions and Order for Further Submissions* (20 March 2008)

[2709] *Prosecutor v. Kanyarukiga*, No. ICTR-2002078-I, *Decision on the Request of the Republic of Rwanda for Permission to file an Amicus Curiae Brief* (1 September 2008); *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision on Request of Republic of Rwanda for Permission to File an Amicus Curiae Brief* (18 July 2008); *Prosecutor v. Kanyarukiga*, No. ICTR-2002078-I, *Decision on the Request of the Republic of Rwanda for Leave to Appear as Amicus Curiae* (9 November 2007); *Prosecutor v Hategekimana*, No. ICTR-00-55B-I, *Decision on Requests by the Republic of Rwanda, the Kigali Bar Association, the ICDAA, and ADAD for Leave to Appear and Make Submissions as Amici Curiae* (4 December 2007); *Prosecutor v Gatete*, No. ICTR-2001-61-R11*bis* , *Decision on Amicus Curiae Request (Republic of Rwanda)* (8 September 2008); *Prosecutor v Uwinkindi*, No. ICTR-2001-75-I, *Invitation to the Government of Rwanda to make Submissions as Amicus Curiae…on the Prosecution's Rule 11 bis Motion* (18 January 2011)

[2710] *Prosecutor v Munyakazi*, No. ICTR-97-36-I, *Decision on the Request of the Republic of Rwanda to be Served with the Amicus Brief of the International Criminal Defence Attorneys' Association for the Referral of the Above Case to Rwanda Pursuant to Rule 11 bis and to File a Written Response* (19 February 2008)

[2711] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on the Admissibility of the Amicus Curiae Brief Filed by the Open Society Justice Initiative and on its Request to be Heard at the Appeals Hearing* (12 January 2007)

[2712] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on the Request of the International Criminal Bar for Leave to file Amicus Curiae Submissions in Relation to Aloys Ntabakuze's Motion*

**Rule 74 bis—medical examination of the accused**

**A Trial Chamber may, proprio motu or at the request of a party, order a medical, including psychiatric examination or a psychological examination of the accused. In such case, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.**

While an accused has a right to privacy in medical information, that right is not absolute. Medical reports ordered disclosed to co-accused and prosecution when necessary to determine when and under what conditions trial may resume.[2713]

**Rule 75—measures for the protection of victims and witnesses**

**(A) A Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Support Unit, order appropriate measures to safeguard the privacy and security of victims and witnesses, provided that the measures are consistent with the rights of the accused.**
**(B) A Chamber may hold an in camera proceeding to determine whether to order notably:**
**(i) Measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:**
**(a) Expunging names and identifying information from the Tribunal's public records;**
**(b) Non-disclosure to the public of any records identifying the victim;**
**(c) Giving of testimony through image- or voice- altering devices or closed circuit television; and**
**(d) Assignment of a pseudonym;**
**(ii) Closed sessions, in accordance with Rule 79;**
**(iii) Appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.**
**(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence by the party calling that witness that his testimony and his identity may be disclosed at a later date in another case, pursuant to Rule 75 (F).**
**(D) A Chamber shall control the manner of questioning to avoid any harassment or intimidation**
**(E) When making an order under paragraph (A) above, a Judge or a Chamber shall wherever appropriate state in the order whether the transcript of those proceedings**

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*Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (29 June 2010); *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on the Request of the Association of Defence Attorneys in Arusha for Leave to file Amicus Curiae Submissions in Relation to Aloys Ntabakuze's Motion Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder* (29 June 2010)

[2713] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion for Disclosure of Medical Information and for Extension of Time* (28 August 2009) at para. 14

**relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal.**
**(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:**
**(i) shall continue to have effect mutatis mutandis in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but**
**(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.**
**(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:**
**(i) to any Chamber, however constituted, remaining seised of the first proceedings; or**
**(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.**
**(H) Before determining an application under paragraph (G) (ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.**
**(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".**
**(J) Decisions under paragraph (G) and, after the close of trial proceedings, paragraph (A), and under Rule 69, are subject to appeal directly to a full bench of the Appeals Chamber by either party. Appeals shall be filed within fifteen days of the filing of the impugned decision. A responding party shall, thereafter, file any response within ten days from the date of the filing of the appeal. The Appellant may file a reply within four days of the filing of the response. Failure to comply with these time limits shall constitute a waiver of the right to appeal.**

**applicability of protective measures**

Protective measures may be rescinded or modified at the request of the Registrar, such as in a completed case where the witness has died.[2714]

**disclosure of testimony in other cases**

**appropriate Chamber**

[2714] *Prosecutor v Zigiranyirazo,* No. ICTR-01-73, *Decision Regarding the Protective Measures of Witness ATM* (26 September 2011)

The Trial Chamber retains jurisdiction over release of transcripts and exhibits from trial, regardless of fact that case is pending before the Appeals Chamber.[2715]

Where the accused no longer had a case pending before a Chamber but sought disclosure of closed session material from another case, he should petition the President for designation of a Trial Chamber to consider the request.[2716]

The appeal should be filed in the case in which the disclosure motion was denied.[2717]

**consent of witness**

Failure to notify the witness of the effect of Rule 75 (F) cannot relieve the Prosecution of its obligation to disclose the testimony. The fact that the Prosecution and the Defence in the second proceeding are bound *mutatis mutandis* by the terms of the witness protection order in the first provides a sufficient safeguard of the non-disclosure of the witness's identity.[2718]

The opinion of the witness should be sought on a motion for disclosure of his closed session testimony, even if it is not bound by that opinion.[2719]

Affidavits from protected witnesses stating that they no longer wished to have protective measures required before protective measures would be varied for use in second proceedings.[2720]

The absence of consent by a protected witness is not determinative of whether testimony should be disclosed to a third party.[2721]

In the absence of consent by the protected witness, variation of protective measures may only be granted where the applicant demonstrates that the protective

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[2715] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on Disclosure of Sealed Exhibits of Witness DM-12* (25 May 2006) at para. 6; *Prosecutor v Bikindi*, No. ICTR-01-72-T, *Decision on Ngirabatware Defence Request for Disclosure of the Exhibits Admitted During the Testimony of Prosecution Witness BKW in the Bikindi Case* (7 July 2009) at para. 7

[2716] *Prosecutor v Niyitegeka*, No. ICTR-96-14-R, *Decision on Request for Disclosure* (11 July 2007) at para. 5

[2717] *Niyitegeka v Prosecutor,* No. ICTR-96-14-R75, *Decision on Joseph Nzirorera's Motion for Re-Classification and Suggestion for Appointment of Counsel* (25 July 2008) at para. 10

[2718] *Prosecutor v Nahimana et al,* No. ICTR-99-52-T, *Decision on Disclosure of Transcripts and Exhibits of Witness X* (3 June 2004) at para. 5.

[2719] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on General Augustin Bizimungu's Motion for the Disclosure of the Closed Session Transcripts of the Testimony of Witness BTH and the Exhibits Tendered Under Seal During the Said Hearings* (26 May 2008) at para. 6

[2720] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Joseph Nzirorera's Motion for Variation of Protective Measures for Witnesses DC2-5 and CBP99* (16 July 2009) at para. 8

[2721] *Prosecutor v Simba,* No. ICTR 01-76-R75, *Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal* (9 April 2008) at para. 8

measures are no longer justified or that exceptional circumstances warrant the variation sought.[2722]

The fact that a protected witness testified under his true name in another jurisdiction after the testimony in this case, does not constitute a consent on behalf of the witness for rescission of protective measures or exceptional circumstances to vary such measures in the absence of the witness' consent.[2723]

Disclosure to France for use in national proceedings granted only to the extent that the witness consented. Where witness declined to consent, motion for disclosure was denied.[2724]

**convicted persons**

A factual nexus between the applicant's case and the testimony of a witness in another proceedings is insufficient to require disclosure of the testimony where the applicant's case at the ICTR has been concluded.[2725]

Where the closed session testimony did not relate to the distribution of weapons for which the applicant was convicted, the testimony would not be disclosed even though it related to the same geographical area and time where the applicant's case at the ICTR had been concluded.[2726]

Testimony could not help convicted accused whose appeal had been denied in review proceedings and therefore disclosure of closed session testimony was not required.[2727]

Trial Chamber erred in deciding that closed session material would not help convicted person in a petition for review. Once it decided that a legitimate forensic

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[2722] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Jacques Mungwarere's Motion for Access to Confidential Material* (17 May 2012) at para. 18

[2723] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-A, *Decision on Innocent Sagahutu's Motion for Clarification or for Variation of Protective Measures* (22 March 2012) at para. 12

[2724] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Prosecutor's Motion to Vary Protective Measures* (14 October 2010)

[2725] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Request for Closed Session Testimony and Sealed Exhibits* (3 April 2008) at para. 5

[2726] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Request for Closed Session Testimony and Sealed Exhibits* (3 April 2008) at para. 6

[2727] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Rutaganda's Motion for Reconsideration or Alternatively, Certification to Appeal the Decision of 3 April 2008 on Request for Closed Session Testimony and Sealed Exhibits* (13 November 2008) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Rutaganda's Motion for Access to Closed Session Testimony and Sealed Exhibits of Witness AWE* (24 March 2009) at para. 7; *Rutaganda v Prosecutor*, No. ICTR-96-3-R, *Decision on Georges A,N, Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits* (22 April 2009) at para. 16

purpose was shown, it erred in conducting further inquiry to determine if the material would be helpful to the applicant.[2728]

On remand, Trial Chamber decided that legitimate forensic purpose existed for disclosure of material to convicted person from geographical and temporal overlap of the cases.[2729]

Where only testimony in closed session was the identifying information of the witness, disclosure to convicted person seeking review could not materially help his case and access was therefore denied.[2730]

An applicant for closed session testimony whose conviction is final has a right to appeal a Trial Chamber decision denying him access to closed session testimony.[2731]

**defence witnesses**

While Rule 75(F) does not apply to testimony of defence witnesses, for whom the prosecution has no obligation of disclosure, where a defence witness has testified in one trial and is scheduled to testify as a defence witness in another trial, there is a legitimate forensic purpose in ordering disclosure of the prior testimony to the defence in the second trial.[2732]

Disclosure of defence witness testimony ordered to accused in other case to assist in impeachment of same prosecution witness whose testimony defence witnesses rebutted in their trial, but it was not permitted for the defence in the second case to reveal the identity of the protected witness to the prosecution witness sought to be impeached.[2733]

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[2728] *Rutaganda v Prosecutor*, No. ICTR-96-3-R, *Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the Karemera et al Case* (10 July 2009) at para. 25

[2729] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand on Rutaganda's Appeal Concerning Access to Confidential Materials in the Karemera et al Case* (29 September 2009)

[2730] *Prosecutor v Niyitegeka*, No. ICTR-96-14-R75, *Decision on Reconsideration of Eliezer Niyitegeka's Motion for Disclosure of Closed Session Testimony and Evidence Under Seal Pursuant to the Appeals Chamber Decision of 23 October 2008* (9 April 2009)

[2731] *Niyitegeka v Prosecutor,* No. ICTR-96-14-R75, *Decision on Motion for Clarification* (20 June 2008) at para.14

[2732] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Bagosora Motion for Disclosure of Closed Session Testimony of Witness 3/13* (24 February 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bizimungu Defence Second Request for Disclosure of Closed Session Testimony and Exhibits Placed Under Seal* (13 June 2007); *Prosecutor v Bizimungu et al,* No. ICTR-99-50-T, *Decision on Augustin Bizimungu's Motion for Disclosure of Closed Session Transcripts of Testimony of Defence Witnesses WFP10, WFP2, WFQ3, and WAE and Exhibits Admitted Under Seal During Those Witnesses' Testimony* (29 August 2007)

[2733] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nzirorera Request for Access to Protected Material* (19 May 2006)

It would be unfair for the defence not to have access to the testimony of its prospective witness as a defence witness in another trial where the person had disclosed that he testified in the other trial. The prosecution is allowed access across trial teams.[2734]

Where a witness reveals to another defence team that he has testified as a witness, that defence team may obtain an order for access to the witness' closed session testimony and exhibits to determine if it wants to call the witness in its case.[2735]

Defence in other case granted access to closed session testimony and exhibits under seal of potential defence witnesses who testified in earlier case.[2736]

Defence granted access to closed session testimony of prosecution expert who was scheduled to testify for accused and who consented to disclosure.[2737]

**disclosure from the prosecution**

It is no longer necessary for the prosecution to obtain an order before disclosing closed session testimony and sealed exhibits to the accused in another case.[2738]

Rule 75(F) prohibits the prosecution from using a protective order in a prior case as an excuse for failing to comply with its disclosure obligations.[2739]

**exculpatory material**

Rule 75(F) and (G) do not create substantive right to disclosure which does not already exist under the Rules. Where Rule 68 is implicated, transcripts of testimony ordered disclosed to accused in separate case subject to protective orders already in place for those witnesses.[2740]

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[2734] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of Witness DM-190* (16 May 2006) at para. 5

[2735] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Disclosure of Closed Session Testimony of Witnesses BDR-1 and LK-2* (29 August 2006); *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Decision on Disclosure of Sealed Exhibits of Witness DM-12* (25 May 2006) at para. 9

[2736] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bizimungu Defence Request for Disclosure of Closed Session Testimony and Exhibits Placed Under Seal* (15 May 2007); *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-T, *Decision on Augustin Bizimungu's Extremely Urgent Motion for the Disclosure of the Closed Session Testimony of Witness WKNMJ and any Sealed Exhibits Admitted in the Course of Her Testimony* (8 June 2007)

[2737] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kanyabashi Defence Request for Disclosure of Closed Session Testimony* (12 September 2007)

[2738] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Request for an Order of Disclosure of Closed Session Transcripts and Sealed Prosecution Exhibits Pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence* (2 February 2005)

[2739] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 18

[2740] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Juvenal Kajelijeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits, and Pre-Trial Statements of Prosecution Witnesses GBU and GFA* (24 November 2004)

**factors**

A party seeking access to closed session testimony from another case must show a legitimate forensic purpose for seeking access—he must show that such access would likely assist his case materially or that there is at least a good chance that it would give that assistance.[2741]

There is a need to strike a balance between the need for protective measures for the witness whose closed session testimony is sought to be disclosed, and the right of the accused to have access to evidence needed for his defence.[2742]

A party is always entitled to seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.[2743]

Rule 75(F)(ii) is intended to create a mechanism for the routine disclosure of closed session testimony without the need for the defence to make an individualized application to the Trial Chamber who granted a protective order.[2744]

Simply claiming that a protected witness in one case is a "potential defence witness" is an insufficient showing for access to the closed session testimony of that witness.[2745]

Where accused had rested its case, and witness whose testimony was sought had already completed his testimony for a co-accused, but all defence cases were not yet closed, Trial Chamber found there remained a legitimate forensic purpose justifying access to the closed session testimony.[2746]

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[2741] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs* (9 September 2005) at page. 3; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nzirorera Request for Access to Protected Material* (19 May 2006) at para. 2; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Augustin Bizimungu's Motion for Disclosure of Closed Session Material of Defence Witness WZ4* (22 September 2008) at para. 5

[2742] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on General Augustin Bizimungu's Motion for the Disclosure of the Closed Session Transcripts of the Testimony of Witness BTH and the Exhibits Tendered Under Seal During the Said Hearings* (26 May 2008) at para. 5

[2743] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs* (9 September 2005) at page. 2

[2744] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber* (26 September 2008) at para. 19; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-76-T, *Decision on Bizimungu's Motion for Reparation Following the Prosecution's Failure to Disclose Documents Affecting the Credibility of Prosecution Witness AOE* (18 February 2009) at para. 8

[2745] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on Prosper Mugiraneza's Motion for Access to Transcripts* (6 July 2007)

[2746] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bizimungu Defence Request for Disclosure of Closed Session Testimony and Exhibits Placed Under Seal* (13 November 2008)

**future disclosures**

Rule 75 (E) allows a Chamber "wherever appropriate" to state prospectively whether the transcript shall be made available in other proceedings. Rule 75 (F) is not expressly conditional upon such a provision.[2747]

Defence would be allowed to share confidential transcripts with other parties in the case in United Kingdom so long as the fact that the ICTR was not revealed as the source of the testimony.[2748]

**granted**

Disclosure of appeal briefs ordered to accused in case where prosecution sought judicial notice to be taken and asserted that facts in issue were not contested on appeal.[2749]

Disclosure of identity of witness who testified about fabrication of evidence in Rwandan prison would be granted to members of defence team of accused in separate case, but not to be further disclosed to defence witness or other third parties without further justification.[2750]

**nexus**

Confidential inter partes material may be disclosed to a party in another case not before the Tribunal provided that the applicant demonstrates that it is likely to assist its case materially or there is a good chance that it would. This standard is met by showing that there is a factual nexus between the two cases.[2751]

Such access will only be granted when the material is sufficiently identified. This standard can be met by showing the existence of a nexus between the applicant's case and the case from which such material is sought, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time.[2752]

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[2747] *Prosecutor v Nahimana et al,* No. ICTR-99-52-T, *Decision on Disclosure of Transcripts and Exhibits of Witness X* (3 June 2004) at para. 5.
[2748] *Prosecutor v Simba,* No. ICTR 01-76-R75, *Decision on the Prosecution Urgent Motion for Clarification and for Disclosure of the Same Documents to the Crown Prosecution of the United Kingdom* (22 April 2008)
[2749] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs* (9 September 2005)
[2750] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Callixte Nzabonimana's Motion for Access to Exhibit DNZ-461* (23 August 2010)
[2751] *Prosecutor v Muhimana,* No. ICTR-95-IB, *Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses* (13 August 2008) at para. 7; *Prosecutor v Niyiramasuhuko et al,* No. ICTR-98-42-A, *Decision on Jacques Mungwarere's Motion for Access to Confidential Material* (17 May 2012) at para.17
[2752] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Augustin Bizimungu's Motion for Disclosure of Closed Session Material of Defence Witness WZ4* (22 September 2008) at para. 5

The relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the case from which the material is sought.[2753]

A significant factual overlap is not required to establish a legitimate forensic purpose.[2754]

Where testimony of a prosecution witness relates to the same event as that of a witness in another case, the defence team in that other case may obtain an order for disclosure of the closed session testimony.[2755]

Defence granted access to testimony of prosecution witness in another case where prosecution indicated it would be cross examining accused on those statements.[2756]

Access to confidential material from related case denied where applicant did not specify, from his review of public material, which material he sought access to, since there was not a complete overlap between the two cases.[2757]

Request for all testimony in one case that is related to the accused in another case did not sufficiently identify the material sought.[2758]

The fact that the same judges were hearing another case as heard the case of the accused did not justify disclosure of all material in the other case relating to the accused. Judges are professional and can separate the two.[2759]

**parties in another jurisdiction**

A distinction must be drawn between requests from a judge or a court from another jurisdiction, and requests emanating from a party to proceedings before another jurisdiction. While any judge or bench, as a judicial authority, may directly apply for the

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[2753] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Joseph Nzirorera's Motion for Access to Appeal Briefs* (9 September 2005) at page. 3; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nzirorera Request for Access to Protected Material* (19 May 2006) at para. 2

[2754] *Rutaganda v Prosecutor*, No. ICTR-96-3-R, *Decision on Georges A,N, Rutaganda's Appeal Against Decision on Request for Closed Session Testimony and Sealed Exhibits* (22 April 2009) at para. 23

[2755] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Niyiramasuhuko's Extremely Urgent Motion for Disclosure of Closed Session Transcripts of Witness ANL/CJ* (30 August 2006); *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony of Witness OX and the Witness' Unredacted Statements and Exhibits* (23 August 2006)

[2756] *Prosecution v Renzaho*, No. ICTR-97-31-T, *Decision on Bizimungu Request for Closed Session Testimony* (8 June 2007)

[2757] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73-A, *Decision on Michel Bagaragaza's Motion for Access to Confidential Material* (14 May 2009)

[2758] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Karera Defence Motion for Disclosure* (4 June 2007) at para. 3

[2759] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Karera Defence Motion for Disclosure* (4 June 2007) at para. 4

variation of protective measures ordered pursuant to Rule 75 of the Rules, a party to proceedings before another jurisdiction should be authorised by an appropriate judicial authority to apply for such variation.[2760]

Disclosure of closed session transcripts to defence of person who is the subject of extradition proceedings from the United Kingdom to Rwanda would be granted subject to protective measures where request specifically identified witnesses common to both cases.[2761]

Disclosure of confidential material to accused in Canadian case denied where there was only a tenuous nexus between the two cases, and therefore it was not shown that the requested material was likely to assist the applicant's case materially.[2762]

A convicted person may seek a variation of protective measures to allow material from his case to be disclosed for use in a national proceeding. The moving party must establish that (1) he has a case pending in a national jurisdiction; (2) there is a legitimate forensic purpose for disclosing the information; (3) the protected witness has been heard on the issue; and (4) the protective measures will be respected by the national jurisdiction.[2763]

Statements obtained by prosecution in which witnesses refused to consent to disclosure to defence in United Kingdom case were misleading where it informed the witness that if he consented, he would be terminated from the witness protection program.[2764]

Closed session testimony would not be released to convicted petitioner to assist him in defending himself in Gacaca proceedings.[2765]

Disclosure from other cases to defendant whose case was proposed for transfer under Rule 11 *bis* denied as premature.[2766]

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[2760] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Jacques Mungwarere's Motion for Access to Confidential Material* (17 May 2012) at para.14
[2761] *Prosecutor v Simba*, No. ICTR 01-76-R75, *Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal* (9 April 2008)
[2762] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Jacques Mungwarere's Motion for Access to Confidential Material* (17 May 2012) at para. 20
[2763] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-R75, *Decision on Emmanuel Ndindabahizi's Appeal of Decision of 13 November 2008 Concerning Access to Protected Materials* (18 June 2009) at paras. 18-19
[2764] *Prosecutor v Simba*, No. ICTR 01-76-R75, *Decision on Charles Munyaneza's Motion for Disclosure of Documents Related to Protected Witnesses before the Tribunal* (9 April 2008) at para. 7
[2765] *Prosecutor v Ndindabahizi*, No. ICTR-2001-71-R75, *Decision on Ndindabahizi's Motion for Reconsideration or Certification to Appeal Decision of 5 March 2008 on Disclosure of Closed Session Testimony* (13 November 2008)
[2766] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on the Motion of Bernard Munyagishari for Access to Confidential Materials* (21 December 2011) at para. 7; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Motion of Bernard Munyagishari for Access to Confidential Documents in the Ngirabatware Case* (1 February 2012) at para. 17

**Rwanda**

Assistance to national prosecutions for crimes committed in Rwanda in 1994 is consistent with the goals of State cooperation set by the Security Council.[2767]

Disclosure of closed session testimony of prosecution witnesses to Gacaca court on behalf of accused where one of the witnesses had brought a claim for compensation against the accused denied as being insufficient to warrant variation of protective measures.[2768]

**States**

The interests of justice require a broad interpretation of Rule 75(F)(i) for variation of protective orders even when the second case is before another jurisdiction.[2769]

Disclosure of defence witness testimony in closed session to Denmark authorized where State has an interest in investigating allegations of genocide, witness consented to the disclosure, and the protective measures would continue to apply to the State.[2770]

Disclosure of transcripts and personal information sheets for protected witnesses to national authorities prosecuting a Rwandan case authorized where the witnesses agreed, and protective measures were lifted where the witnesses agreed to testify in the national court without protective measures.[2771]

**use by the prosecution**

The prosecution may not use closed session testimony in another trial to cross examine a defence witness without obtaining prior leave of the original Trial Chamber.[2772]

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[2767] *Prosecutor v Muhimana*, No. ICTR-95-IB, *Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses* (13 August 2008) at para. 7

[2768] *Prosecutor v Ndindabahizi*, No. ICTR-01-71-R75, *Decision on Disclosure of Closed Session Testimony of Witnesses CGE, CGX, CGF, CGB, and CGH* (5 March 2008)

[2769] *Prosecutor v Muhimana*, No. ICTR-95-IB, *Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses* (13 August 2008) at para. 5; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Jacques Mungwarere's Motion for Access to Confidential Material* (17 May 2012) at para. 13

[2770] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecution's Motion to Unseal the Transcripts of Witness WDUSA* (1 November 2006)

[2771] *Prosecutor v Muhimana*, No. ICTR-95-IB, *Decision on Prosecution's Urgent Ex Parte Motion to Unseal and Disclose Personal Information Sheets and Rescind Protective Measures for Certain Witnesses* (13 August 2008); *Prosecutor v Niyiramasuhuko et al*, No. ITCR-98-42-T, *Decision on the Prosecution Urgent ex parte Motion for Disclosure of Witness FAE's Confidential Material* (13 September 2010); *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Urgent ex parte Motion to Vary Protective Measures for Prosecution Witness CNAT* (16 September 2010)

[2772] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu, Justin Mugenzi, and Jerome Bicamumpaka's Written Submissions Concerning the Issues Raised at the Hearing of 31 March 2006 in Relation to the Cross Examination of Witness Augustin Kayinamura* (1 November 2006)

**violation of protective measures**

Trial Chamber erred in denying access to closed session testimony on grounds that the applicant had violated protective measures by using the testimony without authorization in Appeals Chamber. Trial Chamber should have first considered whether applicant showed a legitimate forensic purpose for access to the testimony.[2773]

Prosecution ordered to redact its closing brief after it revealed information which could lead to the identity of protected witnesses.[2774]

**standing**

A party to the case in which closed testimony is sought does not have standing to participate in the appeal by the applicant.[2775]

**Rule 76—solemn declaration by interpreters and translators**

**Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.**

**Rule 77—contempt of the Tribunal**

(**A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who**
**(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;**
**(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;**
**(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;**
**(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or**
**(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.**

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[2773] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R75, *Decision on Eliezer Niyitegeka's Appeal Concerning Access to Confidential Materials in the Muhimana and Karemera et al Cases* (23 October 2008) at paras. 23-25

[2774] *Prosecutor v Gatete*, No. ICTR-2001-61-T, *Decision on Defence Motion on Public Filing of Prosecution Closing Brief* (4 October 2010) at para. 6

[2775] *Rutaganda v Prosecutor*, No. ICTR-96-3-R, *Decision on Rutaganda's Appeal Concerning Access to Confidential Materials in the Karemera et al Case* (10 July 2009) at para. 6

**(B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties.**
**(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:**
**(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;**
**(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or**
**(iii) initiate proceedings itself.**
**(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:**
**(i) in circumstances described in paragraph (C) (i), direct the Prosecutor to prosecute the matter; or**
**(ii) in circumstances described in paragraph (C) (ii) or (iii), issue an order in lieu of an indictment and either direct amicus curiae to prosecute the matter or prosecute the matter itself.**
**(E) The Rules of Procedure and Evidence in Parts Four to Eight shall apply mutatis mutandis to proceedings under this Rule.**
**(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.**
**(G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding five years, or a fine not exceeding USD10,000, or both.**
**(H) Payment of a fine shall be made to the Registrar to be held in a separate account.**
**(I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both.**
**(J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal.**
**Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless:**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.**
**(K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President. Where the impugned**

**decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless:**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.**

**amicus curiae**

Registrar may appoint a member of the Victims and Witnesses Support Section as an *amicus curiae*.[2776]

Trial Chamber rejected report by amicus curiae due to its incompleteness and illogical conclusions and ordered that a new amicus curiae be appointed to conduct the investigation into disclosure of confidential information by defence investigator.[2777]

**appeal**

A decision refusing to initiate an investigation for contempt is appealable as of right pursuant to Rule 77(J).[2778]

A decision to initiate an investigation for contempt is not appealable as of right. Only decisions which dispose of the matter can be appealed.[2779]

**attempt**

There are three requirements for attempts to be punishable: (1) the conduct is a significant step towards criminal action; (2) there is intent to commit a crime; and (3) the intent to commit a crime fails because of intervening external circumstances.[2780]

**compliance with Court order**

Not every knowing and wilful violation of a court order leads to a finding of contempt. Under Rule 77, the violation must interfere with the Tribunal's administration of justice, and the Chamber must choose to exercise its discretion to hold the person in

[2776] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Report of Amicus Curiae on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements* (19 November 2010) at para. 24
[2777] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Report of Amicus Curiae on Investigations Related to the Disclosure of Prosecution Witnesses CNAL and CNAE Statements* (19 November 2010) at para. 30
[2778] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR77, *Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision dated 9 July 2010* (28 October 2010) at para. 9
[2779] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR77, *Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision dated 10 February 2011* (11 May 2011) at para. 13
[2780] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at para. 205

contempt. Although the prosecution's failure to comply with the Trial Chamber's order to reduce its witness list to 100 names, the sanction of contempt would not be invoked.[2781]

Any defiance of an order of a Chamber per se interferes with the administration of justice for the purposes of a conviction for contempt. No additional proof of harm to the Tribunal's administration of justice is required.[2782]

To be held in contempt, a procedure which may have criminal consequences, there must first be an evidentiary showing to conclude that the Chamber's order was violated. The party alleging the conduct must show that the action was done with specific intent and that the violator had actual knowledge and intended to consciously disregard the order.[2783]

**disclosure**

A Trial Chamber is not obliged to disclose the report of an *amicus curiae* to the parties.[2784]

**incitement**

Pursuant to Rule 77(B), incitement to commit any of the punishable offences under paragraph (A) is punishable as contempt. The act of incitement must be knowing and wilful as required under Rule 77(A).[2785]

**in general**

The Tribunal has the inherent power to hold individuals in contempt.[2786]

Trial Chamber retains discretion not to initiate contempt proceedings even where a *prima facie* case of contempt has been established.[2787]

Failure to require affidavit from prosecution when deciding to initiate contempt proceedings, then denying defence request for contempt proceedings on the grounds that

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[2781] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Reconsideration of Order to Reduce Witness List and on Motion for Contempt for Violation of that Order* (1 March 2004) at para. 9
[2782] *Prosecutor v. Nshogoza*, No. ICTR-2007-91-A, *Judgement* (15 March 2010) at paras. 56 and 80.
[2783] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Haguma Report* (14 December 2007) at para. 14
[2784] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for Prohibition of Conduct Pursuant to Rule 77(A)(ii) of the Rules of Procedure and Evidence* (10 February 2011) at para. 17
[2785] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at paras. 195, 204
[2786] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment* (17 December 2008) at para. 20
[2787] *Prosecutor v Nsengimana*, No. ICTR-01-69-A, *Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses* (16 December 2010) at para. 17

no sworn affidavit had been provided, was not an abuse of the Trial Chamber's discretion.[2788]

Bearing in mind the importance of the presumption of innocence in determining applications for contempt, allegations of contempt are to be considered with due care.[2789]

Considerations of the gravity of an accused's conduct or his underlying motivations are rather to be assessed in connection with the decision to initiate proceedings or in sentencing. [2790]

The fact that other persons might also have engaged in similar conduct is not a defence.[2791]

**interference with witnesses**

Interference with witnesses as contempt is to be construed as prohibiting only undue interference with a witness. Undue interference includes acting in knowing and wilful violation of a witness protection order, or attempting to intimidate a witness, or attempting to induce a witness to change his testimony."[2792]

*Prima facie* evidence existed that defence investigator and resource person threatened and attempted to bribe prosecution witnesses and therefore contempt proceedings were ordered.[2793]

Failure of defence investigators to introduce themselves as more than "working for the Tribunal" was not improper nor could be the basis for contempt findings. [2794]

If evidence of intentionally attempting to interfere with the witness' testimony during proofing sessions comes to light, a Trial Chamber can initiate contempt proceedings.[2795]

Prosecution failed to produce *prima facie* evidence that investigators improperly contacted known prosecution witnesses, prompted them to change their testimony, or falsely recorded their statements.[2796]

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[2788] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR77, *Decision on Callixte Nzabonimana's Interlocutory Appeal of the Trial Chamber's Decision dated 9 July 2010* (28 October 2010) at para. 12
[2789] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Haguma Report* (14 December 2007) at para. 14
[2790] *Prosecutor v. Nshogoza*, No. ICTR-2007-91-A, *Judgement* (15 March 2010) at para. 57.
[2791] *Prosecutor v. Nshogoza*, No. ICTR-2007-91-A, *Judgement* (15 March 2010) at para. 57.
[2792] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C))*(15 November 2002) at para. 9.
[2793] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Allegations of Contempt* (21 February 2013) at para. 14
[2794] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Further Allegations of Contempt* (30 November 2001) at para. 23
[2795] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.8, *Decision on Interlocutory Appeal Regarding Witness Proofing* (11 May 2007) at para. 13

The Trial Chamber directed the appointment of an *amicus curiae* to investigate bribery and intimidation of witness who gave false testimony for prosecution and later recanted.[2797]

Investigation by *amicus curiae* for contempt authorized where prosecution witness claimed that she had been threatened by persons in her community who had access to her witness statements.[2798]

Investigation by *amicus curiae* authorized where prosecution witnesses testified to being threatened by persons on behalf of the accused and where disclosure of identity of prosecution witness occurred.[2799]

**investigation**

Where a Chamber has requested an investigation be initiated for contempt, it is not necessary for the Chamber to authorize a prosecution for contempt. This function may be performed by a confirming judge.[2800]

**mens rea**

It must be shown that there was *prima facie* an intention to violate the Witness Protection Order, or that the conduct disparages the dignity of the Chamber. If this were shown, an evidentiary hearing for contempt charges would then be necessary.[2801]

In determining whether a person can be held for contempt of the Tribunal, or whether strong grounds exist that the witness gave false testimony, the rules require a showing of the specific intention of the person to commit the offence.[2802]

A party seeking an order of contempt must show that the alleged contemnor acted with the intention of committing the crime of contempt.[2803]

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[2796] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Further Allegations of Contempt* (30 November 2001)
[2797] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court* (7 November 2008) at para. 27
[2798] *Prosecutor v Ngirabatware*, No ICTR-99-54-T, *Decision on Prosecution Oral Motion for Rule 77 Investigation Related to Witness ANAF* (30 October 2009)
[2799] *Prosecutor v Ngirabatware*, No ICTR-99-54-T, *Decision on Prosecution Oral Motion for Amendment of the Chamber's Decision on Allegations of Contempt* (6 July 2010)
[2800] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment* (17 December 2008) at para. 35
[2801] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C))*(15 November 2002) at para. 10.
[2802] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Appointment of Amicus Curiae* (26 September 2007) at para. 8
[2803] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses* (9 August 2007) at para. 9

Where the act of contempt arises out of the violation of a Chamber's order, the *mens rea* element is satisfied by any knowing and wilful conduct that violates a Chamber's order.[2804] There is no requirement that the Accused act with a specific intent to interfere with the administration of justice.[2805]

**refusal to testify**

Witness would not be held in contempt for refusing to answer a question about his ethnicity.[2806]

**standing**

In appeal from decision of Trial Chamber declining to prosecute defence investigators for contempt for contacting prosecution witnesses, the defence of the accused had no standing, and the investigators were the appropriate respondents on the appeal.[2807]

**violation of protective measures**

Under Rule 77(A)(ii), the *actus reus* for contempt is the physical act of disclosing confidential information relating to proceedings before this Tribunal in an objective breach of a court order. The *mens rea* for contempt by disclosure of information contrary to Rule 77(A)(ii) is knowledge by the accused that his disclosure of information was done in violation of a court order. It is sufficient to establish that the act which constitutes the violation is deliberate and not accidental. A misunderstanding of the law, as to whether disclosing the information was unlawful or not, does not excuse a violation of it.[2808]

Where prosecution disclosed identities of 16 protected witnesses in court filing, Trial Chamber declined to hold him in contempt, finding the disclosure, while demonstrating a laxity of methodology in the prosecution's office bordering on negligence, was inadvertent.[2809]

Prosecutor's meeting with defence witnesses for whom protective measures were in place, in investigation of defence investigator for contempt, violated those protective

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[2804] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at para. 179
[2805] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at para. 179
[2806] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Hold Witness XAP in Contempt* (17 December 2003)
[2807] *Prosecutor v Nsengimana*, No. ICTR-01-62-A, *Decision on Registrar's Submission Pursuant to Rule 33(B)* (1 June 2010)
[2808] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Judgement* (7 July 2009) at para. 157
[2809] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for an Order Requiring Paul Ng'arua to Show Why He Should Not be Held in Contempt of the Tribunal* (12 May 2004)

measures. The prosecution should have sought variation of the protective measures if it viewed notifying defence counsel of the interviews to be problematic.[2810]

Chamber exercised its discretion not to initiate investigation for contempt where prosecution's meetings with three defence witnesses in violation of protective measures may have resulted from mistake of law and was not of sufficient gravity.[2811]

Trial Chamber declined to initiate contempt proceedings against Co-Counsel and investigator where disclosure of identities of protected witnesses did not have an impact on the proceedings and the behaviour of co-counsel improved during the trial.[2812]

Trial Chamber was entitled to consider impact of alleged contempt, and fact that the witnesses who were improperly contacted did not feel threatened, when declining to initiate contempt proceedings.[2813]

*Amicus curiae* appointed to investigate allegations that defence investigator disclosed protected witness information to persons in the witness' community during his investigation.[2814]

A person who knowingly and wilfully violates an order of a Chamber by disclosing information relating to the proceedings may be held in contempt pursuant to Rule 77(A)(ii).[2815]

Orders on protective measures apply to all persons who come into possession of protected information.[2816]

The protection provided by Rule 75(F) does not terminate even though the trial has concluded or the protected witnesses initiated conduct with a defence investigator.[2817]

Defence failed to show that prosecution intended to commit contempt when communicating identities of protected defence witnesses to Rwandan government while obtaining judicial records for defence witnesses.[2818]

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[2810] *Prosecutor v Nshogoza*, No. ICTR-07-91-A, *Decision on Defence Allegations of Contempt by Members of the Prosecution* (25 November 2010) at para. 18
[2811] *Prosecutor v Nshogoza*, No. ICTR-07-91-A, *Decision on Defence Allegations of Contempt by Members of the Prosecution* (25 November 2010) at paras 23-24
[2812] *Prosecutor v Nzabonimana*, No. IT-98-44D-T, *Decision Following Amicus Curiae Report Pertaining to Allegations Made by Prosecution Witnesses CNAL and CNAE* (21 February 2013) at paras. 28-29
[2813] *Prosecutor v Nsengimana*, No. ICTR-01-69-A, *Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses* (16 December 2010) at para. 34
[2814] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecution's Urgent Motion Alleging Contempt of the Tribunal* (15 December 2009) at para. 15
[2815] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Haguma Report* (14 December 2007) at para. 12
[2816] *Prosecutor v Niyitegeka*, No. ICTR-96-14-R75, *Decision on Motion for Clarification* (20 June 2008) at para. 11
[2817] *Prosecutor v. Nshogoza*, No. ICTR-2007-91-A, *Judgement* (15 March 2010) at para. 65.

Contempt proceedings against investigator and lead counsel for contact with prosecution witness in violation of protective order would not be instituted where the contacts were shrouded in ambiguities and there was no evidence of specific intent to violate the order.[2819]

The Appeals Chamber directed the prosecution to investigate the access to closed session transcripts by an accused in another case. Revealing closed session material without prior authorization in violation of a protective order constitutes a grave interference with the Tribunal's administration of justice.[2820]

Trial Chamber directed *amicus curiae* to investigate whether defence counsel was in contempt by disclosing the identity of a prosecution witness to a prospective defence witness.[2821]

It was not an abuse of discretion for Trial Chamber to refuse to authorize an investigation of the prosecution for contempt for contacting protected witnesses even in the face of *prima facie* evidence that the violation occurred, given the low gravity of the alleged conduct involved.[2822]

**Rule 78—open sessions**

**All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.**

**Rule 79—closed sessions**

**(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:**
**(i) Public order or morality;**
**(ii) Safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or**
**(iii) The protection of the interests of justice.**
**(B) The Trial Chamber shall make public the reasons for its order.**

**confidential filings**

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[2818] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses* (9 August 2007) at para. 9
[2819] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Haguma Report* (14 December 2007) at para. 15
[2820] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 10
[2821] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for Prohibition of Conduct Pursuant to Rule 77(A)(ii) of the Rules of Procedure and Evidence* (10 February 2011) at para. 19
[2822] *Nshogoza v Prosecutor*, No. ICTR-07-91-AR77, *Decision on Nshogoza's Appeal of Decision on Allegations of Contempt by Members of the Prosecution* (7 July 2011) at paras. 16-20

Proceedings in this Tribunal must be in public unless good cause is shown to the contrary. The only good cause for a party filing a document confidentially is if the information in the filing is confidential and exposure would risk damaging the proceedings themselves.[2823]

The transparency of the proceedings is served by the filing of public documents.[2824]

Response to confidential motion need not be filed confidentially if the content does not warrant confidential filing.[2825]

Desire to prevent speculation concerning possible transfer of case to national jurisdiction did not justify confidential filing of Motion to Amend Indictment.[2826]

Extracts from confidential filings may be filed publicly if they do not reveal confidential information.[2827]

Proceedings before the Appeals Chamber, which include the parties' filings shall be public unless there are exceptional reasons for keeping them confidential.[2828]

Affidavit in support of special protective measures would not be unsealed after disclosure of the witness' identity where it could jeopardize the protection of the witness and the prosecutor's ongoing investigations and where the defence cross-examination would not be affected by non-disclosure.[2829]

Information as to subsistence payments and travel costs of defence team members need not be treated as confidential information.[2830]

Confidential filings should be reserved for exceptional circumstances, such as the need for protection of a witness. [2831]

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[2823] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-AR73, *Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005* (12 May 2005) at para. 4

[2824] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3*(22 November 2007) at para. 2

[2825] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion to Permit Limited Disclosure of Information Regarding Payments and Benefits Provided to Witness ADE and his Family* (21 June 2006) at para. 2

[2826] *Prosecutor v Bagaragaza*, No. ICTR-05-86-I, *Decision on the Prosecutor's Application for Leave to Amend the Indictment* (30 November 2006) at paras. 3-4

[2827] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecution Motion for Full Compliance With Rule 73 ter and Variation of Chamber's Decision of 27 June 2005* (20 November 2006) at para. 6

[2828] *Prosecutor v Gacumbitsi*, No. ICTR-01-64-A, *Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution* (21 October 2005) at para. 5

[2829] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion to Compel Inspection and Disclosure* (5 July 2005) at para. 6

[2830] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Ex Parte Motion to Seal Registry Decision as a Violation of a Defence Team's Right to Privacy* (22 May 2006)

Motion for transfer of witness should not have been filed confidentially.[2832]

Inadvertent disclosure by the Registrar of confidential defence material submitted by government of Belgium warranted return of the disclosure by all parties, but dismissal of the indictment was denied as disproportionate.[2833]

**confidential material**

Transcript of defence witness would not be unsealed where material which would reveal his identity is so intertwined with other testimony as to make separation into public and sealed transcripts impracticable.[2834]

Status conference transcript ordered unsealed where there was insufficient reason to have gone into closed session.[2835]

Trial Chamber will not decide request for closed session testimony until having an opportunity to question the witness on the nature of his security concerns.[2836]

Exhibit showing amount of payments to prosecution witness would remain under seal because it could be used by future informants as a bargaining tool if disclosed.[2837]

Decision would remain confidential where it would necessarily reveal the country in which the protected witness resided.[2838]

Where applicant disclosed information from closed session testimony in his application for review, only those disclosures which might reveal the identity of the

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[2831] *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Motion for Protective Measures, Variation of the Witness List, and Transfer of Detained Witness BUY* (5 February 2007) at para 14; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion of Jerome Clement Bicamumpaka to Admit the Report of Dr, Bernard Lugan into Evidence* (21 February 2008) at para. 6

[2832] *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Motion for Protective Measures, Variation of the Witness List, and Transfer of Detained Witness BUY* (5 February 2007) at para 14; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3*(22 November 2007) at para. 2

[2833] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Ex Parte and Confidential Motion for Restitution and Other Appropriate Relief* (31 January 2007)

[2834] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Unseal Testimony of Witness RAS-1* (24 May 2006)

[2835] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on the Defence Motion to Make Public the Transcripts of 11 February 2008 and the Case File in General* (16 April 2009)

[2836] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Requests to Hear Testimony in Closed Session* (18 October 2006)

[2837] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008) at para. 10

[2838] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Public Filing of a Decision* (10 February 2008) at para. 3

witness would be considered for redaction or as justification to place the application under seal.[2839]

**ex parte communications**

Motions should be filed *inter partes.* Where protected information is involved, it can be set forth in an *ex parte* annex.[2840]

It is improper for a person who is not a party to the proceedings to send *ex parte* communications concerning the merits of issues in dispute in a matter pending before the judge.[2841]

Generally, applications must be filed *inter partes*. Such a rule finds its expression in the general principle of *audi alteram partem*. *Ex parte* proceedings should be entertained only where disclosure to the other party or parties would be likely to unfairly prejudice either the party making the application, or some persons involved in or related to that application.[2842]

Trial Chamber denied motion to require a party filing an ex parte motion to at least give notice of the fact of such filing to the other parties.[2843]

Disclosure of memoranda filed by prosecution in connection with confirmation of the amended indictment ordered disclosed where there was no prejudice to the prosecution.[2844]

Disclosure of Rule 90 *bis* transfer application ordered when confidential information was contained only in the annex.[2845]

Disclosure of identity of potential defence witness to the prosecution could have prejudiced the defence and affected the right of the accused to present his defence.

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[2839] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Fourth Request for Review* (12 March 2009) at para. 17

[2840] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ex Parte Motion* (10 November 2004) at para. 2

[2841] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 343

[2842] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions to Exclude Testimony of Prosecution Witness ADE* (30 March 2006) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 6

[2843] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for an Order Requiring Notice of Ex Parte Filings and to Unseal a Prosecution Confidential Motion* (30 May 2006)

[2844] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motion to Unseal Ex Parte Submissions and to Strike Paragraphs 32.4 and 49 from the Amended Indictment* (3 May 2005) at para. 13

[2845] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-PT, *Order for Filing* (9 August 2006)

However, since the request to interview the potential witness was denied, there was no prejudice to the accused.[2846]

Disclosure of list of witnesses to be dropped if other witness added ordered where it was designed to facilitate the preparation of the defence.[2847]

Generally, applications must be filed *inter partes* unless disclosure would prejudice a party or another person unfairly.[2848]

An application may be filed *ex parte* and confidentially if its disclosure to the prosecution would risk causing prejudice to the witnesses.[2849]

An application to be relieved of Rule 68 disclosure obligations is properly filed *ex parte*. No notice of the filing of such a motion is required, as the mere notice might prejudice the ongoing investigation. However, where the statements which were the subject of the motion had already been disclosed to the defence, the defence could be informed of the fact of the motion, but not its content, and be invited to make submissions on the issue.[2850]

Generally, filings pursuant to Rule 73 *ter* should be made *inter partes* unless disclosure to the other party would likely prejudice the persons related to the application or necessary in the interests of justice.[2851]

Disclosure of *ex parte* applications must be predicated on a specific request for the application. Request for disclosure of all *ex parte* applications is too general. A party will generally have notice that an *ex parte* application has been made when the Trial Chamber renders a decision on the application, which is usually done *inter parties*.[2852]

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[2846] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Nzirorera's Ex Parte Motion for Order for Interview of Defence Witnesses NZ1, NZ2, and NZ3* (12 July 2006) at para. 7

[2847] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions to Exclude Testimony of Prosecution Witness ADE* (30 March 2006) at para. 9

[2848] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-PT, *Order for Filing Additional Information to Prosecutor's Motion for Transfer of Witnesses* (6 May 2005); *Prosecutor v Rwamakuba,* No. ICTR-98-44C-PT, *Decision on Prosecution's Motion for an Order for Temporary Transfer of Witnesses Pursuant to Rule 90 bis* (23 May 2005)

[2849] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Confidential Ex Parte Motion for Subpoenas Directed to Defence Witnesses* (16 December 2005) at para. 2

[2850] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Ex Parte Filings* (18 February 2009) at paras. 6-7

[2851] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Ex Parte Prosecution Submissions* (4 September 2008) at para. 6

[2852] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials* (18 January 2008) at paras. 4,7

Request for disclosure of *ex parte* submissions at end of prosecution case denied where disclosure would compromise other investigations and prosecution investigation of accused did not end when it closed its case.[2853]

No double standard existed for disclosure of *ex parte* filings where prosecution filings concerned information that might prejudice protected witnesses and where defence filings dealt with disclosure of witness identities which was required once the defence case had commenced.[2854]

Defence application for cooperation by a State ordered reclassified as *inter partes* where it involved modification of protective measures of a prosecution witness.[2855]

**Rule 80—control of proceedings**

**(A) The Trial Chamber may exclude a person from the proceedings in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.**
**(B) The Trial Chamber may order the removal of an accused from the proceedings and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.**

**Rule 81—records of proceedings and preservation of evidence**

**(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.**
**(B) The Trial Chamber may order the disclosure of all or part of the record of closed proceedings when the reasons for ordering the non disclosure no longer exist.**
**(C) The Registrar shall retain and preserve all physical evidence offered during the proceedings.**
**(D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registry, may be authorised at the discretion of the Trial Chamber.**

**Rule 82—joint and separate trials**

**(A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.**
**(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of**

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[2853] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Unsealing Ex Parte Submissions and for Disclosure of Withheld Materials* (18 January 2008) at para. 10
[2854] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Disclosure of Ex Parte Prosecution Submissions* (4 September 2008) at paras. 9-10
[2855] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Reclassification of Confidential and Ex Parte Submissions Regarding Judicial Cooperation with the United States of America* (8 September 2011)

**justice.**

**appeals**

Rules 48 and 82 also apply to appeals.[2856]

Despite delay caused by six-accused joint appeal, severance of one accused would not be in the interests of justice where it might lead to inconsistent judgements and would delay the appeal of the co-accuseds.[2857]

**co-accused testimony**

The fact that an accused would call co-accused as witnesses in his own trial, but they may not testify in a joint trial, suggests that the interests of justice would be served by severance.[2858]

To establish serious prejudice based on this possibility, the defence must make a threshold showing of, first, the substance of the testimony; second, its exculpatory nature and effect; third, the *bona fide* need for the testimony; and fourth, the reasonable probability that the exculpatory testimony would, in fact, be given by the co-accused at a separate trial. The burden of establishing serious prejudice rests with the moving party. The essential issue is the exculpatory significance of the testimony in relation to the case as a whole, and the likelihood that the testimony will materialize.[2859]

**conflict of interests**

Fact that accused intends to present evidence that criticises the MRND, his co-accused, allegedly influential members of that party, might be affected by this criticism and respond in like manner does not necessitate a separate trial.[2860]

The fact that the accused was a high executive of the MRND and not a former Minister in the *Interim Government* does not necessarily create a conflict of interests that might cause serious prejudice to the accused. Separate trial denied.[2861]

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[2856] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Nsabimana's Motion for Severance* (21 November 2014) at p. 4

[2857] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Nsabimana's Motion for Severance* (21 November 2014) at p. 5

[2858] *Prosecutor v Bizimana et al*, No. ICTR-98-44-I, *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Juvenal Kajelijeli* (6 July 2000) at para. 39

[2859] *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 24; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Motion for Separate Trials* (8 June 2001) at para. 19

[2860] *Prosecutor v Mugenzi et al*, No. ICTR-99-50-I, *Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)* (8 November 2002) at para. 40

Prosecutor's motion to sever three accused from five accused who were members of the Interim government denied where no conflict of interests among the accused were shown and where there was a great deal of common evidence.[2862]

The mere possibility of mutually antagonistic defences does not itself constitute a conflict of interests capable of causing serious prejudice within the meaning of Rule 82(B).[2863]

The fact that one co-accused may adduce evidence which is said to be disadvantageous to another co-accused does not, in and of itself, justify severance.[2864]

For a conflict to exist to justify severance, the circumstances must be extraordinary.[2865]

If evidence is adduced which, in the opinion of the co-Accused, is prejudicial to their interest, then they will have the opportunity to cross-examine the witness on any matter raised by the Prosecution and, where legally justified, to call additional rebuttal evidence. This is sufficient to protect their interests.[2866]

In a joint trial, the right to a full defence means that in a situation of antagonistic defence, an accused can bring evidence which can be incriminating for the other co-accused within certain limits. There are several remedies to assure that each accused does not lose the rights that he or she would have if tried alone. Such remedies may include cross-examination, further cross examination, recall or rebuttal of evidence.[2867]

Trial Chamber excluded some defence evidence objected to by co-accused where the evidence would not benefit the case of the accused offering it.[2868]

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[2861] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Joseph Nzirorera* (12 July 2000) at para. 22

[2862] *Prosecutor v Ngirumpatse et al*, No. ICTR-98-44-I, *Decision on the Prosecutor's Motion for Joinder of the Accused and on the Prosecutor's Motion for Severance of the Accused* (29 June 2000)

[2863] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at fn. 283

[2864] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 5

[2865] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 65

[2866] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 5

[2867] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's and Niyiramasuhuko's Oral Motions to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witnesses D-2-13-0, D-2-15-S, and D-20-H* (5 November 2007) at para. 26

[2868] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's and Niyiramasuhuko's Oral Motions to Exclude Certain Evidence From the Expected Testimony of Kanyabashi's Witnesses D-2-13-0, D-2-15-S, and D-20-H* (5 November 2007)

Although all three accused opposed severance, Trial Chamber found that delay from illness of co-accused created a conflict of interest with their right to be tried without undue delay.[2869]

The party requesting the severance on grounds of conflict of interests with co-accused has to demonstrate the existence of a conflict of such a nature as might cause serious prejudice to an accused or that the interests of justice are compromised.[2870] In this case any prejudice from evidence presented by co-accused which incriminates the accused can be cured by cross-examination, rebuttal evidence if necessary, and careful separation of the evidence by the professional judges.[2871]

The shifting of blame from one accused to another does not cause a conflict of interests warranting severance. Nor does a situation where the accused played different roles in the hierarchies or command or were in different hierarchies or commands.[2872]

Exclusion of evidence, rather than severance, is the appropriate remedy for evidence elicited by the prosecution in cross-examination of a defence witness for the co-accused.[2873]

**consequences of severance**

Severance of accused after prosecution case was completed did not require indictment to be amended.[2874]

Co-accused would be given leave to add additional witnesses because of severance.[2875]

If the decision on severance was overturned on appeal, the remedy would be to recall the witnesses who testified in the meantime.[2876]

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[2869] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 43
[2870] *Prosecutor v. Ntahobali*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Separate Trial* (2 February 2005) at para. 33
[2871] *Prosecutor v. Ntahobali*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Separate Trial* (2 February 2005) at para. 39; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ni Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 70
[2872] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 67
[2873] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Evidence of Jean Kambanda* (11 September 2006)
[2874] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 57
[2875] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 59
[2876] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 62

**delay**

The interest of justice includes the right of the accused to be tried fairly and without delay. Severance was in the interests of justice when it would result in narrower allegations against the accused.[2877]

A joint trial would cause undue delay to an accused named in only a small portion of the paragraphs of the indictment.[2878]

Severance not required for breach of accused's right to have adequate time and facilities for his defence where Trial Chamber took steps to mitigate prejudice from change of counsel after prosecution case by delaying the time at which the accused would have to present his witnesses.[2879]

While a joint trial might add to the complexity of a case at all stages of the proceedings, including at trial, and hence, to their length, this does not necessarily encroach upon the right to be tried without undue delay.[2880]

Illness of the co-accused, which would require the trial to be delayed for an additional nine months, required severance so as not to violate the rights of his co-accused to be tried without undue delay—even if they consented to the delay.[2881]

The interests of justice to be considered under Rule 82 includes an accused's right to be tried without undue delay.[2882]

A co-accused whose case was completed was not entitled to severance as a remedy for the delay in rendering a judgement in his individual case.[2883]

**in general**

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[2877] *Prosecutor v Karemera*, No. ICTR-98-44-T, *Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment* (14 February 2005) at para. 26

[2878] *Prosecutor v Bizimana et al*, No. ICTR-98-44-I, *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Juvenal Kajelijeli* (6 July 2000) at para. 36

[2879] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance by Accused Kabiligi* (25 March 2005) at para. 17

[2880] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Motion for Separate Trials* (8 June 2001) at para. 23

[2881] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at paras. 36, 38

[2882] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 75

[2883] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion Alleging Undue Delay and Seeking Severance* (14 June 2007) at para. 22

The nature of the possible prejudice to an accused, the advantages of a joint trial, and the mechanisms for mitigating the claimed prejudice by means other than severance, must all be weighed when considering a motion for severance.[2884]

The burden of establishing serious prejudice rests with the moving party.[2885]

The advanced stage of the trial weighs against severance, particularly where the accused had benefited from the presentation of evidence by their co-accused.[2886]

**medical reasons**

In practice, Trial Chambers generally consider various professional opinions before taking an important procedural decision arising from an accused's medical condition which may impact the course of the trial.[2887]

Trial Chamber erred in ordering severance of an ill accused based upon information solely from the UN Medical Officer, without informing itself of the specific nature of the accused's medical problem, where that information varied, was contested by the parties, and constituted the sole basis for the finding of prejudice.[2888]

**preference for joint trials**

The preference for joint trials of individuals accused of acting in concert in the commission of a crime is not based merely on administrative efficiency. A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured; enhances fairness as between the accused by ensuring a uniform presentation of evidence and procedure against all; and minimizes the possibility of inconsistencies in treatment of evidence, sentencing, or other matters, that could arise from separate trials.[2889]

**prejudice to the accused**

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[2884] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3
[2885] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3
[2886] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 8
[2887] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.16, *Decision on Appeal Concerning the Severance of Mathieu Ngirumpatse* (19 June 2009) at para. 19
[2888] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.16, *Decision on Appeal Concerning the Severance of Mathieu Ngirumpatse* (19 June 2009) at para.22
[2889] *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 3

Accused would not be prejudiced from severance where witnesses who may have to be called in two trials had already testified before the Tribunal and there was no evidence that the added burden of testifying again would cause them not to testify.[2890]

**spill-over evidence**

Evidence contained in the supporting materials is extraneous to the decision of whether a joint trial would prejudice the accused.[2891]

The ground that evidence may be admissible against one accused and not the others is not applicable at the Tribunal. It is generally assumed that judges can rise above such risk of prejudice and apply their professional judicial minds to the assessment of evidence.[2892]

Rule 82(A) does not, as a matter of principle, bar trial chambers from relying on the evidence presented by a co-defendant where that evidence supports the prosecution's case.[2893]

Severance granted where the accused would be prejudiced by the fact that there are far more allegations against his co-accused, national government figures, than against him, a local bourgmestre.[2894]

Severance is only granted if serious prejudice to a specific right of the accused can be shown.[2895]

There is no possibility of serious prejudice to an accused from the fact that there are allegations against the co-accused which do not directly affect the accused.[2896] Similarly, the fact that the co-accused were leaders of a different political party opposed to that of the accused did not create such a conflict of interest to warrant severance.[2897]

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[2890] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 53
[2891] *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-T, *Decision on Andre Rwamakuba's Motion for Severance* (12 December 2000) at para. 27
[2892] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Motion for Separate Trials* (8 June 2001) at para. 16
[2893] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 115
[2894] *Prosecutor v Bizimana et al*, No. ICTR-98-44-I, *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Juvenal Kajelijeli* (6 July 2000) at para. 28
[2895] *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 22
[2896] *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-T, *Decision on Andre Rwamakuba's Motion for Severance* (12 December 2000) at para. 28
[2897] *Prosecutor v Rwamakuba et al*, No. ICTR-98-44-T, *Decision on Andre Rwamakuba's Motion for Severance* (12 December 2000) at para. 33

In the absence of a clear showing of a severe disproportion of responsibility, the Trial Chamber can only make that determination upon a presentation of the facts at trial. Unlike a trial before a jury, there is little danger of the accused being unfairly tarnished by guilt by association before a panel of judges.[2898]

Trial Chamber declined to strike references to accused whose trial had been severed and held that the accused would not be prejudiced to references to him since the prosecution would have to prove all facts at his separate trial.[2899]

**timeliness of motion**

A separate trial for an accused sought pursuant to Rule 49 must be made by preliminary motion within the prescribed time. However, a motion for severance under Rule 82(B) for conflict of interest may be made at any time.[2900]

A severance may be granted after trial has commenced.[2901]

Timeliness is also an important consideration in a motion for severance. A motion for severance during trial may be timely, particularly where the prejudice could not have been discovered even with reasonable diligence prior to trial. A factor militating against severance, however, is that the prejudice was apparent or discoverable before trial and that the case has proceeded for significant period.[2902]

**victim rights**

The protection of victims and other witnesses should be considered when determining if a severance is in the interests of justice. A joint trial will avoid the pressure and trauma to witnesses who must repeatedly testify in multiple trials [2903]

**Rule 82 bis—trial in the absence of the accused**

**If an accused refuses to appear before the Trial Chamber for trial, the Chamber**

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[2898] *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 30

[2899] *Prosecutor v Nzirorera*, No. ICTR-98-44-I, *Decision on Joseph Nzirorera's Motion Requesting Inter Alia the Deletion of References to him in the Trial of Juvenal Kajelijeli* (29 June 2001)

[2900] *Prosecutor v Bizimana et al*, No. ICTR-98-44-I, *Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial filed by the Accused Juvenal Kajelijeli* (6 July 2000) at para.17; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Motion for Separate Trials* (8 June 2001) at para. 9

[2901] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Continuation of the Trial* (3 March 2009) at para. 41

[2902] *Prosecutor v Bagosora et al*. No. ICTR-98-41-T, *Decision on Motions by Ntabakuze for Severance and to Establish a Reasonable Schedule for the Presentation of Prosecution Witnesses* (9 September 2003) at para. 28

[2903] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings* (7 April 2006) at para. 77

**may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that:**
**(i) the accused has made his initial appearance under Rule 62;**
**(ii) the Registrar has duly notified the accused that he is required to be present for trial;**
**(iii) the interests of the accused are represented by counsel.**

There is sufficient basis to proceed in the absence of the accused under Rule 82 *bis* of the Rules when the accused absented themselves from their trial in protest of proposed transfer of cases to Rwanda.[2904]

Waiver of the right to be present at trial will not be found where the accused shows good cause, such as the existence of a medical condition that prevents the accused from attending the proceedings.[2905]

To substantiate a request for adjournment for medical reasons, a medical report is required.[2906] Where Trial Chamber had medical reports indicating that the accused could come to court if he chose to, it properly proceeded in his absence.[2907]

**Rule 83—instruments of restraint**

**Instruments of restraint, such as handcuffs, shall not be used except as a precaution against escape during transfer or for security reasons, and shall be removed when the accused appears before a Chamber.**

**Rule 84—opening statements**

**Before presentation of evidence by the Prosecutor, each party may make an opening statement. The Defence may however elect to make its statement after the Prosecutor has concluded presentation of evidence and before the presentation of evidence for the defence.**

**Rule 85—presentation of evidence**

**(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:**
**(i) Evidence for the prosecution;**

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[2904] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, including Reasons in Support of the Chamber's Oral Ruling delivered on Monday 20 September 2004* (24 September 2004) at para. 29
[2905] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses* (19 April 2007) at para. 18
[2906] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses* (19 April 2007) at para. 18
[2907] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses* (19 April 2007)

**(ii) Evidence for the defence;**
**(iii) Prosecution evidence in rebuttal;**
**(iv) Defence evidence in rejoinder;**
**(v) Evidence ordered by the Trial Chamber pursuant to Rule 98.**
**(vi) Any relevant information that may assist the Trial Chamber in determining an appropriate sentence, if the accused is found guilty on one or more of the charges in the indictment.**
**(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.**
**(C) The accused may, if he so desires, appear as a witness in his own defence.**

**closing prosecution case**

Trial Chamber had power to order prosecution case closed in interests of justice even though cross examination of prosecution witness had not been completed.[2908]

**cross examination**

To allow the prosecution to elicit evidence on cross-examination of witness for co-accused which broadens the proof offered during its case-in-chief would violate Rule 85's scheme for the order of presentation of evidence.[2909]

**defence case**

In multiple accused case, order of presentation of defence cases would follow the order in which the accused are charged in the indictment.[2910]

**rebuttal**

It is not permissible to call rebuttal evidence solely to challenge the credibility of defence evidence.[2911]

The Trial Chamber has the power to enforce the traditional purpose of rebuttal, which is to afford the prosecution an opportunity to refute evidence of a new matter submitted during the case of the defence that was not reasonably foreseeable.[2912]

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[2908] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Application to Certify an Appeal and Joseph Nzirorera's Application to Certify an Appeal and/or Reconsider Decision on the Prosecution Motion to Reopen Its Case and on the Defence Motion to File Another 98 bis Motion* (25 June 2008) at para. 10
[2909] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Evidence of Jean Kambanda* (11 September 2006) at para. 3
[2910] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Scheduling Order Following the Pre-Defence Conference of 15 February 2007* (16 February 2007) at para. 7
[2911] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on the Prosecution Motion to Call Rebuttal Evidence* (20 February 2009) at para. 20

Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, the Trial Chamber will be reluctant to exercise its discretion and give leave to adduce such evidence. The prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict its case.[2913]

Rebuttal evidence is not a means for the Prosecution to re-open or reinforce its case, to counter evidence presented during the Defence case-in-chief that could have been reasonably foreseen, or to seek solely to challenge the credibility of a Defence witness or peripheral or background issues.[2914]

Rebuttal evidence must have significant probative value on a central issue and not be merely cumulative.[2915]

Although the prosecutor is not generally expected to anticipate and rebut an alibi defence when she has not received adequate prior notice, the prosecutor is not entitled to present rebuttal evidence where the evidence she seeks to tender in rebuttal aims to prove a constituent element of the crimes charged that she would have had to establish to prove the guilt of an accused.[2916]

When the proposed rebuttal evidence challenges the credibility of a witness, or other collateral matters, the Trial Chamber should exclude it in rebuttal.[2917]

Prosecution allowed to call handwriting expert in rebuttal to provide the authenticity of documents used in its cross-examination of defence witness.[2918]

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[2912] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence* (21 May 2003) at para. 31

[2913] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on the Prosecution Motion for Leave to call Rebuttal Evidence (Rule 85)* (12 May 2003) at para. 25.

[2914] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion for Leave to Present Rebuttal Evidence* (14 November 2011) at para. 37

[2915] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence* (21 May 2003) at para. 32

[2916] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence* (21 May 2003) at para. 33

[2917] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence* (21 May 2003) at para. 33

[2918] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained Out of Court Pursuant to Rules 89(C) and (D)* (26 April 2006)

As the party seeking to present rebuttal evidence, the prosecutor must make a showing of the following two elements: (i) the evidence she seeks to rebut arose directly *ex improviso* during the presentation of the defence's case-in-chief and could not, despite the exercise of reasonable diligence, have been foreseen ; and (ii) the proposed rebuttal evidence has significant probative value to the determination of an issue central to the determination of the guilt or innocence of the accused.[2919]

Rebuttal evidence excluded where prosecutor should have anticipated and offered evidence in case-in-chief and where proposed rebuttal was directed at credibility of defence witnesses.[2920]

Rebuttal evidence excluded where timely notice of alibi filed before trial and hence prosecution should have brought evidence contrary to alibi in its case-in-chief.[2921]

Rebuttal witness allowed where defence notice of alibi was untimely,[2922] even where prosecution had met with rebuttal witnesses before defence case commenced.[2923]

Prosecution effort to introduce documents from the bar table at the end of the case must meet the standard for rebuttal evidence. Where there was no justification for not introducing those documents through cross examination of defence witnesses, their admission was denied.[2924]

**recalling a witness**

**absence of the accused**

Recall of witnesses who testified when accused was absent from the trial denied where no legitimate purpose existed for their recall and no showing was made why they

[2919] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence* (21 May 2003) at para. 34; *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence* (13 May 2002) at para.16-18; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion for Leave to Present Rebuttal Evidence* (14 November 2011) at para. 37

[2920] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Decision on the Prosecutor's Motion for Leave to Call Evidence in Rebuttal Pursuant to Rules 54,73,and 85(A)(iii) of the Rules of Procedure and Evidence* (21 May 2003)

[2921] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on the Prosecutor's Motion for Leave to Call Rebuttal Evidence Pursuant to Rule 85(A)(iii) of the Rules of Procedure and Evidence* (13 May 2002)

[2922] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecution Motion to Call Rebuttal Evidence* (8 March 2011); *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor's Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence* (15 June 2011) at para. 33; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion for Leave to Present Rebuttal Evidence* (14 November 2011) at para. 42

[2923] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Motion for Exclusion of Rebuttal Witnesses* (13 September 2011) at para. 7

[2924] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion for Admission of Documentary Evidence* (4 July 2012) at para. 37

could not have been questioned by counsel for the accused in the absence of the accused.[2925]

**bias**

Recall of prosecution witness granted where prosecution had failed to disclose Rule 68 material indicating that source of witness' information was working for RPF.[2926]

Prosecution witness being recalled could be questioned about post-testimony disclosures of the amount of benefits paid to him.[2927]

Recall of defence witness warranted where prosecution had no notice of his claim that he had received payments from Rwandan government for his testimony and was only able to obtain conflicting evidence after his testimony had been concluded.[2928]

Late disclosure of witness statement, Rwandan judicial records, as well as a medical report which raised suspicions of collusion with another witness warranted recalling the witness for further cross examination.[2929]

**collusion**

It was not error to decline to recall witnesses where subsequent evidence that they had lied about knowing each other, where this was inconclusive on the issue of possible "collusion".[2930]

**existence of prior statements**

Recall of prosecution witnesses to determine extent of undisclosed prior statements denied where prosecution was not in possession of such statements and no further detail concerning the statements were likely to emerge.[2931]

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[2925] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses* (19 April 2007) at paras. 21-22

[2926] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness HH* (26 March 2009) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G, and T* (16 April 2009) at para. 8-9

[2927] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witnesses ALG, AWD, G, and T* (16 April 2009) at para. 11

[2928] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi* (14 February 2011) at paras.26-27

[2929] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness* (4 March 2008) at para. 30

[2930] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 231

[2931] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for the Recall of Witnesses CNAL, CNAQ, and CNBU* (29 March 2011) at para. 26

**recantations**

Trial Chamber violated rights of the accused by not recalling witness for cross examination on the issue of his alleged recantation, which was the subject of an *amicus curiae* investigation and report, but the error did not affect the verdict.[2932]

Where a prosecution witness wrote a letter after testifying recanting his testimony, the Trial Chamber would recall him as a court witness, giving both parties the opportunity to cross-examine, and would do so before the commencement of the defence case.[2933]

Where witness testified at subsequent trial that his testimony in this proceeding had been false, there were good grounds to recall him.[2934]

Acknowledgement by a witness that he had lied in his testimony at trial constituted good cause for the recall of the witness.[2935]

Where the witness had recanted his testimony in a letter to Gacaca, but later testified in another trial that his recantation was false and his original testimony was true, there was no grounds to recall him in this trial as it could be expected that he would also repudiate his recantation.[2936]

Witness who admitted in subsequent testimony to having lied at the trial at the request of a member of the Office of the Prosecutor would be recalled for further testimony.[2937]

Recall of prosecution denied where witness, who had informed defence investigator that he had lied in his testimony, declined to recant when contacted by the Registrar.[2938]

A letter recanting his testimony, and testimony of another prosecution witness alleging collusion in the giving of false testimony. justified recalling a prosecution witness.[2939]

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[2932] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 134
[2933] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion to Recall Prosecution Witness BLP* (30 April 2007)
[2934] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's and Nsabimana's Motions to Cross Examine Prosecution Witness QA on Additional Topics* (28 October 2008) at para.28
[2935] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BTH* (12 March 2008); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka Motion Requesting Recall of Prosecution Witness GFA; Disclosure of Exculpatory Material; and to Meet with Witness GFA* (21 April 2008) at para. 7
[2936] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for the Recall of Witness GAP* (5 March 2009) at para. 10
[2937] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Prosecution Witnesses QY,SJ, and Others* (3 December 2008) at para. 24
[2938] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Prosecution Witness BDW* (23 July 2009) at para. 5

Where prosecution witness recanted his testimony in a letter which had been verified by an *amicus curiae* and the Registrar, there was no reason to recall the witness where the Chamber was already deliberating on the case and where the admission of the letter of recantation would suffice to allow the Chamber to assess the witness' credibility in its final judgement.[2940]

**recordings**

Recall of prosecution witness after disclosure of tape recording of meeting he described which contained inconsistencies with his testimony was not necessary, since the Trial Chamber could assess his credibility by comparing his testimony to the recording.[2941]

Prosecution witness who denied voice on recording was his, but subsequently admitted it in subsequent trial would be recalled since his denial had precluded cross examination on the contents of the recording and therefore the defence had been prejudiced.[2942]

**retaliation**

Recall of defence witnesses who had been retaliated against not necessary where no showing of relevant material concerning their underlying testimony was made.[2943]

**Rwandan records**

Witness who had testified before the Tribunal and completed his cross-examination would be recalled where Rwandan records emerged that raised questions as to his credibility due to discrepancies.[2944]

To introduce a contested judgement to challenge the credibility of a witness, without hearing the witness on those issues, would be contrary to the principle of a fair trial. Therefore, where inconsistencies were shown between a prosecution witness' testimony and a subsequent Gacaca judgement, the witness should be recalled.[2945]

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[2939] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Witness GBU…*(6 August 2008) at paras.7-8
[2940] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Witness GFR's Recantation of his Evidence* (10 February 2010)
[2941] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Ahmed Mbonyunkiza* (25 September 2007) at para. 6
[2942] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 6
[2943] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Emergency Motion to Recall Witnesses for Further Testimony* (5 June 2008).
[2944] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at para. 13.
[2945] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Reopen his Case and to Recall Prosecution Witness QA* (2 July 2008) at paras. 30, 36

**scope of recall**

Scope of cross examination on recall was limited to issue for which disclosure violation justified recalling the witness and questions relating to other matters subsequently discovered to be within knowledge of witness would not be permitted.[2946]

**standard**

A party seeking to recall a witness must demonstrate good cause—a substantial reason amounting in law to a legal excuse for failing to perform a required act. The Chamber must consider the purpose of the proposed testimony as well as the party's justification for not offering the evidence when the witness testified. Recall should only be granted in the most compelling of circumstances where the evidence is of significant probative value and not cumulative.[2947]

Assessing good cause to recall a witness involves an analysis of (1) the purpose for which the witness will testify; and (2) the reasons why the witness was not questioned on those matters earlier.[2948]

In considering whether to order the recall of a prosecution witness for further cross examination on new material, the Trial Chamber considers whether the probative value of the cross examination outweighs the prejudice caused by delaying the proceedings.[2949]

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[2946] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Modify Conditions of Recall of Prosecution Witness G* (5 November 2009) at para. 6

[2947] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion to Recall Prosecution Witness OAB for Cross Examination* (19 September 2005) at para. 2; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY for Additional Cross-Examination* (3 March 2006) at para. 32; *Prosecutor v Bagosora et al*, No, ICTR-98-41-T, *Decision on Bagosora Defence Motion to Recall Witness Frank Claeys for Additional Cross Examination* (19 February 2007) at para. 3; *Prosecutor v Ndindiliyimana et al*, ICTR-00-56-T, *Decision on Defence Motion to Recall Witness AOE for Additional Cross Examination* (3 April 2007) at para. 6; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's and Nsabimana's Motions to Cross Examine Prosecution Witness QA on Additional Topics* (28 October 2008) at para. 25; *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi* (14 February 2011) at para. 24

[2948] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motions to Call Doctors and to Recall Eight Witnesses* (19 April 2007) at para. 20; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Ahmed Mbonyunkiza* (25 September 2007) at para. 5; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Recall and Further Cross-Examination of Prosecution Witness QCB* (20 November 2008) at para. 35

[2949] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witness Marianna Baziruwiha dated 5 November 1994* (14 August 2007) at para. 7

The violation of disclosure rules by the prosecution does not waive the requirement of showing good cause to recall a witness.[2950]

**statements**

Recalling a witness when a party seeks to admit new evidence intended to impeach his or her credibility is established practice. This applies not only to witness statements, but to any material intended to impeach witnesses. Considerations of fairness require that a witness be confronted with evidence intended to discredit them.[2951]

Recall may be warranted to demonstrate inconsistencies between testimony of witnesses and any declarations obtained subsequently, if the moving party can show that prejudice would result from the inability to put such inconsistencies to the witness.[2952]

If the defence discovers inconsistent statements pertaining to a witness who has already testified, fairness to the accused justifies recalling that witness.[2953]

Inconsistencies between the witness' testimony and subsequent declarations do not justify recall of a witness if the inconsistency is a minor one or if its justification is self-evident.[2954]

Inconsistencies between trial testimony and subsequent testimony of witness warranted recall where they related to discrepancies as to the perpetrator of a rape and the witness' presence at a particular location. Other discrepancies did not warrant recall of two other witnesses.[2955]

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[2950] *Prosecutor v Ndindiliyimana et al*, ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration* (16 February 2009) at para. 10

[2951] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Request for Certification or Reconsideration Concerning Admission of School Documents* (9 May 2007) at paras. 5,7

[2952] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for the Recall of Defence Witness Jean-Marie Vianney Mporanzi* (14 February 2011) at para. 25

[2953] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Witness GBU…*(6 August 2008) at para. 4

[2954] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion to Recall Prosecution Witness OAB for Cross Examination* (19 September 2005) at para. 3; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY for Additional Cross-Examination* (3 March 2006) at para. 33; *Prosecutor v Bagosora et al*, No, ICTR-98-41-T, *Decision on Bagosora Defence Motion to Recall Witness Frank Claeys for Additional Cross Examination* (19 February 2007) at para. 4; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Recall and Further Cross-Examination of Prosecution Witness QCB* (20 November 2008) at para. 35

[2955] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY for Additional Cross-Examination* (3 March 2006) at para. 46-47

Inconsistency between trial testimony and subsequent interviews and testimony in Canadian proceedings warranted recall on one issue where there was a contradiction, but not on other issues where there were no material contradictions on significant matters.[2956]

Witness' failure to mention an event in brief discussion contained in newly disclosed document was not so inconsistent with his testimony as to meet the requirements for recalling a witness.[2957]

The Trial Chamber will recall a witness for further cross examination by the defence to explore inconsistencies between the witness' testimony and subsequent declarations if the defence can show it would be prejudiced if it were not allowed to put these inconsistencies to the witness. If there is no need for the witness' explanation of the inconsistency, then the witness should not be recalled.[2958]

Trial Chamber admitted new part of statement of prosecution witness *proprio motu* rather than recall the witness where no tangible benefit to further cross examination was shown.[2959]

**waiver**

Where the defence discovers inconsistent statements pertaining to a witness who has already testified, it must move to recall that witness, rather than attempting to introduce the statements during the testimony of the accused. Failure to move to recall the witness rendered the statements inadmissible.[2960]

An accused is not obligated to file a motion to recall a prosecution witness until all grounds for recalling the witness have been developed.[2961]

**re-examination**

If a witness was called to testify on behalf of one of the jointly accused persons, only the party who had called that witness would be permitted to engage in re-examination of that witness**.**[2962]

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[2956] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Recall and Further Cross-Examination of Prosecution Witness QCB* (20 November 2008)
[2957] *Prosecutor v Ndindiliyimana et al*, ICTR-00-56-T, *Decision on Defence Motion to Recall Witness AOE for Additional Cross Examination* (3 April 2007)
[2958] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for the Recall of the Prosecution Fidele Uwizeye for Further Cross Examination* (9 October 2007) at para. 2
[2959] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion in Order to Admit into Evidence the Certified Copy Conform to the Original of the Extrajudicial Declaration of Prosecution Witness Marianna Baziruwiha Dated 5 November 1994* (14 August 2007)
[2960] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion to Admit Documents as Exhibits* (26 February 2007)
[2961] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Recall Witness GBU…*(6 August 2008) at para. 5
[2962] *Prosecutor v. Kayishema*, No.ICTR-95-1-T, *Decision on the Defence Motion for the Re-Examination of Defence Witness DE* (Aug. 1998) at para.8

The prosecution is entitled to re-examine its witnesses when they are re-called by the defence.[2963]

**rejoinder**

Rule 85 envisions the possibility that the defence may call evidence in rejoinder after the prosecution has led evidence in rebuttal. Whether such evidence should be allowed is determined with reference to Rule 89(B)'s direction that rules of evidence be applied "which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[2964]

Defence allowed to call four rejoinder witnesses to rebut testimony of prosecution rebuttal witnesses on alibi.[2965]

Testimony of rejoinder witnesses and admission of documents in rejoinder denied where accused should have anticipated challenge to his alibi before the rebuttal case of the prosecution and sought leave to add the witnesses to his witness list before the defence case was closed.[2966]

**re-opening case**

The primary consideration in determining an application to reopen a case to allow for the admission of fresh evidence is whether, with reasonable diligence, the evidence could have been identified and presented in the party's case-in-chief.[2967]

If it is shown that the evidence could not have been found through the exercise of reasonable diligence before the close of the case, the Trial Chamber should consider whether the probative value of the evidence substantially outweighed the need to ensure a fair trial. [2968]

The need to ensure a fair trial includes consideration of the stage in the trial at which the evidence is sought to be admitted and the potential delay that would be caused to the trial.[2969]

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[2963] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Motion for Certification to Appeal the Decision of 16 June 2008…* (16 July 2008) at para. 7
[2964] *Prosecution v. Semanza,* No.ICTR-97-20-1, *Decision on Defence Motion for Leave to Call Rejoinder Witnesses*(30 April 2002) at para.4
[2965] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Urgent Defence Motion for Leave to Call Evidence in Rejoinder* (13 September 2011)
[2966] *Prosecutor v Ngirabatware,* No. ICTR-99-54-T, *Decision on Defence Motion for Leave to Present Rejoinder Evidence* (18 May 2012) at para. 27
[2967] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2489
[2968] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2489
[2969] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2489

The Trial Chamber has the power to allow the prosecution to reopen its case after it had rested when in the interests of justice.[2970]

Interests of justice allowed prosecution to reopen its case after two defence witnesses had testified where the evidence it had led from a witness during its case had been struck by the Appeals Chamber for procedural reasons.[2971]

A subpoena to a prosecution witness to attend for cross examination would be issued during defence case where Trial Chamber had admitted statement pursuant to Rule 92 *bis* during prosecution case but ordered witness to attend for cross-examination. Having witness attend for cross examination after prosecution had rested would not constitute a re-opening of prosecution case.[2972]

Reopening of a party's case requires a showing of exceptional circumstances.[2973]

The moving party must show that with reasonable diligence, the evidence could not have been identified and presented in its case in chief.[2974]

New evidence includes not only evidence obtained after the party's case, but also evidence in the party's prior possession, which becomes significant only considering other new evidence.[2975]

The probative value of the new evidence must outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings.[2976]

Defence was not diligent in seeking to admit documents in its possession by waiting until co-accused testified, since it was always possible that co-accused would

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[2970] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File Another Rule 98 bis Motion* (19 April 2008) at para. 11

[2971] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Prosecution Joint Motion for Reopening Its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza by Video-Link* (16 November 2006)

[2972] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena Compelling Witness DAN to Attend for Defence Cross-Examination* (31 August 2006)

[2973] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Further Certified Disclosure and Leave to Reopen his Defence* (10 June 2008) at para. 20, fn. 31; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Reopen his Case and to Recall Prosecution Witness QA* (2 July 2008) at para. 23

[2974] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Reopen his Case and to Recall Prosecution Witness QA* (2 July 2008) at para. 23; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Admission of Documents into Evidence* (30 September 2008) at para. 26

[2975] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Admission of Documents into Evidence* (30 September 2008) at para. 26

[2976] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Reopen his Case and to Recall Prosecution Witness QA* (2 July 2008) at para. 23

elect not to testify. Therefore, it would not be allowed to reopen its case to admit the documents.[2977]

Factors to be considered in deciding whether to allow a case to be reopened include the advanced stage of the trial, the potential delay in the trial, and the fact of bringing evidence against one accused in a multi-accused case.[2978]

The admission of evidence after the case has closed is only allowed under exceptional circumstances. Such circumstances existed where the defence, due to insufficient information, was unable to obtain certification for a Rule 92 *bis* statement.[2979]

Exceptional circumstances did not exist for admission of Rule 92 *bis* statement of witness after the close of the case where the witness had been available to give testimony during the trial.[2980]

The previous reluctance of a witness to testify does not, in and of itself, justify re-opening a party's case.[2981]

A Chamber may permit a party to re-open its case to present "fresh evidence" , which could not have been produced with reasonable diligence before the close of the party's case.[2982]

Evidence which was not available during the defence case would nevertheless not be admitted where it was cumulative to evidence already admitted during the case.[2983]

Defence allowed to reopen its case before prosecution rebuttal where witness was important, and he had been unable to be located during the defence case.[2984]

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[2977] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for Admission of Documents into Evidence* (30 September 2008) at para. 32

[2978] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Reopen his Case and to Recall Prosecution Witness QA* (2 July 2008) at para. 23

[2979] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Tender Statement of Witness G-10* (3 April 2007)

[2980] *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. 11

[2981] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motion to Reopen his Case and to Recall Prosecution Witness QA* (2 July 2008) at para. 25; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Motions for Reconsideration of the 2 July 2008 Decision Requesting that Witness D-2-23-C and D-11-AB be Called to Testify…*(19 January 2009) at para. 41

[2982] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Defence Motions for Admission of Additional Evidence* (22 October 2008) at para. 6

[2983] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Defence Motions for Admission of Additional Evidence* (22 October 2008) at para. 7; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Second Motion for Formal Disclosure and for Leave to Reopen his Defence* (3 November 2008)

[2984] *Prosecutor v Nizeyimana*, No. ICTR-00-55C-T, *Decision on Motion to Hear Witness BNN07 and to Amend Witness List* (5 August 2011) at para. 13

Prosecution allowed to re-open its rebuttal case where it had tried and failed to obtain authorization for the witness' testimony from the Nigerian government until after it had closed its rebuttal case.[2985]

**Rule 86—closing arguments**

**(A) After the presentation of all the evidence, the Prosecutor may present a closing argument. Whether or not the Prosecutor does so, the Defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the Defence may present a rejoinder.**
**(B) A party shall file a final trial brief with the Trial Chamber not later than five days prior to the day set for the presentation of that party's closing argument.**
**(C) The parties shall also address matters of sentencing in closing arguments.**

**closing briefs**

Trial Chamber erred in refusing defence opportunity to file rejoinder to prosecution reply brief in accordance with the equality of arms principle.[2986]

Simultaneous closing briefs are in accordance with this rule and would be ordered.[2987]

Trial Chamber violated the spirit of Rule 86(B) by authorising the prosecutor to file a reply brief less than five days prior to the date set for the presentation of closing arguments.[2988]

A Trial Chamber has inherent authority to, *proprio motu*, limit the number of pages of the parties' closing submissions, subject to exceptions based upon a showing of good cause.[2989]

Limitation of 600 pages for prosecution and 250 pages for defence was reasonable for closing briefs in complex case.[2990]

Leave granted for closing brief of 450 pages.[2991]

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[2985] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion for Leave to Reopen Prosecution Rebuttal Case* (18 May 2012) at para. 25
[2986] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 241
[2987] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Parties Oral Motions to Review the Time Frames and Length of Closing Briefs of the 2 July 2008 Scheduling Order* (29 August 2008) at para. 14
[2988] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 243
[2989] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Composite Motion Concerning Page Limits on Closing Briefs* (2 September 2008) at para. 7
[2990] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Parties Oral Motions to Review the Time Frames and Length of Closing Briefs of the 2 July 2008 Scheduling Order* (29 August 2008) at para. 17
[2991] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion for Relief from the Page Limitations on Final Trial Briefs* (24 October 2008)

**sentencing**

Rule 86(C) clearly indicates that sentencing submissions shall be addressed during closing arguments, and it was therefore the Appellant's prerogative to identify any mitigating circumstances instead of directing the Trial Chamber's attention to the record in general.[2992]

**Rule 87--deliberations**

**(A) After presentation of closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.**
**(B) The Trial Chamber shall vote separately on each count contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.**
**(C) If the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.**

An accused is presumed innocent.[2993]

The Prosecution bears the burden of proving the Accused's criminal responsibility beyond a reasonable doubt.[2994]

It is not sufficient for the Chamber to prefer prosecution evidence to defence evidence. The Chamber must be satisfied beyond all reasonable doubt that the accused is guilty before a verdict may be entered against him or her.[2995]

The presumption of innocence requires that each fact upon which an accused's conviction is based must be proved beyond a reasonable doubt.[2996]

Triers of fact should render reasoned opinions based on the entire body of evidence and without applying the "beyond reasonable doubt" standard in a piecemeal approach.[2997]

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[2992] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 390.
[2993] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 172; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 32
[2994] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 157; *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 172; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 32
[2995] *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Judgement and Sentence* (12 November 2008) at para. 12
[2996] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 175

If facts which are essential to a finding of guilt are still doubtful, notwithstanding the support of other facts, this will produce a doubt in the mind of the Trial Chamber that guilt has been proven beyond a reasonable doubt. Thus, if one of the links is not proved beyond a reasonable doubt, the chain will not support a conviction.[2998]

The principle of *in dubio pro reo* provides that any doubt should be resolved in favour of the accused. As a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt, the principle of *in dubio pro reo* applies to findings required for conviction, such as those which make up the elements of the crime charged.[2999]

In borderline cases in which the Trial Chamber is unable to conclude whether the totality of the evidence shows guilt beyond a reasonable doubt, the Trial Chamber must resolve the uncertainty in the accused's favour.[3000]

An "impression" of the Trial Chamber fails to meet this burden. However, when the correct standard was applied, the evidence was nonetheless sufficient.[3001]

In assessing whether circumstantial evidence proves a conclusion beyond reasonable doubt, it must be the only reasonable conclusion available. If there is another conclusion reasonably open from the evidence, and which is consistent with the innocence of the accused, he must be acquitted.[3002]

A Trial Chamber may infer the existence of a particular fact upon which the guilt of the accused depends on circumstantial evidence only if it is the only reasonable conclusion that can be drawn from the evidence presented.[3003]

If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the non-existence of a fact upon which the guilt of the accused depends, the conclusion of guilt beyond a reasonable doubt cannot be drawn.[3004]

Trial Chamber erred in failing to consider that removal of the Butare Prefet could reasonably have been based upon administrative or political reasons, rather than an intent to promote the genocide.[3005]

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[2997] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 213.
[2998] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 175
[2999] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 474
[3000] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 172
[3001] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 163-64
[3002] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 306; *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at paras. 42, 121; *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Judgement and Sentence* (12 November 2008) at para. 13; *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para, 88
[3003] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1509
[3004] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1509
[3005] *Mugenzi & Mugiraneza v Prosecutor*, No. ICTR-99-50-A, *Judgement* (4 February 2013) at para, 91

Trial Chamber erred in failing to consider that Ministers may not have known of the President's intention to incite genocide during his speech at the installation ceremony for the Prefet of Butare and therefore adopt the inference consistent with innocence.[3006]

The burden of proof beyond a reasonable doubt applies to findings of fact as well as ultimate criminal responsibility.[3007]

The duty of the Trial Chamber to consider all the evidence does not relieve it from the duty to apply the required standard of proof to any particular fact.[3008]

**Rule 88—judgement**

**(A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.**
**(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.**
**(C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing. Separate or dissenting opinions may be appended.**

**Rule 89—general provisions**

**admissibility factors**

Rule 89(C) provides that a Chamber "may admit any relevant evidence which it deems to have probative value". This simple formulation sets out three distinct aspects of the process of determining admissibility. First, the evidence must be in some way relevant to an element of a crime. Second, the evidence must have some value in proving the elements of the crimes. Probative value is a different and more complex hurdle than relevance. Third, even where these two criteria are met, Rule 89(C) does not command, but merely permits, admission of the evidence.[3009]

The Trial Chamber has the discretion to admit evidence based upon two criteria only: the evidence must be relevant and have probative value. Proof of authenticity may

[3006] *Mugenzi & Mugiraneza v Prosecutor,* No. ICTR-99-50-A, *Judgement* (4 February 2013) at paras, 138-39
[3007] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (6 July 2006) at para. 170
[3008] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (6 July 2006) at para. 172
[3009] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Proponed Testimony of Witness DBY* (18 September 2003) at para. 4

be required but only the beginning of proof of indicia of reliability must be established for evidence to be admitted.[3010]

**assassination of President Habyarimana**

The identity of the persons responsible for the assassination of President Habyarimana is not relevant to the charges against the accused. However, the jurisprudence of the Tribunal shows that questions relating to the responsibility for shooting down the plane may be put to a witness provided that this line of questioning does not go into great detail.[3011]

Evidence of who assassinated President Habyarimana not relevant to case of accused charged with being member of inner circle who planned genocide.[3012]

Even if the presidential plane was shot down on 6 April 1994 by the RPF, that would not be sufficient to demonstrate that the appellant was not involved in a conspiracy to commit genocide prior to that date.[3013]

Any evidence on the attack on the Presidential plane is a matter of contextual significance and of collateral and indirect relevance. Affidavit of former OTP investigator Hourigan admitted pursuant to Rule 92 *bis*.[3014]

The identity of the killers of President Habyarimana is undoubtedly a matter of contextual significance for the events described in the Indictment against the Accused. On this basis, the Chamber has admitted some evidence concerning this event. On the other hand, even if the report attributed responsibility for the attack on the Presidential plane to persons other than the Accused or their alleged co-conspirators, it is not clear to the Chamber how this would tend to disprove elements of the Prosecution case in this trial. The admission of detailed evidence on what is, essentially, a matter of collateral and indirect relevance would not assist the Chamber in determining the core issues of this trial.[3015]

The fact that prosecution cross examined the accused on his involvement in the assassination of President Habyarimana did not transform it into a material fact for

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[3010] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 4

[3011] *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)

[3012] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3*(22 November 2007) at para. 6

[3013] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 250

[3014] *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

[3015] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Cooperation of the Government of France* (6 October 2006) at para. 6; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Requests for Disclosure of the Bruguière report and the Cooperation of France* (25 September 2006) at para. 27

which evidence of the identity of those responsible for the assassination became relevant.[3016]

The identity of those responsible for the assassination of President Habyarimana was not relevant to any findings of fact in the judgement of the Media trial and the Bruguière report would not be admitted as additional evidence on appeal.[3017]

Evidence of possible RPF infiltration into areas controlled by the Interim Government is relevant to the defence.[3018]

**authenticity**

When it was shown that the prosecution exhibit was not a faithful reproduction of the original and that the English translation did not conform to the Kinyarwandan text, the Trial Chamber reconsidered its admission of the document and ordered it stricken, as well as all testimony about the document.[3019]

For a document to be considered authentic, sufficient indicia of reliability must be shown. Factors include the extent to which the document's content is corroborated by other evidence, the place where it was obtained, whether it is an original or copy; and if a copy, whether it is registered or filed with an institutional authority; and whether it is signed, sealed, stamped, or certified in any way.[3020]

The first step when determining if a document is admissible is to ascertain whether sufficient indicia of reliability has been established. Absolute proof of a document's authenticity is not required.[3021]

Prior statement of witness to Rwandan authorities contained in judicial dossier, which was denied by the witness, did not have sufficient indicia of reliability to be admitted where the document bore no seals or stamps, and therefore could not be admitted as a prior inconsistent statement.[3022]

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[3016] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Requests for Disclosure and Investigations Concerning the Assassination of President Habyarimana* (17 October 2006)
[3017] *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)
[3018] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents into Evidence* (29 May 2008) at para. 9
[3019] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Motion to Strike or Exclude Portions of Prosecutor's Exhibit #34, Alternatively Defence Objections to Prosecutor's Exhibit #34* (30 May 2006)
[3020] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion to Deposit Certain United Nations Documents* (19 March 2007) at para. 3
[3021] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents* (28 November 2007) at para. 4
[3022] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion to Admit MFI/3 into Evidence Pursuant to Rule 89(C) of the Rules of Evidence and Procedure and Evidence* (15 December 2009)

Prosecution request for forensic examination of accused's passport denied where prosecution unreasonably delayed before making the request.[3023]

**burden of persuasion**

For a document to be admitted as evidence, the party relying on it must establish that it has sufficient indicia of reliability.[3024]

The burden is upon the moving party to prove that the document has *prima facie* relevance and that it has probative value.[3025]

In offering a document for admission as evidence, the moving party must as an initial matter explain what the document is. The moving party must further provide indications that the document is authentic – that is, that the document is what the moving party purports it to be. There are no technical rules or preconditions for authentication of a document, but there must be "sufficient indicia of reliability" to justify its admission.[3026]

**chain of custody**

Documents purportedly copied by the FBI in Rwanda in September 1994 would not be admitted where the prosecution did not provide any indication of where the documents were found, by whom they were found, or the chain of custody between discovery and production in court.[3027]

Prosecutor would not be sanctioned for breaking evidence seals outside of the presence of the defence in violation of Trial Chamber order but in the future prosecution evidence under seal should be distinctly marked as such and a caution should be added forbidding any unauthorized breaking of the seals.[3028]

**competency**

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[3023] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution Motion to be Provided With Passports that have been Tendered into Evidence* (23 February 2012) at para. 19
[3024] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 47
[3025] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 2
[3026] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 22; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole* (13 September 2004) at para. 8
[3027] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole* (13 September 2004)
[3028] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Third Motion for Return of Property and Sanctions for Violation of Court Order* (13 October 2003) at paras 23-24.

Fact that witness was sentenced to death in Rwanda and, under Rwandan law, was not competent to give evidence under oath, did not disqualify him as witness at the Tribunal.[3029]

**context**

The fact of a nationwide campaign of genocide is relevant in that it provides context for understanding the actions of the individuals.[3030]

Facts which are not related, directly or indirectly, to the criminal responsibility of the accused are not relevant to the issues to be adjudicated at trial and can neither be admitted into evidence nor be judicially noticed.[3031]

**credibility**

**adequacy of evidence**

As a general matter, material related to the credibility of a witness is *prima facie* relevant and probative.[3032]

While it is permissible to base a conviction on hearsay or circumstantial evidence, caution is warranted in such circumstances.[3033]

Trial Chamber was unreasonable in concluding that accused knew of crimes by subordinates based on testimony of two persons with general, hearsay knowledge of the crimes.[3034]

Trial Chamber erred in concluding that accused tacitly approved killings of refugees based on unsubstantiated assertion that he had ordered some of the refugees spared.[3035]

Where many of the defence witnesses had close ties to the local authorities or lived near the site and therefore would have been well positioned to know if a meeting occurred, the Trial Chamber erred in not explaining more fully why it believed the

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[3029] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (27 November 2007) at para. 38; *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Defence Request to Preclude the Testimony of Prosecution Witness KDD Under Oath* (28 October 2004)
[3030] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 36
[3031] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 48
[3032] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber* (26 September 2008) at para. 22
[3033] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 70
[3034] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 70
[3035] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 87

defence witnesses would not have heard of a second meeting, and thus why their testimony did not cast reasonable doubt on the prosecution's evidence.[3036]

**accomplices**

Accomplice testimony is admissible but must be considered carefully because accomplice witnesses may have motives or incentives to implicate the accused.[3037]

It is accepted both as a matter of law and common sense that the testimony of accomplices may be tainted by motives or incentives to falsely implicate and accused to gain some benefit or advantage regarding their own case or sentence.[3038]

Accomplice testimony viewed with caution.[3039]

A Trial Chamber should exercise caution in assessing the evidence of an accomplice witness and carefully consider the totality of the circumstances in which it was tendered. Of the several factors relevant to a cautious assessment, consideration should be given to circumstances showing that the witness may have motives or incentives to incriminate the accused or to lie.[3040]

Some factors are particularly relevant for the assessment of accomplice witnesses, including: the extent to which discrepancies in the testimony were explained; whether the accomplice witness has made a plea agreement with the Prosecution; whether he has already been tried and, if applicable, sentenced for his own crimes or is still awaiting the completion of his trial; and whether the witness may have any other reason for holding a grudge against the accused. Corroboration is also one of many potential factors relevant to the Trial Chamber's assessment of a witness's credibility. The application of these factors, and the positive or negative impact they may have on the witness's credibility, varies according to the specific circumstances of each case.[3041]

A witness who faces criminal charges that have not yet come to trial may have real or perceived gains to be made by incriminating accused persons and may be tempted or encouraged to do so falsely. The Trial Chamber's failure to consider this risk because

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[3036] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 185
[3037] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 98; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 305; *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 181
[3038] *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Judgement and Sentence* (12 November 2008) at para. 17
[3039] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 128; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 205; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 164; *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 138; *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at paras. 14-15; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 42
[3040] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 63
[3041] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 47.

the witness was a suspect who had not yet been convicted was error. Suspects who are detained awaiting trial may also have motives to fabricate testimony.[3042]

If no special circumstances have been identified it is reasonable not to employ the same cautious approach towards the witnesses charged with similar crimes as to testimony of persons charged with participating in the same criminal acts as those of the accused.[3043]

A witness who has been convicted of murder does not *per se* make the witness incredible. Testimony of persons allegedly involved in the planning and executions of murder and other crimes is often a crucial basis of evidence against other participants in the scheme.[3044]

Trial Chamber was unreasonable in relying on testimony of accomplice to convict accused on one allegation, while disbelieving the accomplice on another allegation, where both allegations were uncorroborated.[3045]

Trial Chamber abused its discretion when relying on the testimony of an accomplice in the face of numerous contradictions in his testimony.[3046]

Accomplice testimony, while viewed with caution, need not be corroborated.[3047]

Trial Chambers are endowed with the discretion to require corroboration but does not mean that corroboration is required when evaluating the testimony of all accomplice witnesses.[3048]

When an accomplice witness testifies in accordance with a prior statement implicating the accused, a Trial Chamber must be mindful that the witness may have had a motive or incentive to implicate the accused when he gave the prior statement, even if he has already been sentenced or has served his sentence. [3049]

Trial Chambers are entitled to rely on the testimony of accomplice witnesses but should treat such evidence with caution. A Trial Chamber should briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused to show its cautious assessment of such evidence. Trial Chambers cannot

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[3042] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 129
[3043] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 234; *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 151
[3044] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 142
[3045] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 131
[3046] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 67
[3047] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 48; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 263; *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (1 April 2011) at para. 38; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 251
[3048] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 45.
[3049] *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 14.

merely state that they exercised caution when assessing the evidence of an accomplice witness but must establish that they in fact did so.[3050]

A Trial Chamber should at least briefly explain why it accepted the evidence of witnesses who may have had motives or incentives to implicate the accused; in this way, a Trial Chamber demonstrates its cautious assessment of this evidence. [3051]

A Trial Chamber should also employ a cautious approach towards witnesses who are merely charged with crimes of a similar nature. However, in most cases, these witnesses will not have the same motives for giving false evidence. In the absence of special circumstances being identified, the Trial Chamber should employ less caution towards these witnesses.[3052]

The testimony of witnesses, who were former local government officials, have been convicted of or charged with crimes in Rwanda relating to crimes that are in issue in the trial and have an interest in shifting blame for their actions onto the accused, is to be viewed with appropriate caution.[3053]

The Chamber is mindful of the possibility of collusion between witnesses detained in the same prison at the time of their testimony.[3054]

Collusion can be defined as an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose. If an agreement between witnesses for the purpose of untruthfully incriminating an accused were indeed established, the evidence would be excluded pursuant to Rule 95.[3055]

The simple fact that two witnesses' testimony was corroborative on the main aspects of the accused's actions but diverged on some details does not suffice to prove collusion. These differences may also demonstrate that collusion has *not* occurred.[3056]

The testimony of a witness who is a convicted *Interahamwe* leader and is incarcerated, serving a 15-year sentence for his participation in crimes during the genocide is viewed with caution as it may have been influenced by a desire to positively impact his circumstances in Rwanda.[3057]

**accused as witness**

[3050] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 420
[3051] *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 15.
[3052] *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at para. 16.
[3053] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 166
[3054] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 166
[3055] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 275
[3056] *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 276
[3057] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 410, 594

If the Prosecution believes that an aspect of the testimony of the Accused is false, then it must so demonstrate it. The Prosecution cannot simply rely on there not being evidence to support the statements of the Accused as proof to discredit him.[3058]

**age**

The young age of the witness at the time of the events (15) requires that his testimony be viewed with some caution.[3059]

**benefits**

A plea agreement creates "a possible motivation to lie" and was one of several reasons for rejecting Georges Ruggiu's evidence in its entirety.[3060]

Evidence that a prosecution witness "appeared to have made a business out of the genocide" was sufficient to cause a reasonable trier of fact to find the witness not credible.[3061]

The Chamber recognizes that an unfortunate side-effect of the necessary practice of providing benefits to who agree to testify for the prosecution is that their testimony is sometimes influenced to some degree by such payments. This will be considered when determining the weight to be accorded to the witness' testimony but is not grounds for dismissal or striking the testimony.[3062]

Direct payments, payment of relocation costs for the witness' family, and promises related to the venue of the witness' own trial required that the witness' testimony be viewed with caution.[3063]

**bias**

Organizational affiliations of a person, who is the partner of an author who assisted in the preparation of an expert report, is not in itself probative of bias unless shown that the author knew about and was influenced by the organisational affiliations of his partner.[3064]

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[3058] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 176.
[3059] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para 78
[3060] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 549.
[3061] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 545
[3062] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Dismiss for Abuse of Process: Payments to Prosecution Witnesses…*(27 October 2008) at para. 7
[3063] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 139
[3064] *Prosecutor v Nahimana et al*, No. ICTR-99-52-A, *Decision on the Defence Request for Disclosure of Information which could show bias in respect of a prosecution expert witness* (5 June 2003).

A witness' close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing his or her evidence. However, such relationships do not render the testimony *per se* unreliable or lacking in credibility.[3065]

**character**

It is for the trier of fact to consider criminal convictions and any other relevant evidence concerning the witness' character along with all the other factors in determining whether the witness is credible.[3066]

The testimony of convicted persons, including those who could be qualified as accomplices of the accused, is not precluded . Such testimonies be treated with special caution, the main question being to assess whether the witness concerned might have motives or incentives to implicate the accused.[3067]

Evidence of the accused's character prior to the events is generally not a relevant issue. Their nature as crimes committed in the context of widespread violence and during a national or international emergency, war crimes and crimes against humanity may be committed by persons with no prior convictions or history of violence, and that consequently evidence of prior good, or bad, conduct on the part of the accused before the armed conflict began is rarely of any probative value before the Tribunal. Secondly, as a general principle of criminal law, evidence as to the character of an accused is generally inadmissible to show the Accused's propensity to act in conformity therewith.[3068]

**corroboration**

Corroboration is not a prerequisite to accepting the credibility of evidence.[3069]

While the law does not require evidence to be corroborated, the Trial Chamber, as the trier of fact, may determine under certain circumstances that corroboration is necessary.[3070]

Trial Chambers have the discretion to decide in the circumstances of each case whether corroboration is necessary at all and as to which witnesses. The fact that a trial

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[3065] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 57; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 674, 1970
[3066] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 142
[3067] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 439
[3068] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 105.
[3069] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 251; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 41; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 135; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 97; *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para.72; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2063
[3070] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 115

chamber requires corroboration for some witnesses and not for others does not necessarily indicate a misapplication of the burden of proof.[3071]

Trial Chamber declined to make finding based upon uncorroborated testimony of a single, otherwise credible witness.[3072]

Where a witness is found to be credible, the Trial Chamber must also determine whether his or her evidence is reliable. The Chamber must consider the evidence as a whole, including other witness' testimonies and the exhibits.[3073]

Uncorroborated testimony of a witness that the accused addressed 20 or 30 people must be treated with caution due to the lack of corroboration and highly incriminating nature of his testimony.[3074]

During trial, the corroboration of evidence is an important factor in assessing the probative value of much of the evidence presented by the parties, in particular where only one testimony was presented in support of certain facts alleged in the indictment, and also in relation to documentary evidence.[3075]

Corroboration is simply one of many potential factors in the Trial Chamber's assessment of a witness's credibility. If the Trial Chamber finds a witness credible, that witness's testimony may be accepted even if not corroborated. Similarly, even if a Trial Chamber finds that a witness's testimony is inconsistent or otherwise problematic enough to warrant its rejection, it might choose to accept the evidence nonetheless because it is corroborated by other evidence.[3076]

Two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony

[3071] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 63
[3072] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Judgement and Sentence* (31 May 2012) at paras. 292, 506, 550,575, 629, 635, 662, 983, 1334, 1454
[3073] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 35
[3074] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 124
[3075] *Prosecutor v. Musema*, No.ICTR-96-13-T,*Judgement* (27 Jan.2000) at para.42
[3076] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 132; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 92; *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 29; *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 36; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 154; *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 79

describes the facts in question in a way which is not compatible with the description given in another credible testimony. [3077]

Corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[3078]

Two sketchy accounts may gain in strength where there is mutual corroboration. An inconclusive sighting cannot gain support from another inconclusive sighting unless one corroborates the other. But where sightings are individually inconclusive and mutually non-corroborative, their combination is also inconclusive.[3079]

It is permissible for a Trial Chamber to rely upon as corroboration the testimony of other witnesses for whom it has said require corroboration themselves.[3080]

Often it is the aggregate effect of multiple statements contradicting or corroborating a witness that is determinative when assessing his or her credibility.[3081]

A Trial Chamber is at liberty to rely on the uncorroborated evidence of a single witness even if it relates to a material fact.[3082]

**criminal history**

A witness' criminal history may be a factor in assessing his credibility.[3083]

**cross examination**

A party is under no obligation to challenge the credibility of a testimony during cross-examination; credibility can also be impugned by other evidence. The party in

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[3077] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 428; *Bikindi v. Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 81; *Ntawukulilyayo v Prosecutor*, No. ICTR-05-82-A, *Judgement* (14 December 2011) at para. 24; *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 177; *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 205; *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at paras. 241

[3078] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 201; *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 31; *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 93; *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 327; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 467; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1483

[3079] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 657.

[3080] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para.

[3081] *Prosecutor v Karemera*, No.ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Rule 92 bis Witnesses or for Reconsideration* (26 April 2010) at para. 5

[3082] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 187

[3083] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 93

question is entitled to take the view that cross-examination is pointless, since there has already been enough to show that the witness is not credible.[3084]

**demeanour**

The assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a Trial Chamber to which the Appeals Chamber must accord considerable deference. The Appeals Chamber is loath to disturb such credibility assessments on review.[3085]

The Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes-circuitous responses to questions. This was due to cultural considerations.[3086]

Witness who was reluctant or unwilling to respond to questions on cross-examination and to speak about his prior testimony evidenced a demeanour not worthy of belief.[3087]

**different trials**

A witness found not credible in one case may reasonably be found credible in another. The probative value of evidence may be assessed differently in different cases, depending on the circumstances. Two judges, both acting reasonably, can come to different conclusions based on the same evidence.[3088]

**documents**

There is no hierarchy which ranks documentary evidence of greater value than oral testimony.[3089]

The probative value of a document may be assessed differently in different cases depending on the circumstances.[3090]

**duty of Chamber**

When faced with competing versions of events, it is the duty of the Trial Chamber which heard the witnesses to determine which evidence it considers more probative.[3091]

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[3084] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 820, fn. 1893
[3085] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 56
[3086] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 156.
[3087] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 115
[3088] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 210
[3089] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 103
[3090] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 132
[3091] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 372.

**factors**

Factors in assessing credibility include the witness's demeanour in court, his role in the events in question, the plausibility and clarity of his testimony, whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination.[3092]

The fact that a criterion for assessing the credibility of the Defence witnesses was not equally applicable to the Prosecution witnesses did not invalidate the application of this factor. The right to have Defence witnesses examined under the same conditions as Prosecution witnesses relates to the right to call witnesses, and the right to cross-examine witnesses called by the Prosecution under the same conditions as the Prosecution. It does not encompass the factors that a Trial Chamber may consider relevant in assessing the credibility of those witnesses. [3093]

**hearsay**

Fact that declarants of hearsay statements were deceased does not make the testimony of the witness repeating these statements more reliable.[3094]

**mistaken**

A witness may be credible, but the testimony not trustworthy because she is mistaken due to problems in observation.[3095]

Minor inconsistencies commonly occur in witness evidence without rendering that evidence unreliable.[3096]

**opportunity**

The Chamber is naturally heedful of witnesses who, while purportedly in hiding and in fear of their lives, nonetheless can move around from one crime scene to the next, gathering intelligence along the way. This is not physically impossible, of course, but the Prosecution when leading such an opportune witness must be especially careful to rub out grey areas of her testimony.[3097]

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[3092] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 194; *Bikindi v. Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 114 ; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at paras. 47 and 285; *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 121; *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 45; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 692

[3093] *Bikindi v. Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 116.

[3094] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 137

[3095] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 234

[3096] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2973

[3097] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 860.

Trial Chamber erred in concluding that defence witness had less reason to pay close attention to speech of the accused because they were from outside the area, but properly relied on other factors to find the defence witnesses not credible.[3098]

Testimony from a witness who positively experienced or learned a matter is generally more probative than testimony from a witness who was unaware of that same matter.[3099]

**part of testimony**

It is not unreasonable for a Trial Chamber to accept part of a witness' testimony and not others.[3100]

It is not unreasonable for a trier of fact to accept some but reject other parts of a witness' testimony. Even if some parts of a witness' testimony are corroborated by other evidence, a Trial Chamber is not bound to accept the whole of the testimony.[3101]

It was error for the Trial Chamber to rely on testimony of two witnesses to infer duress after it had rejected their testimony on closely related issue of whether the accused was in hiding.[3102]

**passage of time**

In situations where witnesses are called to testify on events which took place over a decade ago, discrepancies relating to the time and date of the event may occur.[3103]

It is not unreasonable to accept the substance of a witness's evidence notwithstanding the witness's inability to recall certain details, especially when a significant amount of time has elapsed since the events to which the witness's evidence relates.[3104]

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[3098] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (1 April 2011) at para. 55
[3099] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Judgement and Sentence* (2 February 2012) at para. 347
[3100] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 128; *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 248 *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 212; *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 215; *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 167; *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 110; *Bikindi v. Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 68; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 243; *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 187; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 468
[3101] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 214
[3102] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at paras. 183-84
[3103] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 65
[3104] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 149.

**prior statements**

Prior statements constitute an important tool for assessing the credibility of a witness.[3105]

Rwandan judicial records are a valuable tool when assessing the credibility of witnesses, particularly when used during witness examinations.[3106]

The right to cross examine a witness with previous inconsistent statements is fundamental because it may demonstrate a contradiction by the witness, which is material for assessing his credibility and reliability.[3107]

Differences between prior statements and testimony in court may be due to various factors, such as the lapse of time, the language used, the questions put to the witness, the accuracy of interpretation and transcription and the impact of trauma on the witness. Where the inconsistencies could not be explained to the satisfaction of the Trial Chamber, the probative value of the testimony may be questioned.[3108]

The Trial Chamber has a broad discretion to assess inconsistencies between a witness's pre-trial statement and his or her testimony. The Chamber may decide that an alleged inconsistent statement has considerably less probative value than the witness's testimony. This is particularly where the prior statement was made to an investigator in another case, as there is a greater probability that the prior statement would be presented out of context. [3109]

It is not a legal error per se to accept and rely on evidence that deviates from a prior statement or other evidence adduced at trial. However, a Trial Chamber is bound to consider any explanations offered in respect of inconsistencies when weighing the probative value of the evidence.[3110]

When the effect of trauma is considered alongside the lapse of time from 1994 to the present the Chamber believes that the mere fact that inconsistencies exist in a witness's story does not mean that the witness is not credible. Such inconsistencies go to the weight of the evidence rather than the credibility of the witness.[3111]

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[3105] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 169
[3106] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 58
[3107] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness* (4 March 2008) at para. 17
[3108] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 26; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 24
[3109] *Prosecutor v. Muvunyi*, No. ICTR-00-55A-T, *Judgement* (11 February 2010) at paras. 10-11.
[3110] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 201.
[3111] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 14

Prior consistent statements cannot be used to bolster a witness's credibility, except to rebut a charge of recent fabrication of testimony. The fact that a witness testifies in a manner consistent with an earlier statement does not establish that the witness was truthful on either occasion; after all, an unlikely or untrustworthy story is not made more likely or more trustworthy simply by rote repetition. Another reason supporting this position is that, if admissible and taken as probative, parties would invariably adduce numerous such statements in a manner that would be unnecessarily unwieldy to the trial.[3112]

Where a witness has signed a statement, accompanied by a declaration that the contents are true and correct, there is a presumption that the statement was recorded pursuant to the Rules.[3113]

There is a presumption that interpreter in fact read the statement back to the witness when the interpreter's certificate is attached to the statement.[3114]

Where a witness asserts that he said something different than contained in his signed statement, this does not justify a party to interview or call the investigator who took the statement as a witness.[3115]

The time to challenge the accuracy of a statement, or to impugn the process of recording the statement, is when the statement is tendered into evidence.[3116]

A trial chamber is bound to consider inconsistencies and any explanations offered in respect of them when weighing the probative value of the evidence.[3117]

To suggest that if something were true a witness would have included it in a statement or confession letter is obviously speculative and in general, it cannot substantiate a claim that a Trial Chamber erred in assessing a witness' credibility.[3118]

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[3112] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 147

[3113] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses* (6 July 2006) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters* (21 April 2008) at para. 15

[3114] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Request for Admissions or Motion to Order Interviews of OTP Investigators and Interpreters* (21 April 2008) at para. 15

[3115] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses* (6 July 2006) at para. 15

[3116] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Decision on the Defence Motion for Disclosure of Exculpatory Information With Respect to Prior Statements of Prosecution Witnesses* (6 July 2006) at para. 19

[3117] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 316; *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 96; *Muhimana v Prosecutor*, No. ICTR-95-1B-A, *Judgement* (21 May 2007) at para. 135

Inconsistencies may raise doubts in relation to the piece of evidence in question, or, where the inconsistency is found to be material, to the witness' evidence as a whole.[3119]

A Trial Chamber has the discretion to accept a witness's evidence, notwithstanding inconsistencies between said evidence and his or her previous statements.[3120]

The record of the first interview with a witness is of the highest value because it is most likely to capture the witness's recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence.[3121]

A witness failed to mention seeing the accused distribute weapons in any statement, then brought this up at trial saying that he remembered telling investigators this but couldn't explain why it wasn't recorded. It was held there was every reason that had the witness mentioned this in relation to the accused that the investigators would have recorded this important element.[3122] This (in addition to other contradictions) meant that the witness' statement was "treated with caution" and that corroboration would have to be sought from other sources.[3123]

Failure of a witness to mention a significant statement of incitement in his previous statement, even when not the subject of cross examination, gave the Trial Chamber reasonable doubts about the credibility of his in-court testimony.[3124]

Failure of the witness to mention the accused in his prior statement could not be convincingly answered by the explanation that he was not directly asked about the accused. The absence of questions about the accused would not prevent a witness from volunteering information of he wanted to give a credible account of an event.[3125]

The absence of reference to an accused in separate proceedings involving different accused carries limited probative value when weighed against credible and corroborated eyewitness testimony.[3126]

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[3118] *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 13; *Prosecutor v Munyakazi*, No. ICTR-97-36A-A, *Judgement* (28 September 2011) at para. 85
[3119] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 142
[3120] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 96
[3121] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 33
[3122] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 614.
[3123] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 619.
[3124] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 107
[3125] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 114
[3126] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 225

Failure of a statement to conform to the guidelines set forth in the *Niyitegeka* Appeals Chamber decision may be taken into consideration when assessing the probative value of the prior statement.[3127]

The Trial Chamber may take into consideration the following factors when presented with an inconsistent statement or prior testimony: (1) the language in which the statement or testimony was given; (2) the access of the Trial Chamber to the prior statement or testimony and corresponding ability to scrutinize the nature of the questions put to the witness (3) the time lapse between the prior statement and the trial; (4) the difficulties of recollection; (5) the use or non-use of solemn declarations; and (6) whether the witness had reviewed the prior statement at the time it was made.[3128]

Any inconsistency of a witness statement with the standard of taking and recording statements may be taken into consideration when assessing the probative value of the statement, if necessary.[3129]

It was reasonable for the Trial Chamber to consider inconsistencies and contradictions between prior statements and trial testimony with caution, considering (1) the time lapse; (2) difficulties for witnesses in recalling precise details; (3) difficulties in translation; (4) the fact that certain witnesses were illiterate; and (5) that the statements were not made under solemn declaration.[3130]

Failure of the defence to call the investigator who took the prior statement to testify as to its content showed lack of prejudice.[3131]

The fact that a witness may have links to groups of individuals seeking indictment and prosecution of the accused is probative of credibility but did not prove the existence of an organized political campaign against the accused.[3132]

The importance of evaluation of the demeanour of witnesses by the triers of fact cannot be discounted on the ground that the witnesses may speak through an interpreter.[3133]

Under some circumstances, a reasoned explanation of the Trial Chamber's assessment of a particular witness's credibility is a crucial component of a "reasoned opinion" – for instance, where there is a genuine and significant dispute surrounding a witness's credibility and the witness's testimony is truly central to the question whether a

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[3127] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on the Defence Motion Regarding Will-Say Statements* (14 July 2005) at para. 2
[3128] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 99
[3129] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 36
[3130] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 146
[3131] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 38
[3132] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 420
[3133] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR15*bis*.2, *Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings With a Substitute Judge and on Nzirorera's Motion to Consider New Material* (22 October 2004) at para. 60

particular element is proven. Such circumstances did not exist in this case, [3134] but did exist in this case.[3135]

Where Trial Chamber reconciled contradictory testimony as mutually corroborative, it committed an error of fact which required a conviction of murder to be set aside.[3136]

The fact that a witness is testifying with protective measures should not make a difference in the Trial Chamber's consideration of his or her testimony.[3137]

A Trial Chamber should not apply differing standards in its treatment of evidence of the prosecution and the defence.[3138]

When assessing the credibility of the accused, a Trial Chamber is entitled to consider that the accused testified last and heard the other evidence before giving testimony.[3139]

Explanation for discrepancy in prior statements that witness spoke only in general terms and the investigators inserted the dates into his statement was "surprising" and raises questions of the witness' credibility.[3140]

Witness' prior statements of the events in which he failed to mention the involvement of the accused raised questions as to the witness' credibility.[3141]

Witness who falsely denied the statements attributed to her in prior Rwandan statements was not credible.[3142]

Trial Chamber did not find witness' testimony that his statements to Rwandan authorities appeared to have been forged convincing, but nevertheless credited the testimony of the witness.[3143]

Witness' explanations for inconsistent statements that he was beaten by Rwandan officials who just wrote what they wanted was unconvincing, but witness was simply trying to distance himself from the events and was otherwise credible.[3144]

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[3134] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 61
[3135] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 64
[3136] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at paras. 502,506
[3137] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 71
[3138] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 133
[3139] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 393
[3140] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 81
[3141] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 82, 109, 272-73
[3142] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 190, 193
[3143] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 115,118
[3144] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 166

Witness' failure to mention the accused's participation in the offence when discussing the incident in five statements to Rwandan authorities and one statement to the ICTR resulted in finding that the witness was not credible.[3145]

A witness' testimony tends to be more detailed than a prior statement. Therefore, failure to mention a fact in the statement which is revealed during the testimony is not necessarily indicative that the testimony is false.[3146]

Will-say statements have no probative value except to the extent that the witness confirms their content.[3147] The Trial Chamber erred in relying on the will-say statement to discredit aspects of the witness' testimony.[3148]

To suggest that if something were true the witness would have included it in her statement or confession letter is speculative and cannot substantiate a claim that the Trial Chamber erred in assessing the witness' credibility.[3149]

**proofing sessions**

It is not inappropriate *per se* for the parties to discuss the content of testimony and witness statements with their witnesses unless they attempt to influence the content in ways that shade or distort the truth.[3150]

Witness proofing is a permissible practice so long as it is not used to coach or train witnesses.[3151]

**recantation**

While witness' recantation may or may not have been the truth, the fact that the witness falsely denied signing the recantation form as well as allegations that he was making a business from giving testimony, warranted the conclusion that he was not credible.[3152]

**third party influence**

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[3145] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 195
[3146] *Prosecutor v Ndindiliyimana et al*, ICTR-00-56-T, *Decision on Defence Motion to Recall Witness AOE for Additional Cross Examination* (3 April 2007) at para. 8
[3147] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 180; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Judgement and Sentence* (20 December 2012) at para. 65
[3148] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 180
[3149] *Hategekimana v Prosecutor*, No. ICTR-00-55B-A, *Judgement* (8 May 2012) at para. 281
[3150] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 74
[3151] *Prosecutor v Karemera et al*, No. ICTR-98-44-A, *Decision on Interlocutory Appeal Regarding Witness Proofing* (11 May 2007)
[3152] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 466

The Trial Chamber should consider third party influence on the testimony of a witness when assessing credibility.[3153]

The mere fact that the defence witnesses lived or found refuge in a military camp due to their relationship with soldiers does not in and of itself imply that they gave a tainted account in favor of the accused who was an Army officer.[3154]

The fact that a defence witness' husband was related to an accused at the ICTR does not necessarily indicate that the witness would have distorted her testimony in favor of the accused.[3155]

**trauma**

It is an established practice for Trial Chambers to take into consideration the impact of trauma on a witness' evidence.[3156]

The Trial Chamber should take the likely distorting effects of trauma into account when considering witness testimony. The Trial Chamber is free nonetheless to accept the fundamental features of testimony despite the impact of trauma. Trauma may sometimes explain minor inconsistencies in testimony without necessarily impugning the credibility of the testimony as to the major events that occurred.[3157]

Trauma suffered by a witness is properly considered by the Trial Chamber in evaluating credibility. Such an approach is in fact favourable to an accused as it calls into question the possible effect on the witness' ability to recount events impartially and accurately.[3158]

Trauma may impair perceptions or memory and may explain apparent inconsistencies but does not necessarily render it impossible for the witness to testify credibly and reliably.[3159]

**victims**

The mere fact that a witness or his family was a victim of the accused does not necessarily imply a bias that discredits the witness' testimony. One would assume that victims are motivated to see that justice was done with accuracy.[3160]

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[3153] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 181
[3154] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 188
[3155] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 189
[3156] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1595
[3157] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 13
[3158] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 63
[3159] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 290
[3160] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para.71

A witness' membership in an association of survivors alone does not imply or desire a motive to implicate the accused, nor does it render a witness' account tainted or his accounts unreliable or partial.[3161]

**waiver**

Failure to challenge the testimony of a witness on cross-examination does not require the Trial Chamber to accept the testimony of that witness.[3162]

To successfully cast doubt on the credibility of a witness, the matters which question the witness' testimony should be put to the witness during cross examination.[3163] If they are not, this will be considered by the Chamber in its assessment of the attack on credibility.[3164]

**deceased accused**

Evidence admitted relating to co-accused who died during trial would remain on the record and would be evaluated as applicable to the case of the accused in the final deliberations.[3165]

**deceased witnesses**

Investigator would not be allowed to testify to statements made to him by deceased witness concerning the acts and conduct of the accused.[3166]

**discretion**

The Trial Chamber has a broad discretion to choose to exclude otherwise relevant and probative evidence where its prejudicial effect will adversely affect the fairness or expeditiousness of the proceedings.[3167]

**documentary evidence**

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[3161] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 561
[3162] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 204
[3163] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 148.
[3164] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 157.
[3165] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR50, *Decision on Interlocutory Appeal of Edouard Karemera and Matthieu Ngirumpatse Against Oral Decision of 23 August 2010* (24 September 2010) at para. 17; *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Reasons for Oral Decision of 23 August 2010 and on Oral Applications for Certification to Appeal* (26 August 2010) at paras. 7-11
[3166] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Prosecution Motion to Admit Hearsay Evidence Pursuant to Rule 89(C), or in the Alternative in Accordance With Rule 92 bis (C) of the Rules of Procedure and Evidence* (22 January 2007) at para. 9
[3167] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR93, *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence* (19 December 2003) at para. 16

Documentary evidence is defined as including anything in which information of any kind has been recorded. This includes maps, digital records, audio and video tapes, photographs, etc.[3168]

A party seeking the admission of evidence should ensure that its request is as concise and precise as possible. The wholesale admission of lengthy documents based on general pleadings as to their relevance would normally impede the expeditiousness of the proceedings and impose a heavy burden on the Chamber and opposing parties.[3169]

Simply because document had been commented upon by expert witness did not make it admissible. Defence failed to demonstrate reliability and relevance of documents, including those from U.S. Archives.[3170]

Radio Rwanda broadcasts verifying meetings attended by Ministers was relevant to alibi of the accused and could be admitted from the bar table.[3171]

**hearsay**

Relevant out-of-court statements which a Trial Chamber considers probative, are admissible under Rule 89(C).[3172]

While hearsay evidence is not inadmissible *per se*, it is considered with caution.[3173]

Double hearsay raises greater concerns of reliability, because the truthfulness of that information depends not only on the credibility of the witness and the accuracy of his observation, but also on the credibility and reliability of the declarant.[3174]

Double hearsay is admissible before the Tribunal if it has probative value.[3175]

Witness' second-hand information from several sources concerning the involvement of the accused in training and weapons distribution was insufficient basis to support a finding in the judgement that it occurred.[3176]

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[3168] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 5
[3169] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Interim Order for the Prosecution to Identify Relevant and Probative Passages of Certain Materials it Intends to Tender into Evidence Under Rule 89(C) of the Rules of Procedure and Evidence* (8 August 2007) at para. 12
[3170] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion to Admit as Exhibits Certain Documents Marked for Identification During the Testimony of Alison Des Forges* (14 February 2008)
[3171] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Third Defence Motion for Admission of Documentary Evidence* (4 July 2012) at para.53
[3172] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 286
[3173] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 97.
[3174] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 211
[3175] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 249

Tape recording of interview of Prime Minister Kambanda by OTP admitted as defence exhibit where it related to a disputed issue.[3177]

A Trial Chamber has the discretion to admit hearsay evidence, even when it cannot be examined at its source and when it is not corroborated by direct evidence.[3178]

While hearsay is admissible, the Trial Chamber erred in convicting the accused based upon the statement of one witness about a murder he did not witness where the identities of those who told him about it were unknown.[3179]

The Trial Chamber has broad discretion to admit hearsay evidence. The weight or probative value to be afforded to hearsay evidence will usually be less than that afforded to a witness who has testified under oath and who has been cross-examined, although that will depend on the infinitely variable circumstances which surround hearsay evidence.[3180]

An investigator should testify only as to those exhibits which are the product of his own work. Any photographs or documents that are not the product of the investigator's work should be introduced through other prosecution witnesses during the trial.[3181]

**identification**

When evaluating identification evidence, the Trial Chamber should consider factors such as prior knowledge of the accused, the conditions under which the observations were made, possible discrepancies, influence, and extenuating circumstances.[3182]

A Trial Chamber must consider the difficulties associated with identification evidence in each case and must carefully evaluate any such evidence before accepting it as the basis of sustaining a conviction.[3183]

Identification evidence must be assessed and weighed carefully.[3184] A Trial Chamber must proceed with extreme caution when assessing a witness' identification of an accused made under difficult circumstances.[3185]

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[3176] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 209
[3177] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Disclosure and Admission of Audiotaped Interviews of former Prime Minister Jean Kambanda* (23 May 2003)
[3178] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 34
[3179] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 115
[3180] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 17
[3181] *Prosecutor v Kanyarukiga*, No. ICTR-02-78-I, *Decision on Prosecutor's Motion to Vary his Witness List* (11 August 2009) at para. 18
[3182] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 113
[3183] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 67

Where a finding of guilt is made based on an identification made under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a reasoned opinion. It must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence.[3186]

In court identification should be assigned little or no credence given the signals that may identify the accused aside from prior acquaintance.[3187]

Although a witness' failure to identify the accused in court can be a reason for declining to rely on the identification evidence of that witness, the failure of courtroom identification does not necessarily require the Trial Chamber to disregard the witness' claim that he recognised the accused at the time of the events.[3188]

Trial Chamber erred when failing to discuss defence contentions of misidentification in its judgement and thus failed to provide a reasoned decision.[3189]

Trial Chamber erred in failing to discuss inconsistencies in witness' identification of the accused, including failing to identify him in court and inconsistencies in the evidence as to how he knew the accused.[3190]

Identification of the accused at the scene of a crime by a third party to the witness would be admitted, subject to evaluation of its probative value at the end of the case.[3191]

Trial Chamber refused to require identification of accused from photo array in lieu of in-court identification.[3192]

The Trial Chamber must consider the difficulties associated with identification evidence and must carefully evaluate any such evidence before accepting it as a sole basis for sustaining a conviction.[3193]

Evidence given by a witness who had not previously seen the accused should be considered with caution.[3194]

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[3184] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 143
[3185] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 75
[3186] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 2962
[3187] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 193
[3188] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1624
[3189] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 67
[3190] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 72
[3191] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative à la Requete Orale de la Defence d'André Rwamakuba aux fins de Rejet de l'Identification de l'Accuse Faite par les Témoins RJ, GIO, and HF* (20 February 2004)
[3192] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Accused Nzirorera's Motion to Exclude Evidence* (6 February 2004) at para. 10
[3193] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 234
[3194] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 240

Given the finding that a prosecution witness may have been lying about one of the occasions when she claims to have seen the accused, this created doubt as to the reliability of the witness' testimony about the other occasion where she identified the accused. The identification was therefore not established beyond a reasonable doubt.[3195]

An in-court identification should not be given any probative weight. It is not sufficient to support the credibility of an in-court identification that the witness scanned the courtroom for the accused. The context of the trial makes it clear who the accused is.[3196]

The witness' view, hidden in a field and concerned not to be seen by those she was observing, was much less than ideal. This must be considered by the Chamber when assessing her ability to identify passers-by.[3197]

Where the basis of the witness' identification of the accused on both occasions was hearsay, caution was warranted. Failure of the Trial Chamber to explicitly explain why it accepted this identification evidence constituted an error of law.[3198]

**illegibility**

The illegibility or incomprehensibility of the transcripts of an accused's interview does not preclude it from being reliable, but rather goes to the weight to be given to the evidence.[3199]

**impeachment**

Where a document not already in evidence contains factual assertions which are contrary to the testimony of a witness who is under cross-examination, and that document is not alleged to have been authored by that witness or is not the one the witness has adopted, such assertions or facts may be put orally to the witness and the witness should be asked to comment thereon. If the witness contests those factual contentions, the document cannot be admitted to that witness.[3200]

The written statement of a proposed witness, which is not already in evidence,

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[3195] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 200
[3196] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 243; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 781
[3197] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 700.
[3198] *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 99
[3199] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 36
[3200] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Oral Ruling on Admissibility of Ntamabyaliro Statement During Mugenzi Cross-Examination* (24 November 2005) at Transcript pp. 47-48

does not have any probative value in terms of assessing the credibility of another witness, and may not be used to impeach the credibility of the witness.[3201]

A document may be relevant and of probative value if it impeaches the testimony of a witness.[3202]

List of alleged genocidaires by Rwandan government was relevant to impeach defence witness whose name appears on it.[3203]

Document showing amount of payments by prosecution to its witness was admissible to impeach the witness.[3204]

Rwandan judgements of prosecution witness would not be admitted after case of accused had closed where defence had not shown diligence in obtaining the document, the judgement reversing the witness' acquittal would not affect his credibility, and failure of judgement to mention the accused was of no probative value.[3205]

BBC article not relevant where it did not directly contradict testimony of prosecution witness.[3206]

Text of speech by third person admitted to contradict the testimony of defence witness.[3207]

**joint trials**

Disagreement by an accused with the decision of a co-accused to call a witness is not grounds for exclusion of the evidence as to the accused.[3208]

Evidence offered by one accused which may incriminate another accused whose case has closed is nevertheless admissible where the matter was part of the prosecution's

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[3201] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Oral Ruling on Admissibility of Ntamabyaliro Statement During Mugenzi Cross-Examination* (24 November 2005) at Transcript pp. 47-48
[3202] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents into Evidence* (29 May 2008) at para. 3
[3203] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents into Evidence* (29 May 2008) at para. 13
[3204] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Oral Decision on Motion to Compel Full Disclosure of ICTR Payments for the Benefit of Witnesses G and T* (29 May 2008) at para. 8
[3205] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion of Admission of two Rwandan judgements involving Prosecution Witness TQ* (14 November 2008)
[3206] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion to Admit BBC Documents Pursuant to Rule 89(C)*(3 June 2008)
[3207] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Prosecution's Oral Motion for Admission of Joshua Ruzibiza's Speech into Evidence* (16 December 2010)
[3208] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Request for Exclusion of Testimony of Witness Jean Kambanda* (6 July 2006) at para. 3

case-in-chief, and the co-accused would have the right to cross examine and produce rebuttal evidence.[3209]

**marking for identification**

There is no need to adopt a general rule that each document which are referred to in court and are not admitted in evidence should be marked for identification. The Chamber will decide on a case-by-case basis, bearing in mind the transparency of the proceedings and the interest of justice.[3210]

**not binding determination**

The admission into evidence does not in any way constitute a binding determination as to the authenticity or trustworthiness of the documents sought to be admitted. These are to be assessed by the Trial Chamber at a later stage in the case when assessing the probative weight to be attached to the evidence.[3211]

**not included in indictment**

**admissible to prove conspiracy**

Trial Chamber's refusal to admit evidence of acts allegedly committed by the accused in prefectures not specified in the indictment was not abuse of discretion, even though the indictment used the phrase "throughout Rwanda" in one paragraph.[3212] However, upon reconsideration, evidence excluded on substantive counts for lack of specificity in the indictment may be admitted as to broader conspiracy and complicity counts.[3213]

**admissible to prove *mens rea***

Where indictment alleged that accused had the intent to destroy the Tutsi as a group, evidence that he threw food for Tutsis on the ground was admissible to prove that

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[3209] *Prosecutor v. Niyiramasuhuko et al,* No. ICTR-98-42-T, *Decision on Arlene Shalom Ntahobali's Motion to Exclude Certain Evidence from the Expected Testimony of Kanyabashi's Witness D-2-13-O* (29 June 2007)
[3210] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 16
[3211] *Prosecutor v Bizimungu et al,* No. ICTR-99-50-T, *Decision on Bicamumpaka's Request for Certification to Appeal a Decision on 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of Testimony of Witnesses GFA, GKB, and GAP* (17 November 2004) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 6
[3212] *Prosecutor v Bizimungu et al,* No. ICTR-99-50-AR73.3 and 73.4, *Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on the Exclusion of Evidence* (15 July 2004); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion from Casimir Bizimungu Opposing the Admissibility of the Testimony of Witnesses GKB, GAP, GKC, GKD, and GFA* (23 January 2004)
[3213] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004* (4 October 2004) at para. 24

intent although the act of throwing food had not been specifically alleged in the indictment.[3214]

**notice**

Trial Chambers should not defer issue of admission of testimony for lack of notice until its deliberations on final judgement, as this may create uncertainty that infringes on the rights of the defence.[3215]

Rule 89(C)'s standard for admissibility of evidence is limited by the Trial Chamber's obligation to ensure that the accused has proper notice of the case against him.[3216]

Whether directly or indirectly relevant, the absence of notice of a material fact requires its exclusion.[3217]

A trial chamber has the discretion to admit any relevant evidence which it deems to have probative value, even where it is not possible to convict an accused on such evidence due to lack of notice.[3218]

Evidence of an incident of killing, allegedly on the instructions of the accused, not referred to in the witness's prior statement or the pre-trial brief was inadmissible for lack of notice.[3219]

Evidence of speech of accused at party rally was excluded where the meeting was not included in the indictment or witness statements and therefore the defence did not have adequate notice of this material fact.[3220]

Evidence of the killing of refugees at a school by soldiers and *Interahamwe*, during which the accused was alleged to have been present, not referred to in the witness's prior statement or the pre-trial brief was inadmissible for lack of notice.[3221]

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[3214] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-AR73.2, *Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence* (23 March 2010)
[3215] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para.1280
[3216] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment* (11 May 2007) at para. 4
[3217] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Exclusion of Evidence* (29 June 2006) at para. 62
[3218] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 597; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1585
[3219] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Exclusion of Testimony Outside the Scope of the Indictment* (27 September 2005) at para. 10
[3220] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Admissibility of Witness GFJ's Testimony on a Specific Meeting* (22 September 2005)
[3221] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Exclusion of Testimony Outside the Scope of the Indictment* (27 September 2005) at para. 16

Evidence that the accused ordered killings of specified persons was excluded at the end of the case where the accused lacked adequate notice from the indictment, pre-trial brief, or opening statement.[3222]

Where the Indictment specifically mentioned Gitarama *préfecture* as the site of acts allegedly committed either by the accused, or by members of Government, mentioned more generally, the prosecutor was permitted to lead evidence regarding events involving the accused in Gitarama.[3223]

The prosecutor will be allowed to lead evidence of material facts not pleaded on the indictment only if the defence has been given clear, timely, and consistent notice of the facts, such as through the prosecution's pre-trial brief, opening statement, or witness statements.[3224]

When it has been found that a material fact has not been pleaded in the indictment, this alone does not render the evidence inadmissible. The evidence can be admitted to the extent that it may be relevant to proof of any allegation sufficiently pleaded in the indictment.[3225]

Evidence may be relevant and admissible even if the event it refers to is not specifically pleaded in the indictment.[3226] On the other hand, evidence relating to a pleaded event may be excluded if the Trial Chamber determines that it is not relevant to the crimes charged, or that such evidence should be excluded for other reasons.[3227]

Although meeting to which proposed evidence was directed was not specified in indictment, the defence had adequate notice of it through the pre-trial brief and disclosure of witness statements. Therefore, the evidence of this meeting would not be excluded.[3228]

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[3222] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment* (11 May 2007)
[3223] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Urgent and Confidential Motion from Casimir Bizimungu opposing to the Admissibility of the Testimony of Witness GKF, GBN, ADT, and GTD* (1 July 2004)
[3224] *Prosecutor v Ndindliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony* (30 March 2006) at para. 21
[3225] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Evidence of Material Facts Not Charged in the Indictment* (18 March 2008) at para. 7; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 71
[3226] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Admission of Prosecution Exhibits 27 and 28* (31 January 2005) at para. 9; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Motions to Declare Parts of the Testimony of Witnesses GHT, GHY, and GHS Inadmissible* (21 October 2004); *Ntahobali & Niyiramasuhuko v Prosecutor*, No. ICTR-98-42-AR73, *Decision on the Appeals by Pauline Niyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible* (2 July 2004) at para. 12
[3227] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR93, *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence* (19 December 2003) at para. 22
[3228] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Accused Tharcisse Muvunyi's Motion to Exclude Witness CCR's Testimony* (20 May 2005); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-

Evidence as to allegations of the indictment which the prosecutor agreed had been "dropped" at the close of its case would be excluded.[3229]

Evidence of party rally admitted where rallies were described in general in the indictment and witness statement provided notice of the rallies. However, the relevant statements concerning the naming at the meeting of persons married to Tutsi women and the fact of them having been killed by the *Interahamwe* after that meeting should have been specifically pleaded as material fact in the indictment and were excluded.[3230]

**prejudice**

It was proper to exclude evidence of allegations not specified in the indictment where the defence had not had the opportunity to prepare and thus would suffer prejudice should the prosecution be permitted to present those allegations during trial.[3231]

Addition of new murders in the pre-trial brief which were not charged in the indictment were material facts which would prejudice the accused if offered at trial. The Trial Chamber therefore excluded evidence of such murders at trial.[3232]

The prosecution is required to have provided the accused with "timely, clear, and consistent" disclosure of testimony which it intends to offer at trial. The Trial Chamber will look to the indictment, the pre-trial brief, and the disclosure of witness statements to determine if the accused would be prejudiced by admission of evidence.[3233]

**remedy**

Testimony of witnesses given before indictment was amended would not be stricken, as such a remedy is more appropriate in systems which have jury trials. However, the Trial Chamber will take into consideration at the time of judgement the fact that the meetings testified to by the witnesses are not specified in the amended

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T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimony of Witness AOF* (2 December 2005) at para. 21

[3229] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Exclude Evidence of Material Facts not Charged in the Indictment and/or in the Prosecution's Pre-Trial Brief* (14 February 2011) at para. 17

[3230] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Oral Decision on Defence Motion on Inadmissibility of Evidence Concerning Meetings Not Pled in the Indictment* (27 February 2006)

[3231] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.2, *Decisions on Prosecution's Interlocutory Appeals Against Decisions of the Trial Chamber on Exclusion of Evidence* (25 June 2004)

[3232] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-PT, *Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief* (30 September 2005) at para. 14

[3233] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion of Defendant Bicamumpaka Opposing the Admissibility of Witnesses GFA, GKB, and GAP* (6 October 2004) at para. 16; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Reconsideration of the Trial Chamber's Decision of 5 February 2004 Pursuant to the Appeals Chamber's Decision of 15 July 2004* (4 October 2004) at para. 24

indictment. Trial Chambers may hear evidence of the historical and social background to the events in Rwanda in 1994.[3234]

Evidence that accused published list of persons to be killed excluded where it had not been charged in the indictment.[3235]

Evidence of accused's presence at roadblock excluded where given what happened at roadblocks, it could be incriminating, and it was not charged in indictment. Similarly, evidence that accused accompanied Interahamwe to the bulldozer used to destroy the church, not pled in the indictment, was also excluded.[3236]

Lack of specificity in indictment as to murder required that Trial Chamber not consider evidence as to that murder as a charge against the accused, but admission of the evidence was proper, subject to later determination by the Trial Chamber if it had any relevance to the existing allegations of the indictment.[3237]

Where admission of uncharged acts denied against one accused and allowed against a co-accused, the Trial Chamber is obliged to state its reasons for the disparate treatment.[3238]

**not included in witness statements**

The differences between the testimony of the witness and his prior statement were not so material as to warrant exclusion of his evidence for failure of the prosecution to provide adequate notice to the defence.[3239]

Testimony would not be excluded on the grounds of lack of adequate notice where although the witness' prior statement and pre-trial brief did not mention two of the accused, the testimony of the witness concerned matters which were alleged in the indictment.[3240]

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[3234] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Motion to Strike Testimony of Witnesses GBG and GBV* (30 April 2004)
[3235] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion for Exclusion of Evidence and Delineation of the Defence Case* (26 March 2010) at para. 22
[3236] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, *Decision on Defence Motion for a Stay of the Proceedings or for Exclusion of Evidence Outside the Scope of the Indictment* (15 January 2010) at para. 22, 30
[3237] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Urgent Motion to Declare Parts of the Testimony of Witnesses GTA and DCH Inadmissible* (24 November 2004); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence's Urgent Motion to Declare Parts of Testimony of Witnesses RV and QBZ Inadmissible* (16 February 2004) at para. 25
[3238] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-AR73.3 and 73.4, *Decision on Mugiraneza Interlocutory Appeal Against Decision of the Trial Chamber on the Exclusion of Evidence* (15 July 2004)
[3239] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion to Exclude Portions of the Evidence of Witness Prosper Higiro* (30 January 2004)
[3240] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Bizimungu's Motion to Exclude the Testimony of Witness AP* (28 October 2005)

Evidence excluded at judgement where defence not given adequate notice through witness statement that witness would incriminate accused on this subject.[3241]

Evidence that the accused shot a soldier excluded where it was not in indictment, pre-trial brief, or witness statement, but was contained in a will-say statement filed the day before the witness testified.[3242]

**objections**

Objections play an important role in ensuring that the trial is conducted based on evidence which is relevant to the charges against the accused. Objections should be made contemporaneously with the admission of the evidence, and the failure to do so normally shifts the burden of proving that the case was materially impaired to the accused, unless good reason for not making a contemporaneous objection can be shown.[3243]

General motions to exclude evidence not charged in the indictment are not sufficient. There must be a contemporaneous objection when the evidence is offered for admission.[3244]

**opinions**

Where a party chooses to call a witness as a factual, rather than an expert witness, it implicitly makes a choice to limit the witness' testimony to matters which he personally saw, heard, or experienced. The Trial Chamber is duty bound to exclude irrelevant detail, matters of opinion or expertise beyond the remit of a factual witness.[3245]

Factual witnesses may express opinions if based upon their personal experiences and activities.[3246]

**originals**

While an original of a document is not a precondition for admissibility, when available, an original of a document should be provided for inspection to assist the parties

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[3241] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 34
[3242] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Motion for Exclusion of Evidence* (4 September 2006) at para. 18
[3243] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion for Exclusion of Evidence Outside the Scope of the Indictment* (11 May 2007) at para. 8
[3244] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion for Exclusion of Evidence* (29 June 2006) at para. 9
[3245] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Testimony Opposing the Testimony of Witness DE4-30 as a Factual Witness* (16 May 2007) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision on Requete de la Defence de M .Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pieces Afférentes* (6 August 2008) at para. 4
[3246] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision on Requete de la Defence de M. Ngirumpatse en Retrait de la Déposition du Témoin GFJ et des Pieces Afférentes* (6 August 2008) at para. 4

in assessing the authenticity of the document. Without further clarification concerning the availability of an original of the document, the document will not be admitted.[3247]

**post-1994 evidence**

Document compiled by witness and his organization after 1994 events was not of sufficient probative value where his organization was not a recognized scientific organisation, and the witness was not an expert.[3248]

**pre 1994 evidence**

A Trial Chamber may validly admit evidence relating to pre-1994 acts and rely on it where such evidence is aimed at (1) clarifying a given context; (2) establishing by inference the elements (in particular, criminal intent) of criminal conduct occurring in 1994; and (3) demonstrating a deliberate pattern of conduct.[3249]

A Trial Chamber may admit evidence of pre-1994 acts which are relevant, have probative value, and may serve to clarify a given context or pattern of conduct.[3250]

Information that falls outside the temporal jurisdiction may be useful in helping the accused and the Trial Chamber to appreciate the context of the alleged crimes, particularly due to the complexity of the events that occurred in Rwanda, during 1994. Challenges to temporal jurisdiction are evidentiary and will be considered at the trial stage.[3251]

Evidence of events prior to 1994 that can establish a pattern, design, or systematic course of conduct of the accused, or provide a context or background to crimes falling within the temporal jurisdiction of the Tribunal may be admissible.[3252]

Trial Chamber would not exclude evidence of pre-1994 evidence prior to trial but would assess the proposed evidence when offered during the trial.[3253]

Documents from prior to 1994 must be shown to be relevant to events in 1994 to be admissible.[3254]

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[3247] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 25
[3248] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents into Evidence* (29 May 2008) at para. 6
[3249] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 315
[3250] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 97; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Exclude Evidence Outside the Temporal Jurisdiction of the Tribunal* (3 February 2011) at para. 16
[3251] *Prosecutor v Nahimana et al*, No. ICTR-96-11-T, *Decision on the Defence Preliminary Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence* (12 July 2000).
[3252] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 48
[3253] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion on Admissibility of Allegations Outside the Temporal Jurisdiction of the Tribunal* (3 November 2009)

Evidence of prior conduct, good or bad, is rarely considered probative.[3255]

Evidence of acts occurring before 1994 relating to conspiracy may be admitted because conspiracy is a continuing offence.[3256]

Evidence tending to show the existence of an ongoing criminal act that began prior to 1994 but whose object was only realized in 1994 is admissible. Similarly, pre-1994 evidence may be admitted if the account of the 1994 acts would be otherwise incomplete or incomprehensible. Finally, pre-1994 similar fact evidence relevant to prove intent, or to disprove accident or mistake, to prove identity or to disprove innocent associations may be admitted where the probative value outweighs its prejudice.[3257]

The following factors are to be considered in whether to admit evidence as similar fact evidence: (1) proximity in time of the similar acts; (2) extent to which the other acts are similar in detail to the charged conduct; (3) number of occurrences of the similar acts; (4) any distinctive feature(s) unifying the incidents; (5) intervening events; and (6) any other factor which would tend to support or rebut the underlying unity of the similar acts.[3258]

Evidence of past crimes, introduced merely to blacken the character of the accused and show a propensity and capacity to commit the crimes charged, is improper. This is so because the damning effect of the evidence tends to outweigh its true probative value and to obscure more direct evidence of the crime alleged. In this sense, the evidence is "prejudicial" in a manner that compels exclusion.[3259]

While professional judges may be less susceptible to distraction or prejudice by the admission of irrelevant or prejudicial evidence than juries, hearing extensive examination and cross-examination on the evidence of prior acts would be excluded where it would distract the Trial Chamber from the proper focus of the trial, namely, the events charged in the indictment, and lengthen the trial.[3260]

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[3254] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Request to the Government of Rwanda for Cooperation and Assistance Pursuant to Article 28 of the Statute* (10 March 2004) at para. 9
[3255] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 301
[3256] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 40
[3257] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Proponed Testimony of Witness DBY* (18 September 2003) at paras. 9-14; *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on the Defence Motion for Preclusion of Prosecution Evidence* (31 August 2004) at para. 3
[3258] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Proponed Testimony of Witness DBY* (18 September 2003) at para. 38
[3259] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Proponed Testimony of Witness DBY* (18 September 2003) at para. 17
[3260] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admissibility of Proponed Testimony of Witness DBY* (18 September 2003) at para. 28

Evidence of pre-1994 criminal acts are admissible to prove the conspiracy charged in the indictment, but the accused can only be convicted of crimes falling within the Tribunal's temporal jurisdiction.[3261]

Evidence relating to events that happened before 1994 can be admitted if (1) it is relevant to an offence continuing into 1994; (2) it provides context or background to a charged offence; or (3) the evidence constitutes "similar fact evidence" that demonstrates a consistent pattern of conduct.[3262]

Evidence of uncharged 1992 event was admissible to show that the witness knew the accused prior to 1994 and not to support any charge in the indictment.[3263]

**prejudicial effect**

Where the prejudicial effect of the proposed evidence is likely to outweigh its probative value, the Trial Chamber will generally exercise its discretion against admitting the evidence.[3264]

The Trial Chamber has inherent power to exclude evidence if its probative value is substantially outweighed its prejudicial effect or by the need to ensure a fair trial.[3265]

The prejudicial effect of admitting statements of unavailable witnesses outweighed their probative value where the prosecution's witness had not been confronted with the statements during cross examination.[3266]

**prior statements of accused**

Testimony of accused at another trial at the ICTR, and accompanying exhibits, admitted into evidence during prosecution case.[3267]

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[3261] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Bizimungu's Motion in Opposition to the Admissibility of the Testimony of Witness AOF* (2 December 2005) at para. 26

[3262] *Prosecutor v Ndindliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion to Exclude Parts of Witness AOG's Testimony* (30 March 2006) at para.22

[3263] *Prosecutor v Gatete*, No. ICTR-00-61-T, *Decision on Defence Motion for Exclusion of Evidence* (24 November 2009) at para. 14

[3264] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on the Prosecutor's Motion Pursuant to Trial Chamber's Directives of 7 December 2005 for the Verification of the Authenticity of Evidence Obtained Out of Court Pursuant to Rules 89(C) and (D)* (26 April 2006) at para. 15

[3265] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 20; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials* (30 October 2007) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para.3; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 9

[3266] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3*(22 November 2007) at para. 9

**prior statements of co-accused**

It would be antithetical to the integrity of the proceedings to admit those parts of the interview of an accused that concerns the co-accused before the accused decides whether to testify.[3268]

The mere fact that a statement is made by a co-accused does not make it so unreliable that it cannot be admitted under Rule 89.[3269]

**prior statements of third parties**

Statements of non-testifying individuals used during cross-examination may be admitted into evidence, even if they do not conform to the requirements of Rule 90(A) and 92 *bis,* provided that the statements are necessary to the assessment of the witness' credibility and are not used to prove the truth of their contents.[3270]

Prior statements of third parties, including assertions contained in plea agreements, which purportedly contradict the testimony of a witness may not be admitted as exhibits.[3271]

Prior statement of third party made in late 1994 after going into exile would not be admitted because it dealt with the acts and conduct of the accused and failed to comply with the requirements of Rule 92 *bis*.[3272]

**prior statements of witnesses**

Prior statements are relevant only as to the credibility of the witness and should not constitute evidence that the content thereof is truthful.[3273]

Prosecution witness statements, of witnesses that were not called to testify, were admitted to the extent that they contradicted another prosecution witness' oral testimony, but not to prove the truth of their contents.[3274]

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[3267] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion to Admit Prior Sworn Trial Testimony of the Accused Persons* (6 December 2006)
[3268] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 46
[3269] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 249
[3270] *Simba v Prosecutor,* No. ICTR-01-76-A, *Judgement* (28 November 2007) at para.20
[3271] *Prosecutor v Ndindliyimana et al*, No. ICTR-00-56-T, *Decision on Nzuwonemeye's Motion for Reconsideration of the Chamber's Oral Decision Dated 11 May 2007 Regarding Admission of Exhibits P132 and P135* (25 July 2007)
[3272] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials* (30 October 2007) at para. 20
[3273] *Prosecutor v Akayesu*, No. ICTR-96-4-A, *Judgement* (1 June 2001) at para. 134; *Prosecutor v Niyiramasuhuko et al,* No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1668

Prior consistent statement of a witness lacks probative value and is not admissible.[3275]

Statements of third parties which contradicted testimony of prosecution witnesses would not be admitted in connection with comments by the accused during his testimony on the evidence against him. To be admitted, the defence should have put the documents to the witness who they allegedly contradicted.[3276]

The tender of the further material as a defence exhibit without having given the witnesses the opportunity to deal with it in cross-examination was a serious breach of the duty of fairness of the trial, and it led to the right of the prosecution to have the three witnesses recalled to explain their previous inconsistent statements.[3277]

Where prior inconsistent statements are disclosed by the prosecution after the witness has testified, the inconsistent statements will be admitted, and, if necessary for the witness to explain the inconsistencies, the witness will be recalled.[3278]

Statements of non-testifying witnesses used during cross examination may be admitted for the limited purpose of assessing the credibility of the testifying witness, but do not constitute evidence that the contents are truthful.[3279]

Prior inconsistent statements of a witness are admissible as exhibits when presented to the witness and the witness is asked to explain the inconsistencies. These statements may be used by the Trial Chamber in determining the credibility of the witness. However, statements of third parties admitted during cross-examination are not considered for the truth of their contents but are only used to assist the Trial Chamber in understanding the testimony of the witness on the stand.[3280]

Failure to put contradictory material to prosecution witness, or to seek to recall the witness after obtaining the material, rendered school records which contradicted the witness' testimony inadmissible.[3281]

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[3274] *Prosecutor v Nahimana et al*, No. ICTR-99-52-A, *Decision on the Defence Motion to Admit into Evidence Prosecution Witness's Statements; Alternatively to Produce Alternative Defence Witnesses* (5 June 2003) at para. 6.
[3275] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion to Admit the Statement of Defence Witness Straton Nyarwaya into Evidence and for Other Relief* (1 July 2009) at para 30
[3276] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion to Admit Documents as Exhibits* (26 February 2007) at para. 8.
[3277] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 67
[3278] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (16 December 2003) at para. 8
[3279] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Admission of Certain Exhibits* (23 June 2005) at para. 7
[3280] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Nsengiyumva Motion to Admit Documents as Exhibits* (26 February 2007) at paras. 6-7
[3281] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Defence Request for Admission of Documents* (21 March 2007)

**probative value**

To establish the probative value of evidence, the applicant must show that the evidence tends to prove or disprove an issue.[3282]

Correspondence indicating that Rwandan government had not turned over to ICTR arrest warrant file of the accused was of such minimal probative value that it would not be admitted.[3283]

Lists of persons wanted by the Rwandan government for genocide, upon which the accused's name does not appear, had sufficient probative value to be admitted.[3284]

Evidence does not have to be exculpatory to have probative value. It need only tend to prove or disprove an issue at trial, not the guilt or innocence of the accused.[3285]

**psychological issues**

Testimony of witness who had psychological problems after giving testimony would not be excluded, but Trial Chamber requested report of witness' psychological condition.[3286]

**public documents**

Indictments are public documents and may be referred to without being admitted into evidence.[3287]

Transcripts from other trials at the ICTR form part of the Tribunal's judicial records. Nothing prevents a party from referring to transcripts in his closing submissions.[3288]

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[3282] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Interim Order for the Prosecution to Identify Relevant and Probative Passages of Certain Materials it Intends to Tender into Evidence Under Rule 89(C) of the Rules of Procedure and Evidence* (8 August 2007) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 6

[3283] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Admit Documents* (21 March 2007)

[3284] *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Decision on Defence Motion for Admission of Certain Materials* (2 March 2009) at para. 5

[3285] *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Decision on Defence Motion for Admission of Certain Materials* (2 March 2009) at para. 5

[3286] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motion to Exclude Testimony of Witness AXA Based Upon Medical Report Communicated to Parties on 4 December 2007* (18 January 2008)

[3287] *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Decision on Defence Motion for Admission of Certain Materials* (2 March 2009) at para. 14

[3288] *Prosecutor v Setako*, No. ICTR-04-81-T, *Decision on Defence Motion for Exclusion of Evidence* (3 March 2009) at para. 6

Note verbale from Benin and France attesting to the issuance of a visa to the accused was reliable and admissible from the bar table.[3289]

**rebuttal**

Excerpts from book of General Dallaire would be admitted to rebut portions of his testimony in which he said that the accused was an opponent of the regime.[3290]

**relevance**

To establish that evidence is relevant, the moving party must show that a connection exists between the evidence sought to be admitted and the proof of an allegation sufficiently pleaded in the indictment.[3291]

A written statement which contradicts prosecution evidence meets the relevance requirement of Rule 89(C).[3292]

To establish that evidence is relevant and of probative value, it must be shown that (1) there is a connection between the evidence sought to be admitted and the proof of allegation sufficiently pleaded in the indictment; and (2) the evidence tends to prove or disprove an issue.[3293]

UNAMIR documents were relevant to the timing and general context of events referred to in the indictment and how UNAMIR officials assessed those events.[3294]

Letters and communiqués in 1993 and 1994 from Rwandan government officials were relevant to show their views on the issues pleaded in the indictment or understanding the context and background of the events.[3295]

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[3289] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on the Third Defence Motion for Admission of Documentary Evidence* (4 July 2012) at paras. 41, 46

[3290] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Motion to Admit Extracts From General Romeo Dallaire's book "Shake Hands With the Devil"* (18 November 2008)

[3291] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-AR73, *Decision on the Appeals by Pauline Niyiramasuhuko and Arsene Shalom Ntahobali on the Decision on Defence Urgent Motion to Declare Parts of Evidence of Witnesses RZ and ABZ Inadmissible* (2 July 2004) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Interim Order for the Prosecution to Identify Relevant and Probative Passages of Certain Materials it Intends to Tender into Evidence Under Rule 89(C) of the Rules of Procedure and Evidence* (8 August 2007) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 6

[3292] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decisions on Four Prosper Mugiraneza Motions Concerning Witness List* (4 November 2008) at para. 25

[3293] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials* (30 October 2007) at para. 9; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 2

[3294] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of UNAMIR Documents* (30 October 2007) at para. 13

[3295] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents* (28 November 2007) at para.12

Documents authored by President Habyarimana, as well as his Chief of Cabinet were relevant to issues such as MRND attitude towards Arusha Accords and reasons for formation of Interahamwe and were admissible from the bar table.[3296]

Documents which show commitment of Rwandan government to peace process and violation of ceasefires by RPF were relevant to the general context of the events, the alleged conspiracy, and the alleged joint criminal enterprise.[3297]

The fact that documents reflect the views of one party to the armed conflict is relevant to their weight and not admissibility.[3298]

Document showing witness was acquitted in Rwanda was relevant to bolster the credibility of the witness and would be admitted after the witness testified where it bore stamps of the prison.[3299]

Statement of witness in another case that his testimony on behalf of the prosecution was the result of pressure placed on him by the Rwandan government was not relevant to show that unrelated witness in this case succumbed to such pressure and the link was too speculative to be admitted.[3300]

Response of current Rwandan government to UN Mapping report, in which it was indicated that *Interahamwe* were concentrated in Kigali and not prevalent in the countryside was authentic and relevant and would be admitted at the request of the defence.[3301]

Study by Dr Nancy Combs concerning fact-finding at the international tribunals was not relevant to the present case and would not be admitted.[3302]

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[3296] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Documents Authored by Enoch Ruhigira* (26 March 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Documents Obtained from the RPF Archives in Kigali* (13 February 2009) at para. 10

[3297] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Documents Obtained from the RPF Archives in Kigali* (13 February 2009) at para. 16

[3298] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents* (28 November 2007) at para. 12

[3299] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Confidential and Amended Motion to Admit Rwandan Judicial Records into Evidence* (10 June 2008)

[3300] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion to Admit Exhibit DNZ-461 into Evidence and to Appoint an Amicus Curiae to Investigate Witness CNAL's False Testimony* (2 December 2010) at para. 34

[3301] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for the Admission of Documentary Evidence: Official Government of Rwanda Comments on the Draft UN Mapping Report on the DRC* (31 March 2011)

[3302] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for the Admission of Documentary Evidence* (15 June 2011)

**reliability**

Rule 89 (C) grants a Trial Chamber a broad discretion in assessing admissibility of evidence. Evidence may be deemed inadmissible where it is found to be so lacking in terms of the indicia of reliability, such that it is not probative. Thus, at the stage of admissibility, only the beginning of proof that evidence is reliable, namely, that sufficient indicia of reliability have been established, is required for evidence to be admissible.[3303]

The fact that the author is unknown, the signature illegible, and the seizure disputed are matters which will affect the weight to be given to the evidence so long as there is a minimum showing of indicia of reliability.[3304]

Indicia of reliability include: the place in which the document was seized, in conjunction with testimony describing the chain of custody since the seizure of the document; corroboration of the contents of the document with other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.[3305]

Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or even the form of the handwriting.[3306]

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[3303] *Niyiramasuhuko v Prosecutor*, No. ICTR-98-42-AR73.2, *Decision on Pauline Niyiramasuhuko's Appeal on the Admissibility of Evidence* (4 October 2004) at para. 7; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 273; *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Admission of Prosecution Exhibits 27 and 28* (31 January 2005) at para. 10; *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 33; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross-Examination of Defence Witness Augustin Ndindiliyimana* (28 February 2006) at para. 12

[3304] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Admission of Prosecution Exhibits 27 and 28* (31 January 2005) at para. 10

[3305] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 22; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admission of Tab 19 of Binder Produced in Connection With Appearance of Witness Maxwell Nkole* (13 September 2004) at para. 8; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 8; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to Admit United Nations Documents Into Evidence Under Rule 89(C)* (25 May 2006) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Oral Motions by Edouard Karemera and the Prosecution to Admit Certain Documents into Evidence* (29 May 2008) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Submission on Entering Into Evidence Exhibits Arising from the Prosecution Cross Examination of Karemera Defence Witnesses KBL, LSP, and TXL, and Joseph Nzirorera's Eighteenth Motion for Remedial and Punitive Measures for Violation of Rule 66* (10 November 2008) at para. 6

[3306] *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, *Decision on Prosecution Motion for Admission of Certain Materials* (10 July 2008) at para. 7

Lack of credibility is not a basis for exclusion of a witness' testimony.[3307]

For a document to be admitted, the moving party must provide some indication of the document's authenticity such as the nature of the document, its author(s), the provenance of the document and its chain of custody from the time of seizure to its production in court. If a copy of a document is sought to be admitted, there should be some explanation about the non-availability of the original, or some confirmation that the copy sought to be tendered genuinely emanates from the original.[3308]

Copies of military correspondence pertaining to civil defence were inadmissible where they were not recognized by the witness and there was no evidence that signature on letter was that of the accused.[3309]

Statement of person who was not a witness would not be admitted to impeach the statement of a witness.[3310]

Documents admitted in other trials of their authors were sufficiently reliable to be admitted without an authenticating witness.[3311]

The fact that a document was admitted in another trial is, in and of itself, not a sufficient showing of reliability.[3312]

Documents obtained by defence from RPF Archives, which bore signatures, seals, or stamps, had sufficient indicia of reliability to be admitted.[3313]

Statement by individual who reviewed contents of survivor organization website was not admissible to show that content of website was accurate.[3314]

**rulings**

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[3307] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Request for Exclusion of Testimony of Witness Jean Kambanda* (6 July 2006) at para. 3

[3308] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross- Examination of Defence Witness Augustin Ndindiliyimana* (28 February 2006) at para. 13

[3309] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on the Prosecutor's Motion to Admit Documents Tendered During the Cross- Examination of Defence Witness Augustin Ndindiliyimana* (28 February 2006) at para. 15

[3310] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Muvunyi's Motion to Exclude Prosecution Exhibit No. 33* (13 June 2006)

[3311] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials* (30 October 2007) at para. 7

[3312] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 10

[3313] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Documents Obtained from the RPF Archives in Kigali* (13 February 2009) at para. 7

[3314] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Defence Motion to Admit the Statement and Report of Mr. Vincent Chauchard* (29 September 2009) at para. 18

It is not necessary for a Trial Chamber to give formal oral or written reasons in response to every objection raised by the parties. To require reasons for all objections would place an unreasonable burden on the resources of the Trial Chamber.[3315]

It is for the Trial Chamber, and not the witness, to determine which questions are relevant.[3316]

A ruling by the Trial Chamber in response to a timely objection during a witness's testimony does not foreclose a subsequent written motion. Considering the complexity sometimes associated with determining whether adequate notice of a material fact has been given, the Chamber's oral decision during a witness's testimony cannot be taken to foreclose any further objection. Where the Chamber can be satisfied that the evidence in question cannot not be relied upon as a basis for conviction, then the interests of judicial economy are served by deciding in advance that the evidence should be excluded.[3317]

**Rwandan judicial documents**

Gacaca documents showing that name of accused was not mentioned during evidence of the events in which he was charged would be admitted as having adequate reliability without authentication by a witness.[3318]

The Chamber has previously recognised the importance of Rwandan judicial records in connection with the credibility assessment of witnesses. For instance, they may be valuable when used during the examination of a witness. Judicial records from domestic proceedings about the same crime as charged against an accused before the Tribunal may also provide relevant context.[3319]

**Self-authentication**

A document not recognized by a witness cannot be admitted through the testimony of that witness.[3320]

Documents need not be recognized by a witness to have probative value.[3321]

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[3315] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR93, *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence* (19 December 2003) at para. 21

[3316] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Hold Witness XAP in Contempt* (17 December 2003) at para. 4

[3317] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Exclusion of Testimony Outside the Scope of the Indictment* (27 September 2005) at para. 7

[3318] *Prosecutor v Setako*, No. ICTR-04-81-T, *Decision on Defence Motion to Admit Rwandan Judicial Documents* (4 November 2009)

[3319] *Prosecutor v. Setako*, No. ICTR-04-81-T, *Judgement* (25 February 2010) at para. 85.

[3320] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 6

[3321] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to Admit United Nations Documents Into Evidence Under Rule 89(C)* (25 May 2006) at para. 4; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of UNAMIR Documents* (30 October 2007) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the*

Documents obtained from government of France via official request were reliable, relevant, and probative, and would be admitted without the requirement of an authenticating witness.[3322]

A party seeking to admit documents from the bar table must make a prima facie case as to the relevance of the documents to the charges against the accused. Failure to specify how the document related to the charges or the testimony of a witness led to denial of the motion for its admission.[3323]

A book about conditions in Rwandan prisons was admissible from the bar table absent objection from the prosecution.[3324]

Transcripts of Radio Rwanda broadcasts not admitted from bar table where no witness testified to having heard the broadcasts.[3325]

Wikipedia article is not sufficiently reliable to be admitted into evidence from the bar table.[3326]

**source of document**

The sole fact that evidence is proffered by the accused is no reason to find that it is less reliable. Nevertheless, the source of a document may be relevant to the Trial Chamber's assessment of the reliability and credibility of that document.[3327]

Document appended to prosecution expert report would not be admitted excerpt where expert explained source and provenance of the document.[3328]

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*Prosecution Motion for Admission into Evidence of Certain Exhibits from Other Trials* (30 October 2007) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Admission of UNAMIR Related Documents* (28 November 2007) at para. 5; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 5; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion to Deposit Certain United Nations Documents* (19 March 2007) at para. 2; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 7

[3322] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for the Admission of Documentary Evidence* (7 May 2010)

[3323] *Prosecutor v. Bizimungu et al*, No. ICTR-98-44-T, *Decision on Defence Motions to admit Church Records and School Records Pursuant to Rule 89(C)*(2 June 2008); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Documents Obtained from the RPF Archives in Kigali* (13 February 2009) at para. 4

[3324] *Prosecution v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Defence Motion for the Admission of Documentary Evidence* (13 May 2011)

[3325] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Admission of Documentary Evidence* (9 February 2012) at para. 65

[3326] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Admission of Documentary Evidence* (9 February 2012) at para. 87

[3327] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 50

[3328] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of Admission of Prosecution Exhibits P293 -298* (29 May 2008)

**statements of the accused**

Prior statements of accused Kanyabashi taken by Belgian authorities lacked sufficient indicia of reliability and were therefore not admissible on behalf of his co-accused.[3329]

**statements of parties**

Prosecution's statements in oral hearing in another case questioning methodology and reliability of witness who testified as its expert in present case were not relevant to credibility of the expert and would not be admitted.[3330]

**statements of third parties**

Statements of third parties will be marked for identification, but not admitted as evidence.[3331]

The admission of statements of third parties is governed by Rule 92 *bis*. Prosecution motion to admit the statements under Rule 89(C) denied.[3332]

Chamber would not consider prior statements of witnesses admitted pursuant to Rule 89(C) as substantive evidence, but only as evidence of the credibility of the witness.[3333]

As a matter of law, statements of non-testifying individuals used during cross examination may be admitted into evidence even if they do not conform to the requirements of Rule 90(A) and 92 *bis*, provided the statements are necessary to the Trial Chamber's assessment of the witness' credibility and are not used to prove the truth of their contents.[3334]

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[3329] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion to Admit Kanyabashi's Custodial Statements* (15 September 2006) at para. 19

[3330] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion to Admit into Evidence the Transcripts from the Munyakazi Referral Hearing* (23 July 2008); *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion to Admit Portions of Transcript from Another Proceeding* (2 September 2008)

[3331] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Submission on Entering Into Evidence Exhibits Arising from the Prosecution Cross Examination of Karemera Defence Witnesses KBL, LSP, and TXL, and Joseph Nzirorera's Eighteenth Motion for Remedial and Punitive Measures for Violation of Rule 66* (10 November 2008) at para. 7

[3332] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecutor's Motion for the Admission of Marguerite Mukansanga and Alfred Kwende's Affidavits Pertaining to the Testimony of Jean Vianney Mporanzi* (16 September 2010) at para. 19

[3333] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Judgement and Sentence* (29 March 2011) at para. 80, fn. 57

[3334] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at fn.1152

**tape recordings**

Testimony from person making recording as to how it was made and that the transcript accurately reflected its contents, as well as four witnesses who recognized the voice of the accused on the recording, provided sufficient indicia of reliability for it to be admitted.[3335]

**timeliness**

The prejudice from the admission of fresh prosecution evidence during the defence case probative of guilt is greater than that of evidence admitted with the sole purpose of impeaching the witness.[3336]

Exhibits may be offered by the prosecution during the defence case if it is relevant to impeachment of a defence witness.[3337]

Where the accused was a witness, evidence used by the prosecution was probative of guilt as well as impeaching. Failure of the prosecution to admit the evidence in its case in chief rendered it inadmissible during the cross examination of the accused.[3338]

The admission of prosecution evidence outside of its case-in-chief is not ordinarily in the interests of justice and judicial economy as it requires the defence to engage in additional investigations and production of evidence in the context of very complex and lengthy trials.[3339]

Prosecution exhibits offered during cross examination of accused admitted where they went primary to impeach his credibility and had been previously disclosed, save for one document not previously disclosed whose admission would prejudice the defence by requiring further investigation.[3340]

**United Nations documents**

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[3335] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Exclusion of Testimony and Admission of Exhibit* (20 March 2007) at para. 13
[3336] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of Documents Used in Cross Examination of Edouard Karemera and Witness 6* (11 November 2009) at para. 5
[3337] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Admission of I-P-32 into Evidence Pursuant to Rule 89(C)* (2 September 2009) at para. 3
[3338] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Motion for Reconsideration of Trial Chamber III's Decision of 11 November 2009 not o Admit into Evidence I-P-048* (15 February 2010) at para. 7
[3339] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of Documents Used in Cross Examination of Edouard Karemera and Witness 6* (11 November 2009) at para. 4
[3340] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of Documents Used in Cross Examination of Edouard Karemera and Witness 6* (11 November 2009)

Documents which reflect the views of United Nations officials as to the military and political context of Rwanda in 1994 are relevant to the charges against the accused and can be admitted.[3341]

UNAMIR documents can be admitted through a witness who knows their contents. They can also be admitted without a witness if the probative value and relevance of each document are shown. However, it is not appropriate to admit a bundle of UNAMIR reports without a showing of the relevance or probative value of each report.[3342]

UNAMIR documents admitted from the bar table.[3343]

Party seeking to admit United Nations documents must specify passages within those documents which it contends are relevant to an issue in the case. The wholesale admission of entire, lengthy documents based on general pleadings as to their relevance would normally impede the expeditiousness of the proceedings and impose a heavy burden on the Chamber and the opposing parties.[3344]

Gersony report and interview with former Special Representative would not be admitted where they describe events which occurred outside of the relevant period oof the indictment.[3345]

**variance with indictment**

Trial Chamber excluded evidence from the judgement which it had previously admitted when it determined that fact that indictment alleged the act took place outside temporal jurisdiction and evidence indicated it took place in 1994, thus providing inadequate notice and opportunity to prepare for cross-examination.[3346]

Conviction for meeting which occurred in late May upheld despite allegation of the indictment that it occurred in early May where there was only one meeting at that location and no prejudice was shown.[3347]

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[3341] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request to Admit United Nations Documents Into Evidence Under Rule 89(C)* (25 May 2006) at para. 3; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion to Deposit Certain United Nations Documents* (19 March 2007) at paras. 4-5

[3342] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Admission of UNAMIR Documents* (21 November 2006) at para. 9-12

[3343] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Admission of Documentary Evidence* (9 February 2012) at para. 60

[3344] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Interim Order for the Prosecution to Identify Relevant and Probative Passages of Certain Materials it Intends to Tender into Evidence Under Rule 89(C) of the Rules of Procedure and Evidence* (8 August 2007) at para. 12

[3345] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuze Motion to Deposit Certain United Nations Documents* (19 March 2007) at paras. 7,9

[3346] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 29

[3347] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (1 April 2011) at para. 29

**waiver**

Failure to object contemporaneously waives objections to the evidence of a witness unless there was a satisfactory reason for failure to object and the accused has suffered prejudice.[3348]

The defence is expected to make a timely objection to evidence whose admissibility it challenges. Failure to make a contemporaneous objection does not constitute an absolute waiver of the rights of the accused but shifts the burden of proof to the Accused to show that lack of notice has been prejudicial.[3349]

**written statements**

Trial Chamber was within its discretion to refuse to admit statements from defence witnesses when few details were available to the Trial Chamber in relation to the circumstances in which the statements were taken, the identity of the interviewers, the nature of the questioning, and whether the witnesses had spoken under oath or solemn declaration.[3350]

Admission of evidence in the form of written statements is specifically governed by Rule 92 *bis* with certain factors and conditions to be satisfied. The Chamber will not admit under Rule 89(C) statements which do not meet the requirements of Rule 92 *bis*.[3351]

Trial Chamber refused to admit written statement of alibi witness who refused to testify after being contacted by prosecution in violation of protective order.[3352]

The Trial Chamber will not admit statements pursuant to Rule 92 *bis* that do not meet the relevance test of Rule 89(C).[3353]

**verification by the Trial Chamber**

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[3348] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Motion to Declare Part of the Testimony of Witness GTD Inadmissible* (30 November 2004)
[3349] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Exclusion of Testimony Outside the Scope of the Indictment* (27 September 2005) at para. 6
[3350] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 269
[3351] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecution Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Niyiramasuhuko* (1 October 2004) at para. 26; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses* (22 January 2003) at para. 20; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admission of Statement of Kabiligi Witness Under Rule 89(C)*(14 February 2007) at paras. 3-5
[3352] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion to Admit Evidence Pursuant to Rule 89 of the Rules of Procedure and Evidence* (10 February 2003)
[3353] *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Decision on the Defence Motion for Leave to Present Evidence in the Form of a Written Statement Pursuant to Rule 92 bis* (13 March 2003) at para. 16

Requests under Rule 89 (D) are part of the discretionary power of the Chamber. It is a power which the Chamber may exercise *suo motu*. The existence of that power does not shift the responsibility which Rule 85 has placed on a party to present its case as it should in the usual manner. Trial Chamber denied request to employ handwriting expert to identify diary in issue.[3354]

The Tribunal could, under this Rule, order an exhumation and forensic analysis to prove or disprove a contentious piece of evidence.[3355]

The Trial Chamber was within its discretion to allow the prosecution to call a handwriting expert after cross examination of defence witness raised question of authenticity of documents.[3356]

**Rule 90—testimony of witnesses**

**(A) Witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71.**
**(B) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."**
**(C) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty to tell the truth. A judgement, however, cannot be based on such testimony alone.**
**(D) A witness, other than an expert, who has not yet testified, shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.**
**(E) A witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.**
**(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:**
**(i) Make the interrogation and presentation effective for the ascertainment of the truth; and**
**(ii) Avoid needless consumption of time.**

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[3354] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Prosecution Motion for Verification of the Authenticity of Evidence Obtained Out of Court, Namely the Alleged Diary of Pauline Niyiramasuhuko* (1 October 2004) at para. 28
[3355] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis* (17 February 1998) at para. 12.
[3356] *Muvunyi v. Prosecutor*, No. ICTR-2000-55A-AR73(C), *Decision on Interlocutory Appeal* (29 May 2006)

**(G) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of the case.**
**(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.**
**(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.**

**oath**

Information from Chief Medical Officer need not be taken under oath but is more akin to a submission from the Registrar under Rule 33(B).[3357]

**oral testimony**

Rule 90(A)'s express preference for oral testimony requires that written statements of witnesses not be admitted in the manner done at the ICTY, which has enacted Rule 89(F) and repealed Rule 90(A).[3358] The same is true for a newspaper article sought to be admitted without oral testimony of an authenticating witness.[3359]

**order of witnesses**

The accused may determine the timing of his or her appearance as a witness and cannot be required to testify as the first defence witness.[3360]

Trial Chambers have discretion pursuant to Rule 90(F) of the Rules to determine when an accused may testify in his own defence, but this power must nevertheless be exercised with caution as it is, in principle, for both parties to structure their cases themselves, and to ensure that the rights of the accused are respected, in particular his or her right to a fair trial.[3361]

Accused could not be prohibited from having contact with his counsel during the period that he is testifying.[3362]

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[3357] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.16, *Decision on Appeal Concerning the Severance of Mathieu Ngirumpatse* (19 June 2009) at para. 20
[3358] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Certification of Appeal Concerning Admission of Written Statement of Witness XXO* (11 December 2003) at para. 7
[3359] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Admissibility of Newspaper Article and Subpoena to Journalist* (23 January 2006) at para. 5
[3360] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Compel Accused to Testify Prior to Other Defence Witnesses* (11 January 2005)
[3361] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 19
[3362] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Permit Contact between the Accused and his Counsel During Testimony* (26 April 2010)

Once the accused has commenced his testimony, he would not be allowed to meet with his counsel. The underlying rationale behind this practice is to prevent tutoring of the witness by counsel.[3363]

The Trial Chamber's decision to call the accused to testify before another witness was a reasonable measure taken to avoid unnecessary delays in the proceedings while accommodating his late request that the witness be allowed to testify by video-link from South Africa.[3364]

There is no right of the accused to testify last.[3365]

Defence investigators may be present at court sessions and will not be excluded as witnesses because they had heard other testimony.[3366]

**self-incrimination by witnesses**

The defence does not have standing to request the appointment of counsel for a prosecution witness.[3367]

Prosecution witness would not be compelled to answer questions that would disclose the times and places of statements made by witness to Rwandan authorities where the Trial Chamber determined that the defence had adequate opportunity to explore the credibility of the witness through other disclosures.[3368]

Trial Chamber declined to compel accused in another case who was awaiting judgement to testify, holding that Rule 90(E) was insufficient to protect him from having his testimony used against him in his pending case.[3369]

Detainee witness would be allowed to have counsel present in the courtroom during his testimony as a defence witness in another trial.[3370]

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[3363] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Request to Meet the Accused During his Examination-in-Chief* (3 October 2007) at para. 3
[3364] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 20
[3365] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Decision on Motion for Disqualification of Judges* (25 April 2006) at para. 14
[3366] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion to Permit Investigators to Attend Closed Sessions* (18 August 2005) at para. 12
[3367] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion to Preclude Portions of the Anticipated Testimony of Prosecution Witness DCH, for the Postponement of DCH's Testimony, and for the Appointment of Defence Counsel for DCH* (29 March 2004) at para. 10
[3368] *Prosecutor v Karemera et al*., No. ICTR-98-44-T, *Decision on Defence Motion to Obtain Documents Pertaining to Witness HH in Possession of Government of Rwanda* (27 November 2006)
[3369] *Prosecutor v Karemera et al*., No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Postpone or Compel the Testimony of Casimir Bizimungu* (7 April 2010) at para. 7; *Prosecutor v Karemera et al*., No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Postpone or Compel the Testimony of Augustin Ngirabatware* (3 May 2010) at para. 8

**manner of examination and time limits**

The way counsel structures a cross-examination is a matter of defence strategy which rests squarely within the discretion of the defence..[3371]

The concept of a fair trial includes equal opportunity to present one's case and the fundamental right that criminal proceedings should be adversarial in nature, with both prosecution and accused having the opportunity to have knowledge of and comment on the observations filed or evidence adduced by either party.[3372]

Defence teams other than the one calling a witness allowed to elicit evidence in its favour, even if this is not "cross-examination" in the narrow sense of the word. When eliciting such evidence, defence counsel should not ask leading questions to the witness as this will undermine the credibility of such testimony and avoid repetitive questions.[3373]

Defence counsel for a co-accused needs permission of the Trial Chamber to meet with a protected witness of another accused. If he or she meets the witness and determines not to classify the witness as a common witness, defence counsel may cross examine the witness through leading questions. However, eliciting favourable information by leading questions will have a bearing on the value of that evidence.[3374]

Trial Chambers have an inherent power to control the proceedings by imposing time limits on direct and cross examination. The governing principle is whether the amount of time allocated is objectively adequate to permit the party to fairly set forth its case.[3375]

Cross examination limited to 1.5 times the direct examination when involving the acts of a single accused and 2.5 times the direct examination when involving more than one accused.[3376]

**scope of cross-examination**

The defence can cross-examine a witness about pre-testimony meetings with the prosecutor provided that such cross-examination is limited to the number of preparatory meetings, the dates of the meetings and the duration of the meetings.[3377]

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[3370] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on DW-2's Urgent Request to Limit the Cross-Examination of DW-2 Before Trial Chamber II and to Permit DW-2 to be Accompanied by Counsel* (8 May 2007) at para. 4
[3371] *Bikindi v. The Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 44.
[3372] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 181
[3373] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Modalities for Examination of Defence Witnesses* (26 April 2005)
[3374] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Proprio Motu Decision Clarifying the Chamber's Oral Ruling of 12 November 2007* (30 November 2007) at paras. 4-5
[3375] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Scheduling Order* (21 August 2007) at para. 4
[3376] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Scheduling Order* (21 August 2007) at para. 14

Through careful cross examination, a party can explore the impact of preparation on the witness' testimony and use this to call into question the witness' credibility.[3378]

Allowing two counsel to cross-examine a single witness is not the usual practice and requires the express approval of the Chamber.[3379]

The Tribunal's rules on the examination and cross-examination of witnesses are patterned after the U.S. Rules of Evidence.[3380]

When weighing the accused's allegations going to the credibility of the prosecution witnesses, the Trial Chamber was entitled to consider the fact that the accused did not put such allegations to the witnesses for their reactions.[3381]

The defence may put a proposition to a witness during cross-examination of a witness without being thereby bound to that suggestion.[3382]

A party who fails to cross-examine a witness upon a particular statement tacitly accepts the truth of the witness' evidence on that matter.[3383]

The prosecution is not obligated to cross examine the accused on all aspects of its case.[3384]

Cross-examination of defence witnesses by the prosecution must be defined and limited by the evidence presented during the prosecution case. The Prosecution may adduce evidence during its cross-examination which corroborates or reinforces evidence presented during the presentation of its case, but may not, at this stage, venture into new areas.[3385]

The prosecution is limited in its cross-examination to matters raised in examination in chief or which were already substantially presented in its case-in-chief.

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[3377] *Prosecutor v Ndindiliyimana et al*, No. ICTR-200)-56-T, *Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing* (1 April 2005) at para. 37
[3378] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73.8, *Decision on Interlocutory Appeal Regarding Witness Proofing* (11 May 2007) at para. 13
[3379] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on the Defence Motion to Recall Witness KEL for Further Cross Examination* (28 October 2004) at para. 7
[3380] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 31; *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement* (2 September 1998) at para. 47
[3381] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 26
[3382] *Prosecutor v Mpambara*, No. ICTR-01-65-T, *Judgement* (12 September 2006) at para. 125, fn. 293
[3383] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 310
[3384] *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 191
[3385] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance of Three Accused* (27 March 2006) at para. 7

Testimony which broadens the facts imputed to the accused or the nature of his culpability are inadmissible.[3386]

Testimony elicited by prosecution on cross examination of former Prime Minister Jean Kambanda excluded where it broadened the evidence against the co-accused from that introduced during the prosecution's case-in-chief and was not inconsistent with the witness' prior statements.[3387]

Where the prosecution chooses not to introduce the statement of an accused in its case in chief, it is precluded from using the substance of the statements during his cross examination. It can use the statement during cross examination for purposes of credibility only.[3388]

Trial Chamber declined to issue a blanket order prohibiting cross examination by prosecution of defence witness on issue relating to the witness' own indictment. However, prosecution would not be allowed to ask questions on grounds that it would advance its case against the detainee. The "case for the cross-examining party" refers to the case in which the witness is giving testimony, not his own case.[3389]

It was error to fail to allow the defence to cross examine a prosecution witness on the testimony of another prosecution witness. However, the error did not affect its findings.[3390]

Evidence would not be stricken as "unresponsive" where cross examination asked the witness to elaborate.[3391]

**Rule 90 bis—transfer of detained witnesses**

**(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the Detention Unit of the Tribunal, conditional on his return within the period decided by the Tribunal.**
**(B) The transfer order shall be issued by a Judge or Trial Chamber only after prior verification that the following conditions have been met:**
**(i) The presence of the detained witness is not required for any criminal proceedings**

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[3386] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for a Subpoena* (11 September 2006) at para. 3
[3387] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Severance or Exclusion of Evidence Based on Prejudice Arising from Testimony of Jean Kambanda* (11 September 2006)
[3388] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Oral Motion to Cross Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997* (15 May 2006) at para. 61
[3389] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on DW-2's Urgent Request to Limit the Cross-Examination of DW-2 Before Trial Chamber II and to Permit DW-2 to be Accompanied by Counsel* (8 May 2007) at para. 5
[3390] *Nizeyimana v Prosecutor*, No. ICTR-00-55C-A, *Judgement* (29 September 2014) at para. 92
[3391] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Defence Motions to Exclude Prosecution Witness AWD Evidence on 28 January 1993 MRND Meeting* (22 November 2007) at para. 10

**in progress in the territory of the requested State during the period the witness is required by the Tribunal;**
**(ii) Transfer of the witness does not extend the period of his detention as foreseen by the requested State.**
**(C) The Registry shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained.**
**Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar.**
**(D) The Registry shall ensure the proper conduct of the transfer, including the supervision of the witness in the Detention Unit of the Tribunal; it shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the Detention Unit and, as promptly as possible, shall inform the relevant Judge or Chamber.**
**(E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.**
**(F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a Judge or a Chamber may extend the period, on the same conditions stated in the Sub-Rule (B).**

The party making an application for transfer of a detained witness to Arusha bears the burden of satisfying the Trial Chamber that the conditions set forth in the rule exist; that is (1) the witness is not required for any criminal proceedings in the requested State during the relevant period and (2) the transfer would not extend the witness' detention.[3392]

The Trial Chamber does not have the authority to issue a request for transfer of a detained witness until the required assurances from the government of the State where the witness is detained have been sought and obtained, even if those assurances had been given for the same witness for a previous period.[3393]

**Rule 91—false testimony under solemn declaration**

**(A) A Chamber, proprio motu or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.**
**(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:**
**(i) direct the Prosecutor to investigate the matter with a view to the preparation and**

[3392] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Order Rwanda to Transfer Witness DO* (3 May 2005)
[3393] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Motion by Jerome-Clement Bicamumpaka's for the Transfer of Detained Defence Witness LD-1 from Rwanda* (23 January 2008)

**submission of an indictment for false testimony; or**
**(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.**
**(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:**
**(i) in circumstances described in paragraph (B) (i), direct the Prosecutor to prosecute the matter; or**
**(ii) in circumstances described in paragraph (B) (ii), issue an order in lieu of an indictment and direct amicus curiae to prosecute the matter.**
**(D) The Rules of Procedure and Evidence in Parts Four to Eight shall apply mutatis mutandis to proceedings under this Rule.**
**(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45.**
**(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.**
**(G) The maximum penalty for false testimony under solemn declaration shall be a fine of USD10,000 or a term of imprisonment of five years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H).**
**(H) Paragraphs (B) to (G) apply mutatis mutandis to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 bis which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.**
**(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal.**
**Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless:**
**(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or**
**(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.**

**amicus curiae**

Where witness alleged that prosecution authorities had procured his false testimony, investigation should be conducted by amicus curiae and not Office of the Prosecutor.[3394]

[3394] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Confidential Motion to Investigate Witness BTH for False Testimony* (14 May 2008) at para. 6

Investigation by amicus curiae ordered where defence produced letter from prosecution witness alleging that he had lied during his testimony.[3395]

Investigation into false testimony by amicus curiae granted where two witnesses recanted their earlier testimony and alleged that they were instructed to deny that they knew certain prosecution witnesses.[3396]

Investigation into false testimony by amicus curiae granted where witness had sent a letter to Gacaca recanting some of his testimony in a prior case at the Tribunal.[3397]

The Trial Chamber directed that a prosecution witness who had recanted his testimony be prosecuted for false testimony by an amicus curiae, given that the prosecution had pressed for charges to be brought and therefore had a conflict of interest.[3398]

**assignment of counsel**

Witness who was subject of court-ordered investigation into false testimony was neither a suspect or an accused and not entitled to appointment of counsel.[3399]

**credibility or contradictions alone**

There is a clear distinction between the credibility of the witness as to some of his statements and the false testimony of a witness; the testimony of a witness may lack credibility without such testimony amounting to false testimony within the meaning of Rule 91.[3400]

A party is not required to request initiation of criminal proceedings against a witness to impugn the credibility of the witness.[3401]

Discrepancy between testimony of witness at present trial and other ICTR trial did not warrant investigation for perjury.[3402]

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[3395] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Ndindiliyimana's Motion Requesting a Remedy for Possible Witness Recantation* (4 August 2009)
[3396] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation into False Testimony and Kanyabashi's Motion for an Investigation into Contempt of Court Relative to Prosecution Witnesses QY and SJ* (19 March 2009)
[3397] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for the Recall of Witness GAP* (5 March 2009) at para. 27
[3398] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Remand Following Appeal Chamber Decision of 16 February 2010* (18 May 2010) at para. 6
[3399] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Confidential Motion to Investigate Witness BTH for False Testimony* (14 May 2008) at para. 3
[3400] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 32
[3401] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 55
[3402] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated* (23 September 2005)

Contradiction between witnesses forms part of the proceedings in many criminal cases. This does not suffice to demonstrate that the witness intended to mislead the Chamber and to cause harm.[3403]

Conflicting testimony does not suffice to demonstrate that a contradicted witness has intentionally given false testimony.[3404]

Inconsistent findings of Trial Chambers do not alone constitute sufficient grounds to believe that a witness has given false testimony.[3405]

Mere existence of discrepancies between the witness' testimony and his or her prior statements does not constitute strong grounds for believing that a witness may have given false and misleading testimony.[3406]

Contradictory evidence between prosecution witnesses, without more, is insufficient to demonstrate that one of those witnesses intended to mislead the Chamber and to cause harm. The appropriate time to resolve contradictions in the testimony is during deliberations at the end of the case.[3407]

Where additional evidence exists that goes beyond mere contradictions in testimony and indicates an attempt to knowingly and wilfully mislead and deceive the Chamber, it may be appropriate to appoint an amicus curiae to investigate the matter further.[3408]

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[3403] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence for the Chamber to Direct the Prosecutor to Investigate a Matter with a view to the Preparation and Submission of an Indictment for False Testimony* (11 July 2000) at paras. 6-7; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony* (29 December 2006) at para. 7

[3404] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, Notice of 15th Violation of Rule72(E), and Motion to Strike the Prosecution's Response* (19 November 2008) at para. 12 *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 4;

[3405] *Renzaho v Prosecutor*, No. ICTR-97-31-A, *Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal* (27 September 2010) at para. 31

[3406] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 32; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GKB, and GAP* (23 July 2008) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 4

[3407] *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness HH for False Testimony* (26 September 2007) at para. 6

[3408] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 4

Determination of contradictions is a matter left for the judgement at the end of the case.[3409]

**disclosure**

Trial Chamber abused its discretion in not making *amicus curiae* report available to the parties prior to the issuance of the final judgement.[3410]

Accused were not prejudiced by failure of the Trial Chamber to make *amicus curiae* report available prior to final judgement where the substance of the information contained in the report was known to the parties prior to issuance of the judgement.[3411]

Trial Chamber did not abuse its discretion in making *amicus curiae* report which it considered defective and incomplete available to the parties.[3412]

**elements**

There are four elements of false testimony, as described in Rule 91(B):(1) the witness must make a solemn declaration; (2) the false statement must be contrary to the solemn declaration; (3) the witness must believe at the time the statement was made that it was false; and (4) there must be a relevant relationship between the statement and a material matter within the case.[3413]

**inducing false testimony**

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[3409] *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony* (29 December 2006); *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion to Admit Exhibit DNZ-461 into Evidence and to Appoint an Amicus Curiae to Investigate Witness CNAL's False Testimony* (2 December 2010) at para. 43

[3410] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 300

[3411] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at paras. 303,305,308,318

[3412] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 298

[3413] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (3 October 2003) at para. 8; *Prosecutor v Akayesu,* No. ICTR-96-4-T, *Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R"* (9 March 1998).; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony* (29 December 2006) at para. 6; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GKB, and GAP* (23 July 2008) at para. 5; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court* (7 November 2008) at para. 20 ; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 5

The culpability of a person who induces the false testimony is even greater than the that of the person who gives the false testimony. Trial Chamber disapproves of failure to indict defence investigator who allegedly procured false testimony.[3414]

Investigation into false testimony necessarily includes inquiry into whether false testimony was procured or induced by others.[3415]

Investigation into false testimony ordered to include those who incited the witness to give false testimony.[3416]

Rule 91 does not allow inquiry into the conduct of witnesses not connected to the testimony of the witness being specifically investigated.[3417]

**in general**

False testimony under solemn declaration constitutes a direct challenge to the integrity of the trial process. Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences.[3418]

The giving of false testimony before the Court, as well as the interference with the testimony of other witnesses who may appear before the Court, are unacceptable practices, both for the impact that they have on the trial as well as the impact that they have on the Tribunal's mandate to seek justice and establish the truth.[3419]

**investigation**

The onus is on the party requesting the investigation to establish (1) the falsehood of the statements; (2) that the statements were made with harmful intent, or at least made by a witness who was fully aware that they were false; and (3) the possible bearing of the statements on the judge's decision on a material matter in the case.[3420]

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[3414] *Prosecutor v GAA*, No. ICTR-07-90-R77-I, *Judgement and Sentence* (4 December 2007) at para. 11
[3415] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Confidential Motion to Investigate Witness BTH for False Testimony* (14 May 2008) at para. 7
[3416] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court* (7 November 2008) at para. 24
[3417] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court* (7 November 2008) at para. 25
[3418] *Prosecutor v GAA*, No. ICTR-07-90-R77-I, *Judgement and Sentence* (4 December 2007) at para. 10
[3419] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court* (7 November 2008) at para. 21
[3420] *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony* (29 December 2006) at para. 6; *Prosecutor v Karemera et al*, No, ICTR-98-44-T, *Decision on Defence Motion for Investigation of Prosecution Witness HH for False Testimony* (26 September 2007) at para. 4; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GKB, and GAP* (23 July 2008) at para. 6

Factors to be considered in determining whether to appoint an amicus curiae are: (1) indicia as to the mens rea of the witness, including his or her intent to mislead or cause harm; (2) the relationship between the statement in question and a material matter in the case; and (3) the possible bearing of the statement on the Chamber's final decision.[3421]

The burden is on the party pleading a case of false testimony to prove the alleged falsehood of the statement and that the testimony was given knowingly and wilfully.[3422]

The Chamber must have strong grounds for believing that a witness knowingly and wilfully gave false testimony, before initiating the procedure which may lead to the issuance of an indictment against a witness for false testimony.[3423]

Appeals Chamber referred matter of testimony at Rule 115 hearing to prosecutor for investigation of false testimony.[3424]

Where witness acknowledged that he had given false testimony on material matters in previous testimony before the Tribunal, strong grounds existed justifying the ordering of an investigation into the alleged false testimony.[3425]

Trial Chamber ordered Registry to conduct independent investigation into allegations of false testimony of prosecution witness who allegedly recanted to a defence investigator and to report within two months.[3426]

Investigation into false testimony declined where witness disputed statement of defence counsel that he had acknowledged that his testimony was false.[3427]

There was insufficient evidence warranting further investigation into subornation of perjury by Ruhengeri prison officials or relatives of the accused.[3428]

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[3421] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 5

[3422] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 32

[3423] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Decision on the Defence Motion to Appoint an Amicus Curiae in Proceedings Against Investigator Tony Lucassen for False Testimony* (6 May 2004)

[3424] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Oral Decision (Rule 115 and Contempt for False Testimony* (19 May 2005)

[3425] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecutor's Confidential Motion to Investigate Witness BTH for False Testimony* (14 May 2008) at para.6; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GKB, and GAP* (23 July 2008) at para. 15; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court* (7 November 2008) at para. 23

[3426] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on the Motions Relating to the Scheduled Appearances of Witness BLP and the Defence Investigator* (4 July 2007)

[3427] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion Seeking the Appointment of Amicus Curiae to Investigate Possible False Testimony by Witnesses GFA, GKB, and GAP* (23 July 2008) at para. 28

Insufficient grounds to initiate investigation for false testimony where evidence consisted of contradictions with six defence witnesses, an alleged recantation to a defence investigator and an expert report indicating that documents submitted by witness to Chamber may have been falsified.[3429]

Rule 91(B) does not authorize recall of a witness for false testimony, but only enables the Trial Chamber to order further investigations.[3430]

**materiality**

Falsely denying a prior meeting with the prosecution does not concern a matter material to the case.[3431]

Testimony by defence witness that accused participated in meeting on 6-7 April 1994 by phone was not relevant to a material matter in the case.[3432]

**mens rea**

False testimony is a deliberate offence which requires wilful intent on the part of the perpetrator to mislead the Judge and thus to cause harm.[3433]

Submission of forged letters of an accused falsely claiming he authorized Interahamwe to erect roadblocks did not provide strong grounds for believing that witnesses who testified about the letter had any harmful intent or intended to subvert the trial.[3434]

"Strong grounds" for referral of false testimony to prosecutor did not exist where witness corrected false testimony on his own.[3435]

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[3428] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Remand Following Appeal Chamber Decision of 16 February 2010* (18 May 2010) at para. 11
[3429] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at paras. 10-14
[3430] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion to Recall Prosecution Witness OAB for Cross Examination* (19 September 2005) at para. 4
[3431] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (3 October 2003) at para. 11
[3432] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 7
[3433] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para.31, fn. 68
[3434] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions for Appointment of Amicus Curiae* (26 September 2007) at para. 9
[3435] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO* (3 October 2003) at para. 13

In determining whether strong grounds exist to order an investigation the Chamber must examine whether evidence exists of intent to commit the offence.[3436]

The onus lies on the party pleading a case of false testimony to prove that it was given knowingly and wilfully.[3437]

**standing**

An investigation for false testimony is only ancillary to proceedings and does not necessarily affect the rights of the accused.[3438]

**Rule 92—confessions**

**A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.**

**Rule 92 bis –proof of facts other than by oral evidence**

**(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.**
**(i) Factors in favour of admitting evidence in the form of a written statement include, but are not limited to, circumstances in which the evidence in question:**
**(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;**
**(b) relates to relevant historical, political or military background;**
**(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;**
**(d) concerns the impact of crimes upon victims;**
**(e) relates to issues of the character of the accused; or**
**(f) relates to factors to be considered in determining sentence.**
**(ii) Factors against admitting evidence in the form of a written statement include whether:**
**(a) there is an overriding public interest in the evidence in question being presented orally;**
**(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or**
**(c) there are any other factors which make it appropriate for the witness to**

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[3436] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony* (6 April 2010) at para. 4
[3437] *Prosecutor v Nahimana,* No. ICTR-96-11-I, *Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "AEN" in terms of Rule 91(B),* (27 February 2001); *Prosecutor v Akayesu,* No. ICTR-96-4-T, *Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R"* (9 March 1998).
[3438] *Simba v Prosecutor,* No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 33

**attend for cross-examination.**
**(B) A written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and**
**(i) the declaration is witnessed by:**
**(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or**
**(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and**
**(ii) the person witnessing the declaration verifies in writing:**
**(a) that the person making the statement is the person identified in the said statement;**
**(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;**
**(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and**
**(d) the date and place of the declaration.**
**The declaration shall be attached to the written statement presented to the Trial Chamber.**
**(C) A written statement not in the form prescribed by paragraph (B) may nevertheless be admissible if made by a person who has subsequently died, or by a person who can no longer with reasonable diligence be traced, or by a person who is by reason of bodily or mental condition unable to testify orally, if the Trial Chamber:**
**(i) is so satisfied on a balance of probabilities; and**
**(ii) finds from the circumstances in which the statement was made and recorded that there are satisfactory indicia of its reliability.**
**(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.**
**(E) Subject to any order of the Trial Chamber to the contrary, a party seeking to adduce a written statement or transcript shall give fourteen days notice to the opposing party, who may within seven days object. The Trial Chamber shall decide, after hearing the parties, whether to admit the statement or transcript in whole or in part and whether to require the witness to appear for cross-examination.**

**acts and conduct of the accused**

**adjudicated facts**

Since judicially noticed facts cannot go to the acts and conduct of the accused, statements rebutting the adjudicated facts do not go to the acts and conduct of the accused.[3439]

**alibi**

Rule 92 *bis* provides the sole avenue for the admission of written statements in lieu of oral testimony intended for the proof of facts. Admission of written statement of defence alibi witness denied because it goes directly to proof of the acts and conduct of the accused.[3440]

**charges in the indictment**

In determining whether the proposed evidence is of the acts and conduct of the accused, it is not relevant whether the conduct is specifically alleged in the indictment.[3441]

Rule 92 *bis* does not prevent admission of statements which refer to acts and conduct of the accused, only the acts and conduct of the accused charged in the indictment.[3442]

Rule 92*bis* excludes the acts and conduct of the accused as charged in the Indictment *which establish his responsibility* for the acts and conduct of others but does not exclude the acts and conduct of *others* for which the Accused is alleged to be responsible, for example, the acts and conduct of his co-perpetrators or subordinates.[3443]

**co-perpetrators or subordinates**

In cases alleging command responsibility and where the crimes charged involve widespread criminal conduct by the alleged subordinates of the accused, there is often but a short step from a finding that the acts constituting the crimes charged were committed by such subordinates to a finding that the accused knew or had reason to know that those crimes were about to be or had been committed by them. In such cases, it may well be that the alleged subordinates of the accused are so proximate to the accused that "the

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[3439] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara* (9 July 2008) at para. 15

[3440] *Prosecutor v Simba*, No. ICTR-01-76-T, *Decision on the Admission of a Written Statement* (25 January 2005)

[3441] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Statement of the Deceased Witness Faustin Nyagahima to be Accepted as Evidence* (30 May 2007) at para. 13

[3442] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Motion by Mathieu Ngirumpatse for the Admission of Statements Pursuant to Rule 92 bis of the Rules and for the Protection of Witnesses* (11 November 2009) at para. 23

[3443] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 10

evidence of their acts and conduct which the prosecution seeks to prove by a Rule 92*bis* statement becomes sufficiently pivotal to the prosecution case that it would not be fair to the accused to permit the evidence to be given in written form.[3444]

Rule 92*bis* excludes the acts and conduct of the accused as charged in the Indictment *which establish his responsibility* for the acts and conduct of others but does not exclude the acts and conduct of *others* for which the Accused is alleged to be responsible, for example, the acts and conduct of his co-perpetrators or subordinates.[3445]

**deceased witnesses**

Statements that go to the acts and conduct of the accused are not admissible, although the witnesses are deceased, and independent of any evaluation of the admissibility of hearsay evidence under the more general provisions of Rule 89(C).[3446]

Rule 92 *bis* (C) merely grants the Chamber the discretion to admit the written statement of a deceased witness absent the attached declaration required under Rule 92 *bis* (B). It does not provide a separate and self-contained method of producing evidence in written form in lieu of oral testimony. Statements of deceased witnesses dealing with acts and conduct of the accused are not admissible under Rule 92 *bis*.[3447]

Statements of deceased witnesses which refer to acts and conduct of the accused, or their proximate subordinates, may nevertheless be admitted if such information is redacted from the statement. However, where redaction is impossible to make the remainder of the statement of probative value, or the statements are not tendered to the Trial Chamber, the entire statement will be denied admission.[3448]

Expert report and treatise of deceased witness Alison Des Forges would not be admitted because they went to live and important issues in the case for which cross examination should be permitted. Transcripts of prior testimony of Ms. Des Forges, on

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[3444] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 12

[3445] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 10

[3446] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Decision on Prosecution Motion for Admission of Witness Statements* (20 May 2004)

[3447] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses* (22 January 2003) at para. 21

[3448] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Admission of Statements of Deceased Witnesses* (19 January 2005*); Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses* (22 January 2003) at para. 25

the other hand, could be admitted, provided they were redacted to eliminate references to acts and conduct of the accused.[3449]

Portions of statement of deceased defence witness admitted, including military background and character of the accused, but portions contradicting allegations of prosecution witnesses that the accused carried out certain acts go to "acts and conduct of the accused" and must be excluded.[3450]

Statement of deceased witness offered by the defence which refuted allegations that accused had been present when an inflammatory speech was made and that accused did not know the person with whom he was alleged to have distributed weapons went to the acts and conduct of the accused and would not be admitted.[3451]

Statement of deceased witness that he did not attend a specific meeting at which the accused was also alleged to have attended did not go to the acts and conduct of the accused, as it does not include testimony whether the meeting took place or whether the accused attended, and therefore could be admitted.[3452]

**definition**

The term "acts and conduct of the accused" is a plain expression which means deeds and behaviour of the accused himself and not the acts and conduct of his co-perpetrators or his subordinates.[3453]

Acts or conduct of the accused includes proof (a) that the accused physically perpetrated any of the crimes charged himself, or (b) that he planned, instigated or ordered the crimes or (c) that he otherwise aided and abetted those who actually did commit the crimes, or (d) that he was a superior to those who actually did commit the crimes, or (e) that he knew or had reason to know that those crimes were about to be or had been committed by his subordinates, or (f) that he failed to take reasonable steps to prevent such acts or to punish those who carried out those acts.[3454]

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[3449] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Prosecutor's Motion to Admit into Evidence the Report of Dr. Alison Des Forges* (5 October 2010)
[3450] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion for Admission of Statement of Witness LG-1/UO-3 Under Rule 92 bis* (11 December 2006)
[3451] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Statement of the Deceased Witness Faustin Nyagahima to be Accepted as Evidence* (30 May 2007) at para. 14
[3452] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro* (14 April 2008) at para. 5
[3453] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber* (26 September 2008) at para. 10
[3454] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis* (9 March 2004) at para. 13; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion to*

**disclosure violations**

Statements going to the acts and conduct of the accused may nevertheless be admitted where the failure to introduce the live testimony was the result of disclosure violations by the prosecution.[3455]

**disproving acts and conduct of accused**

Statements which tend to disprove acts and conduct of the accused are not admissible under Rule 92 *bis*.[3456]

**evidence admissible**

Testimony about theft of accused's passports did not go to the acts and conduct of the accused.[3457]

Statement of witness that he did not attend a specific meeting at which the accused was also alleged to have attended did not go to the acts and conduct of the accused.[3458]

**evidence inadmissible**

Transcripts and statements not admitted because they went to the acts and conduct of the accused.[3459]

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*Admit Witness Statement from Joseph Serugendo* (15 December 2006) at para. 19; *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Motion by Mathieu Ngirumpatse for the Admission of Statements Pursuant to Rule 92 bis of the Rules and for the Protection of Witnesses* (11 November 2009) at para. 11

[3455] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire 's Evidence in the Ndindiliyimana Proceedings* (4 November 2008) at para. 28

[3456] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Motion to Admit Transcript Extracts of General Romeo Dallaire 's Evidence in the Ndindiliyimana Proceedings* (4 November 2008) at para. 24; *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Nzabonimana's Motion for Admission of Written Witness Statements* (10 May 2011) at para. 34

[3457] *Prosecutor v Bizimungu et al*, No. ICR-99-50-T, *Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony* (1 May 2008) at para. 21

[3458] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara* (9 July 2008) at para. 10; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Aloys Simpunga and Gerard Kayumba and on Reconsideration of Decision of Admission of Written Statements and Witness Testimony* (20 October 2009); *v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statement of Gratien Kabiligi* (4 February 2010) at para. 7

[3459] *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Arsene Shalom Ntahobali's Notice of Intention to File on the Record Written Statements of Witnesses and the Transcripts of their Testimony before the ICTR in Lieu of Oral Testimony* (30 August 2005); *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Motion to Admit Transcripts from the Karemera et al Case* (10 May 2011)

Defence motion for admission of transcripts from other ICTR trial denied where testimony of witness that he was not in the country was offered to rebut presence of accused at a certain place with the witness.[3460]

Statement of proposed defence witness which showed that the accused assisted the refugees went to the acts and conduct of the accused and could not be admitted pursuant to Rule 92 *bis*.[3461]

Statement indicating that accused was not at his mother's house during an alleged meeting on the morning of 7 April 1994 went to the acts and conduct of the accused and could not be admitted under Rule 92 *bis*.[3462]

Statement indicating accused did not initiate meeting with protected witness went to the acts and conduct of the accused and could not be admitted under Rule 92 *bis*.[3463]

Rule 92 *bis* (B) cannot be used to admit evidence which was central to the prosecution's case when involving acts and conduct of the accused.[3464]

**impeachment**

The fact that the statement is to be used to impeach a witness does not take it out of the realm of acts and conduct of the accused if it contradicts evidence that the accused carried out certain acts.[3465]

Written statements seeking to contradict evidence that the accused carried out certain acts do not fall within Rule 92 *bis*.[3466]

Statements relevant to the credibility of prosecution witnesses did not go to the acts and conduct of the accused.[3467]

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[3460] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Motion for the Admission of Written Materials* (21 August 2007) at para. 3
[3461] *Prosecutor v Nyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Nsabimana's Motion to Admit the Written Statement of Witness JAMI in Lieu of Oral Testimony* (15 September 2006) at para. 34
[3462] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit the Testimony of Witnesses YD-1, MCM, 4, 10, and 11* (23 October 2009) at paras. 14,20
[3463] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13,A14,A15,A16,A17,A18, A20,A22,A23,A26,A28, and A30 as Evidence in Lieu of Oral Testimony* (29 April 2009) at para. 13
[3464] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Admit into Evidence Affidavits Pursuant to Rule 92 bis (B)* (1 July 2003).
[3465] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Statement of the Deceased Witness Faustin Nyagahima to be Accepted as Evidence* (30 May 2007) at para. 14
[3466] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Defence Motion to Admit Documents* (12 February 2008) at para. 4

In circumstances where a witness was not available to testify before the Trial Chamber and had recanted his testimony against the accused in another proceeding, the transcript of the testimony from the other proceeding would be admitted on the issue of the witness' credibility even if it included testimony on the acts and conduct of the accused.[3468]

Where documents go towards the proof of the acts of the conduct of the accused as charged in the indictment and whose primary purpose is to impeach the testimony of a witness, the documents must be either introduced during the witness's testimony or the witness could have been recalled based on the documents. Rule 92 *bis* is not a way around this obligation.[3469]

Statements of proposed defence witnesses contradicted the evidence which incriminated the accused on charges in the indictment and therefore went to the acts and conduct of the accused and were inadmissible.[3470]

**implied references**

It is not necessary that the statement refer to the accused by name to constitute acts and conduct of the accused, where the statement implicitly applies to the accused.[3471]

**joint criminal enterprise**

Where an accused is charged with being a member of a joint criminal enterprise, statements going to the acts or conduct of the accused upon which the prosecution relies to establish that he participated in that joint criminal enterprise, or that he shared the intent of the perpetrator, are not admissible.[3472]

Where the prosecution case is that an accused participated in a joint criminal enterprise, and is therefore liable for the acts of others in that joint criminal enterprise, Rule 92 *bis* also excludes any written statement or transcript which goes to proof of any

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[3467] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13,A14,A15,A16,A17,A18, A20,A22,A23,A26,A28, and A30 as Evidence in Lieu of Oral Testimony* (29 April 2009) at para. 14

[3468] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber* (26 September 2008) at para. 28

[3469] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 55

[3470] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Declare Written Statements Admissible…*(22 September 2011) at paras. 36-37,41,43,45; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Admission of Written Statements* (14 May 2012) at paras. 26, 30

[3471] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion to Admit Witness Statement from Joseph Serugendo* (15 December 2006) at para. 9

[3472] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Motion by Mathieu Ngirumpatse for the Admission of Statements Pursuant to Rule 92 bis of the Rules and for the Protection of Witnesses* (11 November 2009) at para. 11

act or conduct of the accused upon which the prosecution relies to establish that he had participated in that joint criminal enterprise, or that he shared with the person who actually did commit the crimes charged the requisite intent for those crimes.[3473]

**omission**

The conduct of the accused may also include an omission to act.[3474]

**position of the accused**

Statement describing the position of the accused and the rules of discipline under which he operated did not go to the acts and conduct of the accused. However, the statement would not be admitted because it went to a live and important issue in the case and there were insufficient reasons as to why the witness could not appear to give live testimony.[3475]

**purpose**

The purpose of the restriction against acts and conduct of the accused is to protect the right of the accused to examine or have examined the witnesses against him.[3476]

**sentencing**

Statements of the good character of the accused were admitted at defence request at sentencing hearing without objection by the prosecution.[3477]

**certification**

Statement of defence witness for whom motion to vary witness list was denied was not admissible under Rule 92 *bis* where formalities for witnessing signature were not observed.[3478]

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[3473] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 13

[3474] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Statement of the Deceased Witness Faustin Nyagahima to be Accepted as Evidence* (30 May 2007) at para. 10

[3475] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Prosecutor's Motion to Admit into Evidence the Statement of General Marcel Gatsinzi* (6 October 2010) at paras. 9,11

[3476] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber* (26 September 2008) at para. 10

[3477] *Prosecutor v Serugendo*, No. ICTR-2005-85-I, *Decision on Defence Motion for the Admission of Written Witness Statements Under Rule 92 bis* (1 June 2006)

[3478] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Bagosora Motion to Vary Its Witness List and Tender a Witness Statement Under Rule 92 bis* (12 December 2006) at para. 5

Statements offered under Rule 92 *bis* could be conditionally admitted pending formal certification.[3479]

Statement taken by defence counsel in presence of the prosecution could be admitted without the required certification where the prosecution did not object.[3480]

**cross examination**

Prior statements made to prosecution investigators by prospective witnesses for the purposes of legal proceedings raise serious issues of reliability that are most effectively tested through the process of cross-examination.[3481]

The proximity to the accused of the acts and conduct which are described in the written statement sought to be admitted is also relevant to the exercise of the Trial Chamber's discretion in deciding whether to require the witness to appear for cross-examination.[3482]

Cross-examination shall be granted if the statement touches upon a critical element of the prosecution's case or goes to a live and important issue between the parties, as opposed to peripheral or marginally relevant issue.[3483]

Cross examination denied where witness had been cross examined by the prosecution in previous trial in which transcript was offered and purpose of rule was to streamline the trial.[3484]

Testimony concerning theft of accused's passports went to live and important issue between the parties as passports contained entries related to times of acts alleged to

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[3479] *Prosecutor v Karemera & Ngirumpatse*, No. ICTR-98-44-T, *Decision on Motion by Mathieu Ngirumpatse for the Admission of Statements Pursuant to Rule 92 bis of the Rules and for the Protection of Witnesses* (11 November 2009) at para. 13

[3480] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara* (9 July 2008) at para. 8

[3481] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion to Remove from her Witness List Five Deceased Witnesses and to Admit Into Evidence the Witness Statements of Four of Said Witnesses* (22 January 2003) at para. 23

[3482] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 15

[3483] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 16; *Prosecutor v Bizimungu et al*, No. ICR-99-50-T, *Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony* (1 May 2008) at para. 19; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara* (9 July 2008) at para. 4

[3484] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Testimony of Witness WFP-1*(10 November 2008) at para. 7

have been committed by the accused in Rwanda as well as his alibi. Therefore, witness would be required to attend for cross examination.[3485]

Although not going to the acts and conduct of the accused, statements of victims of rapes committed by alleged subordinates of the accused were so pivotal to the prosecution's case that it would be unfair to the accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses.[3486]

Although other witnesses challenged the credibility of Prosecution Witness GBU, this did not reduce the need for cross examination of Rule 92 *bis* witness, since it is possible that the Rule 92 *bis* witness, if believed, could tip the balance in favor of the defence claim that Witness GBU is not credible.[3487]

**cumulative**

Fact that statement was cumulative to other evidence which went to the lack of credibility of a prosecution witness was a factor in favor of its admission under Rule 92 *bis*.[3488]

The cumulative nature of the Rule 92 *bis* statement is measured by whether the statement is cumulative to similar facts adduced in other evidence, and not whether the similar facts also are of similar weight. Trial Chamber erred in holding that statement was not cumulative because other witnesses were not of the same rank as the declarant.[3489]

**defence witnesses**

Statements and testimony not going to the acts and conduct of the accused admitted under Rule 92 *bis*, except those for which questions as to relevance and reliability existed.[3490]

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[3485] *Prosecutor v Bizimungu et al*, No. ICR-99-50-T, *Decision on Casimir Bizimungu's Motion to Vary Witness List; and to Admit Evidence of Witness in Written Form in Lieu of Oral Testimony* (1 May 2008) at para. 23

[3486] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 20

[3487] *Prosecutor v Karemera*, No.ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Subpoena to Rule 92 bis Witnesses or for Reconsideration* (26 April 2010) at para. 5

[3488] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for the Admission of Written Statements of Witnesses A1, A13,A14,A15,A16,A17,A18, A20,A22,A23,A26,A28, and A30 as Evidence in Lieu of Oral Testimony* (29 April 2009) at para. 18

[3489] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-AR73, 2, *Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92 bis* (8 March 2011) at para. 14

[3490] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions for Admission of Written Statements and Witness Testimony* (15 July 2009)

**deceased witnesses**

OTP investigator would not be allowed to give oral testimony about statement of deceased witnesses concerning the acts and conduct of the accused as such testimony, in the absence of an ability to cross examine the declarant, would be unreliable.[3491]

The Trial Chamber must be satisfied that the statement of the deceased witness possesses sufficient indicia of reliability. The mere fact that it was sworn before a notary is insufficient.[3492]

Statement taken by defence counsel and witnessed by declarant's son, a defence investigator, and UN Security officer possessed sufficient indicia of reliability.[3493]

Testimony of a close relative was sufficient to establish on the balance of probabilities that the declarant was deceased.[3494]

Where Chamber had ordered Rule 92 *bis* witness to appear for cross examination, and witness subsequently died, there was no legal basis to admit his statement.[3495]

**discretion**

Even where a statement meets the requirements of Rule 92 *bis*, the Trial Chamber retains discretion not to admit it.[3496]

Where statement inferred that prosecution witnesses had not told the truth in their testimony, an overriding public interest required that such allegations be heard orally. Therefore, the motion to admit the written statement of the witness was denied.[3497]

A statement may be prejudicial even if it does not go to the acts and conduct of the accused. Trial Chamber did not abuse its discretion in finding that statement as to identity of accused's subordinates was prejudicial and declining to admit it.[3498]

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[3491] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Prosecution Motion to Admit Hearsay Evidence Pursuant to Rule 89(C), or in the Alternative in Accordance With Rule 92 bis (C) of the Rules of Procedure and Evidence* (22 January 2007) at para. 9

[3492] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion for Statement of the Deceased Witness Faustin Nyagahima to be Accepted as Evidence* (30 May 2007) at para. 15

[3493] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro* (14 April 2008) at para. 8

[3494] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statement of Bonaventure Ubalijoro* (14 April 2008) at para. 6

[3495] *Prosecutor v Karemera et al*., No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for the Admission of the Statement of Theogene Bamporeye* (17 May 2010)

[3496] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3*(22 November 2007) at para. 7

[3497] *Prosecutor v Karemera et al*., No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Reconsideration of the Chamber's Decision on Admission of Written Statements* (7 April 2010) at para. 9

An overriding public interest in hearing the testimony *viva voce* is a legitimate reason for exercising discretion not to admit a statement.[3499]

**documents**

Rental receipts did not qualify as a written statement and be admitted under this rule.[3500]

**experts**

Report of sexual assault expert admitted into evidence under Rule 92 bis, but witness required to submit to cross examination. Prosecution ordered to clarify if she is expert or fact witness.[3501]

**redacted statements**

Statements of deceased witnesses redacted to delete references to acts and conduct of the accused contained little of probative value to the case and would not be admitted under Rule 92 *bis* (C).[3502]

A statement which refers to the act and conduct of the accused may nevertheless be admitted pursuant to Rule 92 *bis* by redacting those portions of the statement which go to the acts and conduct of the accused.[3503]

Transcripts of testimony of witness from another trial would be admitted in their entirety, even where portions went to the acts and conduct of the accused, where redaction was too time consuming. The Chamber would not consider those portions relating to the acts and conduct of the accused in its deliberations.[3504]

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[3498] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-AR73, 2, *Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92 bis* (8 March 2011) at para. 18

[3499] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-AR73, 2, *Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92 bis* (8 March 2011) at para. 24

[3500] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Admit into Evidence Rental Receipts of Witness RHU23 Pursuant to Rule 92 Bis (A)* (1 July 2003).

[3501] *Prosecutor v Nizeyimana*, No. ICTR -2000-55C-PT, *Decision on Prosecutor's Motion to Admit into Evidence the Report of Binaifer Nowrojee* (1 November 2010) at para. 13

[3502] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on the Prosecution Motion to Admit Hearsay Evidence Pursuant to Rule 89(C), or in the Alternative in Accordance With Rule 92 bis (C) of the Rules of Procedure and Evidence* (22 January 2007) at para. 12

[3503] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY* (28 September 2007) at para.23(ii)

[3504] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on Defence for Bizimungu's Motion for the Admission into Evidence of Prosecution Witness GAP's Transcripts and Exhibits in the Karemera et al Case* (13 October 2010) at para. 7

**relevance**

Statements tendered under Rule 92 *bis*, although not touching upon the direct conduct of the accused, needs to bear some evidentiary value related to the issues at stake to be admitted.[3505]

Trial Chamber declined to admit transcript of witness' testimony from other ICTR trial where the testimony was "unnecessarily cumulative".[3506]

Trial Chamber admitted affidavit of former OTP investigator Hourigan concerning investigation of assassination of President Habyarimana since it was of some relevance, cumulative to testimony already heard, and did not go to the acts and conduct of the accused.[3507]

Testimony from prior proceeding in which witness testified to receiving transportation expenses from the prosecution would be admitted in trial of defence investigator accused of bribing witness by providing transportation expenses.[3508]

Judicially noticed facts are categorically relevant because they must relate to a matter in issue in the current proceedings. Statements which call into question the credibility of the witness who testified to those facts were relevant and could be admitted pursuant to Rule 92 *bis*.[3509]

**reliability**

Statement of deceased witness taken by defence team was sufficiently reliable to meet the requirements of Rule 92 *bis*, although it would have been preferable for an independent person to have witnessed the statement.[3510]

Statements of witnesses admitted under Rule 92 *bis* even though witness had been found not credible by other Trial Chambers when testifying to same matters.[3511]

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[3505] *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Decision on the Defence Motion for Leave to Present Evidence in the Form of a Written Statement Pursuant to Rule 92 bis* (13 March 2003) at para. 14
[3506] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for the Admission of Transcripts Under Rule 92 bis* (21 May 2004)
[3507] *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.
[3508] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for the Admission of Transcripts Pursuant to Rule 92 bis* (23 April 2009)
[3509] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara* (9 July 2008) at para.13
[3510] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Defence Motion for Admission of Statement of Witness LG-1/UO-3 Under Rule 92 bis* (11 December 2006) at para. 6
[3511] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Reconsideration of Admission of Written Statements in lieu of Oral Testimony and Admission of the Testimony of Witness GAY* (28 September 2007) at para. 23(viii)

Transcript of interview of accused in a related case would not be admitted where the interview took place at a time when the accused was seeking to avoid indictment and transfer to the ICTR, making them of little probative value.[3512]

**requirements**

Rule 92 *bis* analysis involves:(1) whether the statement or transcript sought to be admitted satisfies Rule 89(C), in that it is relevant and has probative value; (2) whether it goes to proof of a matter other than the acts and conduct of the accused as charged in the Indictment; (3) whether the formal requirements of Rule 92bis(B) must be met: (4) whether to admit the statement in the exercise of the Trial Chamber's discretion. The Chamber may decide to admit a statement in whole or in part.[3513]

Once the Chamber is satisfied that the statement does not go to the acts and conduct of the accused, and that the formalities of Rule 92 *bis* (B) have been met, the Chamber exercises its discretion whether to admit the statement.[3514]

After deciding that a written statement or transcript of previous trial testimony is admissible in written form, Sub-Rule 92*bis* (E) bestows a further discretionary power upon the Chamber to admit the witness' evidence in whole or in part, and/or to require the witness to appear for cross-examination. The exercise of the Chamber's discretion under Rule 92*bis*, must be governed by the right of the Accused to a fair trial, as provided for in Articles 19 and 20 of the Statute.[3515]

Relevant factors in the exercise of discretion to admit a statement under Rule 92 *bis* are the proximity to the accused of the person whose acts are described in the statement and the cumulative nature of the evidence. Where the acts are of those persons for whom the accused could be held responsible as superiors, any admission of the statements should be with the right of cross-examination.[3516]

The exercise of the Chamber's discretion must be governed by the right of the accused to a fair trial.[3517]

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[3512] *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Prosecutor's Motion to Admit into Evidence the Tape Transcript of Lt. Col. Tharcisse Muvunyi* (6 October 2010) at para. 8
[3513] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis* (9 March 2004) at para. 16
[3514] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decisions on Four Prosper Mugiraneza Motions Concerning Witness List* (4 November 2008) at para. 15
[3515] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 bis of the Rules and Order for Reduction of Prosecution Witness List* (11 December 2006) at para. 8
[3516] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor's Motion for the Admission of Written Witness Statements Under Rule 92 bis* (9 March 2004)
[3517] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decisions on Four Prosper Mugiraneza Motions Concerning Witness List* (4 November 2008) at para. 16

To be admitted under Rule 92 *bis*, the written statement must also comply with the relevance and probative value requirements of Rule 89(C).[3518]

**transcripts**

Closing arguments from another ICTR trial cannot be admitted pursuant to Rule 92 *bis*. However, since they are part of the record of proceedings at the Tribunal, the parties are free to refer to them in their closing submissions.[3519]

**unavailability**

A party is not required to provide information as to the availability of a witness whose statement is offered pursuant to Rule 92 *bis*. Trial Chamber erred in considering the lack of showing of unavailability when denying admission of the statement.[3520]

**weight**

Where the prosecution was present when the statement was taken from the defence witness and where it did not request that the witness appear for cross examination, the statement would be given the same weight as live testimony.[3521]

**will-say statements**

Defence motion for admission of will-say statements under Rule 92 *bis* denied where they were not a statement of the witness, but a summary of what someone else expected the witness to say.[3522]

**witness list**

Statements of persons who were not listed as witnesses in the prosecutor's witness list cannot be admitted pursuant to Rule 92 *bis*, since it is a prerequisite to admission that the statement be of a "witness."[3523]

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[3518] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Motions to Admit Witness Statements of Witnesses Joshua Abdul Ruzibiza, RW2 and RW3*(22 November 2007) at para. 3; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions for the Admission of Testimony Given by Prosecution Witness GFA Before the Karemera et al Chamber* (26 September 2008) at para. 11; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decisions on Four Prosper Mugiraneza Motions Concerning Witness List* (4 November 2008) at para. 16

[3519] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Defence Motion to Admit Documents* (12 February 2008) at para. 5

[3520]*Prosecutor v Nizeyimana*, No. ICTR-2000-55C-AR73, 2, *Decision on Prosecutor's Interlocutory Appeal of Decision not to Admit Marcel Gatsinzi's Statement into Evidence Pursuant to Rule 92 bis* (8 March 2011) at para. 29

[3521] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Admit Statements of Augustin Karara* (9 July 2008) at para.18

[3522] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion to Declare Written Statements Admissible and for Leave for Certification of these Written Statements by a Presiding Officer* (11 April 2011) at para. 20

To tender a statement pursuant to Rule 92 *bis*, the person who gave the statement must have been listed as a witness in the first place.[3524]

**Rule 93—evidence of consistent pattern of conduct**

**(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.**
**(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the Defence pursuant to Rule 66.**

Admission of evidence under Rule 93 is subject to the discretion given to the Trial Chamber under Rule 89(C) concerning the balance between the probative value and prejudicial effect of the evidence. Where the proposed testimony simply showed that the accused committed crimes on previous occasions, it was not directly relevant to the crimes charged in the indictment and was properly excluded.[3525]

Evidence of a prior criminal act of the accused is not admissible for the purpose of demonstrating a general propensity or disposition to commit the crimes charged.[3526]

Evidence regarding the character of an accused is inadmissible to show that an accused is likely to behave in a particular manner.[3527]

Even if an accused is charged with the same crime, the evidence of the prior crime is not admissible to show that the accused is capable of committing the offence, or that on some other occasion he had the intent to commit the offence.[3528]

Evidence of similar conduct may be admissible where it is probative of some peculiar feature of the case or where it is highly distinctive or unique such that it amounts to a signature or identifiable pattern.[3529]

Evidence of a pattern is also admissible in prosecutions for contempt of court.[3530]

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[3523] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice Pursuant to Rule 92 bis (B)* (17 November 2004)
[3524] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion to Present Additional Witnesses and to File Documentary Evidence Prior to the Close of its Case* (30 November 2007) at para. 12
[3525] *Prosecutor v Bagosora et al*, No. ICTR-98-41-AR93, *Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence* (19 December 2003) at para. 14
[3526] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct* (20 February 2009) at para. 4
[3527] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct* (20 February 2009) at para. 4
[3528] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct* (20 February 2009) at para. 4
[3529] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct* (20 February 2009) at para. 4

Evidence of prior violation of protective measures in another case is not so unique as to constitute a consistent pattern of conduct.[3531]

Even where a pattern of evidence is relevant and probative, it may not be admitted where the probative value is outweighed by the prejudicial effect.[3532]

**Rule 94—judicial notice**

**(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.**
**(B) At the request of a party or proprio motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.**

**acts and conduct of the accused**

The practice of judicial notice must not be allowed to circumvent the presumption of innocence and the defendant's right to a fair trial, including his right to confront his accusers.[3533]

It would be plainly improper for facts being judicially noticed to be the basis for proving the accused's criminal responsibility in the sense of being sufficient to prove that responsibility.[3534]

Judicial notice should not be taken of adjudicated facts related to the acts, conduct, or mental state of the accused.[3535]

Judicial notice should not be taken of facts relating to the acts, conducts and mental state of the accused. This exclusion does not apply to acts and conduct of other persons for which the accused is alleged to be responsible. Such persons may include, for instance, alleged subordinates whose criminal conduct the accused is charged with failing

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[3530] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Further Motion for the Prosecutor to Remove Witness BLP from his Witness List* (2 January 2009) at para. 10
[3531] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct* (20 February 2009) at para. 12
[3532] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Prosecutor's Motion to Admit Evidence of a Consistent Pattern of Conduct* (20 February 2009) at para. 5
[3533] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 47
[3534] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 47
[3535] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 50; *Prosecutor v Hategekimana*, No. 00-55/B-T, *Decision on the Prosecution Motion for Judicial Notice* (9 April 2009) at para. 9

to prevent or punish, persons said to have participated with the accused in a joint criminal enterprise, and persons the accused is alleged to have aided and abetted.[3536]

Facts going indirectly to the acts and conduct of the accused may be judicially noticed in the exercise of the Trial Chamber's discretion. This includes facts related to the existence of a joint criminal enterprise and the conduct of its members other than the accused, as well as facts related to the conduct of physical perpetrators of a crime for whom the accused is charged with responsibility.[3537]

While judicial notice can be taken of acts and conducts of persons for which an accused is alleged to be responsible, judicial notice denied where the facts were so proximate and central to the criminal responsibility of the that it would compromise the rights of the accused if judicial notice was taken of these facts.[3538]

A Trial Chamber should determine whether the facts to be judicially notice go to the acts, conduct, or mental state of the accused, and if not, whether taking judicial notice would advance the objective of expediency without compromising the rights of the accused.[3539]

Taking of judicial notice of facts of common knowledge, including the internal character of the armed conflict, did not shift the burden of proof to the defence, but was a decision on the type of proof that the prosecutor was entitled to offer. None of the facts judicially noticed concerned acts of the accused.[3540]

The Chamber declined to judicially notice facts which would have a bearing upon the guilt or innocence of the accused, or which are central to the prosecution case.[3541]

**adjudicated facts**

**agreed facts**

Judicial notice of facts from proceedings where the accused entered a plea of guilt or cases in which the accused voluntarily admitted facts is not appropriate.[3542]

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[3536] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 23

[3537] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 52

[3538] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 40

[3539] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 53

[3540] *Semanza v Prosecutor,* No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 192

[3541] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 21; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 61; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 14

**appeal**

A fact will not be judicially noticed where the original judgement is being appealed and general issues concerning the fairness of the trial have been raised. This has the potential to impact all factual findings including the facts sought for judicial notice.[3543]

Adjudicated facts in cases under appeal must not be judicially noticed as they have not been finally adjudicated, even if the particular facts are not the subject of the appeal.[3544]

Factual findings of the Trial Chamber which were reversed on appeal due to lack of notice would not be judicially noticed.[3545]

Judicial notice may be taken of a fact which the Appeals Chamber has declined to consider on appeal.[3546]

**concreteness**

The only facts that the Chamber may decide to take judicial notice of are those that constitute part of the factual findings. The Chamber may not take judicial notice of facts contained in the "introductory" part of a judgment since such facts would not have been adjudicated upon in the sense discussed above.[3547] The contents of the "historical background" portion of a judgment cannot be said to contain "facts'' for the purposes of Rule 94(B).[3548]

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[3542] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Anatole Nsengiyumva's Motion for Judicial Notice* (29 October 2010) at para. 11; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules* (16 April 2002) at para. 14.

[3543] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at paras. 72-73

[3544] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 24; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Bicamumpaka's Motion for Judicial Notice* (11 February 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion for Judicial Notice of Adjudicated Facts: Bagosora Judgement* (20 May 2009) at para. 4

[3545] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motions to Vacate Judicial Notice of Some Adjudicated Facts* (6 September 2007)

[3546] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Vacate Adjudicated Fact No. 13* (15 July 2008) at para. 11

[3547] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 14; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B)* (10 December 2004); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 14

[3548] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 15; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 5

Where the prosecutor's request did not correspond exactly to the facts adjudicated in the previous cases, the Trial Chamber rejected its request to judicially notice such facts.[3549]

A motion properly brought under Rule 94(B) should specify exactly which of those facts the Chamber is asked to judicially notice and how each of these relate to the matter at issue in the current proceedings. Mere reproduction of whole paragraphs of a previous judgment is insufficient to trigger the exercise of the Chamber's discretion under Rule 94(B).[3550]

A vague and generalised request to take judicial notice of the content of an entire batch of documents is insufficient to invoke Rule 94(B). A request must specifically point out the paragraphs or parts of each document of which it wishes judicial notice to be taken and refer to particular facts.[3551]

**context**

Facts taken out of context from previous judgements may be rejected for judicial notice.[3552] When ruling on judicial notice, the Chamber must examine the purported fact in the context of the original judgement [3553]

**credibility**

Issues of witness credibility in an original judgement *may* mitigate against judicial notice of an adjudicated fact, depending upon the fact in question and the totality of the circumstances surrounding that finding.[3554]

The Chamber will not exclude the admission of an adjudicated fact solely because the original Chamber made its finding based on the evidence of only one witness.[3555]

**definition**

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[3549] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative a la Requete de la Procureur aux fins de Constat Judicaire* (15 July 2005) at para. 34,38; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 15

[3550] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 19

[3551] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 38

[3552] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 55

[3553] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 23; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Vacate Adjudicated Fact No. 13* (15 July 2008) at para. 7

[3554] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 69

[3555] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 29

Adjudicated facts have been defined in the jurisprudence as facts which have been finally determined in a proceeding before the Tribunal and upon which it has deliberated, and thereupon made a finding in proceedings that are final, in that no appeal has been instituted therefrom or if instituted, the facts have been upheld.[3556]

**discretion**

Once the Chamber is satisfied that the facts sought for admission are truly adjudicated facts and do not relate to the acts, conduct and mental state of the Accused, it is called upon to invoke an exercise of its discretion for the purpose of expediting the proceedings, only in circumstances where admitting such facts will not compromise the rights of the Accused, including his or her right to a fair and expeditious trial, to hear and confront the witnesses against him or her.[3557]

In the exercise of the Trial Chamber's discretion, acts which are core issues should not be judicially noticed. Where a certain fact concerns a core issue in the case, the taking of judicial notice of that fact may place such a significant burden on the accused to produce rebuttal evidence that it would jeopardise the Accused's right to fair trial.[3558]

Where bulldozing of church went to a core issue in the case, Trial Chamber would decline to take judicial notice of adjudicated fact.[3559]

**legal conclusions**

The Trial Chamber will not take judicial notice of legal conclusions.[3560]

Legal conclusions as to the responsibility of the accused cannot be the subject of judicial notice.[3561]

Judicial notice of conviction of person in related case declined based on a legal conclusion.[3562]

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[3556] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Admission of Exhibits* (5 April 2006) at para. 6

[3557] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 23

[3558] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 23

[3559] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on the Prosecution Motion for Judicial Notice* (14 May 2009) at para. 24

[3560] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 16; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 64; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Motion for Judicial Notice* (6 December 2005) at para. 13

[3561] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Anatole Nsengiyumva's Motion for Judicial Notice* (29 October 2010) at para. 12

Whether rapes and sexual assaults were committed *during* a widespread attack upon the Tutsi civilian population may be considered as a characterisation of an essentially legal nature and would not be judicially noticed under Rule 94(B).[3563]

**relevance**

Rule 94 is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.[3564]

The fact in question must relate to a matter at issue in the current proceedings.[3565]

Judicially noted facts must be relevant and of probative value[3566]

Events prior to 1959, which is the earliest date mentioned in the indictments, would not be judicially noticed.[3567] Other "historical facts" were not facts of common knowledge pursuant to Rule 94 (A) of the Rules, and could only be judicially noticed pursuant to Rule 94 (B) of the Rules, if they were indeed adjudicated facts and related to the present proceedings. The prosecution failed to demonstrate their relevancy.[3568]

**requirements**

There are two requirements of judicial notice of adjudicated facts. (1) the facts proposed for notice under Rule 94(B) must have been adjudicated in other proceedings before the Tribunal; facts contained in judgments based on guilty pleas, or admissions voluntarily made by the Parties cannot be the subject matter of judicial notice under the above Rule; and (2) the facts must be relevant-and not just remotely connected to the

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[3562] *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on the Prosecution Motion for Judicial Notice* (14 May 2009) at para. 25
[3563] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 42
[3564] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 189
[3565] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 20
[3566] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 23, fn. 32; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules* (16 April 2002) at para. 8; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Motion for Judicial Notice* (22 September 2006) at para. 14
[3567] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Judicial Notice and the Admission of Documents* (15 May 2002) at para. 90
[3568] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Judicial Notice and the Admission of Documents* (15 May 2002) at para. 92

current proceedings, so that judicial notice of such facts must advance judicial economy.[3569]

There is no requirement that adjudicated facts be beyond reasonable dispute.[3570]

The following requirements exist for taking judicial notice of adjudicated facts: (1) A fact sought to be judicially noticed must be distinct, concrete and identifiable; (2) a fact in relation to which judicial notice is sought must be in the same or a substantially similar form to how it was expressed by the original Chamber. Facts altered in a substantial way by the moving party cannot be considered to have been truly adjudicated; (3) facts proposed for judicial notice must constitute factual findings and must not include legal characterisations; and (4) a fact cannot be considered as adjudicated in circumstances where those facts *are* or *might be* subject to pending appeal.[3571]

Rule 94 does not allow judicial notice to be taken of adjudicated facts in courts other than the ICTR.[3572]

**facts of common knowledge**

Facts of common knowledge are facts of such notoriety, so well-known and acknowledged that no reasonable individual with relevant concern can possibly dispute them.[3573]

The determination of whether a fact qualifies as one of common knowledge does not turn on evidence introduced in a particular case.[3574]

Matters of common knowledge include facts which are not subject to dispute among reasonable persons, including common or universally known facts such as historical facts, generally known geographical facts and the laws of nature, or facts that are generally known within the area of the Tribunal's territorial jurisdiction. In addition,

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[3569] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 11; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 14

[3570] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 40

[3571] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 23

[3572] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome Clement Bicamumpaka's Motion for Judicial Notice of a Rwandan Judgement of 8 December 2000 and in the Alternative for an Order to Disclose Exculpatory Evidence* (15 December 2004) at para. 19

[3573] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 194; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 23; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 5; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Admission of Exhibits* (5 April 2006) at para. 6

[3574] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decisions on Motions for Reconsideration* (1 December 2006) at para. 8

"matters of common knowledge" captures those facts which are readily verifiable by reference to a reliable and authoritative source.[3575]

Judicial notice of facts of common knowledge should not be refused on the ground that they constitute legal conclusions or elements of the charged offenses.[3576]

Matters of common knowledge must also be reasonably indisputable to come within the scope of Rule 94(A). Judicial economy is not to be achieved by visiting unfair prejudice upon the accused.[3577]

Notwithstanding the over-abundance of official reports, including United Nations reports confirming the occurrence of genocide, the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime.[3578]

Status of two persons as Ministers of the Interim Government and the date on which a particular massacre occurred were not proper subjects for judicial notice as they did not qualify as facts of common knowledge.[3579]

Fact that 2000 RWF notes were not introduced until 2007 was judicially noticed.[3580]

Value of Rwandan Franc in terms of US dollars was not relevant and would not be judicially noticed.[3581]

Official map of Rwanda would be taken judicial notice of as fact of common knowledge. However, list of persons present at French Embassy compiled by expert witness Guichaoua was not the proper subject of judicial notice, even though it had been admitted in other cases.[3582]

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[3575] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 44; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules* (16 April 2002) at para 12; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Motion for Judicial Notice* (6 December 2005) at para. 13; *Bikindi v. Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 99

[3576] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at paras. 29-30,37

[3577] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 50

[3578] *Prosecutor v. Semanza*, No.ICTR-97-20-1,*Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54*.(3 Nov.200) at para.36

[3579] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Admission of Exhibits* (5 April 2006) at para. 7

[3580] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for Judicial Notice* (16 April 2009)

[3581] *Prosecutor v Nshogoza*, No. ICTR-07-91-T, *Decision on Defence Motion for the Trial Chamber to Take Judicial Notice of the Value of the Rwandan Currency* (16 April 2009)

[3582] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Prosecution's Motion for Judicial Notice of Facts of Common Knowledge* (15 July 2010)

Relevant legislative, judicial, executive, administrative and organizational laws of Rwanda may be judicially noticed as facts of common knowledge.[3583]

**conclusiveness of judicial notice**

Judicially noticed facts of common knowledge serve as conclusive proof of those facts.[3584]

The parties remain free to introduce evidence to contradict or challenge the contents of documentary evidence the Trial Chamber has taken judicial notice of, in the same way as they may call evidence to dispute or challenge other documents that have been regularly admitted into evidence.[3585]

Adjudicated facts are presumed accurate but may be challenged.[3586]

**discretion**

While Rule 94(A) is mandatory with respect to facts of common knowledge, section (B) confers a discretionary power on the Chamber to decide whether to take judicial notice of adjudicated facts or documentary evidence.[3587]

Once it is established that a fact is one of common knowledge, the Trial Chamber has no discretion not to take judicial notice of it.[3588]

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[3583] *Prosecutor v Ndahimana*, No. 2001-68-PT, *Decision on the Prosecution's Motion for Judicial Notice* (7 April 2010) at para. 5

[3584] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 42; *Prosecutor v. Semanza*, No.ICTR-97-20-1,*Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54*.(3 Nov.200) at para.41; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 5

[3585] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 44

[3586] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 42; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 13

[3587] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C)*, Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 41; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 9; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 59; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules* (16 April 2002) at para. 14; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 13

[3588] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decisions on Motions for Reconsideration* (1 December 2006) at para. 24; *Bikindi v. Prosecutor*, No. ICTR-01-72-A, *Judgement* (18 March 2010) at para. 99

**documents**

Both facts (which have been previously adjudicated) and documents (which have been received and admitted in previous proceedings) may be judicially noticed under Rule 94(B).[3589]

Documents do not need to be "adjudicated" i.e., the Chamber in other proceedings does not need to have pronounced a specific and unchallenged or unchallengeable decision on the admissibility of the document. It is enough that the document was admitted into evidence.[3590]

Judicial notice of documents does not constitute admission that all the matters of facts therein contained are proved and admitted as such by the Chamber but is limited to judicial notice of the existence and the authenticity of the documents.[3591]

The Trial Chamber took judicial notice of the fact and existence of certain UN reports on the Rwandan events, but not of their contents.[3592] The Trial Chamber took judicial notice of the fact and existence of certain laws and regulations of Rwanda, but not the applicability of those provisions to Rwanda in 1994.[3593]

**effect of judicial notice**

Facts judicially noticed cannot be a substitute for a finding of *mens rea* of the accused but can be used to establish the context in which the accused acted.[3594]

**facts judicially noticed**

Trial Chamber took judicial notice of three ethnic groups in Rwanda and death of President Habyarimana but refused to take judicial notice of facts relating to the massacres.[3595]

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[3589] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 34
[3590] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 35
[3591] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 39; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 57; *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Motion for Judicial Notice* (6 December 2005) at para. 14
[3592] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative a la Requete de la Procureur Aux Fins de Constat Judicaire* (15 July 2005) at para. 18
[3593] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecutor's Motion for Judicial Notice* (6 December 2005) at para. 15-16
[3594] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 63
[3595] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Judicial Notice and the Admission of Documents* (15 May 2002) at para. 105-06, 115

Trial Chamber took notice that three protected groups under the Genocide Convention were Tutsi, Hutu, and Twa, and that Rwanda was a party to genocide convention.[3596]

Trial Chamber took judicial notice of laws of Rwanda relating to administrative structures but refused to take judicial notice of prosecution's interpretation of those laws.[3597]

Fact that armed conflict in Rwanda was internal in character was not subject to reasonable dispute and should be judicially noticed.[3598]

Fact that attack in Rwanda was widespread and systematic should be judicially noticed.[3599]

Fact that some Rwandans killed Tutsi and there were many deaths of Tutsi should be judicially noticed as facts of common knowledge.[3600]

Fact that there was a genocide in Rwanda between 6 April and 17 July 1994 should be judicially noticed.[3601] The prosecution must still introduce evidence that the specific events alleged in the indictment constituted genocide and that the conduct and mental state of the accused make them culpable for genocide.[3602]

The taking of judicial notice of the fact that there was a genocide in Rwanda does not imply the existence of a plan to commit genocide.[3603]

Judicial notice taken of adjudicated facts concerning the dimensions and seating capacity of a church and the population of a commune.[3604]

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[3596] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at paras. 8, 10; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Judicial Notice of Facts of Common Knowledge* (22 February 2008)

[3597] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Judicial Notice and the Admission of Documents* (15 May 2002) at para. 121,133

[3598] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 198; *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 29; *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Judicial Notice of Facts of Common Knowledge* (22 February 2008)

[3599] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 29; *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 192

[3600] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 31

[3601] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 35

[3602] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006) at para. 37

[3603] *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decisions on Motions for Reconsideration* (1 December 2006) at para. 21

[3604] *Prosecutor v Ndahimana*, No. 2001-68-PT, *Decision on the Prosecution's Motion for Judicial Notice* (7 April 2010) at paras. 9-12

Decision of Appeals Chamber is binding on all Trial Chambers. Therefore, judicial notice taken of fact that genocide was committed in Rwanda in 1994, internal character of the conflict in Rwanda, existence of a widespread and systematic attack in Rwanda, existence of ethnic groups in Rwanda, and applicability of genocide convention to Rwandan events.[3605]

**notice**

Trial Chamber erred in referring to fact from another judgement without formally taking judicial notice of it. Rule 94(B) requires a trial chamber to hear the parties before deciding to take judicial notice.[3606]

**rebuttal of adjudicated facts**

A Trial Chamber cannot deny the defence its right to put the adjudicated fact into question by introducing evidence to the contrary simply because it would frustrate judicial economy.[3607]

Rule 94(B) fosters judicial economy by avoiding the need for evidence in chief to be presented in support of a fact already previously adjudicated. Hence, the purpose of judicial economy underlying Rule 94(B) is not frustrated by the admission of rebuttal evidence.[3608]

Trial Chamber erred in holding that testimony of defence witness at underlying trial, which had not been credited in that case, was inadmissible to rebut adjudicated facts for which judicial notice had been taken in subsequent case.[3609]

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[3605] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Motion for Judicial Notice* (22 September 2006) ; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Prosecutor's Motion for the Trial Chamber to Take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)* (29 November 2006); *Prosecutor v Nsengimana*, No. ICTR-2001-69-T, *Decision on Judicial Notice of Facts of Common Knowledge* (16 January 2008); *Prosecutor v Kalimanzira*, No. ICTR-2005-88-I, *Decision on Judicial Notice of Facts of Common Knowledge* (22 February 2008); *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on Prosecutor's Motion for Judicial Notice* (29 April 2009); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-I, *Decision on the Prosecution Motion for Judicial Notice* (14 May 2009) at para. 14; *Prosecutor v Gatete*, No. ICTR-2000-61-PT, *Decision on Prosecution's Motion for Judicial Notice of Facts of Common Knowledge* (21 August 2009); *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-PT, *Decision on Prosecutor's Motion for Judicial Notice of Facts of Common Knowledge* (3 March 2010); *Prosecutor v Ndahimana*, No. ICTR-2001-68-PT, *Decision on the Prosecutor's Motion for Judicial Notice* (7 April 2010)

[3606] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 200

[3607] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.17, *Decision on Joseph Nzirorera's Appeal of Decision of Admission of Evidence Rebutting Adjudicated Facts* (29 May 2009) at para. 20

[3608] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.17, *Decision on Joseph Nzirorera's Appeal of Decision of Admission of Evidence Rebutting Adjudicated Facts* (29 May 2009) at para. 20

[3609] *Karemera et al v Prosecutor*, No. ICTR-98-44-AR73.17, *Decision on Joseph Nzirorera's Appeal of Decision of Admission of Evidence Rebutting Adjudicated Facts* (29 May 2009)

**refusal to take judicial notice**

Trial Chamber refused to take judicial notice of all facts except that Rwanda was a party to the Genocide Convention and the protocols of the Geneva Conventions.[3610]

Trial Chamber took judicial notice of some official documents concerning the structure of government in Rwanda and the Arusha Accords and refused to take judicial notice of other documents such as Encyclopaedia Britannica, and reports of human rights organizations, and factual material on the events in 1994.[3611]

Trial Chamber refused to take judicial notice that genocide was committed, based upon prior judgements, preferring to adjudicate the matter for itself.[3612] It also refused to take judicial notice of United Nations reports and other documents which drew conclusions about the massacres.[3613]

Where the accused was not charged with war crimes, the Trial Chamber refused to take judicial notice of the non-international character of the armed conflict, since it was not relevant to the crime of genocide.[3614]

No judicial notice taken that the armed conflict in Rwanda was internal in character, where it was reasonably disputable.[3615]

No judicial notice that there were widespread and systematic attacks, which were organized and planned, against the Tutsi, as it was reasonably disputable.[3616]

A finding that killings "were not spontaneous reaction of the Hutu populace to the death of the President", touched upon a core issue in the case and would not be judicially noticed.[3617]

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[3610] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004)
[3611] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative a Requete du Procureur aux fins de Constat Judicaire* (30 April 2004)
[3612] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Judicial Notice and the Admission of Documents* (15 May 2002) at para. 127; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 7
[3613] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Prosecutor's Motion for Judicial Notice and the Admission of Documents* (15 May 2002) at para. 140
[3614] *Prosecutor v Seromba*, No. ICTR-2001-66-T, *Décision Relative a la Requete de la Procureur aux fins de Constat Judicaire* (15 July 2005) at para. 27
[3615] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules* (16 April 2002) at para. 17; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 11
[3616] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules* (16 April 2002) at para. 19; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 9
[3617] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 41

**timing**

Where evidence pertaining to some facts sought to be judicially noticed had already been introduced during the trial, it would be unfair to the accused to take judicial notice of those facts.[3618]

Trial Chambers have also declined to take judicial notice of adjudicated facts in circumstances where evidence has already been heard on the subject matter of the fact sought to be judicially noticed.[3619]

The fact of a Trial Chamber having heard testimony on a particular fact is not an absolute bar to the taking of judicial notice of that fact. The Chamber must determine whether, having already heard testimony on a particular fact, taking judicial notice of that fact will advance the objective of expediency without compromising the rights of the accused. Relevant considerations to this determination may include, for example, how much evidence has been heard on a particular fact, how much evidence is still to be heard with respect to the fact, how directly a witness has testified on a particular fact, and whether the relevant witness testimony corroborates or contradicts the fact proposed for judicial notice.[3620]

It is proper for the Trial Chamber to take judicial notice at any stage in the trial, even after the defence has presented most of its evidence.[3621]

Judicial notice denied where parties applied 5 months after closure of evidence.[3622]

Trial Chamber took judicial notice of genocide, internal character of the conflict, and widespread and systematic attacks at the end of the case, in its judgement, and disregarded all evidence which had been adduced on those matters.[3623]

**Rule 94 bis—testimony of expert witnesses**

**(A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 bis (B) (iv) (b) and Rule 73 ter (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and**

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[3618] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 15

[3619] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 23

[3620] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Appeals Chamber Remand of Judicial Notice* (11 December 2006) at para. 51

[3621] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosecutor's Motion for Judicial Notice* (22 September 2006) at para. 10

[3622] *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Requests for Judicial Notice Pursuant to Rule 94 of the Rules* (27 May 2008)

[3623] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 16

**shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.**
**(B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether:**
**(i) It accepts or does not accept the witness's qualification as an expert;**
**(ii) It accepts the expert witness statement; or**
**(iii) It wishes to cross-examine the expert witness.**
**(C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.**

**acts and conduct of the accused**

While the report and testimony of an expert witness may be based on facts narrated by ordinary witnesses or facts from other evidence, an expert witness cannot, in principle, testify himself or herself on the acts and conduct of accused persons, without having been called to testify also as a factual witness and without his or her statement having been disclosed in accordance with the applicable rules concerning factual witnesses.[3624]

An expert witness may not testify on the acts and conduct of the accused. Admission of prior testimony of expert witness admitted with references to the acts and conduct of the accused redacted.[3625]

An expert witness may not testify about the criminal responsibility of the accused.[3626]

Evidence of a murder based entirely on the testimony of an expert witness cannot form the basis of a conviction, as the expert is not a fact witness.[3627]

The role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts, as would ordinary witnesses.[3628]

The Trial Chamber appropriately credited Professor Guichaoua's general testimony concerning the behaviour of officials during the events of 1994, but not his specific testimony speculating on the Appellant's behaviour.[3629]

The testimony of an expert witness on the acts and conduct of the accused would not be given any weight.[3630]

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[3624] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 212 ; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 288
[3625] *Prosecutor v Nizeyimana*, No. 2000-55C-T, *Further Decision on Admission of Evidence of Dr. Alison Des Forges* (15 March 2011) at para. 11
[3626] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 212, fn. 511
[3627] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 509
[3628] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 1601
[3629] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 304

There is an inextricable nexus between the acts, conduct, and mental state of the accused and he ultimate issue of criminal responsibility and therefore expert witnesses are precluded from offering determinative opinions that avert to the acts, conduct, and mental state of the accused.[3631]

Admitting testimony of Alison Des Forges to link the accused to a conspiracy to commit genocide would usurp the functions of the Trial Chamber in determining the guilt or innocence of the accused.[3632]

**disclosure**

Disclosure of the full statements of the expert witnesses should be made, as a matter of principle, as early as possible.[3633] Disclosure of report of Alison Des Forges ordered to be filed more than 2 months before her anticipated testimony. The Prosecution's indication that her report would be like previous reports filed in six other cases does not satisfy the disclosure obligations envisaged under Rule 94*bis* (A).[3634]

The curriculum vitae of expert witnesses should be submitted as verification or in support of their expert status.[3635]

The Rule does not require the parties to wait until twenty-one days before testimony to disclose the witness' expert report nor does it prohibit disclosure before the trial commences. Reports ordered disclosed three weeks before trial.[3636]

Trial Chamber declined to order prosecutor to have expert witness reports prepared more than 21 days before the testimony of the expert at trial.[3637]

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[3630] *Prosecutor v Zigiranyirazo*, No. ICTR-01-73-T, *Judgement* (18 December 2008) at para. 148
[3631] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Limit the Scope of Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua* (21 August 2007) at para. 3
[3632] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Motion for Reconsideration of the Decision or Prospective Experts Guichaoua, Nowrojee, and Des Forges or for Certification* (16 November 2007) at para. 21
[3633] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mugenzi's Confidential Motion for the Filing, Service, or Disclosure of Expert Reports and/or Statements* (10 November 2004) at para. 19; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecution Motion for Addition of Witnesses Pursuant to Rule 73 bis (E)* (26 June 2003) at para. 23
[3634] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mugenzi's Confidential Motion for the Filing, Service, or Disclosure of Expert Reports and/or Statements* (10 November 2004) at para. 21
[3635] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Mugenzi's Confidential Motion for the Filing, Service, or Disclosure of Expert Reports and/or Statements* (10 November 2004) at para. 22
[3636] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Joseph Nzirorera's Motion for Deadline for Filing of Reports of Experts* (16 May 2005)
[3637] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Décision Relative a la Requete de L'Accuse Nzirorera aux fins de la Communication des Rapports des Témoins Experts du Procureur* (2 April 2004)

Delay in disclosure of expert reports did not prejudice the accused and the Trial Chamber could remedy the prejudice, if any, by granting more time to the defence.[3638]

**discretion**

Even where the requirements for expert testimony are met, the Trial Chamber has the discretion to determine whether the subject matter is such that the Chamber might not be able to form a sound judgement on it without the assistance of witnesses possessing a specialized knowledge in the area.[3639]

The forensic examination of documents is a highly technical matter for which the Trial Chamber may require an expert opinion.[3640]

**equality of arms**

Trial Chamber violated equality of arms by allowing a prosecution witness to testify on interpretation of accused's speeches, then denying the defence a right to call an expert on the same subject.[3641]

**examination**

Exhibits ordered to be transmitted to defence exhibit via DHL for examination in his laboratory.[3642]

**hearsay**

Expert witnesses are ordinarily afforded sufficient latitude to offer opinions within their expertise and their views need not be based upon first-hand knowledge or experience.[3643]

Experts are allowed to rely on a variety of sources in support of their conclusions and this may include hearsay.[3644]

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[3638] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motions to Exclude Testimony of Professor Andre Guichaoua* (20 April 2006) at para. 8

[3639] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 8; *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003)

[3640] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Ex Parte Motion re Exhibits DNZ-444-45 and DNZ-463-66* (4 September 2008) at para.8

[3641] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 243

[3642] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Ex Parte Motion re Exhibits DNZ-444-45 and DNZ-463-66* (4 September 2008) at paras. 11-12

[3643] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 267

[3644] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 267

**impartiality**

To be entitled to appear, an expert witness must not only be a recognised expert in his field but must also be impartial in the case. Therefore, another Accused before the Tribunal could not qualify as an expert witness.[3645]

The mere fact that an expert witness is employed by or paid by a party does not disqualify him or her from testifying as an expert witness.[3646]

The Chamber is troubled that the prosecution's expert witness would exclude highly exculpatory material regarding one of the accused from her expert report to the Chamber in this case, particularly when the excluded information had been included in a previous expert report by the witness in the Military I case. The Chamber relies on expert witnesses for their specialised knowledge within a field, and thus they have a special duty to inform the Chamber of relevant facts. The Chamber recalls that expert witnesses are "obliged to testify with the utmost neutrality and with scientific objectivity."[3647]

Witness' long-standing relationship with prosecution was not grounds for finding that he had not testified with neutrality and objectivity.[3648]

**inadmissible evidence**

The portions of testimony of expert witness Alison Des Forges in which she relied upon interview of the accused later excluded would also be excluded.[3649]

**investigator**

Police officer who examined crime scenes, made sketches, photographs, and videos was not qualified to testify as an expert witness, but could testify as a fact witness.[3650]

**notice**

Defence failure to file a timely notice pursuant to Rule 94 *bis* did not result in a waiver of its right to cross-examine an expert witness.[3651]

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[3645] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness* (9 March 1998).
[3646] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 282
[3647] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 2209
[3648] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 424
[3649] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Kabiligi Motion for the Exclusion of Portions of Testimony of Prosecution Witness Alison Des Forges* (4 September 2006)
[3650] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness* (13 April 2005) at para. 6
[3651] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Prosecution Motion for Dismissal of the Defence Notice Due to Dismissal of the Defence Notice Due to Failure to Meet the Time Limit* (24 February 2006); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Prospective*

Prosecution's failure to file timely notice pursuant to Rule 94 *bis* did not result in a waiver of its right to cross-examine an expert witness.[3652]

Time for objecting to expert witness runs from filing of Rule 94 *bis* notice and not from filing of defence witness list.[3653]

**payment**

Policy of Registrar to condition payment of expert witnesses on their being qualified to testify by the Trial Chamber has the potential of depriving the accused of potential expert witnesses and should be reconsidered. Such a condition should only be imposed in exceptional circumstances.[3654]

**privilege**

Dr Des Forges' refusal to reveal the sources of information in her report and testimony was not based upon privilege, but she requested the opportunity to seek permission of the sources before revealing them. No party took any steps to see that such permission was sought.[3655]

The refusal of an expert witness to reveal his or her sources does not violate the rights of the accused.[3656]

**protected witnesses**

An expert witness is not a member of the defence team and thus not entitled to receive information covered by witness protection measures. The Trial Chamber would consider varying its protection order to allow such disclosure upon a showing of the details of the information to be disclosed, to whom the information is to be provided, and why it is necessary to provide the information to that individual.[3657]

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*Expert Witnesses Alison Des Forges, Andre Guichaoua, and Binaifer Nowrojee* (25 October 2007) at para. 6

[3652] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion to Admit Report of Expert Dr. Bernard Lugan* (21 February 2008)

[3653] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Jerome-Clement Bicamumpaka's Motion to Admit Report of Expert Dr. Bernard Lugan* (21 February 2008) at para. 8

[3654] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Motion in Respect of a Condition in the Special Services Agreement for Expert Witnesses* (12 December 2006)

[3655] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges* (2 September 2005) at para. 31

[3656] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Limit the Scope of Testimony of Expert Witnesses Alison Des Forges and Andre Guichaoua* (21 August 2007) at para. 5

[3657] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Motion for Permission to Convey Protected Information to Defence Experts* (11 September 2006)

**qualifications**

The Trial Chamber retains discretion in determining who is qualified to testify as an expert.[3658]

The prosecution is not entitled to make submissions on the qualifications of an expert the defence proposes be retained under the legal aid system. It is only after the filing of a notice of intent to rely upon expert testimony that the prosecution may challenge the testimony of an expert witness.[3659]

Once a party has given notice of its intent to call an expert witness, the Chamber must first rule on the witness' qualifications before the witness can be heard.[3660]

It is settled jurisprudence in common law that the judge must determine whether the witness is qualified to give evidence as an expert. In the civil law system, where the judge appoints the expert, the qualification of the expert is established by his selection by the judge.[3661]

The role of an expert is to assist the Chamber in understanding the context in which the events took place. The expert must possess a relevant specialised knowledge acquired through education, experience, or training in his proposed field of expertise.[3662]

Before a witness may be called to testify as an expert, he or she must possess some specialised knowledge acquired through education, experience, or training in the field that may assist the fact finders to understand the evidence or to assess a fact in issue.[3663]

A lawyer who is an expert in one area of the law may not be an expert in another, as legal studies are complex, and it is no longer a discipline where one could be expected to be knowledgeable in all aspects.[3664]

An expert witness is one "whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field". The

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[3658] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 7

[3659] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Ex Parte Motion re Exhibits DNZ-444-45 and DNZ-463-66* (4 September 2008) at para. 7

[3660] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order Relating to Defence Witness Bernard Lugan* (5 May 2008) at para. 3

[3661] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para.7, fn. 3

[3662] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe* (2 May 2005)

[3663] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 174; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness* (13 April 2005) at para. 5

[3664] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 12

Tribunal is not bound by the findings of the Canadian Court in *Mugesera v Canada*, just as it is not bound by previous Trial Chambers in this Tribunal who have found the witness to be an expert witness. Rule 95 does not disallow the admission of the report or the witness and issue of disqualification of expert witness is premature.[3665]

The Trial Chamber is not persuaded that the interdisciplinary field of socio-legal-political science is sufficiently organized or recognized as a reliable body of knowledge or experience with which the witness could potentially aid the Trial Chamber.[3666]

Witness Binaifer Norowjee qualified as expert in sexual violence in Rwanda.[3667]

Witness Jean Rubaduka not qualified as expert in Rwandan constitutional law.[3668]

Witness Susan Thomson's potential testimony about incentives of Rwanda witnesses to make false accusations not admissible where evidence of specific circumstances of individual prosecution witnesses had been heard and was more useful to the Chamber than generalities.[3669]

Witness Charles Ntampaka not qualified as an expert in Rwandan constitutional law.[3670]

Witness Sebahire Deo Mbonyikebe qualified as expert in issues of social and cultural anthropology in relation to the events of 1994 in Rwanda.[3671]

Witness Bernard Lugan qualified as expert on history, politics, and military affairs concerning 1994 Rwandan events.[3672]

Witness Helmut Strizek qualified as expert on geopolitics in Great Lakes region, developmental issues in Rwanda, and diplomatic and social relations relevant to the 1994 Rwandan events.[3673]

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[3665] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Defence Motion to Disqualify Expert Witness Alison Des Forges and to Exclude Her Report* (14 July 2004)
[3666] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 15
[3667] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee* (8 July 2005) at para. 9
[3668] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Oral Decision on Qualification of Prosecution Expert Witness Jean Rubaduka* (24 March 2004)
[3669] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Prosecution's Rule 94 bis (B) Notice Rejecting Dr. Susan Thomson's Qualifications as an Expert* (30 March 2011) at para. 17
[3670] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 13
[3671] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe* (2 May 2005)
[3672] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution's Objections to Expert Witnesses Lugan and Strizek* (23 October 2008) at para. 10
[3673] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution's Objections to Expert Witnesses Lugan and Strizek* (23 October 2008) at para. 11

A witness' qualification as an expert turns on the contribution he or she can make to the Trial Chamber's analysis of a particular case. Thus, the same person might be qualified in one case and not in another.[3674]

**relevance**

Expert testimony is relevant if the testimony enlightens the Trial Chamber on specific issues of a technical nature requiring specialized knowledge in a special field and if the specialized knowledge possessed by the expert, applied to the evidence which is the foundation of the opinion, may assist the Trial Chamber in understanding the evidence.[3675]

Testimony of defence expert on planning of genocide, legitimacy of civil defence, and evidence against the accused declared inadmissible as within the province of the Trial Chamber and for which expertise would not be of assistance.[3676]

Testimony of historian expert witness on Rwandan civil defence system was within the scope of her expertise and was properly relied upon by the Trial Chamber.[3677]

Expert witnesses are ordinarily afforded significant latitude to offer opinions within their expertise; their views need not be based upon first-hand knowledge or experience.[3678]

Testimony of defence expert on accuracy of translation of letters admitted into evidence was not necessary to the Chamber's understanding of the case and therefore was excluded.[3679]

Testimony of defence expert on multi party politics in Rwanda and establishment of Interim Government was not relevant to the charges against the accused.[3680]

Testimony of expert witness Deo Mbonyikebe admissible as it assisted the Trial Chamber in understanding issues such as anti-Tutsi sentiment in Rwanda, the power

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[3674] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 32 *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para.16;
[3675] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyikebe* (2 September 2005) at para. 12
[3676] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order Relating to Defence Witness Bernard Lugan* (5 May 2008) at para. 7
[3677] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 226
[3678] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 225
[3679] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Prosecution Motion to Reject Joseph Ufiteyezu as an Expert Witness* (25 November 2009)
[3680] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Order Relating to Defence Witness Bernard Lugan* (5 May 2008) at para. 7

struggle within the multiparty system, the effect of the Arusha Accords on the social atmosphere in Rwanda and various other matters of Rwandan cultural significance.[3681]

Expert testimony on the historical and military context in which the crimes charged in the indictment occurred was relevant and admissible, but testimony on the sufficiency of the evidence against the accused, legal issues in the case, and prosecutorial discretion was not.[3682]

**reliability**

To establish the reliability of expert testimony, the party must only satisfy the low threshold of the beginning of proof that the testimony is reliable. It will be for the Trial Chamber to give the appropriate weight to the testimony during its deliberations.[3683]

An expert's refusal to disclose the sources upon which she has based her information does not render the testimony based on those sources inadmissible but goes to the weight to be given to the testimony.[3684] Such testimony has probative value when the undisclosed sources are among a multitude of sources the expert has consulted as the basis of her opinion.[3685]

**requirements**

The requirements for admission of an expert include: (1) the witness must be an expert; (2) the statement/report must be reliable; (3) the statement has to be relevant and of probative value; and (4) the content of the statement/report has to fall within the competence of the witness.[3686]

The requirements for admission of an expert include: (1) the Chamber discretionarily deems it necessary to hear an expert on a determined issue: (2) the prospective witness is an expert on that issue; (3) the statement/report is reliable; (3) the statement/report is relevant and of probative value; (4) the content of the statement/report falls within the competence of the witness; (5) the witness must possess the relevant specialized knowledge acquired through education, expertise, or training in his proposed

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[3681] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyikebe* (2 September 2005) at para. 12
[3682] *Prosecutor v Ndindiliyimana et al*, No. ICTR-00-56-T, *Decision on the Prosecution's Objections to Expert Witnesses Lugan and Strizek* (23 October 2008) at para. 16-17
[3683] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyikebe* (2 September 2005) at para. 14-16
[3684] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges* (2 September 2005) at para. 17
[3685] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges* (2 September 2005) at para. 25
[3686] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 8

field of expertise; and (6) the Chamber must be convinced that the expert witness could assist it in understanding the evidence or in determining a fact in issue.[3687]

**timeliness**

Failure to file a timely objection to expert testimony does not waive objections to the qualifications of the expert or the admissibility of his report. The Trial Chamber can reject the expert *proprio motu*.[3688]

**ultimate issues of fact**

To the extent that sexual violence expert offered opinions on ultimate issues of fact, that evidence is inadmissible. Only the Trial Chamber is competent to decide on the ultimate issues of fact in the case.[3689]

Trial Chamber declined to exclude testimony of defence expert Reyntjens as going to the criminal responsibility of the accused but would instead disregard such opinions in its deliberations.[3690]

**usefulness**

The opinion of an expert need not be essential or strictly necessary, or that any of his knowledge lie beyond the understanding of the triers of fact as a predicate of its admissibility. Rather, the evidence needs to be useful to the finders of fact.[3691]

The standard for admission of expert testimony is whether the specialized knowledge possessed by the expert, applied to the evidence, which is the foundation of the opinion, may assist the Chamber in understanding the evidence[3692]

Expert witnesses have been authorized to testify on such matters as the role of military forces in Rwanda in 1994; the socio-economic and political situation leading up

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[3687] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Prospective Expert Witnesses Alison Des Forges, Andre Guichaoua, and Binaifer Nowrojee* (25 October 2007) at paras. 15-16
[3688] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 31
[3689] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Nowrojee* (8 July 2005) at para. 12; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Casimir Bizimungu's Urgent Motion for the Exclusion of the Report and Testimony of Deo Sebahire Mbonyikebe* (2 September 2005) at para. 13
[3690] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Ntahobali and Niyiramasuhuko's Extremely Urgent Motions to Limit the Extent and Nature of the Report and Testimony of Filip Reyntjens* (18 September 2007)
[3691] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Oral Decision on the Qualification of Mr. Edmond Babin as Defence Expert Witness* (13 April 2005) at para. 5
[3692] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens* (28 September 2004) at para. 8

to 1994; the role of the media in Rwandan society; the perpetration of human rights violations in 1994; and the organization of civil defence.[3693]

Trial Chamber did not abuse its discretion in admitting former Kigali prosecutor Francois-Xavier Nsanzuwera as an expert witness concerning the activities of the Interahamwe.[3694]

Expert testimony on the nature of the powers of a sous prefet could be of assistance to the Trial Chamber and may be admitted if the witness possesses the necessary qualifications.[3695]

Expert witness Andre Guichaoua appeared as an expert in sociology and not as a factual witness. He received information from unidentified sources. His testimony cannot reliably establish the content of a meeting.[3696]

Broad historical evidence offered by Alison des Forges did not have any value in the proving of the charges against a single accused. Therefore, the evidence did not satisfy the criteria of Rule 89(C) for admission.[3697]

Testimony of Alison Des Forges, Andre Guichaoua, and Binaifer Nowrojee would not be of assistance to the Trial Chamber and their evidence was excluded.[3698]

Testimony on defence expert witness interpreting speeches of interim government during the genocide would not be of any assistance to the Trial Chamber and was excluded.[3699]

Testimony of prosecution expert historian witnesses Allison Des Forges and Filip Reyntjens on the political meaning of a speech of President Sindikubabwo was within the scope of their expertise and the Trial Chamber did not err in considering it.[3700]

The testimony of an expert witness is admissible only to the extent that the testimony comes within the scope of the witness' expertise. Sexual violence expert's opinions on genocide propaganda, the political goals of the perpetrators of crimes, the

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[3693] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion for Exclusion of Expert Witness Statement of Filip Reyntjens* (28 September 2004) at para. 8
[3694] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 166
[3695] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Prosecution Motions Opposing Proposed Defence Expert Witness Charles Ntampaka* (27 November 2009) at para. 31
[3696] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 177
[3697] *Prosecutor v Simba*, No. ICTR-2001-76-I, *Decision on Prosecutor's Motion for Admission of Testimony of an Expert Witness* (14 July 2004)
[3698] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Prospective Expert Witnesses Alison Des Forges, Andre Guichaoua, and Binaifer Nowrojee* (25 October 2007)
[3699] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion for the Admission of an Expert Witness* (22 May 2009)
[3700] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 608

culpability of authorities, and the knowledge of officials are inadmissible as beyond her expertise.[3701]

**voir dire**

The Trial Chamber did not err in refusing a "voir dire" examination of the expert witness and instead evaluating the qualification of the expert during examination and cross-examination.[3702]

There is no compulsory voir dire hearing on the qualifications of an expert witness.[3703]

Voir dire of defence expert required where CV did not make it clear whether he possessed the relevant expertise to testify on the duties of prefecture authorities in Rwanda.[3704]

**weight**

In weighing expert testimony, the Trial Chamber will take into consideration the bases upon which the expert formed the opinion, the extent to which the expert has been able to provide details about the bases of the opinion, corroboration during the trial, as well as the extent to which the accused has had the opportunity to test the veracity of the information provided by the expert.[3705]

**Rule 95—exclusion of evidence**

**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.**

In deciding on the admission of evidence, the correct balance must be maintained between the fundamental rights of the accused and the essential interests of the

[3701] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Admissibility of the Expert Testimony of Dr. Binaifer Norwojee* (8 July 2005) at para. 11
[3702] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 164
[3703] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 164; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Preclude Testimony by Charles Ntampaka* (26 September 2007) at para. 6; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Prosecution Prospective Expert Witnesses Alison Des Forges, Andre Guichaoua, and Binaifer Nowrojee* (25 October 2007) at para. 11
[3704] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Prosecution Motions Opposing Proposed Defence Expert Witness Charles Ntampaka* (27 November 2009) at para. 28
[3705] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motion for Exclusion of Portions of Testimony of Expert Witness Dr. Alison Des Forges* (2 September 2005) at para. 21

international community in the prosecution of persons charged with serious violations of international humanitarian law.[3706]

Rule 95 does not require automatic exclusion of all unlawfully obtained evidence. Evidence will only be excluded if the integrity of the proceedings would otherwise be seriously damaged.[3707]

It is difficult to imagine a statement taken in violation of the fundamental right to the assistance of counsel which would not require its exclusion under Rule 95 as being "antithetical to, and would seriously damage, the integrity of the proceedings".[3708]

Statement taken after accused was properly advised of his rights and voluntarily waived them could be used to impeach the accused during his testimony.[3709]

Statement taken one week after arrest of accused, when he had not yet been taken before a judge, would not be excluded for that reason alone.[3710]

Statement taken without informing accused of the charges against him and without respecting his desire for counsel would be excluded.[3711]

Statement excluded under Rule 95 may nevertheless be used during cross examination of the accused.[3712]

Violation of national law might be a consideration in determining whether evidence should be excluded under Rule 95, as having been "obtained by methods which

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[3706] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 4

[3707] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 11

[3708] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C)* (14 October 2004) at para. 21; *Prosecutor v Zigiranyirazo*, No. ICTR—2001-73-T, *Decision on the Voir Dire Hearing of the Accused's Curriculum Vitae* (29 November 2006) at para. 13; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 25

[3709] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Kanyabashi's Oral Motion to Cross Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997* (15 May 2006) at para. 80

[3710] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 17

[3711] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (2 November 2007) at para. 32

[3712] *Prosecutor v Karemera & Ngirumpatse*, No IT-98-44-T, *Decision on Prosecutor's Request for Clarification of Trial Chamber's Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse* (6 December 2010) at para. 9

cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.[3713]

Even where the arrest of the accused was illegal, a document seized at the time of his arrest will not be excluded unless it was shown that the document was not reliable or that the admission of the document would seriously damage the integrity of the proceedings.[3714]

Trial Chamber did not err in refusing to preclude testimony of witness because contemporaneous notes of his interview were not preserved.[3715]

Prosecution witness statement taken in violation of a witness protection order was excluded. Violation of the procedure laid down by Trial Chamber in an order about the formalities of contacting protected witnesses for the other side is antithetical to the integrity of, and causes serious damage to, the proceedings.[3716]

Tape recording by person listening to intercepted conversation by RPF soldiers was admitted since even if it were a violation of Rwandan law, it would not lead to exclusion of the evidence.[3717]

If an agreement between witnesses for the purpose of untruthfully incriminating an accused is established, their evidence should be excluded pursuant to Rule 95.[3718]

The mere fact that two witnesses attended Gacaca sessions together is insufficient to establish collusion.[3719]

**Rule 96—rules of evidence in cases of sexual assault**

**In cases of sexual assault:**
**(i) Notwithstanding Rule 90(C), no corroboration of the victim's testimony shall be required;**
**(ii) Consent shall not be allowed as a defence if the victim:**
**(a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or**

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[3713] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motion to Harmonize and Amend Witness Protection Orders* (1 June 2005) at para. 15.
[3714] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecutor's Motion for Admission of Certain Exhibits Into Evidence* (25 January 2008) at para. 16
[3715] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 39
[3716] *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Kajelijeli's Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C))*(15 November 2002) at para. 14.
[3717] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Exclusion of Testimony and Admission of Exhibit* (20 March 2007) at para. 16
[3718] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 137; *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 238; *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 106
[3719] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 240

**(b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.**
**(iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;**
**(iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence.**

No corroboration of the victim's testimony is required in the case of rape and sexual violence.[3720]

**Rule 97—lawyer-client privilege**

(**A) All communications between lawyer and client shall be regarded as privileged, and consequently disclosure cannot be ordered, unless:**
**(i) The client consents to such disclosure; or**
**(ii) The client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.**
**(B) Nothing in this rule shall be interpreted as permitting the use of confidentiality between Counsel and Client to conceal the participation of Counsel in illegal practices such as fee-splitting with client.**

**Rule 98—power of Chambers to order production of additional evidence**

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

**orders to the prosecution**

The Trial Chamber has a clear power – as part of its duty to ensure that the trial is properly conducted – to direct the prosecution to obtain material which may be relevant to the case of the accused. In such a case, the further material should be produced, not only to the Trial Chamber, but also to the accused.[3721]

Trial Chamber used Rule 98 to order prosecution to obtain prior statements of its witnesses from the government of Rwanda and disclose them to the defence.[3722]

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[3720] *Prosecutor v. Rutaganda*, No.ICTR-96-3-T, *Judgement* (6 Dec. 1999) at para.18
[3721] *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, *Judgement* (3 July 2002) at para. 66
[3722] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Request for Documents Arising From Judicial Proceedings in Rwanda in Respect of Prosecution Witnesses* (16 December 2003); *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 11; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Decision on Juvenal Kajelijeli's Motion Requesting the Recalling of Prosecution Witness GAO* (2 November 2001) at paras 20-22; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Judgement* (7 June 2001) at para. 18; *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA* (8 June 2000); *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Subpoenas to Prosecution Witnesses* (10 May 2007) at para. 15,18

However, where witnesses were not detained in Rwanda, Trial Chamber was reluctant to order prosecution to obtain prior statements from Rwandan authorities.[3723]

Prosecutor would not be required to use best efforts to obtain records which were already covered by Trial Chamber request to government of Rwanda.[3724]

Trial Chamber ordered Prosecutor to take the necessary steps to obtain the minutes of the Security Council meeting, held on 9 April 1994, in Kibuye Prefecture. Given two weeks to do so.[3725]

Trial Chamber ordered prosecution to obtain testimony of prosecution witness given in Belgium.[3726]

Trial Chamber ordered prosecution to identify Rwandan judicial records that it was missing and take steps to obtain them from the Rwandan government within one week.[3727]

The Trial Chambers have in the past ordered, pursuant to Rule 98, the prosecution to use its good offices to request the Rwandan judicial records of detained witnesses. This is a different avenue of relief than Article 28 and does not necessarily require the same showing, given that the Chamber is issuing an order to a party and not a state. With respect to the judicial records of detained witnesses, Rule 98 may be invoked to expedite the proceedings given the importance of these records to the preparation of the parties and given the familiarity of the prosecution with its witnesses. An order may be made under Rule 98 even absent defence efforts to obtain the records directly from the government.[3728]

Each party is expected to investigate the judicial records of its own witnesses who have been subject to criminal proceeding, prior to calling them to testify. Trial Chamber declined to issue order under Rule 98 to obtain Rwandan judicial records of defence witness where defence made no effort to obtain them prior to calling the witness.[3729]

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[3723] *Prosecution v Simba*, No. ICTR-2001-76-T, *Decision on Defence Motion to Obtain Judicial Records Pursuant to Rule 68* (4 October 2004) at para. 9
[3724] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defence Motion to Compel Best Efforts to Obtain and Disclose Statements and Testimony of Witness UB* (10 October 2006)
[3725] *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, *Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses* (8 June 2000) at para. 14.
[3726] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records* (14 September 2005) at para. 11
[3727] *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, *Order for Judicial Records* (12 October 2006)
[3728] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Decision on Matters Related to Witness KDD's Judicial Dossier* (11 November 2004) at para. 11
[3729] *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Defence Motion for Additional Disclosure* (1 September 2006); *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents* (23 November 2009) at para. 30

Trial Chamber declined to order prosecution to use best efforts to obtain missing Rwandan judicial records for its witnesses by obtaining specific information from the witnesses as to the dates and places of the statements. The defence was free to attempt to meet with the prosecution witnesses and obtain this information.[3730]

To comply with an order to use its best efforts to obtain information about prior witness statements and/or judicial records from Rwandan authorities, the prosecution must, in a timely manner, conduct systematic interviews of the witnesses in order to elicit as detailed information as possible as to when, where, and by which authority the witnesses have been interviewed, examined and/or tried and make inquiries to the Rwandan authorities with reference to the elicited information.[3731]

Prosecution did not use its best efforts to obtain and disclose Rwandan judicial records of its witness in a timely manner.[3732]

**remedy**

Exclusion of evidence too extreme a remedy where prosecution failed to obtain information from witness to identify and obtain prior Rwandan statements. Other steps, such as recalling the witness, can be taken to remedy any prejudice.[3733]

Defence was prejudiced by failure of prosecution to use best efforts to obtain and disclose Rwandan judicial records of its witness before cross examination. However, the remedy would be to recall the witness, not to exclude his testimony.[3734]

**summoning witnesses**

Trial Chamber declined to summon sous-prefet and OTP investigator about funds disbursed from investigator to sous prefet for witnesses where amount paid to witness for travel expenses was not so excessive as to warrant further evidence on the matter.[3735]

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[3730] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Motion for Further Order to Obtain Documents in Possession of Government of Rwanda* (27 Nov 2006)

[3731] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decisions on Joseph Nzirorera's Motions to Vacate the Decision on Defence Motions for Subpoenas to Prosecution Witnesses , to Exclude the Testimony of Witnesses AMB, ANU, AWD, AWE, FH, and KGV, and to Postpone the Testimony of Witness ANU* (14 June 2007) at para. 18; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Testimony of Witness AXA* (11 July 2007) at para. 6

[3732] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness* (4 March 2008) at para. 14; *Prosecutor v Nzabonimana*, No. ICTR-98-44D-PT, *Decision on Callixte Nzabonimana's Motion for an Order Concerning Disclosure of Gacaca and Judicial Material Relating to Prosecution Witnesses* (29 October 2009) at para. 32

[3733] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Motion to Exclude Testimony of Witness AXA* (11 July 2007) at para. 7

[3734] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion to Exclude Testimony of Witness AXA and Edouard Karemera's Motion to Recall the Witness* (4 March 2008) at paras. 18-19

**Rule 98 *bis*—motion for judgement of acquittal**

**If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or proprio motu, shall order the entry of judgement of acquittal in respect of those counts.**

**appeal**

Denial of a motion for judgement of acquittal may be appealed with certification under Rule 73(B).[3736]

Denial of a motion for judgement of acquittal may not be appealed under Rule 73(B).[3737]

**background allegations**

Paragraphs of the indictment which present the context of the events that occurred, but which do not mention the accused, fall outside the scope of Rule 98*bis* which provides only for acquittal on "counts charged in the indictment".[3738]

**conspiracy**

No reasonable Trial Chamber could properly convict an accused of conspiracy to commit genocide based solely on indirect evidence that could show that the accused may have acted in concert with others, and which could thereby form the basis of an inference that an agreement had been reached, in the absence of evidence of an actual agreement.[3739]

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[3735] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Decision on Callixte Nzabonimana's Motion for Summon of OTP Investigators…*(7 April 2011) at para. 22

[3736] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Request for Certification to Appeal the Chamber's Decision Pursuant to Rule 98 bis* (24 April 2007) at para. 4; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 bis* (20 March 2006)

[3737] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Oral Decision on Defence Motion for Acquittal Pursuant to Rule 98 bis* (19 March 2007) at transcript page 69

[3738] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 80

[3739] *Prosecutor v Ntagerura et al*, No. ICTR-98-46-T, *Separate and Concurring Decision of Judge Williams on Imanishimwe's Defence Motion for Judgement of Acquittal on Count of Conspiracy to Commit Genocide Pursuant to Rule 98 bis* (13 March 2002)

Trial Chamber was not satisfied there was sufficient evidence of conspiracy. Motion for acquittal granted.[3740]

Liability for conspiracy under Article 6(3) did not exist where none of the persons over whom the accused exercised superior responsibility were shown to have been members of the conspiracy.[3741]

**counts or paragraphs**

Rule 98 *bis* requires the Chamber to determine only whether "the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment", and to order a "judgement of acquittal in respect of those counts". This does not involve an evaluation of paragraphs in the indictment.[3742]

Notwithstanding the general standard, the Chamber may make a finding that the accused has no case to answer on particular factual allegations and may strike out or indicate that it has no intent to consider those specific allegations during final deliberations. However, it declined to do so where removal of the paragraphs would not, in any way, alter the counts against the accused.[3743]

Accused acquitted of paragraphs in the indictment where no evidence was adduced under that paragraph.[3744]

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[3740] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence* (20 August 2002) at para. 23
[3741] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 37
[3742] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motions for Judgement of Acquittal* (2 February 2005) at para. 8; *Prosecutor v Mpambara*, No. ICTR-2001-65-T, *Decision on the Defence's Motion for Judgement of Acquittal* (21 October 2005) at para. 6,8; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 39; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Defence Motion for Judgement of Acquittal* (28 October 2005) at para. 8; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para.12; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (17 October 2006) at para. 12; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para.10; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Judgement of Acquittal* (8 March 2007) at para.16; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 10; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (22 March 2007) at para. 5; *Prosecutor v Bikindi*, No. ICTR-2001-72-T, *Decision on Defence Motion for Judgement of Acquittal* (26 June 2007) at para. 12; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera and Edouard Karemera's Motions for No Case to Answer* (19 March 2008) at para. 3; *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, *Decision on Defence Motion for No Case to Answer* (2 July 2009); *Prosecutor v Nizeyimana*, No. ICTR-2000-55C-T, *Decision on Defence Motion for Judgement of Acquittal* (16 March 2011) at para. 6
[3743] *Prosecutor v Mpambara*, No. ICTR-2001-65-T, *Decision on the Defence's Motion for Judgement of Acquittal* (21 October 2005) at para. 6,8
[3744] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 169,178,183

Where prosecution acknowledged that it had not led evidence concerning allegations in some paragraphs of the indictment, the Trial Chamber ruled that the accused has no case to answer as to those allegations.[3745]

Where prosecution acknowledged that it would not rely on the testimony of a witness, Trial Chamber ruled at the close of the prosecution case that the defence had no case to answer as to the allegation of that witness.[3746]

Rule 54, along with Articles 19 and 20 of the Statute, allows a Trial Chamber to hold, at the conclusion of the prosecution case, that the accused has no case to answer as to certain paragraphs of the indictment upon which the prosecution has led no evidence.[3747]

Trial Chamber ordered, pursuant to Rule 54, prosecution to review indictment at end of its case and remove paragraphs for which it had led no evidence.[3748]

The Trial Chamber may adopt a paragraph-based approach to Rule 98 *bis* in exceptional circumstances. However, it declined to do so in this case.[3749]

However, a paragraph-by-paragraph analysis of the indictment is not required where the allegations of the indictment are interrelated describing a series of events which seeks to establish a systematic, continuing criminal campaign.[3750]

Trial Chamber declined to strike paragraph of the indictment upon which no evidence was led where paragraph was interrelated to other paragraphs.[3751]

In cases where some evidence was led on part of a paragraph of an indictment, it is not justified to enter a finding of no case to answer.[3752]

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[3745] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 29; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 10; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (22 March 2007) at para. 8; *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Judgement of Acquittal* (14 October 2010) at para. 20

[3746] *Prosecution v Kalimanzira*, No. ICTR-05-88-T, *Decision of No Case to Answer* (3 September 2008) at para. 5

[3747] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera and Edouard Karemera's Motions for No Case to Answer* (19 March 2008) at para. 3

[3748] *Prosecutor v Nzabonimana*, No. ICTR-98-44D-T, *Order for Prosecution to Review Indictment and to File Public Version* (8 April 2011)

[3749] *Prosecutor v Ngirabatware*, No. ICTR-99-54-T, *Decision on Defence Motion for Judgement of Acquittal* (14 October 2010) at paras. 28-29

[3750] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera and Edouard Karemera's Motions for No Case to Answer* (19 March 2008) at para. 4

[3751] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion for Finding of No Case to Answer and Motion for Reconsideration* (3 July 2008) at para. 8

[3752] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera and Edouard Karemera's Motions for No Case to Answer* (19 March 2008) at para. 9

Accused acquitted on one of two independent allegations of murder that comprised a single count where they involved separate transactions and occurrences.[3753]

**credibility**

Generally, the Trial Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98*bis*, leaving those matters to the end of the case. However, there is one situation in which the Trial Chamber is obliged to consider such matters; it is where the Prosecution's case has completely broken down, either on its own presentation, or because of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case.[3754]

In assessing whether there is sufficient evidence upon which a reasonable trier of fact could, at the end of the trial, enter a conviction, the Chamber must "assume that the prosecution's evidence [is] entitled to credence unless incapable of belief". The inquiry is simply to determine whether the evidence – assuming that it is true – could not possibly sustain a finding of guilt beyond a reasonable doubt.[3755]

Contradictory evidence may nevertheless be reliable, at least in part, and thus, there is no justification for discounting evidence of prosecution witness who contradicted one another on a motion to acquit.[3756]

Trial Chamber declined to find "no case to answer" as to testimony of prosecution witness whose testimony had been contradicted by other prosecution witnesses, preferring to wait until it heard all the evidence before making a credibility determination.[3757]

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[3753] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision on Defence Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (22 March 2007) at para. 9

[3754] *Prosecutor v Kamuhanda*, No. ICTR-99-54A-T, *Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence* (20 August 2002) at para. 19; *Prosecutor v Mpambara*, No. ICTR-2001-65-T, *Decision on the Defence's Motion for Judgement of Acquittal* (21 October 2005) at para. 4; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 37; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Defence Motion for Judgement of Acquittal* (28 October 2005) at para. 7; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 11; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Judgement of Acquittal* (8 March 2007) at para. 13; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 7

[3755] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motions for Judgement of Acquittal* (2 February 2005) at para. 6; *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 71

[3756] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 42

[3757] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, Notice of 15th Violation of Rule 72(E), and Motion to Strike the Prosecution's Response* (19 November 2008) at para. 9

Trial Chamber declined to rule on matters related to credibility of witness who had recanted during prosecution case, preferring to defer its decision until the end of the case and the completion of an investigation into false testimony by the witness.[3758]

**defects in indictment**

Under Rule 98 *bis* , the Trial Chamber is not to consider whether the defence has had insufficient notice of charges to sustain a conviction, or whether there are other legal defects in an Indictment which could lead to acquittal.[3759]

Pleas for quashing the indictment cannot be raised under Rule 98*bis*.[3760]

Trial Chamber erred in finding indictment defective in Rule 98 *bis* decision. Instead, it should have determined whether variance between indictment and evidence warranted acquittal.[3761]

**forms of liability**

An accused may be acquitted of individual responsibility under Article 6(1) on a particular count, even if there is sufficient evidence to convict under Article 6(3).[3762]

Rule 98 *bis* deals with consideration of counts, and not forms of liability. Trial Chamber refused to consider acquittal of Article 6(3) charges at conclusion of prosecution case.[3763]

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[3758] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Joseph Nzirorera's Second Motion for Finding of No Case to Answer and Motion for Reconsideration* (3 July 2008) at para. 4

[3759] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motions for Judgement of Acquittal* (2 February 2005) at para. 7; *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 73; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 41; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 14; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (17 October 2006) at para. 19; *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 27; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 8

[3760] *Prosecutor v. Semanza*, No. ICTR-97-20-1, *Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment(Article 93bis of the Rules of Procedure and Evidence) and Decision on the Prosecutor's Urgent Motion for Suspension of Time –Limit for Response to the Defence Motion for a Judgement of Acquittal* (27 Sept.2001) at para.18

[3761] *Prosecutor v Muvunyi*, No. ICTR-00-55A-R98*bis*, *Decision on Appeal of Decision Denying the Motion for Judgement of Acquittal* (11 November 2009)

[3762] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at paras. 40-41

[3763] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Motions for Judgement of Acquittal* (19 March 2008) at para. 15

**not binding on judgement**

Non-acquittal under a Rule 98*bis* motion does not mean that it will necessarily ultimately result in a conviction on the count or the charge at the end of the trial. Even if the Defence fails to adduce exculpatory evidence, the assessment of the evidence in its totality at the end of the trial is different from the evaluation of its sufficiency under Rule 98*bis.*[3764]

**standard**

The standard which must be met by prosecution evidence to resist a motion for judgement of acquittal is that there must be evidence upon which a reasonable trier of fact could find the accused guilty of the crime charged.[3765]

The test under Rule 98 *bis* is whether a reasonable trier of fact could arrive at a conviction if the prosecution evidence is accepted.[3766]

The prosecution case should be evaluated as a whole, looking to the totality of the evidence and making any reasonably possible inferences.[3767]

Where some evidence was adduced, and that evidence, if believed, could be sufficient for a reasonable trier of fact to sustain beyond reasonable doubt a conviction on that count, a motion for judgement of acquittal should be denied. Where no evidence was adduced in relation to a count, the motion should be granted.[3768]

The test to be applied is whether the evidence, assuming it is true, could not possibly sustain a finding of guilt beyond reasonable doubt. That will only be the case

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[3764] *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 71; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Defence Motion for Judgement of Acquittal* (28 October 2005) at para. 16

[3765] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Motions for Judgement of Acquittal* (2 February 2005) at para. 3; *Prosecutor v. Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Defence Motions for Acquittal Under Rule 98 bis* (16 December 2004) at para. 71; *Prosecutor v Mpambara*, No. ICTR-2001-65-T, *Decision on the Defence's Motion for Judgement of Acquittal* (21 October 2005) at para. 4; *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98 bis* (13 October 2005) at para. 35; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Defence Motion for Judgement of Acquittal* (28 October 2005) at para. 5; *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on Defence Motions for Judgement of Acquittal* (20 March 2007) at para. 6

[3766] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 8; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Judgement of Acquittal* (8 March 2007) at para. 11

[3767] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 11

[3768] *Prosecutor v Zigiranyirazo*, No. ICTR-2001-73-T, *Decision on the Defence Motion Pursuant to Rule 98 bis* (21 February 2007) at para. 8; *Prosecutor v Nchamihigo*, No. ICTR-2001-63-T, *Decision on Defence Motion for Judgement of Acquittal* (8 March 2007) at para. 12

where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief.[3769]

A Rule 98 *bis* motion will succeed if an essential ingredient for a crime was not made out in the Prosecution's case; or, if based on evidence adduced by the Prosecution, an ingredient required as a matter of law to constitute the crime is missing, that evidence would also be insufficient to sustain a conviction.[3770]

In this case, there was no evidence to support charges of rape, murder, outrages upon human dignity, and superior responsibility for conspiracy and judgement of acquittal on those counts were granted.[3771]

**timing**

Defence would not be allowed to make new motion for judgement of acquittal where witness recanted his testimony when recalled after close of prosecution case.[3772]

**variance**

Variance in date of meeting between indictment and prosecution evidence would only warrant acquittal if prosecution evidence was susceptible of the existence of more than one meeting during the relevant time frame. Since the prosecution led evidence of only one meeting, the variance in dates did not warrant a judgement of acquittal for material variance.[3773]

**Rule 99—status of the acquitted person**

**(A) In case of acquittal, the accused shall be released immediately.**
**(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of his intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, at the request of the Prosecutor, issue a warrant for the arrest and further detention of the accused to take effect immediately.**

**release upon acquittal**

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[3769] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005) at para. 4
[3770] *Nahimana et al*., Reasons for Oral Decision of 17 September 2002 on the Motions for Acquittal (TC); *Ntagerura et al*., T. 6 March 2002 (oral argument and decision) para. 19
[3771] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Defence Motions Pursuant to Rule 98 bis* (22 November 2005)
[3772] *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File Another Rule 98 bis Motion* (19 April 2008) at para. 7; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Mathieu Ngirumpatse's Motion for Judgement of Acquittal* (16 June 2008)
[3773] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision on Appeals Chamber Remand of Decision Denying the Motion for Judgement of Acquittal* (25 November 2009) at para. 13

The failure of the prosecution to seek restrictions on the liberty of an acquitted person at the time of pronouncement of the judgement does not preclude the Chamber from imposing conditions if it believes they are necessary.[3774]

Restrictions on liberty of acquitted person pending decision of prosecution whether to appeal denied. Acquitted person need only inform the Tribunal of change of address.[3775]

**rights of acquitted persons**

It is a fundamental principle of human rights law that any violation of a human right entails the provision of an effective remedy.[3776]

Neither customary international law nor the Statute of the Tribunal provides for compensation to acquitted persons for a grave and manifest miscarriage of justice.[3777]

Article 85(3) of the ICC Statute constitutes customary international law for compensation of acquitted persons and makes compensation discretionary and not mandatory.[3778]

There is no right to compensation simply because one has been acquitted.[3779]

Acquitted person failed to establish that he was indicted and prosecuted on false and manipulated evidence or that the length of pre-trial detention violated his rights.[3780]

Compensation from the Tribunal for violation of right to counsel by unwarranted delay in providing counsel to an accused may not be ordered under Rules 54 or 5. where no material prejudice was caused.[3781]

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[3774] *Prosecutor v Nsengimana*, No. ICTR-01-69-T, *Decision on the Prosecution's Motion to Impose Restrictions on Nsengimana's Liberty* (24 November 2009) at para. 5
[3775] *Prosecutor v Nsengimana*, No. ICTR-01-69-T, *Decision on the Prosecution's Motion to Impose Restrictions on Nsengimana's Liberty* (24 November 2009)
[3776] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at para. 16; *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007) at para. 24
[3777] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007) at para. 10; *Prosecutor v Rwamakuba,* No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at para. 31
[3778] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73, *Decision on Protais Zigiranyirazo's Motion for Damages* (18 June 2012) at para. 19
[3779] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73, *Decision on Protais Zigiranyirazo's Motion for Damages* (18 June 2012) at para. 49
[3780] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007) at para.15
[3781] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at paras. 34,38

Compensation for failure to assign counsel to the accused while detained in Belgium at the request of the Tribunal denied where he was not prejudiced and his right to assignment of counsel prior to his transfer to the Tribunal was unclear.[3782]

Compensation for delay in commencing the trial was not warranted where the accused did not object to the delay.[3783]

Compensation for miscarriage of justice in Trial Chamber's analysis of accused's alibi was not the kind of grave or manifest injustice that would warrant compensation.[3784]

Compensation for failure of Tribunal to return accused to Belgium, where he was arrested, after his acquittal, denied where the Tribunal had no power to do so.[3785]

The right to an effective remedy for violation of fundamental human rights is provided in customary international law and is part of the inherent powers possessed by the Trial Chamber.[3786]

The power to provide an effective remedy to an accused who has suffered a violation of his or her fundamental human rights includes the power to award financial compensation.[3787]

An accused who was not assigned counsel for 4 ½ months likely suffered moral damage through feelings of confusion, isolation, and distress warranting financial compensation of $2,000.[3788]

**Rule 100—sentencing procedure on a guilty plea**

**(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.**
**(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Sub-Rule 102 (B).**

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[3782] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73, *Decision on Protais Zigiranyirazo's Motion for Damages* (18 June 2012) at para. 28
[3783] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73, *Decision on Protais Zigiranyirazo's Motion for Damages* (18 June 2012) at paras. 16, 42
[3784] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73, *Decision on Protais Zigiranyirazo's Motion for Damages* (18 June 2012) at para.21
[3785] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73, *Decision on Protais Zigiranyirazo's Motion for Damages* (18 June 2012) at para. 55
[3786] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at paras. 45,49
[3787] *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007) at para. 26; *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at paras. 58,62
[3788] *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Decision on Appropriate Remedy* (31 January 2007) at para. 73; *Rwamakuba v Prosecutor*, No. ICTR-98-44C-A, *Decision on Appeal Against Decision on Appropriate Remedy* (13 September 2007) at para. 30

**Rule 101—penalties**

**(A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.**
**(B) In determining the sentence, the Trial Chamber shall consider the factors mentioned in Article 23 (2) of the Statute, as well as such factors as:**
**(i) Any aggravating circumstances;**
**(ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;**
**(iii) The general practice regarding prison sentences in the courts of Rwanda;**
**(iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.**
**(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.**

**aggravating factors**

**abuse of trust**

Abuse of trust was aggravating factor for priest convicted of committing genocide against his parishioners.[3789]

The fact that the attacks were committed in churches and a hospital, which are traditionally regarded as places of sanctuary and safety, constitutes an aggravating factor.[3790]

**cooperation with prosecution**

The lack of cooperation with the prosecution cannot be considered an aggravating factor.[3791]

**double counting**

Any circumstances that are included as an element of a crime cannot be taken into consideration as an aggravating factor.[3792]

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[3789] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 230
[3790] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 605; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 580
[3791] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 127
[3792] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 438; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 22

The accused's abuse of his role as an influential authority is an element of the crime for which he was convicted under Article 6 (1) and Article 6 (3) of the Statute. Therefore, it cannot be considered as an aggravating factor.[3793]

Abuse of authority may be considered as an aggravating factor for an accused convicted of superior responsibility.[3794]

Trial Chamber erroneously double counted the accused's failure to take action to prevent the killings as an aggravating factor for sentencing and an element of his conviction for superior responsibility.[3795]

Although certain modes of liability require a position of authority, a high level of authority is not an element of the mode of liability and can be considered an aggravating factor.[3796]

The Trial Chamber erred in finding the same facts to be aggravating factors as it used to convict the accused of instigating and aiding and abetting.[3797]

Trial Chamber erred in considering number of victims for the gravity of the offence and again as an aggravating factor.[3798]

**indictment**

Only those facts pleaded in the indictment can be considered as aggravating factors for sentencing.[3799]

**magnitude of crimes**

The magnitude of the crimes committed in Rwanda in 1994, resulting in the killing of several thousand civilians within 100 days, shock the collective conscience and constitute an aggravating circumstance.[3800]

**position and stature of the accused**

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[3793] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 859

[3794] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3360

[3795] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 380

[3796] *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 26

[3797] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 137

[3798] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 275; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3413

[3799] *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 82; *Kalimanzira v Prosecutor*, No. ICTR-05-88-A, *Judgement* (20 October 2010) at para. 46; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 615; *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 381

[3800] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 112

The fact that the accused was educated is an aggravating factor.[3801]

The more senior an accused is in the command structure, the more severe should be the sentence.[3802]

The fact that the accused held a position of authority may be an aggravating factor at sentencing.[3803] Before taking an accused's superior position into account at sentencing, the Trial Chamber must find that the accused's superior position was proven at trial.[3804]

The accused stature in the community as a prominent former official is an aggravating factor.[3805]

Stature in Rwandan society can be an aggravating factor. The accused, a military chaplain, was a well-known priest within the community, and his position meant that he was trusted and that he had a certain moral authority over soldiers.[3806]

The accused's position in the Interim Government is not itself an aggravating factor, but his abuse of that position is.[3807]

The position of bourgmestre was not such a high position of authority such as to constitute and aggravating factor.[3808]

The role of the accused in the formation and operation of Radio RTLM was an aggravating factor.[3809]

It was within the Trial Chamber's competence and reasonable for it to conclude that the accused did not hold a hierarchical position sufficient to render him liable for

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[3801] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 120; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 63; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 581

[3802] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 382; *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 352

[3803] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 357; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 819; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 604; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.345; *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 347; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 120; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 62; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 577

[3804] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 82

[3805] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 439

[3806] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Judgement* (27 February 2009) at para 559.

[3807] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 136

[3808] *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 28

[3809] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 47

criminal responsibility as a superior while also finding that his influence was substantial enough to constitute an aggravating factor.[3810]

**victims**

The number of victims may be an aggravating factor[3811] even for extermination, where the number of victims exceeded that necessary to support a conviction for extermination.[3812]

The harm caused to the victims and families may be an aggravating factor, for instance in the case of mutilation.[3813]

The young age of the victim is an aggravating factor.[3814]

To be raped in the presence of other people, compounds the public humiliation and constitutes an aggravating factor.[3815] Public humiliation is an aggravating factor.[3816] Attacks calculated to degrade and humiliate the victims constitute an aggravating factor.[3817]

A savage attack upon a pregnant woman constitutes a highly aggravating factor.[3818]

**zeal in committing crime**

The zeal with which a crime is committed may be viewed as an aggravating factor,[3819] not in assessing the gravity of the offence.[3820]

**burden of proof**

Aggravating circumstances must be proved beyond a reasonable doubt. Mitigating factors must be proved on a balance of probabilities.[3821]

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[3810] *Semanza v Prosecutor,* No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 336
[3811] *Prosecutor v Simba,* No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 440; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 579; *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2272
[3812] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 135; *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 231; *Nzabonimana v Prosecutor*, No. ICTR-98-44D-A, *Judgement* (29 September 2014) at para. 465; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 23; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3389
[3813] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 361
[3814] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 607
[3815] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 609
[3816] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 611
[3817] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 613
[3818] *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 612
[3819] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 351
[3820] *Simba v Prosecutor,* No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 320

Only those matters which are *proved beyond reasonable doubt* against an accused may be the subject of an accused's sentence or considered in aggravation of that sentence.[3822]

Trial Chamber refused to consider conduct not alleged in the indictment when determining aggravating factors.[3823]

The burden of proof which must be met by an accused regarding mitigating circumstances is not, as with aggravating circumstances, proof beyond reasonable doubt, but proof on the balance of probabilities -- the circumstance in question must exist or have existed "more probably than not".[3824]

**credit for time served**

Credit for time served in State custody during an abortive transfer of the case pursuant to Rule 11 *bis* would be granted toward service of the ICTR sentence.[3825]

**cumulative convictions**

**chapeau elements**

The elements compared under this test include those contained in the introductory paragraphs of the provisions.[3826]

**conspiracy**

Cumulative convictions can be entered for genocide and conspiracy to commit genocide as the material elements are different. A court is bound to enter a conviction for distinct crimes to fully reflect the criminality of the accused person.[3827]

The inchoate nature of the crime of conspiracy does not obviate the need to enter a conviction for this crime when genocide has also been committed by the accused, since the crime of genocide does not punish the agreement to commit genocide.[3828]

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[3821] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 40
[3822] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 817; *Prosecutor v Muhimana*, No. ICTR-95-1B-T, *Judgement* (28 April 2005) at para. 590; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 438
[3823] *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para.29
[3824] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 294; *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para 438; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 111
[3825] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Order Regarding the Computation of Time Spent in Custody to be Deducted in Michel Bagaragaza's Sentence* (1April 2010)
[3826] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 363
[3827] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 261; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Judgement and Sentence* (24 June 2011) at para. 5678 at fn. 14634

The cumulative conviction prohibition arises only between crimes not between a crime, such as conspiracy to commit genocide, and a form of liability, such as joint criminal enterprise.[3829]

An accused can be held criminally responsible for both the act of conspiracy and the substantive offence of genocide that is the object of the conspiracy.[3830] However, it is the better practice to enter only a single conviction for the substantive offense.[3831]

**forms of liability**

It is error for a Trial Chamber to convict an accused on alternative forms of liability. However, the Trial Chamber did not err when it implied that the accused was guilty under multiple modes of liability.[3832]

An accused cannot be convicted of both planning and committing the same offence.[3833]

Where both article 6(1) and article 6(3) responsibility are alleged under the same count, a Trial Chamber should enter a conviction based on Article 6(1) only and consider the accused's superior responsibility as an aggravating factor in sentencing.[3834]

Concurrent conviction for individual and superior responsibility in relation to the same count based on the same facts constitutes legal error invalidating the judgement.[3835]

In case of cumulative charging, the Trial Chamber will retain only the form of responsibility that best describes the Accused's culpable conduct.[3836]

The Trial Chamber erred in failing to determine the accused's responsibility under Article 6(3) even where it convicted him under Article 6(1) so that it could be determined whether the superior responsibility was an aggregating factor at sentencing.[3837]

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[3828] *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 711
[3829] *Gatete v Prosecutor*, No. ICTR-00-61-A, *Judgement* (9 October 2012) at para. 263
[3830] *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1043.
[3831] *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Judgement and Sentence* (29 March 2011) at paras.661-62
[3832] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Judgement* (16 January 2007) at para. 123
[3833] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at para. 643
[3834] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 487; *Renzaho v Prosecutor*, No. 97-31-A, *Judgement* (1 April 2011) at para. 564; *Prosecutor v Karera*, No. ICTR-01-74-T, *Judgement and Sentence* (7 December 2007) at para. 566; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 338; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3359
[3835] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 81
[3836] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.266
[3837] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 268

Conviction for aiding and abetting would be vacated when based upon the same facts as conviction for ordering, instigating, or joint criminal enterprise.[3838]

**same acts and separate crimes**

Convictions for genocide and convictions for crimes against humanity, based on the same facts, are permissible.[3839]

Convictions for genocide and extermination as a crime against humanity, based on the same facts, are permissible,[3840] as are convictions for murder as a war crime and genocide and extermination,[3841] as are convictions for murder and persecution as crimes against humanity,[3842] and murder as a crime against humanity and violence to life as a war crime.[3843]

Cumulative convictions for persecution and extermination were permissible,[3844] as well as incitement to genocide and persecution.[3845]

Simultaneous convictions are permissible for war crimes, crimes against humanity and complicity to commit genocide as each has a materially distinct element.[3846]

Murder and torture are composed of different legal elements; that is, each crime contains an element that the other does not.[3847]

Conviction for murder as a crime against humanity and conviction for extermination as a crime against humanity, based on the same set of facts, however, cannot be cumulative.[3848]

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[3838] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 77; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at paras. 448,549

[3839] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 318; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 426 *Simba v Prosecutor*, No. ICTR-01-76-A, *Judgement* (28 November 2007) at para. 277; *Karemera & Ngirumpatse v Prosecutor*, No. ICTR-98-44-A, *Judgement* (29 September 2014) at para. 610

[3840] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 542; *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 583; *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 367; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 1032

[3841] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 583

[3842] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 414

[3843] *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 415

[3844] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 1027

[3845] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Judgement* (28 November 2007) at para. 1035

[3846] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 369; *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Judgement* (7 July 2006) at para. 427

[3847] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 320

[3848] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 542; *Prosecutor v Kajelijeli*, No. ICTR-98-44A-T, *Judgment and Sentence* (1 December 2003) at para. 886;

**test**

Multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.[3849]

**false testimony**

Sentence of 9 months imprisonment was appropriate for witness who pled guilty to providing false testimony to exonerate an accused.[3850]

**gravity of offence**

The gravity of the offence is the primary consideration for a Trial Chamber when imposing sentence.[3851]

The gravity of the offence includes the nature of the crime, the circumstances of the case, and the form and degree of the participation of the accused in the crime.[3852]

Conviction on basis of superior responsibility does not necessarily warrant a less severe sentence than a conviction for individual responsibility.[3853]

Aiding and abetting is a form of responsibility that generally warrants a lower sentence than forms of direct participation.[3854]

The principle that gradation in sentencing dictates that leaders and planners should bear heavier responsibility than those further down the scale, subject to the proviso that the gravity of the offence is the primary consideration of the Trial Chamber in imposing a sentence.[3855]

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*Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 102; *Prosecutor v Gatete*, No. ICTR-2000-61-T, *Judgement and Sentence* (29 March 2011) at para. 666; *Bagosora & Nsengiyumva v Prosecutor*, No. ICTR-98-41-A, *Judgement* (14 December 2011) at para. 416; *Ntabakuze v Prosecutor*, No. ICTR-98-41A-A, *Judgement* (8 May 2012) at para. 261

[3849] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-A, *Judgement* (13 December 2004) at para. 542; *Prosecutor v Nahimana et al*, No. ICTR-99-52-T, *Judgement and Sentence* (3 December 2003) at para. 1090.

[3850] *Prosecutor v GAA*, No. ICTR-07-90-R77-I, *Judgement and Sentence* (4 December 2007) at para. 13

[3851] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 382; *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 357; *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 39

[3852] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 39

[3853] *Ntabakuze v Prosecutor*, No. ICTR-98-41A-A, *Judgement* (8 May 2012) at paras. 282,303

[3854] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3424

[3855] *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 402

Trial Chamber erred in holding accused responsible for crimes committed while he was head of civil defence when it had acquitted him of responsibility for crimes committed by members of civil defence structure.[3856]

**individual circumstances of accused**

A Trial Chamber must consider the individual circumstances of the accused, as well as the aggravating and mitigating factors.[3857]

The Chamber must ensure that the sentence is commensurate with the individual circumstances of the offender.[3858]

Fact that the accused held no position of authority warranted lesser sentence that that of others convicted of the same offence.[3859]

**life sentence**

The Chamber has also examined the jurisprudence of the Tribunal and notes that the maximum penalty of life imprisonment is usually reserved for those who held positions of authority and planned or ordered atrocities, as well as for those who committed crimes with zeal or sadism.[3860]

There is no presumption that a conviction for genocide should be accompanied by a life sentence absent significantly mitigating factors. Each case is to be decided on its individual facts.[3861]

Nothing prevents a Trial Chamber from imposing a life sentence considering the gravity of the crimes committed, even if the evidence in the case reveals the existence of mitigating circumstances.[3862]

**mitigating circumstances**

**age and health**

Advanced age of more than 63 years old was a mitigating factor.[3863]

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[3856] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3431
[3857] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 352; *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 354
[3858] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 39
[3859] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 280
[3860] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 538
[3861] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 260
[3862] *Niyitegeka v Prosecutor*, No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 267; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at paras. 3394, 3404
[3863] *Prosecutor v Kanyarukiga*, No 2002-78-T, *Judgement and Sentence* (1 November 2010) at para. 681

Combination of age and ill-health considered a mitigating factor.[3864]

**conduct in detention**

Good conduct at the UNDF is a mitigating factor.[3865]

Trial Chamber erred in failing to consider accused's good conduct in detention.[3866]

**cooperation with the prosecution**

Cooperation with the prosecution is a mitigating factor.[3867] However, a mere offer to cooperate in the future is not.[3868]

**difficulties**

Difficulties in exercising authority to stop killings, considering prevailing situation in Rwanda during the genocide, was a mitigating factor.[3869]

**in general**

Mitigating circumstances do not have be directly related to the offence.[3870]

**good character**

It was within the Trial Chamber's discretion to consider as mitigation in sentencing the accused's previous good character and accomplishments as bourgmestre.[3871]

Previous good character was a mitigating factor.[3872]

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[3864] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 175; *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 72; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3476
[3865] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 92; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 43; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3476
[3866] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3476
[3867] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 62; *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 39
[3868] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 74
[3869] *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 47
[3870] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 125; *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 34
[3871] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 398; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.352; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 150
[3872] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 92

The fact that the accused had no prior criminal record was a mitigating factor.[3873]

Trial Chamber erred in finding that good relations of accused's family with its neighbours in Rwanda to be a mitigating factor.[3874]

Lengthy public service to one's country prior to the events is a mitigating factor.[3875]

The fact that the accused acted more out of concern for the safety of himself and his family rather than out of hatred for Tutsis was a mitigating factor.[3876]

Trial Chamber erred in considering the accused's moderate political views and his membership in a moderate political party as mitigating circumstances.[3877]

The fact that the accused is married and has children can be a mitigating factor.[3878]

Social factors such as the accused's social, professional, and family background may be mitigating factors in showing the likelihood of rehabilitation.[3879]

The good character of the Accused prior to 1994, his position as a husband and father of three children, and the fact that he spent most of his life working for the defence of his country are mitigating factors as was evidence indicating that prior to 1994, the Accused never discriminated against anyone based on ethnicity.[3880]

**guilty plea**

A guilty plea, and its timing, is a mitigating factor.[3881]

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[3873] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 165; *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 65; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 92 *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para.43;
[3874] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 198
[3875] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 824
[3876] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 36
[3877] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at paras. 243-44
[3878] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 143; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 81; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 39; *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 396
[3879] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 143-44; *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 66
[3880] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 543
[3881] *Prosecutor v Bisengimana*, No. ICTR-00-60-T, *Judgement and Sentence* (13 April 2006) at para. 126, 140; *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 52,55; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 68; *Prosecutor v*

**remorse or regret**

Expression of remorse is a mitigating factor.[3882]

The accused can express sincere regrets without admitting his participation in a crime. Such expressions of sympathy or compassion have been accepted as mitigating circumstances.[3883]

Trial Chamber erred in not considering accused's statement of regret as a mitigating factor.[3884]

**role in the offence**

Participation in offence simply as an approving spectator was not a mitigating factor.[3885]

Although following superior orders is a mitigating factor under Article 6(4), the senior status and stature of the accused in the Rwandan army and their repeated execution of crimes as well as the manifestly unlawful nature of any orders they received to perpetrate them meant that no mitigation was warranted on this ground.[3886]

In mitigation, the character of the accused, his reputation as a political moderate, his support for the Arusha Accords, his cooperation with UNAMIR, and his attempts to stop the killings and to save the lives of Tutsi during the events of 1994, the degree of control that the accused exercised over the *gendarmes*, his material ability to prevent and punish crimes led to a reduction of sentenced to time served.[3887]

The fact that the accused did not possess the genocidal intent to kill the Tutsis and that he tried to preserve security in his *commune* in the days following the death of President Habyarimana until the situation became extremely chaotic, carried significant weight as mitigating factors in sentencing.[3888]

**victims' assistance**

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*Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para.33 *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 38

[3882] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 64; *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 34; *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 38

[3883] *Nchamihigo v. Prosecutor*, No. ICTR-2001-63-A, *Judgement* (18 March 2010) at para. 396.

[3884] *Ntabakuze v Prosecutor*, No. ICTR-98-41A-A, *Judgement* (8 May 2012) at para. 292

[3885] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 87

[3886] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement* (18 December 2008) at para. 2274.

[3887] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at para. 2188

[3888] *Prosecutor v Ndahimana*, No.ICTR-01-68-T, *Judgement and Sentence* (30 December 2011) at para. 869

Trial Chamber erred in holding that accused's saving of Tutsis prior to 1994 could not be a mitigating factor because it was outside the temporal jurisdiction of the Tribunal.[3889] Trial Chamber erred as a matter of law in failing to consider, as a mitigating circumstance, that the accused offered words of comfort to the Tutsis hiding in his home and made a decision not to evacuate his wife and children partly on account of these Tutsis.[3890]

The provision of assistance to Tutsis, by sheltering them at one's home and trying to arrest wrongdoers, is a mitigating factor.[3891]

Trial Chamber did not err in concluding that selective assistance to Tutsis was not a mitigating factor.[3892]

Saving a Tutsi during the genocide is a mitigating factor.[3893]

Good relations with Tutsis was a mitigating factor.[3894]

The selective exercise by the accused of his power to protect civilians based on friendship or family ties, was not a mitigating factor, but further evidence of his abuse of office and authority.[3895]

**voluntary surrender**

The accused's voluntary surrender was a mitigating factor.[3896]

**proportionality of sentence**

A sentence must be proportionate to both the seriousness of the crimes committed and the degree of participation of the accused.[3897]

Comparison between cases is of limited assistance in challenging a sentence. Any given case may contain a multitude of variables, and often the differences are more significant than the similarities.[3898]

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[3889] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 298
[3890] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 310
[3891] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Judgement* (14 July 2009) at para 824
[3892] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Judgement* (20 October 2001) at para. 256
[3893] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 69; *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 77 *Prosecutor v Rugambarara*, No. ICTR-00-59-T, *Sentencing Judgement* (16 November 2007) at para. 37;
[3894] *Prosecutor v Bagaragaza*, No. ICTR-2005-86-S, *Sentencing Judgement* (17 November 2009) at para. 36
[3895] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-T, *Judgement and Sentence* (12 September 2006) at para. 540
[3896] *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Judgement* (12 March 2008) at para. 236
[3897] *Rutaganda v Prosecutor*, No. ICTR-96-3-A, *Judgement* (26 May 2003) at para. 591
[3898] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Judgement* (14 December 2015) at para. 3400

Two accused convicted of similar crimes should not receive very different sentences and a previous decision may indeed provide guidance if it was for the same offence committed in substantially similar circumstances. However, often there are significant differences warranting different results.[3899]

A higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets extermination.[3900]

Life sentences are usually reserved for those who planned or ordered atrocities or participated with zeal.[3901]

In certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and even though the accused was not senior in the so-called command structure, a very severe penalty is nevertheless justified.[3902]

**remedy for violation of rights**

Any violation, even if it entails a relative degree of prejudice, requires a remedy.[3903]

A remedy for a human rights violation is to be granted on a case-by-case basis, considering the subject matter as well as the nature of the right allegedly violated.[3904]

The nature and form of the remedy should be proportional to the gravity of harm that is suffered.[3905]

Sentence reduction ordered for violation of right to be informed of charges promptly, right to appear before a Judge after arrest, and right to prompt initial appearance.[3906]

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[3899] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 387
[3900] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 388; *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 83
[3901] *Prosecutor v Serugendo*, No. ICTR-05-84-I, *Judgement and Sentence* (12 June 2006) at para. 83
[3902] *Muhimana v Prosecutor*, No. ICTR-95-1B-A, *Judgement* (21 May 2007) at para. 233
[3903] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Decision* (31 May 2000) at para. 125; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion Relating to his Right to be Tried Without Undue Delay* (23 June 2009) at para. 4
[3904] *Prosecutor v Rwamakuba*, No. ICTR-98-44-T, *Decision on Appropriate Remedy* (31 January 2007) at para. 68; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion Relating to his Right to be Tried Without Undue Delay* (23 June 2009) at para. 4
[3905] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Decision* (31 May 2000) at para. 125; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Edouard Karemera's Motion Relating to his Right to be Tried Without Undue Delay* (23 June 2009) at para. 4
[3906] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Judgement* (23 May 2005) at para. 25

Trial Chamber was required to make a finding that the fair trial rights of the accused were violated before considering this as a factor in the sentence.[3907]

Prosecution's violation of its disclosure obligations under Rule 68, as well as offer to drop the charges if the accused became a prosecution witness was considered by the Chamber in giving the accused a reduced sentence.[3908]

Where an accused's fair trial rights have been violated, a reduction in sentence may be an appropriate remedy if the accused is convicted at trial.[3909]

**revision of sentence**

Bourgmestre's sentence increased from 30 years to life where Trial Chamber's sentence simply could not be reconciled with principles governing sentences at the Tribunal.[3910]

Increase in sentence for additional murder conviction was not warranted where the Trial Chamber decided on the sentence based upon a full picture of the proven material allegations against him.[3911]

Sentence reduced from 25 years to 20 years where conviction for ordering one of the two crimes was vacated and he was convicted of aiding and abetting instead.[3912]

**Rwandan sentencing consideration**

Although his sentence may have been more severe in Rwandan courts, the Trial Chamber acted within its discretion when it imposed a lesser sentence.[3913]

Taking into consideration sentences imposed under Gacaca, a person who pled guilty to aiding an offence was subject to sentence of 7-12 years imprisonment.[3914]

**seriousness of offence**

There is no hierarchy of crimes under the statute. All the crimes are serious violations of international humanitarian law capable of attracting the same sentence.[3915]

The more heinous the crimes, the more severe the sentence should be.[3916]

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[3907] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 297
[3908] *Prosecutor v Ndindiliyimana*, No. ICTR-00-56-T, *Judgement* (17 May 2011) at paras. 2190-93
[3909] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 23
[3910] *Gacumbitsi v Prosecutor*, No. ICTR-2001-64-A, *Judgement* (7 July 2006) at para. 205
[3911] *Setako v Prosecutor*, No. ICTR-04-81-A, *Judgement* (28 September 2011) at para. 299
[3912] *Ntawukulilyayo v Prosecutor*, No. ICTR-05-82-A, *Judgement* (14 December 2011) at para. 245
[3913] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 380
[3914] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-T, *Judgement* (23 February 2007) at para. 104
[3915] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at para. 367
[3916] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, *Judgement* (17 June 2004) at para.344

Life sentences are generally reserved for those who planned or ordered atrocities or those who participated in them with zeal or sadism.[3917]

Determination that accused shared criminal intent of perpetrators, rather than simply aided and abetted them, resulted in increase of sentence from 15 to 25 years [3918]

**waiver**

Prosecution's failure to identify factors to be considered in sentencing during closing arguments waived its right to appeal the Trial Chamber's failure to consider them.[3919]

Failure to argue for mitigating circumstances precludes them from being taken into consideration on appeal.[3920]

Failure to make submissions on sentencing in the closing brief precludes an appeal on the Trial Chamber's failure to find mitigating circumstances.[3921]

**Rule 102—status of the convicted person**

**(A) Subject to the Trial Chamber's directions in terms of Rule 101, the sentence shall begin to run from the day it is pronounced under Rule 100 (B). However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64.**
**(B) If, by a previous decision of the Trial Chamber, the convicted person has been provisionally released, or is for any other reason at liberty, and he is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for his arrest. On arrest, he shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed.**

**Rule 103—place of imprisonment**

(**A) Imprisonment shall be served in Rwanda or any State designated by the Tribunal from a list of States which have indicated their willingness to accept convicted persons for the serving of sentences. Prior to a decision on the place of imprisonment, the Chamber shall notify the Government of Rwanda.**
**(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time limit for appeal has elapsed.**

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[3917] *Prosecutor v Simba*, No. ICTR-2001-76-T, *Judgement* (13 December 2005) at para. 434
[3918] *Ndahimana v Prosecutor*, No. ICTR-01-68-A, *Judgement* (16 December 2013) at para. 252-53
[3919] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 444
[3920] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 354; *Bizimungu v Prosecutor*, No. ICTR-00-56B-A, *Judgement* (30 June 2014) at para. 389
[3921] *Kanyarukiga v Prosecutor*, No. ICTR-02-78-A, *Judgement* (8 May 2012) at para. 274

**Rule 104—supervision of imprisonment**

**All sentences of imprisonment shall be served under the supervision of the Tribunal or a body designated by it.**

**Rule 105—restitution of property**

**(A) After a judgement of conviction containing a specific finding as provided in Rule 88 (B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.**
**(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.**
**(C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.**
**(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.**
**(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.**
**(F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.**
**(G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-Rules (C), (D), (E) and (F).**

**Rule 106—compensation to victims**

**(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.**
**(B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.**
**(C) For the purposes of a claim made under Sub-Rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.**

**Rule 107—general provisions**

**The Rules of Procedure and Evidence that govern proceedings in the Trial**

**Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber.**

**Rule 107 bis—practice directions for the Appeals Chamber**

**The Presiding Judge of the Appeals Chamber may issue Practice Directions, in consultation with the President of the Tribunal, addressing detailed aspects of the conduct of proceedings before the Appeals Chamber.**

**Rule 108—notice of appeal**

**A party seeking to appeal a judgement or sentence shall, not more than thirty days from the date on which the judgement or the sentence was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.**

The time for filing a notice of appeal runs from the time of the written judgement, not the oral delivery of the judgement.[3922]

Pursuant to Rule 108 of the Rules, the Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal contained in the notice of appeal. Such motions should be submitted as soon as possible after identifying the new alleged error of the Trial Chamber to be included in the notice of appeal or after discovering any other basis for seeking a variation to the notice of appeal. [3923]

A request to amend a notice of appeal must, at least, explain precisely what amendments are sought and why, with respect to each such amendment, the 'good cause' requirement of Rule 108 is satisfied. [3924]

The concept of "good cause" under this provision encompasses both good reason for including the new or amended grounds of appeal sought and good reason showing

[3922] *Prosecutor v Setako*, No. ICTR-04-81-A, *Decision on the Prosecution's Motion to Dismiss Ephrem Setako's Notice of Appeal* (2 July 2010) at para. 12
[3923] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 9
[3924] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 9; *Prosecutor v Seromba*, No. ICTR-2001-66-A, *Decision on Motion Accompanying Anathase Seromba's Appellant's Brief and Prosecution's Urgent Motion Objecting to Anathase Seromba's Appellant's Brief* (6 June 2007) at para. 11

why those grounds were not included (or were not correctly phrased) in the original notice of appeal. [3925]

Factors in determining whether "good cause" exists, include (i) the fact that the variation is so minor that it does not affect the content of the notice of appeal; (ii) the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and (iii) the fact that the variation would bring the notice of appeal into conformity with the appeal brief. [3926]

The "good cause" requirement must be interpreted restrictively at late stages in the appeal proceeding when amendments would necessitate a substantial slowdown in the progress of the appeal – for instance, when they would require briefs already filed to be revised and resubmitted. [3927]

In the interest of protecting the right of convicted defendants to a fair appeal, the Appeals Chamber has, in limited circumstances, permitted amendments even where there was no good cause for failure to include the new or amended grounds in the original notice—that is, where the failure resulted solely from counsel negligence or inadvertence. In such instances, the Appeals Chamber has permitted amendments which are of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if they were excluded. In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of counsel. [3928]

It is the Appellant's burden to demonstrate that each amendment should be permitted under the standards outlined above, including establishing lack of prejudice to the Prosecution.[3929]

The Appeals Chamber will refuse to consider an argument raised for the first time in the appellant's brief and not included in the notice of appeal, unless a motion to amend the notice of appeal is filed.[3930]

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[3925] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 10

[3926] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 10

[3927] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 11

[3928] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 12

[3929] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal, and to Correct His Appellant's Brief* (17 August 2006) at para. 14

Prosecution's motion to amend notice of appeal denied. The fact that an issue only became apparent during the drafting of the appellant's brief does not constitute good cause.[3931]

Good cause existed for adding a new ground of appeal when it arose from consultation with the accused after the French translation of the judgement was made available to him.[3932]

While the absence of prejudice for the opposing party is an important factor, it does not constitute good cause in and of itself. The mere fact that an appellant files proposed amendments before or the same day that the appellant's brief is filed is not sufficient to justify a variation of the notice of appeal, in particular when the variation sought consists of the addition of an entirely new error.[3933]

Good cause existed to amend grounds for appeal where issue was important, it was included in appellant's brief, there was no prejudice to the opposing party, and the accused should not be penalized for inadvertence of counsel.[3934]

**Rule 108 bis—Pre-Appeal Judge**

**(A) The Presiding Judge of the Appeals Chamber may designate from among its members a Judge responsible for the pre-hearing proceedings (the "Pre-Appeal Judge").**
**(B) The Pre-Appeal Judge shall ensure that the proceedings are not unduly delayed and shall take any measures related to procedural matters, including the issuing of decisions, orders and directions with a view to preparing the case for a fair and expeditious hearing.**
**(C) The Pre-Appeal Judge shall record the points of agreement and disagreement between the parties on matters of law and fact. In this connection, he or she may order the parties to file further written submissions with the Pre-Appeal Judge or the Appeals Chamber.**
**(D) In order to perform his or her functions, the Pre-Appeal Judge may proprio motu, where appropriate; hear the parties without the convicted or acquitted person being present. The Pre-Appeal Judge may hear the parties in his or her office, in which case minutes of the meeting shall be taken by a representative of the Registry.**
**(E) A motion made in the course of the proceedings shall be determined before the**

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[3930] *Prosecutor v Seromba,* No. ICTR-2001-66-A, *Decision on Motion Accompanying Anathase Seromba's Appellant's Brief and Prosecution's Urgent Motion Objecting to Anathase Seromba's Appellant's Brief* (6 June 2007) at para. 11
[3931] *Simba v Prosecutor,* No. ICTR-2001-76-A, *Decision on Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108* (17 August 2006) at para. 9
[3932] *Zigiranyirazo v Prosecutor,* No. ICTR-2001-73-A, *Decision on Protais Zigiranyirazo's Motion for Leave to Amend Notice of Appeal* (18 March 2009)
[3933] *Simba v Prosecutor,* No. ICTR-2001-76-A, *Decision on Prosecutor's Motion for Variation of Notice of Appeal Pursuant to Rule 108* (17 August 2006) at para. 11
[3934] *Prosecutor v Muvunyi,* No. ICTR-00-55A-A, *Decision on Motion to Amend Grounds of Appeal* (18 April 2007) at para. 5

**hearing unless the Pre-Appeal Judge, for good cause, orders that it be deferred for determination by the Appeals Chamber. Failure by a party to raise objections or to make requests which can be made prior to the hearing shall constitute waiver thereof, but the Pre-Appeal Judge for good cause may grant relief from the waiver.**
**(F) The Pre-Appeal Judge shall keep the Appeals Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Appeals Chamber.**
**(G) Upon a report of the Pre-Appeal Judge, the Appeals Chamber shall decide, should the case arise, on appropriate sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Section of the Rules.**
**(H) The Appeals Chamber may proprio motu exercise any of the functions of the Pre-Appeal Judge.**

**Rule 109—record on appeal**

**(A) The record on appeal shall consist of the trial record, as certified by the Registrar.**
**(B) A certified true copy of the record on appeal shall be promptly transmitted to the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague.**

**Rule 110—list of certified documents to the parties**

**The Registrar shall make available to the parties the list of documents constituting the record on appeal as certified by him and shall provide them with any of these documents on demand.**

**Rule 111—appellant's brief**

**(A) An Appellant's brief setting out all the arguments and authorities shall be filed within seventy-five days of filing of the notice of appeal pursuant to Rule 108. Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal pursuant to Rule 108.**
**(B) Where the Prosecutor is the Appellant, the Prosecutor shall make a declaration in the Appellant's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.**

The time limit as provided in Rule 111 of the Rules is neither dependent on the extent to which co-counsel contributes to the preparation of the appellant's brief, nor on the fact whether lead counsel was already part of the defence team during trial proceedings.[3935]

[3935] *Prosecutor v Ndindabahizi*, No. ICTR-01-71-A, *Décision on Requete Urgente Aux Fins de Prorogation de Délai Pour le Dépôt de Mémoire en Appel* (5 April 2005)

Prosecution's appeal and responding briefs would not be considered where they were filed out of time.[3936]

Post hearing submissions informing the Appeals Chamber of new jurisprudence will not be considered.[3937]

**Rule 112—respondent's brief**

**(A) A Respondent's brief of argument and authorities shall be filed within forty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief.**
**(B) Where the Prosecutor is the Respondent, the Prosecutor shall make a declaration in the Respondent's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.**

**Rule 113—brief in reply**

**An Appellant may file a brief in reply within fifteen days of filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief.**

**Rule 114—date of hearing**

**After the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties.**

**Rule 115—additional evidence**

**(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.**
**(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the**

[3936] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-A, *Judgement* (1 June 2001) at paras. 43-47
[3937] *Prosecutor v Muvunyi*, No. ICTR-00-55A-A, *Decision on Muvunyi's Request for Consideration of Post-Hearing Submissions* (18 June 2008)

**Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 118.**
**(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.**
**(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.**

**conclusiveness**

Testimony of witness at subsequent trial not admitted under Rule 115 where it did not undermine the Trial Chamber's conclusion, regarding the crimes committed on 13 April 1994 since the accused could have been at both places on the same day.[3938]

When additional evidence has been admitted on appeal, the accused must establish that no reasonable tribunal of fact could have reached a conclusion of guilt based upon the evidence before the Trial Chamber together with the additional evidence admitted on appeal.[3939] Such a showing was made in relation to the accused's conviction for rape.[3940]

Evidence "could have affected the verdict" if it could be shown that a conviction was unsafe.[3941]

Where the evidence was available at trial, or could have been discovered through due diligence, it may still be admitted if it could be shown that it *would* have had an impact on the verdict.[3942]

Testimony of witnesses to the killing of victim was not conclusive as to whether the accused, at a different time, had incited the population to kill the victim, and therefore evidence would not have affected the judgement and would not be admitted.[3943]

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[3938] *Prosecutor v Semanza*, No. ICTR-97-20-A, *Decision on Laurent Semanza's Motion for Admission of Additional Evidence* (5 April 2005) at para. 12
[3939] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 185
[3940] *Musema v Prosecutor*, No. ICTR-96-13-A (16 November 2001) at para. 193
[3941] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence* (4 May 2004); *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) at para. 8
[3942] *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) at para. 8
[3943] *Prosecutor v Muvunyi*, No. ICTR-00-55A-A, *Decision on Request to Admit Additional Evidence* (27 August 2007) at para. 14

Material related to the credibility of the witness would not be admitted under Rule 115 where the Trial Chamber took similar material into account in determining the credibility of the witness.[3944]

Subsequent testimony at which witness failed to attribute inciting words to the accused would not have made a difference in the verdict where the witness was not asked what the accused at said and where the witness testified that the purpose of the meeting was to incite people to kill Tutsis.[3945]

Information about prospect of fair trial in Rwanda would not have affected the judgement because the referrals were subject to revocation, and therefore were not admissible under Rule 115.[3946]

**credibility**

When deciding whether to admit additional evidence, the Appeals Chamber is required to ascertain whether the evidence appears to be reasonably capable of belief or reliance and need not at that stage make a finding as to the weight to be accorded to it.[3947]

Witness' recantation during Rule 115 hearing was not credible, therefore it did not require reversal of the Trial Chamber's judgement.[3948]

The Appeals Chamber will only admit evidence pursuant to Rule 115 if it appears to be reasonably capable of belief or reliance.[3949]

The Appeals Chamber will only refuse to admit evidence for lack of credibility if it does not appear to be reasonably capable of belief or reliance.[3950]

**diligence**

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[3944] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Anatole Nsengiyumva's Motions for the Admission of Additional Evidence* (21 March 2011) at para. 23
[3945] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Nteziryayo's Motion to Present Additional Evidence* (27 March 2015) at paras. 17-18
[3946] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at paras. 17,24
[3947] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Ntahobali's Seventh Motion to Present Additional Evidence* (6 October 2015) at fn. 51
[3948] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, *Judgement* (19 September 2005) at para. 221
[3949] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses* (20 June 2006) at para. 5
[3950] *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) at para. 7

Testimony of defence witnesses who subsequently testified in another trial could have been obtained by exercise of diligence by defence counsel and therefore their evidence was not admissible under Rule 115.[3951]

Defence counsel did not exercise due diligence by failing to request witness' judicial records from Rwandan authorities. Therefore, those records would not be admitted as additional evidence on appeal.[3952]

Defence counsel did not exercise due diligence in failing to see if prosecution witness had made further statements and in failing to seek to locate third person named by the witness to verify or disprove the allegations.[3953]

Defence counsel did not exercise due diligence by failure to file motion to compel testimony of witness after video link was denied. Therefore, the testimony of the witness would not be admitted as additional evidence on appeal.[3954]

The allocation of defence resources is a matter of trial strategy and cannot be used to justify the failure to obtain evidence during the trial.[3955]

The failure to appeal Trial Chamber's denial of admission of exhibits was a lack of diligence which precludes admission of the documents on appeal under Rule 115 absent a showing that they would have affected the judgement.[3956]

**evidence sought to be admitted**

A party seeking the admission of additional evidence on appeal must provide to the Appeals Chamber the evidence sought to be admitted to allow it to determine whether the evidence meets the requirements of Rule 115.[3957]

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[3951] *Prosecutor v Muvunyi*, No. ICTR-00-55A-A, *Decision on Request to Admit Additional Evidence* (27 August 2007) at para. 11; *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Nteziryayo's Motion to Present Additional Evidence* (27 March 2015) at para. 15

[3952] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Decision on Rukundo's Motion for Admission of Additional Evidence on Appeal* (4 June 2010) at para. 14

[3953] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Ntahobali's Seventh Motion to Present Additional Evidence* (6 October 2015) at para. 27

[3954] *Rukundo v Prosecutor*, No. ICTR-2001-70-A, *Decision on Rukundo's Motion for Admission of Additional Evidence on Appeal* (4 June 2010) at para. 20

[3955] *Bikindi v Prosecutor* No. ICTR-01-72-A, *Decision on Simon Bikindi's Motions to Admit Additional Evidence Pursuant to Rule 115 of the Rules* (16 September 2009) at para. 10

[3956] *Nchamihigo v Prosecutor*, No. ICTR-2001-63-A, *Decision on Simeon Nchamahigo's Second Motion for Leave to Present Additional Evidence on Appeal* (28 September 2009) at para. 14

[3957] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motion to Present Additional Evidence* (14 February 2005); *Prosecutor v Muvunyi*, No. ICTR-00-55A-A, *Decision on a Request to Admit Additional Evidence* (27 April 2007); *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Theoneste Bagosora's Motion for Admission of Additional Evidence* (7 February 2011) at para. 9

Appeals Chamber unable to determine relevance of proposed affidavits where they were not furnished in support of Rule 115 motion.[3958]

**excluded evidence**

Evidence which a party contends was improperly excluded at trial may not be the subject of a motion pursuant to Rule 115, but any error in its exclusion should be raised as a ground of appeal.[3959]

**good cause**

The good cause requirement obliges the moving party to show that it was not able to comply with the time limit set out in the rule and that it filed the motion as soon as possible after it became aware of the existence of the evidence sought to be admitted.[3960]

Appellant failed to show that evidence was not available to him within the time for filing of a Rule 115 motion, even if it was not available to him at trial.[3961]

The relevant time is when the witness became available to the appellant, not when a formal witness statement was taken.[3962]

**investigation**

In an exceptional case, the Appeals Chamber may order the Registrar to fund investigations at the appeal stage, if the moving party could show, for example, that it is in possession of specific information that needs to be further investigated to avoid a miscarriage of justice and that this specific information was not available at trial and could not have been discovered at trial even through the exercise of due diligence.[3963]

The party seeing authorization for funding of an investigation at the appeal stage must demonstrate that he has specific information that needs to be further investigated to

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[3958] *Prosecutor v. Kanyarukiga*, No. ICTR-2002-78-AR11bis, *Decision on the Request to Admit Additional Evidence of 18 July 2008* (1 September 2008) at para. 9

[3959] *Prosecutor v Gacumbitsi*, No. ICTR-01-64-A, *Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution* (21 October 2005) at para. 8

[3960] *Ndindabahizi v Prosecutor*, No. ICTR-01-71-A, *Decision on the Admission of Additional Evidence* (4 April 2006)

[3961] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses* (20 June 2006) at para. 16

[3962] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses* (20 June 2006) at para. 30

[3963] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Motion for Approval of the Investigation at the Appeal Stage* (3 May 2005); *Decision on the Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase* (3 May 2005) at para. 3; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator* (4 October 2005)

avoid a miscarriage of justice, such that the investigation will not merely be a fishing expedition.[3964]

**legal material**

Rule 115 does not apply to case law and legislation for the purposes of illustrating sentencing practices in national jurisdictions. Such materials may be referred to without being admitted as evidence.[3965]

**rejoinder**

There is no right to present rejoinder evidence to evidence admitted on appeal pursuant to Rule 115. Appeals Chamber determined that hearing rejoinder evidence in this case would not make a material difference nor was necessary for a fair determination of the issue.[3966]

**relevance**

Bruguière Report not admitted under Rule 115 because the identity of the persons responsible for the assassination of President Habyarimana was not relevant to any of the findings of the Trial Chamber that the accused had incited genocide.[3967]

**requirements**

The admission of additional evidence is subject to several conditions. The evidence submitted must first be relevant and credible. Moreover, the party adducing the additional evidence must establish that the said evidence "was not available at trial" in any form whatsoever and demonstrate that it could not have been discovered through the exercise of due diligence.[3968]

The following requirements must be met for additional evidence to be admitted on appeal: (1) the motion is filed within 30 days after filing of the reply brief, unless good

[3964] *Prosecutor v Gacumbitsi*, No. ICTR-01-64-A, *Decision on the Appellant's Rule 115 Motion and Related Motion by the Prosecution* (21 October 2005) at para. 15
[3965] *Bikindi v Prosecutor* No. ICTR-01-72-A, *Decision on Simon Bikindi's Motions to Admit Additional Evidence Pursuant to Rule 115 of the Rules* (16 September 2009) at para. 19
[3966] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Hassan Ngeze's Motion for Leave to Present Rejoinder Evidence* (12 January 2007)
[3967] *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)
[3968] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Decision on Prosecution Motion for Admission of Additional Evidence* (10 December 2004) at para. 9; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motion to Present Additional Evidence* (14 February 2005)

cause is shown; (2) the additional evidence was not available at trial: (3) the evidence is relevant; and (4) the evidence is credible.[3969]

The Appeals Chamber will only consider those items of evidence as potentially admissible which have in fact been submitted, are accompanied by precise references to the findings of fact made by Trial Chamber to which the evidence is directed and include detailed submissions on the effect of that evidence on the verdict.[3970]

**subpoena**

Rule 115 does not permit a party to request the Appeals Chamber to use its process to obtain evidence for the party. It deals with the situation where the party is already in possession of material which he did not have at trial.[3971]

Rule 115 does not permit a party to merely request that a person be summoned to give evidence at the appellate stage. Where a party seeks to call a witness at the appellate stage, it needs to provide a statement or other documentation of a potential witness' proposed evidence which the Appeals Chamber may admit as additional evidence and based on which it may determine whether calling the witness to testify on appeal is necessary.[3972]

Although Rule 115 could not be used to subpoena witness whose evidence had not been obtained at trial, the Appeals Chamber *proprio motu* ordered the witness to testify at the appeal hearing so that it could determine whether the failure to enforce the subpoena at trial prejudiced the accused.[3973]

**timeliness**

A motion to admit additional evidence on appeal must be filed within 75 days of the judgement, or good cause must be shown for the failure to do so.[3974]

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[3969] *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) at para. 6

[3970] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Decision on Defence Motion for the Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (28 October 2004) at para. 8.

[3971] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115* (5 May 2006) at para. 20; *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Theoneste Bagosora's Motion for Admission of Additional Evidence* (7 February 2011) at para. 9

[3972] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Anatole Nsengiyumva's Motions for Admission of Additional Evidence* (21 March 2011) at para. 32

[3973] *Bagosora et al v Prosecutor*, No. ICTR-98-41-A, *Decision on Theoneste Bagosora's Motion for Admission of Additional Evidence* (7 February 2011) at para. 10

[3974] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Decision on Second Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (7 March 2005)

Failure to show good cause for delay in filing Rule 115 motion and to provide reasons why items sought to be admitted were not available at trial required motion be rejected.[3975]

Good cause for late filing of two witness statements did not exist where defence failed to show why the information was not obtained earlier.[3976]

Good cause existed where material sought to be admitted was first published after the expiration of the deadline for Rule 115 motions.[3977]

Good cause for admitting testimony in other trial and portion of judgement in other case found at the discretion of the Pre-Trial Judge, due to the importance of the matter.[3978]

Satellite photos would not be admitted where accused waited four months after obtaining photographs to file Rule 115 motion.[3979]

**transfer proceedings**

Rule 115 applies to appeals from decisions under Rule 11 *bis*.[3980]

**unavailability at trial**

The party in question must show that it sought to make "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence before the Trial Chamber. In this connection, counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, and his or her inability to locate certain witnesses.[3981]

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[3975] *Muhimana v Prosecutor*, No. ICTR-95-1B-A, *Decision on Appellant's Motion to Present Additional Evidence* (25 September 2006)
[3976] *Karera v Prosecutor*, No. ICTR-01-74-A, *Decision on the Appellant's Request to Admit Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (29 October 2008) at para. 10
[3977] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 9
[3978] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73-A, *Decision on Zigiranyirazo's Second Motion for Admission of Additional Evidence* (24 September 2009)
[3979] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-A, *Decision on Ntahobali's Fifth Motion to Present Additional Evidence* (27 March 2015) at pp. 4-5
[3980] *Munyagishari v Prosecutor*, No. ICTR-05-89-AR11*bis*, *Decision on Bernard Munyagishari's Third and Fourth Motions for Additional Evidence and on the Appeals Against the Decision on Referral Under Rule 11 bis* (3 May 2013) at para. 9
[3981] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Decision on Prosecution Motion for Admission of Additional Evidence* (10 December 2004) at para. 9; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motion to Present Additional Evidence* (14 February 2005); *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence* (4 May 2004); *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on*

Evidence not available at trial or through due diligence must be such that it *could* have had an impact on the verdict, *i.e.*, it *could* have shown that the judgement was unfounded. Evidence that was available at trial and could have been discovered through the exercise of due diligence, must be such that the exclusion of the additional evidence *would amount to* a miscarriage of justice, since, had it been available at trial, it *would have had* an impact on the verdict.[3982]

The two witnesses who came forward after the acquittals at trial could have been interviewed by the Prosecution at the time of the trial if it had exercised due diligence. In addition, their testimony was not so critical to amount to a miscarriage of justice if not admitted.[3983]

Material from other cases which were publicly available during the trial should have been discovered with due diligence and would not be admitted on appeal.[3984]

Four letters were admitted pursuant to Rule 115 where they were relevant to the accused's alibi and could not have been produced through due diligence by the defence at trial since the prosecution had not disclosed them.[3985]

Additional evidence in the form of documents obtained from United States declassified archives refused where alternative means existed to obtain the information, including Freedom of Information Act request and interview of United States Ambassador.[3986]

Where the accused prevailed in the Trial Chamber, report of Human Rights Watch concerning fair trials in Rwanda, or information from his own investigators of interference with defence witnesses could not be shown to have affected the decision if

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*Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses* (20 June 2006) at para. 5

[3982] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Decision on Prosecution Motion for Admission of Additional Evidence* (10 December 2004) at para. 10-11; *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Hassan Ngeze's Motion to Present Additional Evidence* (14 February 2005); *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Decision on Second Defence Motion for Admission of Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (7 March 2005); *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Order for the Defence to File a Detailed Explanation on the Availability of the Additional Evidence Sought for Admission Pursuant to Rule 115 of the Rules of Procedure and Evidence* (4 May 2004).

[3983] *Prosecutor v Ntagerura et al*, No. ICTR-99-46-A, *Decision on Prosecution Motion for Admission of Additional Evidence* (10 December 2004) at para.24-26

[3984] *Zigiranyirazo v Prosecutor*, No. ICTR-01-73-A, *Decision on Zigiranyirazo's Motion for Admission of Additional Evidence on Appeal* (16 September 2009) at paras. 14,31,46

[3985] *Ndindabahizi v. Prosecutor*, No. ICTR-01-71-A, *Decision on the Admission of Additional Evidence* (14 April 2005)

[3986] *Nahimana v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence* (8 December 2006)

available to the Trial Chamber and therefore could not be admitted on appeal pursuant to Rule 115.[3987]

**Rule 116—extension of time limits**

**(A) The Appeals Chamber or the Pre-appeal Judge may grant a motion to extend a time limit upon a showing of good cause.**
**(B) Where the ability of the accused to make full answer and Defence depends on the availability of a decision in an official language other than that in which it was originally issued, that circumstance shall be considered as a good cause under the present Rule.**

Procedural time limits are to be respected, they are indispensable to the proper functioning of the Tribunal and the fulfilment of its mission to do justice. Violation of these time limits, unaccompanied by any showing of good cause, will not be tolerated.[3988]

Good cause for extension not shown where appeal was served on someone in OTP and prosecutor in charge of case made no inquiries, even though he knew certification to appeal had been granted. However, late filing of brief would be in the interests of justice given the difficulties of the Appeals Chamber in deciding an appeal based solely on one-sided briefing.[3989]

Good cause was not shown by prosecutor when it claimed it did not become aware of a Pre-Appeal Ruling denying an extension of time.[3990]

The prosecutor is expected to work equally in English and French. Good cause not shown for translation.[3991]

Good cause not shown for filing late reply due to holiday schedule of lead counsel.[3992]

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[3987] *Prosecutor v. Kanyarukiga*, No. ICTR-2002-78-AR11bis, *Decision on the Request to Admit Additional Evidence of 1 August 2008* (1 September 2008) at para. 10; *Prosecutor v. Kanyarukiga*, No. ICTR-2002-78-AR11bis, *Decision on the Request to Admit Additional Evidence of 18 July 2008* (1 September 2008) at para. 11
[3988] *Prosecutor v Karemera*, No. ICTR-98-44-R75, *Decision on Edouard Karemera's Motion for Extension of Time to Respond to Eliezer Niyitegeka's Appeal of 2 July 2008* (3 October 2008) at para. 4
[3989] *Ngirumpatse v Prosecutor*, No. ICTR-98-44-AR73.3, *Decision on Prosecutor's Urgent Motion for Extension of Time Limit* (10 June 2004)
[3990] *Prosecutor v Kajelijeli* , No. ICTR-98-44A-A, *Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time* (23 January 2004).
[3991] *Prosecutor v Kajelijeli*, No. ICTR 98-44A-A, *Decision on Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal* (17 December 2003).
[3992] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in Prosecutor v Karemera et al Case and Prosecutor's Motion to Object to the Late Filing of Jean-Bosco Barayagwiza's Reply* (8 December 2006) at para. 3

Good cause was shown when counsel had been unable to consult with the appellant over a weekend. [3993]

Good cause was shown where prosecutor's brief not yet translated into language of the accused. The instructions of the accused are important.[3994]

Good cause established for extension until judgement translated into French where accused and counsel worked in French only.[3995]

The Rule does not provide a basis for extension of time for filing the grounds of appeal where the judgement is filed in English and the accused understands French only. It may provide the basis for an extension for the filing of the appeal brief, however.[3996]

The complexity of the proceedings and the fact that the defence was engaged in trial proceedings when it was expected to prepare its interlocutory appeal cumulatively constituted good cause for an extension of time.[3997]

Good cause established where Trial Chamber had not yet issued written judgement.[3998]

A motion for extension of time should be filed as soon as possible after the decision granting certification, to allow the opposite party time to respond and time for the Appeals Chamber to conduct a fair assessment of the request.[3999]

**Rule 117—expedited appeals procedure**

**(A) An appeal under Rule 72 or Rule 73 or an appeal from a decision rendered under Rule 11 bis, Rule 65, Rule 77 or Rule 91 shall be heard expeditiously on the basis of the original record of the Trial Chamber. Appeals may be determined entirely on the basis of written briefs.**
**(B) Rules 109 to 114 shall not apply to such appeals.**
**(C) The Presiding Judge, after consulting the members of the Appeals Chamber, may decide not to apply Rule 118 (D).**

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[3993] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Decision on Notice of Leave to File Extremely Urgent Motion for Permission to Supplement Defence's Detailed Explanation Filed on May 24 2004* (15 June 2004).
[3994] *Kajelijeli v Prosecutor*, No. ICTR-98-44A-A, *Decision on Notice of Leave to File Extremely Urgent Motion for Enlargement of Time to Appellant's Brief in Reply* (14 June 2004).
[3995] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-A, *Decision on Motions for Extension of Time for Filing of Notices of Appeal* (11 November 2008)
[3996] *Prosecutor v Renzaho*, No. ICTR-97-31-A, *Decision on Tharcisse Renzaho's Motion for Extension of Time for the Filing of Notice of Appeal and Brief in Reply* (22 September 2009) at para. 4
[3997] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*.2, *Decision on Nzabonimana's Urgent Motion for an Extension of Time to File an Interlocutory Appeal* (8 June 2010) at para. 6
[3998] *Prosecutor v Nchamihigo*, No. ICTR-2001-63-A, *Decision on Motions for Extension of Time for Filing of Notices of Appeal* (11 November 2008)
[3999] *Nzabonimana v Prosecutor*, No. ICTR-98-44D-AR7*bis*.2, *Decision on Nzabonimana's Urgent Motion for an Extension of Time to File an Interlocutory Appeal* (8 June 2010) at para. 4

**Rule 117 ter—filing of the appeal documents**

**The notice of Appeal under Rule 108 and, where necessary, the briefs earmarked under Rules 111, 112, 113, 115 and 117 shall be filed, by the parties, either with the Registry or with an officer of the Registry specifically designated by the Registrar at the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague. Two similar records shall be kept: one at the Registry of the Tribunal and the other in The Hague. Depending on the place of filing, each record shall consist of the original documents or certified true copies thereof.**

**Rule 118—judgement on appeal**

**(A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal and on any additional evidence as has been presented to it.**
**(B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.**
**(C) In appropriate circumstances the Appeals Chamber may order that the accused be re tried before the Trial Chamber.**
**(D) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present.**
**(E) The written judgement shall be filed and registered with the Registry or with an officer of the Registry specifically designated by the Registrar at the Appeals Unit of the Appeals Chamber of the International Criminal Tribunal for Rwanda, located in The Hague.**

Retrial ordered where Trial Chamber failed to give reasoned opinion for believing prosecution witnesses over defence witness.[4000]

**Rule 119—status of accused following judgement on appeal**

**(A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.**
**(B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a re0sult of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces his acquittal, order his arrest or surrender to the Tribunal.**

**Rule 120—request for review**

**(A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber and**

[4000] *Muvunyi v Prosecutor*, No. ICTR-2000-55A-A, *Judgement* (29 August 2008) at para. 148

**could not have been discovered through the exercise of due diligence, the Defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.**
**(B) Any brief in response to a request for review shall be filed within forty days of the filing of the request.**
**(C) Any brief in reply shall be filed within fifteen days after the filing of the response.**

**additional evidence**

Rules 89(C) and 115 cannot be used to support the admission of new evidence in review proceedings.[4001]

**confidential information**

Appeals Chamber refused to consider closed session transcripts from other cases obtained by the accused in violation of protective orders and ordered the prosecution to investigate how the accused came into possession of the material.[4002]

**counsel**

A person is entitled to assignment of counsel to prepare a document which would allow a preliminary examination by the Appeals Chamber of an application to determine whether to authorize a review.[4003]

Counsel may be assigned in connection with a request for review at the preliminary examination stage for a limited duration if it is necessary to ensure the fairness of the proceedings.[4004]

Where defence counsel was willing to represent the accused pro bono, and the accused raised bona fide legal issues for which the assistance of counsel was necessary,

[4001] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at paras. 45,48
[4002] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review* (23 January 2008) at paras. 9-10
[4003] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Niyitegeka's Urgent Request for Legal Assistance* (20 June 2005)
[4004] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (7 March 2007) at para. 30; *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 12; *Ngeze v Prosecutor*, No. ICTR-99-52-R, *Decision on Hassan Ngeze's Motion to Obtain Assistance from Counsel* (28 February 2008); *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Fourth Request for Review* (12 March 2009) at para. 52

legal assistant would be appointed for three-month duration to assist the accused in preparing a petition for review.[4005]

This necessity is determined, to a great extent, by the grounds for review put forward by the applicant.[4006]

Where the petitioner's submissions were extensive, there was no cause for appointment of counsel.[4007]

Counsel cannot be appointed where the issues on review have not been identified by the applicant.[4008]

Appointment of counsel to reply to issues of disclosure of closed session testimony denied where responses of co-accused were not adverse to the petitioner.[4009]

Although exceptional circumstances did not exist for appointment of counsel, a petitioner on review could be represented on a pro bono basis, or with funds provided by a third party, by a lawyer qualified to appear before the Tribunal.[4010]

**credibility**

Newly discovered information related to a witness' credibility may amount to a new fact.[4011]

However, in this case, the core information was already at issue in the earlier proceedings and therefore does not amount to a new fact. [4012]

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[4005] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Motion for Legal Assistance* (21 July 2009)

[4006] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Fourth Request for Review* (12 March 2009) at para.52; *Karera v Prosecutor*, No. ICTR-01-74-R, *Decision on Requests for Review and Assignment of Counsel* (28 February 2011) at para. 39

[4007] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 12

[4008] *Ngeze v Prosecutor*, No. ICTR-99-52-R, *Decision on Hassan Ngeze's Motion to Obtain Assistance from Counsel* (28 February 2008); *Musema v Prosecutor*, No. ICTR-96-13-R, *Decision on Request for Assignment of Counsel* (27 February 2009)

[4009] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R75, *Decision on Extremely Urgent Motion for Extension of Time for Filing a Reply* (23 September 2008) at para. 10

[4010] *Musema v Prosecutor*, No. ICTR-96-13-R, *Decision on Motion for Reconsideration of Decision on Request for Assignment of Counsel of 27 February 2009* (23 April 2009); *Muvunyi v Prosecutor*, No. ICTR-00-55A-R, *Decision on Request for Variation of Protective Measures and Request for Review* (28 September 2012) at para. 7

[4011] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 August 2011) at paras. 26-27; *Muvunyi v Prosecutor*, No. ICTR-00-55A-R, *Decision on Request for Variation of Protective Measures and Request for Review* (28 September 2012) at para. 22

[4012] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 August 2011) at paras. 26-27

However, the assessment of the reliability of a witness's testimony concerning a discrete incident by a different trier of fact in a separate trial and based on a different evidentiary record does not constitute new information of an evidentiary nature in review proceedings.[4013]

**decisive factors**

The presence of the accused at a particular place and time was not a decisive factor in the decision and therefore, even if transcripts supporting his alibi were considered, they would not be sufficient to grant review of the judgement.[4014]

Since it was impossible to determine the time or place of the interview of the accused on the radio, the transcripts of the interview could not be a decisive factor.[4015]

Since it was still possible for the accused to have been at the scene of the crime despite the affidavit of the new witness, the affidavit could not be a decisive factor.[4016]

**diligence**

In determining diligence, the moving party must have taken advantage of all mechanisms available to obtain the evidence.[4017]

In wholly exceptional circumstances, where the impact of a new fact on a decision would be such that to ignore it would lead to a miscarriage of justice, review might be possible even though the new fact was known or discoverable through diligence.[4018]

Matters concerning the credibility of prosecution witnesses revealed for the first time in a Rwandan court were new facts but should have been discovered by the accused through the exercise of diligence.[4019]

**final judgements**

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[4013] *Muvunyi v Prosecutor*, No. ICTR-00-55A-R, *Decision on Request for Variation of Protective Measures and Request for Review* (28 September 2012) at para. 22

[4014] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 13

[4015] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 19

[4016] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 28

[4017] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6

[4018] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 7; *Prosecutor v Simba*, No. ICTR-01-76-A, *Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review* (9 January 2007) at para. 8; *Karera v Prosecutor*, No. ICTR-01-74-R, *Decision on Requests for Review and Assignment of Counsel* (28 February 2011) at para. 10

[4019] *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 17-18

Only a final judgement may be reviewed pursuant to Article 25 of the Statute and to Rule 120.[4020]

Review is only available from the final judgement in a case—that being the decision of the Appeals Chamber where an appeal had been lodged.[4021]

Only a final judgement may be reviewed. Decision granting transfer pursuant to Rule 11 *bis* is not a final judgement.[4022]

**items found not to be new facts**

Transcripts and video footage of interviews and broadcasts of the accused were not new facts, but merely new evidence in support of his alibi.[4023] Likewise, an affidavit and agenda from Prime Minister Kambanda showing the accused was at cabinet meetings at the time of the crimes in Kibuye were not new facts.[4024]

Testimony of prosecution witness in other trials that confirmed alibi of accused and refuted testimony of prosecution witness was not a new fact where the issue of alibi and the credibility of that witness were at issue during the trial.[4025]

Decision in another judgement that it was difficult to travel around Kigali on 10 April 1994 was not a new fact that could be applied to the case of the accused on review.[4026]

A finding made by a separate trial chamber on the criminal liability of another accused based on a different evidentiary record does not amount to a new fact.[4027]

Affidavit from investigator on distance and travel time between two places was not a new fact, but new evidence of a fact already in issue at the trial. Therefore, it was not susceptible to review proceedings.[4028]

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[4020] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Niyiramasuhuko's Motion for Review of the Decision Regarding Communication of Documents and Information Relating to Prosecution Witnesses Detained in Rwanda* (14 December 2001) at para. 14
[4021] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 8
[4022] *Uwinkindi v Prosecutor*, No. ICTR-01-75-AR11*bis*, *Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda…*(23 February 2012) at para. 10
[4023] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 12,16, 21
[4024] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (7 March 2007) at paras. 10-28
[4025] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Third Request for Review*(23 January 2008) at para. 21
[4026] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (7 March 2007) at para. 7
[4027] *Muvunyi v Prosecutor*, No. ICTR-00-55A-R, *Decision on Request for Variation of Protective Measures and Request for Review* (28 September 2012) at para. 24
[4028] *Prosecutor v Simba*, No. ICTR-01-76-A, *Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review* (9 January 2007)

Affidavit from new witness as to alibi of the accused was not a new fact, but new evidence of a fact which had been determined at the trial.[4029]

Fact that the accused was not mentioned in Gacaca proceedings for same crime is not a new fact where his presence at the scene of the crime was an issue at trial.[4030]

**new fact**

A "new fact" refers to information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings.[4031]

The new "fact" must not have been among the factors that the deciding body could have considered in reaching its decision.[4032]

It is irrelevant whether the new fact was in existence, the issue is whether it was known to the moving party or the deciding body.[4033]

The difference between a new fact which can generate review under Article 25 and Rule 120 and new evidence, which can be brought on appeal under Rule 115 but cannot generate "review" is that the former describes the issue under consideration while the latter describes the evidence proving that issue.[4034]

**reconsideration**

There is no reconsideration available of a decision on request for review.[4035]

**requirements**

In order to have review granted, the moving party must demonstrate that (1) there is new information of an evidentiary nature of a fact that was not in issue during the trial or appeal proceedings—a "new" fact; (2) the "new" fact was not known to the moving party at the time of the proceedings before the Trial or Appeals Chamber; (3) the failure

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[4029] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 25

[4030] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-R, *Decision on Request for Review* (25 August 2011) at para. 43

[4031] *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 9

[4032] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 9

[4033] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6

[4034] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 12

[4035] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Reconsideration of the Decision on Request for Review* (27 September 2006); *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 6

to discover the new fact was not due to lack of diligence; and (4) the new fact, if proved, could have been a decisive factor in reaching the original decision.[4036]

**waiver**

As issue included in the notice of appeal but abandoned has been waived and could not be the subject of review, absent a showing that counsel's decision to withdraw this ground of appeal constitutes professional negligence resulting in a miscarriage of justice.[4037]

**Rule 121—preliminary examination**

**If the Chamber constituted pursuant to Rule 120 agrees that the new fact, if it had been proven, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.**

**Rule 122—appeals**

**The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.**

**Rule 123—Return of the case to the Trial Chamber**

**If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.**

Where a party seeks review while an appeal of the judgement is pending, it should file a motion to the Appeals Chamber for a determination of whether the review should be heard by the Appeals Chamber or referred to the Trial Chamber. In this case, the Appeals Chamber exercised its discretion to decide the review itself.[4038]

**Rule 124—notification by States**

**If, according to the law of a State in which a convicted person is imprisoned, he is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 27 of the Statute, notify the Tribunal of such eligibility.**

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[4036] *Niyitegeka v Prosecutor*, No. ICTR-96-14-R, *Decision on Request for Review* (30 June 2006) at para. 6; *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 8; *Prosecutor v Simba*, No. ICTR-01-76-A, *Decision on Aloys Simba's Requests for Suspension of Appeal Proceedings and Review* (9 January 2007) at para. 8

[4037] *Rutaganda v Prosecutor*, No. ICTR-96-03-R, *Decision on Requests for Reconsideration, Review, Assignment of Counsel, Disclosure, and Clarification* (8 December 2006) at para. 34

[4038] *Prosecutor v Simba*, No. ICTR-01-76-A, *Decision on Aloys Simba's Request for Suspension of Appeals Proceedings and Review* (9 January 2007) at para. 7

**Rule 125—determination by the President**

**The President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal and after notification to the Government of Rwanda, whether pardon or commutation is appropriate.**

**Rule 126—general standards for granting pardon or commutation**

**In determining whether pardon or commutation is appropriate, the President shall consider, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.**

**Directive on Assignment of Defence Counsel**

**Article 1—definitions**

**(A) For the purposes of this Directive:**

| | |
|---|---|
| **President:** | **Means the President of the Tribunal;** |
| **Registrar:** | **Means the Registrar of the Tribunal;** |
| **Rules:** | **Means the Rules of Procedure and Evidence adopted by the Tribunal on 29 June 1995, as amended;** |
| **Rules of Detention:** | **Means the Rules Covering the Detention of Persons Awaiting Trial or Appeal the Tribunal or Otherwise Detained on the Authority of the Tribunal adopted by the Tribunal on 9 January 1996;** |
| **Statute:** | **Means the Statute of the Tribunal adopted by the Security Council under Resolution 955 (1994) of 8 November 1994;** |
| **Tribunal:** | **Means the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994;** |
| **Stage of Procedure:** | **Means the following stages of procedure: Pre-Trial, Trial, Sentencing Hearing, Appeal and Review.** |

**(B) The masculine shall include the feminine and the singular the plural, and vice-versa.**

**Article 2--right to counsel**

**(A) Without prejudice to the right of an accused to conduct his own Defence, a**

**suspect who is to be questioned by the Prosecutor during an investigation and an accused upon whom personal service of the indictment has been effected shall have the right to be assisted by Counsel provided that he has not expressly waived his right to Counsel.**
**(B) Any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90 bis, also has the right to be assisted by Counsel provided that the person has not expressly waived his right to Counsel.**
**(C) All references in this Directive to suspects or accused shall also be understood to apply to any persons detained on the authority of the Tribunal.**

**Article 3--person to whom counsel is assigned**

**If he has insufficient means, the suspect during an investigation or the accused being prosecuted before the Tribunal may be assigned Counsel free of charge on the following terms and conditions.**

**Article 4—indigence**

**A person shall be considered to be fully or partially indigent if he does not have sufficient means to engage Counsel of his choice and to have himself legally represented or assisted by Counsel of his choice.**

**Article 5--request for assignment of counsel**

**Subject to the provisions of Article 21, a suspect or accused who wishes to be assigned Counsel shall make a request to the Registrar of the Tribunal by means of the appropriate form established by the Registrar, with the approval of the Bureau. A request shall be lodged with the Registry, or transmitted to it, by the suspect or accused himself or by a person authorised by him to do so on his behalf.**

**Article 6--applicant's financial situation**

**(A) A suspect or accused who requests the assignment of Counsel, must fulfil the requirement of indigence as defined in Article 4.**
**(B) In order to determine whether the suspect or accused is indigent, there shall be considered means of all kinds of which he has direct or indirect enjoyment or freely disposes, excluding any family or social benefits to which he may be entitled. In assessing such means, account shall also be taken of the means of the spouse of a suspect or accused, as well as those of persons with whom he habitually resides.**
**(C) Account shall also be taken of the apparent lifestyle of a suspect or accused, and of his enjoyment of any property, movable or immovable, and whether or not he derives income from it.**

**Article 7--declaration of means**

**For the purposes of Article 6, the Registrar shall invite a suspect or accused**

**requesting the assignment of Counsel to make a declaration of his means on the appropriate form established by the Registrar, with the approval of the Bureau.**

**Article 8--certification of the declaration of means**

**A declaration must, so far as possible, be certified by an appropriate authority located either in the place where the suspect or accused resides or is found, or any other place considered appropriate in the circumstances to be determined by the Registrar. If the declaration is not certified within a reasonable period of time, the Registrar may assign Counsel without prejudice to Articles 9 and 18.**

**Article 9—information**

**(A) For the purpose of establishing whether the suspect or accused satisfies the requisite conditions for assignment of Counsel, the Registrar may request the gathering of any information, hear the suspect or accused, consider any representation, or request the production of any documents likely to support the request.**
**(B) When communicated confidentially, such information or its source shall not be subject to disclosure or notification to the Parties but shall be made available by the Registrar to a Judge or a Trial Chamber in camera upon a request from the Judge or the Chamber, as the interests of Justice may require.**

**Article 10--decision by the Registrar**

**(A) After examining the declaration of means laid down in Article 7 and relevant information obtained pursuant to Article 9, the Registrar shall determine if the suspect or accused is indigent or not, and shall decide:**
**(i) Without prejudice to Article 18, either to assign Counsel and choose for this purpose a name from the list drawn up in accordance with Article 13; or**
**(ii) Not to grant the request for assignment of Counsel, in which case the decision shall be accompanied by a written explanation giving reasons therefor.**
**(B) To ensure that the right to Counsel is not affected while the Registrar examines the declaration of means laid down in Article 7 and the information obtained pursuant to Article 9, the Registrar may temporarily assign Counsel to a suspect or accused for a period not exceeding 30 days.**

**Article 10 bis--assignment of counsel in the interests of justice**

**If a suspect or accused,**
**(i) Either requests an assignment of Counsel but does not comply with the requirement set out above within a reasonable time; or**
**(ii) Fails to obtain or to request assignment of Counsel, or to elect in writing that he intends to conduct his own defence, the Registrar may nevertheless assign him Counsel in the interests of justice in accordance with Rule 45(E) of the Rules and without prejudice to Article 18.**

**Article 11--notification of the decision**

**(A) The Registrar shall notify the suspect or accused of his decision.**
**(B) The Registrar shall also notify the assigned Counsel and Counsel's professional or governing body of his decision.**

**Article 12--remedy against a decision not to assign counsel**

**(A) The suspect whose request for assignment of Counsel has been denied may seek the President's review of the decision of the Registrar. The President may either confirm the Registrar's decision or decide that a Counsel should be assigned.**
**(B) The accused whose request for assignment of Counsel for his initial appearance has been denied, may make a motion to the Trial Chamber before which he is due to appear for immediate review of the Registrar's decision. The Trial Chamber may either confirm the Registrar's decision or decide that a Counsel should be assigned.**
**(C) After the initial appearance of the accused, an objection to the denial of his request for the assignment of Counsel shall take the form of a preliminary motion by him before the Trial Chamber not later than 60 days after his first appearance and, in any event, before the hearing on the merits.**

**Article 13--pre-requisites for assignment of counsel**
**Any person may be assigned as Counsel if the Registrar is satisfied that he fulfils the following pre-requisites:**
**(i) He is admitted to practice law in a State, or is a professor of law at a university or similar academic institution and has at least seven years' relevant experience;**
**(ii) He speaks one of the working languages of the Tribunal, namely French or English;**
**(iii) He agrees to be assigned as Counsel by the Tribunal to represent a suspect or accused;**
**(iv) His name has been included in the list envisaged in Rule 45(A) of the Rules; and**
**(v) He undertakes to appear before the Tribunal within a reasonable time, as specified by the Registrar.**

**Article 14--professional certification**

**In support of the pre-requisites provided for in Article 13(i), the Registrar shall be supplied with certification of professional qualifications issued by the competent professional or governing body for that Counsel and such other documentation as the Registrar deems necessary.**

**Article 15--scope of the assignment**

**(A) A suspect or accused shall only be entitled to have one Counsel assigned to him**

**and that Counsel shall deal with all stages of procedure and all matters arising out of the representation of the suspect or accused or of the conduct of his Defence. No Counsel shall be assigned to more than one suspect or accused.**
**(B) Where persons accused of the same or different counts are jointly charged or tried, each accused shall be entitled to request assignment of separate Counsel.**
**(C) Whenever appropriate and at the request of the assigned Counsel, the Registrar may, pursuant to Article 13 above, appoint a co-Counsel to assist the assigned Counsel. The first Counsel shall thereafter be designated lead Counsel.**

The authority of lead counsel to sign all documents on behalf of the accused is incompatible with *pro se* submissions pertaining to the conduct of the defence of the accused. However, the accused's submissions would be considered in the interest of judicial economy.[4039]

Lead Counsel is responsible for the strategy and organization of the defence.[4040]

Lead Counsel has primary responsibility for the defence, including the assignment of tasks within the Defence team.[4041]

The assignment of a co-counsel is not mandatory. However, the Registrar erred in removing co-counsel on retrial of the case for budgetary reasons, since appointment of the co-counsel would likely delay the trial and lead to greater costs.[4042]

**Article 16--applicable law**

**In the performance of their duties assigned Counsel shall be subject to the relevant provisions of the Statute, of the Rules, of the Rules of Detention, of any other rules or regulations adopted by the Tribunal, of the Host Country Agreement, of this Directive, of the Code of Conduct and of the codes of practice and ethics governing the profession.**

**Article 17--responsibility for costs and expenses**

**(A) Where Counsel has been assigned, the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be met by the Tribunal, subject to availability of funds and applicable United Nations rules and regulations and the procedures established by the Registrar with the approval of the Bureau.**

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[4039] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Request for Severance by Accused Kabiligi* (25 March 2005) at para. 12
[4040] *Prosecutor v Muvunyi*, No. ICTR-2000-55-T, *Decision Withdrawing Jean Paul Flamme's Appointment as Co-Counsel for Tharcisse Muvunyi* (22 December 2005)
[4041] *Barayagwiza v. Prosecutor*, No. ICTR-99-52-A, *Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel* (29 August 2006) at para. 7
[4042] *Prosecutor v Muvunyi*, No. ICTR-2000-55A-PT, *Decision on Tharcisse Muvunyi's Motion for an Order to Reinstate Co-Counsel Abbe Jolles and to Reschedule Trial to Commence on 11 March 2009* (31 December 2008)

**(B) Such costs and expenses to be met by the Tribunal shall include costs relating to investigative and procedural steps, measures taken for the production of evidence to assist or support the Defence, expenses for ascertainment of facts, consultancy and expert opinion, transportation and accommodation of witnesses, postal charges, registration fees, taxes or similar duties, and all remuneration due to Counsel in accordance with Articles 22 and 27.**
**(C) When Counsel has not been assigned, and if Counsel so requests, the Registrar, subject to reservations of paragraph (A), may determine that all or part of the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be covered by the Tribunal to the extent that such expenses cannot be borne by the suspect or the accused because of his financial situation.**
**(D) The Registry shall reimburse the sums claimed by assigned Counsel for the expenses, as provided in paragraph (A) and (B) above, upon receipt of a statement of expenses made out on the appropriate form established by the Registrar with the approval of the Bureau.**
**(E) The Registrar may however authorize, under exceptional circumstances, direct payment by the Tribunal of some of the costs and expenses referred to in paragraph (B) above, subject to the Counsel providing, at the end of the specific mission for which such direct payment has been requested, originals of receipts for the expenses under consideration.**

**Article 18--withdrawal of assignment**

**(A) Assignment of Counsel may be withdrawn by the Registrar if, after his decision, the suspect or accused comes into means which, if available at the time the request in Article 5 was made, would have caused the Registrar not to grant the request.**
**(B) Assignment of Counsel may be withdrawn if information obtained according to Article 9 establishes that the suspect or accused has sufficient means to allow him to pay for the cost of his Defence.**
**(C) The decision to withdraw the assignment shall be accompanied by a written explanation giving reasons for such decision and the suspect or accused and the assigned Counsel shall be so notified. Such withdrawal shall take effect from the date of receipt of the notification.**
**(D) After the notification of the withdrawal of the assignment of Counsel, all the costs and expenses incurred by the representation of the suspect or accused shall cease to be met by the Tribunal.**
**(E) The provisions of Article 12 shall apply mutatis mutandis where there is dissatisfaction with the decision withdrawing the assignment of Counsel.**

**Article 19--withdrawal of assignment in other situations**

**(A) The Registrar may:**
**(i) In exceptional circumstances, at the request of the accused, or his Counsel, withdraw the assignment of Counsel;**
**(ii) In exceptional circumstances, at the request of Lead Counsel withdraw the**

**assignment of co-Counsel;**
**(iii) In the case of a serious violation of the Code of Conduct, withdraw the assignment of Counsel or co-Counsel.**
**(B) The Registrar shall withdraw the assignment of Counsel:**
**(i) Upon the decision by a Chamber to refuse audience to assigned Counsel for misconduct under Rule 46 (A) of the Rules;**
**(ii) Where Counsel no longer satisfies the requirements of Article 13 (i) of this Directive.**
**(iii) Where Counsel or co-Counsel fails to observe the undertaking made by him pursuant to Rule 45 ter.**
**(C) The accused, the Counsel concerned and his respective professional or governing body shall be notified of the withdrawal.**
**(D) The Registrar shall immediately assign a new Counsel to the suspect or accused, and where appropriate, a co-Counsel.**
**(E) Where a request for withdrawal, made pursuant to paragraph (A), has been denied, the person making the request may seek the President's review of the decision of the Registrar.**

**appeal**

The Appeals Chamber has inherent power to review decisions of the President concerning withdrawal of counsel where those decisions are closely related to the fairness of the proceedings on appeal.[4043]

Decision of the Registrar on issues of withdrawal of counsel are only overturned if it can be shown that the Registrar (a) failed to comply with the legal requirements of the directive; (b) failed to observe any rules of natural justice or failed to act with procedural fairness; (c) considered irrelevant material or failed to consider relevant material; or (d) reached a decision which no reasonable person could have reached.[4044]

**communication breakdown**

Lack of confidence of the accused in his counsel based upon failure of communication constitutes exceptional circumstances justifying withdrawal of lead counsel. An accused person needs constant contact with his Counsel.[4045]

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[4043] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 9
[4044] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 9
[4045] *Prosecutor v Bagosora*, No. ICTR-96-7-T, *Decision on Request of the Accused for Change of Assigned Counsel* (26 June 1997); *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision on the Request of the Accused for the Replacement of Assigned Counse*l (20 November 1996); *Prosecutor v Ngirabatware*, No. ICTR-99-54-PT, *Decision Withdrawing Professor David M. Thomas as Counsel for the Accused Augustin Ngirabatware* (16 June 2009)

Incompatibility of character and breakdown in communication constitute exceptional circumstances justifying the withdrawal of defence counsel.[4046]

Breakdown in communication between lead counsel and accused after lead counsel sent letter to prosecution notifying them of misconduct by co-counsel constituted exceptional circumstances for withdrawal of assignment of lead counsel.[4047]

Where accused terminated all communication with lead counsel, exceptional circumstances existed for withdrawal of defence counsel. Therefore, the President overruled the decision of the Registrar denying withdrawal.[4048]

Exceptional circumstances existed for withdrawal of assignment of lead counsel where lead counsel never responded to client's complaints that he was neglecting the case and had not visited the client in Arusha.[4049]

Withdrawal of co-counsel ordered where new lead counsel did not wish co-counsel to continue and accused did not have confidence in co-counsel.[4050]

Withdrawal of co-counsel ordered where breakdown in communication with lead counsel made working together impossible,[4051] or for breakdown in communication between co-counsel and client.[4052]

**disagreement over strategy**

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[4046] *Prosecutor v Mugiraneza*, No. ICTR-99-50-T, *Registrar's Decision on Withdrawal of Mr. Christian Gauthier as Co-Counsel for Prosper Mugiraneza* (31 January 2005); *Prosecutor v Nchamihigo*, No. ICTR-01-63-I, *Decision on the Accused's Renewed Request for Replacement of His Counsel* (1 October 2004); *Prosecutor v Rukundo*, No. ICTR-01-70-I, *Decision of Withdrawal of Mr. Philippe Moriceau as Lead Counsel for the Accused Emmanuel Rukundo* (16 Nov 2005)

[4047] *Prosecutor v Bikindi*, No. ICTR-01-72-T, *Decision Withdrawing the Assignment of Mr. Wilfred Nderitu as Lead Counsel for the Accused Simon Bikindi* (30 March 2007)

[4048] *Prosecutor v Bizimungu*, No. ICTR-99-50-T, *The President's Decision on Review, in Accordance with Article 19(E) of the Directive on Assignment of Defence Counsel* (20 September 2001)

[4049] *Prosecutor v Mpambara*, No. ICTR-2001-65-I, *Decision of Withdrawal of Maitre Mario Spandre as Lead Counsel of the Accused Jean Mpambara* (19 August 2003)

[4050] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decisión de Retrait de la Comisión d'Office de Maitre Rene Saint-Leger Co-Conseil de M. Gratien Kabiligi* (20 May 2005); *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision of Withdrawal of Ms. Danielle Girard as Co-Counsel for the Accused Francois-Xavier Nzuwonemeye* (13 October 2005); *Prosecutor v Niyiramasuhuko et al*, No. ICR-98-42-T, *Decision on the Withdrawal of the Assignment of Mr. Louis Huot, Co-Counsel for the Accused Arsene Shalom Ntahobali* (10 September 2007)

[4051] *Prosecutor v Muvunyi*, No. ICTR-2000-55-T, *Decision Withdrawing Jean Paul Flamme's Appointment as Co-Counsel for Tharcisse Muvunyi* (22 December 2005); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Décision de la Retrait de la Commission d'Office de Maitre Charles Tchakoute Patie a Titre de Co-Conseil de l'Accuse Sylvain Nsabimana* (14 June 2006) ; *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Withdrawal of the Assignment of Marie-Pierre Poulain Co-Counsel for the Accused Prosper Mugiraneza* (29 October 2007); *Prosecutor v Karera*, No. ICTR-01-74-T, *Decision on Withdrawal of the Assignment of Mr. Steve Kelleher Co-Counsel for the Appellant Francois Karera* (4 August 2008)

[4052] *Prosecutor v Nzuwonemeye*, No. ICTR-2000-56-T, *Decision on Withdrawal of the Assignment of Mr. Hamuli Rety, co-counsel for the Accused Francis-Xavier Nzuwonemeye* (29 January 2007)

Disagreement over defence strategy with the accused constitutes good cause for withdrawal of lead counsel.[4053] Failure of lead counsel to diligently complete preparation of the case, and complete delegation of his responsibilities to co-counsel, justified removal of lead counsel.[4054]

Exceptional circumstances for discharging co-counsel existed where co-counsel engaged in plea negotiations and took over control of the case from lead counsel in violation of Article 15(E) of the Directive.[4055]

**failure to perform duties**

Failure of lead counsel to perform his duties constituted exceptional circumstances warranting his removal.[4056]

Failure of counsel to attend trial on a specified trial date constitutes an exceptional circumstance warranting replacement of Counsel.[4057]

Failure of co-counsel to make himself available to replace lead counsel when needed warranted his removal and notification to his bar of violation of Code of Conduct as well as striking him from list of counsel.[4058]

Co-counsel who abandoned his duties was withdrawn, stricken from the list, and reported to his bar association.[4059]

Scheduling conflict making lead counsel unavailable when trial was scheduled to commence constituted exceptional circumstances justifying withdrawal of lead counsel, but his name was struck from the list of counsel.[4060]

**health issues**

Health problems, supported by a medical certificate, constitute exceptional circumstances justifying the withdrawal of defence counsel.[4061]

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[4053] *Prosecutor v Bagosora*, No. ICTR-98-41-T, *Decision of Withdrawal of Mr. Clemente Monterosso as Lead Counsel of the Accused Aloys Ntabakuze* (28 August 2002)
[4054] *Prosecutor v Ntahobali*, No. ICTR-98-42-T, *Decision to Withdraw the Assignment of Mr. Duncan Mwanyumba as Lead Counsel for Mr. Arsene Shalom Ntahobali* (15 June 2005)
[4055] *Prosecutor v Bagosora et al*, No. ICTR-98-44-T, *Decision on Withdrawal of Mr. David Martin-Sperry as Co-Counsel of the Accused Gratien Kabiligi* (11 February 2004)
[4056] *Prosecutor v Nzabirinda*, No. ICTR-2001-77-I, *Decisión de Retrait de la Comisión d'Office de Maitre Joseph Sainte- Luce a Titre de Conseil Principal de M. Joseph Nzabirinda* (21 June 2005)
[4057] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Decision Concerning a Replacement of an Assigned Defence Counsel and Postponement of the Trial* (31 October 1996).
[4058] *Prosecutor v Ndindiliyimana et al*, No. ICTR-2000-56-T, *Decision on the Withdrawal of the Assignment of Mr. Paul DeWolf as Co-Counsel for the Accused Augustin Ndindiliyimana* (16 May 2007)
[4059] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Withdrawal of Assignment of Mr. Guy LaRue as Co-Counsel for the Accused Alphonse Nteziryayo* (27 July 2007)
[4060] *Prosecutor v Setako*, No. ICTR-04-81-I, *Decision on Withdrawal of the Assignment of Mr. Stefan Kirsch, Lead Counsel for the Accused Ephrem Setako* (16 November 2007)

**misconduct of counsel**

Defence counsel discharged for fraud mid-trial where Registry concluded he had been involved in massive fraud by over-billing for work done by co-counsel and converting the proceeds to his own use.[4062]

**personal or professional reasons**

Co-counsel allowed to withdraw for personal and family reasons.[4063] Co-counsel allowed to withdraw for "professional reasons" which made him unavailable to continue on the case.[4064]

The completion of the trial, awaiting judgement, was the end of the critical stages of the procedure of the case, and co-counsel would be allowed to withdraw to accept an assignment as co-counsel in another case at the ICTR.[4065]

Appointment of co-counsel as prosecutor in his home jurisdiction constituted exceptional circumstances justifying his withdrawal as co-counsel.[4066]

Election of co-counsel to Parliament constituted exceptional circumstances justifying his withdrawal.[4067]

Appointment of lead counsel as head of defence services at another Tribunal justified his withdrawal.[4068]

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[4061] *Prosecutor v Sagahutu*, No. ICTR-00-56-T, *Decision on the Withdrawal of Mr. Didier Patry as Co-Counsel for the Accused Innocent Sagahutu* (26 January 2005); *Prosecutor v Bizimungu et* al, No. ICTR-99-50-T, *Decision on the Withdrawal of the Assignment of Ms. Alexandra Marcil as Co-counsel for the Accused Casimir Bizimungu* (10 March 2008) *; Prosecutor v Munyakazi,* No. ICTR-97-36-T, *Decision on the Withdrawal of the Assignment of Mr. Richard Kazadi Kabimba Co-Counsel for the Accused Yusuf Munyakazi* (27 April 2009)

[4062] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision to Withdraw the Assignment of Mr. Jean Yaovi Degli as Counsel for Gratien Kabiligi* (29 October 2004)

[4063] *Prosecutor v Ndyambaje's*, No. ICTR-96-8-T, *Décision de Retrait de la Commission d'Office de Maitre Claude Desrochers a Titre de Co-Conseil d M. Elie Ndayambaje* (15 February 2006); *Prosecutor v Nteziryayo*, No. ICTR-98-42-T, *Decision on Withdrawal of the Assignment of Mr. Richard Perras Co-Counsel for the Accused Alphonse Nteziryayo* (8 December 2006)

[4064] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on the Withdrawal of Andre Tremblay as Co-Counsel for the Accused Aloys Ntabakuze* (22 February 2007)

[4065] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Withdrawal of the Assignment of Mr. Philippe LaRochelle as Co-Counsel for Jerome-Clement Bicamumpaka* (26 February 2009); *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on the Withdrawal of the Assignment of Mr. Claver Sindayigaya, Co-Counsel for the Accused Elie Ndayambaje* (9 June 2009)

[4066] *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, *Decision of Withdrawal of the Assignment of Mr. Martin Joly, Co-Counsel for the Accused Person Mr. Tharcisse Muvunyi* (6 April 2006)

[4067] *Prosecutor v Niyiramasuhuko et al*, No. ICTR-98-42-T, *Decision on Withdrawal of the Assignment of Mr. Bertrand St.-Arnaud, Co-Counsel for the Accused Arsene Shalom Ntahobali* (8 January 2009)

[4068] *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-I, *Decision on Withdrawal of the Assignment of Mr. Francois Roux* (18 March 2009)

**withdrawal denied**

Withdrawal of co-counsel denied where incompatibility would not prejudice the accused, since the co-counsel had used all her allotted hours and it was reasonable for Registrar to conclude that expense of bringing on board a new co-counsel was unjustified.[4069]

Registrar's decision denying withdrawal of co-counsel affirmed where fears for his safety due to acts of government of Rwanda were objectively unreasonable and no medical documentation was filed in support of withdrawal for medical reasons.[4070]

Withdrawal of co-counsel for breakdown in confidence and communication at the request of lead counsel denied where accused made no complaints about co-counsel and the co-counsel had been allocated extra hours to complete the appeal.[4071]

Conflict between Lead Counsel and Co-Counsel on matters of strategy does not constitute an exceptional circumstance warranting withdrawal of co-counsel where it was not alleged that co-counsel was incompetent, inattentive, negligent, or in breach of her professional responsibilities.[4072]

Exceptional circumstances did not exist for discharging lead counsel based upon complaints of accused that lead counsel had discussed facts of his case with a potential co-counsel.[4073]

Exceptional circumstances for discharging lead counsel did not exist where the accused claimed counsel did not investigate and prepare his case and counsel disputed those facts. The accused did not demonstrate derogation of duty by the lead counsel.[4074]

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[4069] *Barayagwiza v. Prosecutor*, No. ICTR-99-52-A, *Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel* (29 August 2006); *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006)

[4070] *Ntabakuze v Prosecutor*, No. ICTR-98-44-A, *Review of the Registrar's Decision Denying the Request for Withdrawal of Co-Counsel* (28 March 2011)

[4071] *Prosecutor v Nahimana et al*, No. ICTR-98-37-A, *Decision of the Registrar Denying the Request of the Lead Counsel Mr. Peter Herbert to Terminate the Assignment of Co-Counsel Ms. Tanoo Mylvaganam Representing the Appellant Mr. Jean Bosco Barayagwiza* (27 March 2006); *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006)

[4072] *Nahimana et al v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 12

[4073] *Prosecutor v Nzuwonemeye*, No. ICTR-2000-56-T, *Decision Denying Mr. Francois-Xavier Nzuwonemeye Request for Withdrawal of Assignment of his Counsel Mr. Francois-Xavier Charvet* (7 August 2001)

[4074] *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision of Denial of the Request for Withdrawal of Mr. Michael Fisher as Lead Counsel of the Accused Tharcisse Muvunyi* (15 April 2003); *Prosecutor v*

Withdrawal of co-counsel denied where personal differences should be overcome given the mid-trial status of the case to protect the interests of the client.[4075]

Exceptional circumstances did not exist for withdrawal of counsel where the Trial Chamber had criticised counsel for filing piecemeal and incomplete motions.[4076]

**without good cause**

The need to avoid disruption of the trial at a late juncture provided exceptional circumstances for withdrawal of lead counsel even where the accused did not provide sufficient reasons for discharge of lead counsel.[4077]

**Article 20—replacement**

**(A) Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel assigned may not withdraw from acting until either a replacement Counsel has been provided by the Tribunal or by the suspect or accused, or the suspect or accused has declared his intention in writing to conduct his own defence.**
**(B) Where the assignment of Counsel is withdrawn by the Registrar or where the services of assigned Counsel are discontinued, the Counsel must deliver within fifteen days of withdrawal all the original documents in the file to the Counsel who succeeds him, or otherwise, to his client.**
**(C) In the case of the withdrawal of the assignment of a co-Counsel, such delivery of documents shall be made to the Counsel within seven days.**
**(D) Failure by Counsel to comply with the requirement of this article may result in withholding counsel's fees, notification to the professional body regulating the conduct of counsel in his place of admission and, if he is a professor and not otherwise admitted to the profession, to the governing body of his University.**
**(E) (i) If Counsel is not available, co-Counsel shall assume responsibility of carrying on the proceedings.**
**(ii) If there is no co-Counsel, the Registrar may appoint one, in consultation with Counsel.**

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*Nchamihigo*, No. ICTR-01-63-I, *Decision of Denial of the Request for Withdrawal of Mr. David Gachuki as Lead Counsel for the Accused Simeon Nchamihigo* (16 April 2003); *Prosecutor v Nchamihigo*, No. ICTR-01-63-I, *The President's Decision on Simeon Nchamahigo's Appeal Against the Registrar's Decision Denying the Request for Withdrawal of Lead Counsel* (12 September 2003)
[4075] *Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision Denying the Application for the Withdrawal of Ms. Anne Olivier Co-Counsel for the Accused Mr. Emmanuel Rukundo* (10 May 2007)
[4076] *Prosecutor v Simba*, No. 2001-76-I, *Decision Denying the Request for Withdrawal of Assignment of Mr. Sadikou Alao as Lead Counsel for Mr. Aloys Simba* (11 August 2004)
[4077] *Prosecutor v Ngirumpatse*, No. ICTR-98-44-PT, *Decision of Denial of Mr. Charles Roach's Request for Withdrawal of Co-Counsel Mr. Frederick Weyl and of Withdrawal of Mr. Roach as Lead Counsel for the Accused Mathieu Ngirumpatse* (22 March 2005) at para. 9

Once counsel has been properly assigned, counsel has a professional obligation to continue representing the accused any may only withdraw or be replaced if sufficient cause exists. Furthermore, a counsel's obligation to represent the accused continues after withdrawal until new counsel is assigned.[4078]

Under Article 20 (E) of the Directive, Co-Counsel shall assume responsibility of carrying on the proceedings if Lead Counsel is not available. The term "the proceedings" covers the entire proceedings against the Accused, not only the trial. Therefore, the Trial Chamber may order Co-Counsel to assume Lead Counsel's responsibilities also at the start of the trial.[4079]

Exceptional circumstances existed to waive the requirement that defence teams be bilingual and to appoint English speaking co-counsel to team with English speaking lead counsel.[4080]

Exceptional circumstances justifying withdrawal of co-counsel may be different from those justifying withdrawal of lead counsel.[4081]

Exceptional circumstances justified withdrawal of co-counsel in case awaiting judgement so that he could be appointed to another case.[4082]

**Article 21--assignment of counsel away from the seat of the Tribunal**

**(A) Away from the seat of the Tribunal, and in a case of urgency, a suspect who, during the investigation, requests assignment of Counsel, may indicate the name of Counsel if he knows one who may be assigned in accordance with the provisions of this Directive.**
**(B) Where the suspect fails to indicate a name, and none of the Counsel on the list maintained by the Registrar resides in the area or the country in question, the Registrar or a person authorized by him or acting under his direction, may contact the local Bar Association and obtain the name of Counsel who may be assigned in accordance with the provisions of this Directive.**
**(C) In the situations envisaged in paragraphs (A) and (B), the procedure for assignment of Counsel as set out in this Directive shall apply mutatis mutandis but shall be accelerated where necessary.**

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[4078] *Ndindiliyimana et al v Prosecutor*, No. ICTR-000-56-A, *Judgement* (11 February 2014) at para. 92
[4079] *Prosecutor v Simba*, No. 2001-76-I, *Decision on Postponement of Trial* (18 August 2004) at para. 26
[4080] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Assignment of Ms. Cynthia Cline as Co-Counsel for the Accused Prosper Mugiraneza* (15 February 2008)
[4081] *Nahimana v Prosecutor*, No. ICTR-99-52-A, *Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel* (23 November 2006) at para. 11;*Prosecutor v Rukundo*, No. ICTR-2001-70-T, *Decision Denying the Application for the Withdrawal of Ms. Anne Olivier Co-Counsel for the Accused Mr. Emmanuel Rukundo* (10 May 2007) at para. 6
[4082] *Prosecutor v Renzaho*, No. ICTR-97-31-T, *Decision on Withdrawal of the Assignment of Bernabe Nekiue for the Accused Tharcisse Renzaho* (28 April 2009)

**Article 22--remuneration paid to assigned counsel**

**(A) The remuneration paid to assigned Counsel for any one case and at any one stage of the procedure shall include:**
**(i) A fixed rate, (ii) Fees calculated on the basis of a fixed hourly rate determined by the Registrar based on the Counsel's seniority and experience in accordance with the table of rates published by the Registrar after consultation with the Bureau. This rate includes the charges related to general costs;**
**(ii) A daily subsistence allowance based on the United Nations Schedule of Daily Subsistence Allowance Rates in force at the time when work was done.**
**(B) Assigned Counsel who receives remuneration from the Tribunal, shall not be entitled to receive remuneration from any other source with respect to the same assignment.**
**(C) The Registrar, with the concurrence of the President, may establish an alternative scheme of payment based on a fixed fee ("lump sum") system consisting of a maximum allotment of moneys for each Defence Team in respect of each stage of the procedure taking into account the Registrar's estimate of the duration of the stage and the apparent complexity of the case. In the event that a stage of the procedure is of substantially longer or shorter duration than estimated, the Registrar may adapt the allotment, whether by increasing or decreasing it. In the event of disagreement on the quantum of the maximum allotment, the Registrar shall make a decision, after consulting the Chamber and, if he deems it expedient to do so, the Advisory Panel.**
**(D) Claims for remuneration and reimbursement of expenses under this Article shall be submitted to the Registrar no later than ninety days from the last day of the calendar month during which the work was performed or the expense was incurred. Any such claim that is submitted later shall not be paid, unless the Registrar is persuaded that extenuating circumstances of an exceptional nature existed so as to justify such late submission.**

**Article 23--fixed rate**

**The fixed rate envisaged in Article 22 (A) (i) shall be determined by the Registrar in consultation with the local Bar and is payable at the conclusion of each stage of procedure as set out in paragraph (A) of Article 1 of the Directive.**
**Article 24--statement of remuneration**

**(A) Subject to the provisions of Article 25, payment of the fees envisaged in Article 22 (A) shall be made at the conclusion of the relevant stage of procedure, or, as appropriate, at the conclusion of a minimum period of one month, on presentation by Counsel of a detailed statement using the appropriate form established by the Registrar, with the approval of the Bureau and any other documentation required by the Registrar.**
**(B) The statement shall indicate, inter alia, the name of the suspect or the accused,**

**the registration number in the Record Book, the stage of the procedure at which assigned Counsel was involved, and a statement of the fees. To support the statement of fees, the Counsel shall provide as much information as possible, including the nature of the services rendered; and, as appropriate, the relation between these and the case pending before the Tribunal.**

**Article 25--provisional payment**

**(A) When the engagement of assigned Counsel outside his place of residence lasts more than two weeks, a provisional payment of the daily subsistence allowance, set out in Article 22 (A) (iii) above may be made.**
**(B) The Registrar authorizes the provisional payment on the basis of the provisional engagement program submitted by the assigned Counsel and approved by the Registrar. At the conclusion of the specific mission for which such provisional payment was made, the Counsel shall provide the Registrar, for regularisation purposes, with the originals of the supporting documents showing that he has actually fulfilled his assignment.**

**Article 26--payment pro rata temporis**

**When, during engagement, an assigned Counsel is replaced in the same capacity by another assigned Counsel for whatever reason, the remuneration shall be paid to each of them pro rata temporis.**

**Article 27--travel expenses**

**(A) Travel expenses shall be reimbursed for an assigned Counsel who does not usually reside in the territory of the host country or in the country where the particular stage of the procedure is being conducted, on the basis of one economy class round trip air ticket by the shortest route or within limits laid down by the Registrar, on presentation of a statement of travel expenses using the appropriate form established by the Registrar, with the approval of the Bureau, accompanied by the original counterfoil of the ticket, as well as the original of the invoice and any receipt including receipt showing payment by credit card.**
**(B) Travel expenses shall be reimbursed to assigned Counsel residing in the territory of the country but not in the town where he is serving, on the basis of either first class public transportation tickets or fixed rates as established by the United Nations Schedule of Rates of Reimbursement for Travel by Private Motor Vehicle applicable to different groups of Countries and Territories, per kilometre traveled on the outward and return journeys by the shortest route, on presentation of a statement of travel expenses using the appropriate form established by the Registrar, with the approval of the Bureau.**
**(C) Notwithstanding paragraphs (A) and (B), the Registrar shall assess, after consulting the President and depending on the circumstances of the case, whether the Tribunal, in the interests of justice and in order to ensure the full exercise of Defence rights, is required to meet other travel expenses of assigned Counsel.**

**(D) Travel expenses, and daily subsistence allowance payable under Article 25 of the present Directive, shall only be reimbursed when prior authorization for travel by assigned Counsel has been sought by assigned Counsel and authorized by the Registrar.**

**Article 28--approval of remuneration and expenses**

**(A) All sums payable to assigned Counsel under the provisions of this Directive shall be paid by the Registry.**
**(B) The statement of expenses, the statement of remuneration (be it provisional or final) and the statement of travel expenses envisaged under Articles 17, 24, 25 and 27, must receive the prior approval of the Registrar.**

**Article 29--advisory panel**

**(A) An Advisory Panel shall be set up consisting of two members chosen by the President by ballot from the list referred to in Rule 45, two members proposed by the International Bar Association, two members proposed by the Union Internationale des Avocats, and the President of the Tanganyika Law Society or his representative.**
**(B) The President of the Advisory Panel will be the President of the Tanganyika Law Society or his representative. The membership of the Advisory Panel shall come up for appointment every two years on the anniversary date of the entry into force of this Directive.**
**(C) The Advisory Panel may be consulted as and when necessary by the Registrar or the President on matters relating to assignment of Counsel.**
**(D) The Advisory Panel may also of its own initiative refer to the Registrar any matter relating to the assignment of Counsel.**

**Article 30--settlement of disputes**

**In the event of disagreement on questions relating to the calculation and payment of remuneration, or to the reimbursement of expenses, the Registrar shall make a decision after consulting the President and, if necessary, the Advisory Panel, on an equitable basis. The Registrar may also consult the President and, if necessary, the Advisory Panel, and make a decision under this Article, if it appears to the Registrar that a Counsel has been submitting inflated claims for remuneration or claims for expenses which are unnecessary or unreasonable.**

There was no irregularity in the fact that the Registrar's decision resolving a dispute between counsel and the Defence Management Section over remuneration was signed by the Director of the Defence Management Section, as the Registrar may delegate his authority to such person.[4083]

[4083] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-A, *Decision on Ntahobali's Request for Review of Registrar's Decisions* (21 February 2014) at para. 10

Counsel renumerated for work on weekends where he was pressed for time because of being recently assigned to the case. DCMS erred in disallowing remuneration for hours spent by counsel that it considered could have been done by the legal assistant.[4084]

Selection of exhibits by counsel is strategic work and not part of administrative overhead. However, copying exhibits is administrative work not subject to payment of fees.[4085]

Where time claimed by counsel is within the 1 minute per page guideline of DCMS and within the range of work done of a similar nature, it should be paid in full.[4086]

Defence counsel entitled to be paid for more than 1 minute per page where he was required to read documents in French after Trial Chamber denied adjournment so that documents could be translated into English.[4087]

Full claim for preparing outline of cross examination allowed where several statements were analysed, and it was necessary to compare what witness had said on same subject.[4088]

Full amount allowed for preparation of appellate brief. DCDMS should not use the probable success of an interlocutory appeal as a factor in assessing claims for fees.[4089]

Full hours allowed for preparation of appellate brief where nature and substance of appeal warranted it. Length of brief and number of footnotes is not conclusive of time spent but may serve as a guide.[4090]

Recourse to the Trial Chamber in fees dispute issues should only be had in exceptional circumstances. It should be resorted to only when Counsel has utilised all

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[4084] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision Pursuant to Article 30 of the Directive on the Assignment of Defence Counsel* (24 May 2004)
[4085] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision on the Appeal by Peter Robinson Against the Decision of Defence Counsel and Detention Management Section Regarding the Bill for the Month of May 2004* (3 March 2005) at section 1
[4086] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision on the Appeal by Peter Robinson Against the Decision of Defence Counsel and Detention Management Section Regarding the Bill for the Month of May 2004* (3 March 2005) at section 2
[4087] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision on the Appeal by Peter Robinson Against the Decision of Defence Counsel and Detention Management Section Regarding the Bill for the Month of May 2004* (3 March 2005) at section 3
[4088] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision on the Appeal by Peter Robinson Against the Decision of Defence Counsel and Detention Management Section Regarding the Bill for the Month of May 2004* (3 March 2005) at section 4
[4089] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision on the Appeal by Peter Robinson Against the Decision of Defence Counsel and Detention Management Section Regarding the Bill for the Month of May 2004* (3 March 2005) at section 5
[4090] *Prosecutor v Nzirorera*, No. ICTR-98-44-T, *Registrar's Decision on the Appeal by Peter Robinson Against the Decision of Defence Counsel and Detention Management Section Regarding the Bill for the Month of May 2004* (3 March 2005) at section 6

other available channels without results, and Counsel can demonstrate that the Registry is acting unreasonably and that the dispute directly affects the conduct of the trial.[4091]

Where DCDMS could not confirm that counsel had read the same material earlier, counsel should be paid in full for 26 hours for reading 648 pages of MINADEF material.[4092]

The Appeals Chamber did not have jurisdiction to review a decision of the President, which upheld the decision of the Registrar concerning the adequacy of the lump sum payment.[4093]

Registrar's failure to consult the President prior to making decision on remuneration deprived the accused of his procedural rights and required reversal of his decision.[4094]

**Article 31--provision of facilities**

**(A) Assigned Counsel who do not have professional facilities close to the seat of the Tribunal shall, subject to availability of space and resources, be provided with reasonable facilities and equipment such as photocopiers, computer equipment, various types of office equipment, and telephone lines.**
**(B) At the seat of the Tribunal, assigned Counsel may use the libraries and the documentation centre used by the Judges of the Tribunal.**

**Article 32--amendment of the directive**

**(A) Any article of the Directive may be amended during a plenary meeting at the request of a Judge, the Prosecutor or the Registrar if agreed to by not less than ten Judges.**
**(B) An Amendment of the Directive may be otherwise adopted, provided it has been circulated to all the Judges, and has received the approval of at least ten Judges. Amendments proposed under this paragraph shall also be circulated to the Prosecutor and the Registrar.**
**(C) The amendments shall enter into force upon adoption, but without prejudice to the rights of the accused in any pending case.**

**Code of Professional Conduct for Defence Counsel**

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[4091] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on Prosper Mugiraneza's Motion for Adjournment of 13 September Trial Session* (3 September 2004) at para. 1
[4092] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Registrar's Decision on the Appeal by Rafael Constant Against the Decision of the Defence Counsel and Detention Management Section Regarding the Bill for the Month of September 2004* (16 March 2005)
[4093] *Nshogoza v Prosecutor*, No. ICTR-2007-91-A, *Decision on Request for Judicial Review of the Registrar's and President's Decisions Concerning Payment of Fees and Expenses* (13 April 2010) at para. 14
[4094] *Prosecutor v Niyiramasuhuko*, No. ICTR-98-42-A, *Decision on Ntahobali's Request for Review of Registrar's Decisions* (21 February 2014) at para. 20

**Introduction**

**This Code is made in the belief that:**
**1. As legal practitioners, Counsel must maintain high standards of professional conduct;**
**2. The role of Counsel as specialist advocates in the administration of justice requires them to act honestly, fairly, skillfully, diligently and courageously;**
**3. Counsel have an overriding duty to defend their client's interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice;**
**4. Counsel may be subject to disciplinary proceedings under Rule 46 of the Rules of Procedure and Evidence of the Tribunal. It is therefore necessary that Counsel be aware of their rights and obligations toward the Tribunal;**
**To these ends, this Code and its Articles of conduct have been formulated.**

The standards imposed upon defence counsel appearing before the Tribunal to "act honestly, fairly, skilfully, diligently and courageously are applicable to all counsel appearing before the Tribunal, including prosecutors.[4095]

**Article 1--Definitions**

**(1) In this Code, unless a different interpretation is required by the provisions of the Code or the context in which they appear, the following terms shall mean:**

| | |
|---|---|
| **Client:** | **An accused, suspect, detainee, witness or other person who has engaged Counsel for the purposes of his legal representation before the Tribunal;** |
| **Counsel:** | **Any person who has satisfied the Registrar that he is admitted to the practice of law in a State, or is a University professor of law, and**<br>**(a) Has filed his or her power of attorney with the Registrar; or**<br>**(b) Has been assigned under the Rules to a suspect, accused, detainee, witness or other person.**<br>**Any reference to Counsel includes a reference to any Co-counsel jointly and to**<br>**each of them severally.** |
| **Directive:** | **The directive entitled "Directive on Assignment of Defence Counsel", as amended (No. 1/96 (ICTR/2/L.2);** |
| **Rules:** | **The Rules of Procedure and Evidence of the Tribunal adopted on 5 July 1995, as amended;** |
| **Statute:** | **The Statute of the Tribunal adopted by Security Council Resolution 955 of 8 November 1994;** |

[4095] *Niyitegeka v Prosecutor,* No. ICTR-96-14-A, *Judgement* (9 July 2004) at para. 16

**Tribunal:** **The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council Resolution 955 of 8 November 1994.**

**(2) In the event of any inconsistency between this Code and the Directive, the terms and provisions of the Directive prevail.**

**(3) Any term not defined in this Code has the same meaning given to it by the Statute or by the Rules.**

**(4) While Counsel is bound by this Code, it is not, and should not be read as if it were a complete or detailed Code of Conduct for Counsel. Other standards and requirements may be imposed on the conduct of Counsel by virtue of the Tribunal's inherent jurisdiction and the code of conduct of any national body to which Counsel belongs.**

**(5) This Code must be read and applied so as to most effectively attain the objects and uphold the values expressed in the Preamble.**

**(6) General provisions of this Code should not be read or applied in a restrictive way by reason of any particular or illustrative provisions.**

**(7) The singular includes the plural and vice versa.**

**Article 2--entry into force**

**This Code enters into force on 4 June 1998.**

**Article 3--general purpose and application**

**(1) The general purpose of this Code is to provide for standards of conduct on the part of Counsel which are appropriate in the interests of the fair and proper administration of justice.**

**(2) This Code applies to Counsel as defined in Article 1(1) of this Code.**

**Article 4--scope and termination of representation**

**(1) Counsel must advise and represent their client until the client duly terminates Counsel's position, or Counsel is otherwise withdrawn with the consent of the Tribunal.**

**(2) When representing a client, Counsel must:**

**(a) Abide by a client's decisions concerning the objectives of representation if not inconsistent with Counsels ethical duties; and**

**(b) Consult with the client about the means by which those objectives are to be pursued.**

**(3) Counsel must not advise or assist a client to engage in conduct which Counsel knows is in breach of the Statute, the Rules or this Code and, where Counsel has been assigned to the client, the Directive.**

The provision of Article 4 providing that counsel must represent the client until terminated must be interpreted considering Appeals Chamber case law prohibiting an accused from unilaterally destroying the trust between himself and counsel as well as authorizing the Chamber to assign counsel in certain circumstances against an accused's will.[4096]

**Article 5--competence and independence**

**In providing representation to a client, Counsel must:**
**(a) Act with competence, dignity, skill, care, honesty and loyalty;**
**(b) Exercise independent professional judgement and render open and honest advice;**
**(c) Never be influenced by improper or patently dishonest behaviour on the part of a client;**
**(d) Preserve their own integrity and that of the legal profession as a whole;**
**(e) Never permit their independence, integrity and standards to be compromised by external pressures.**

**Article 5 bis--fee splitting**

**(1) Fee-splitting arrangements, including but not limited to financial arrangements, between Counsel and their clients, relatives and/or agent of their clients are not permitted by the Tribunal.**
**(2) Where Counsel are being requested, induced or encouraged by their clients to enter into fee splitting arrangements, they shall advise their clients on the unlawfulness of such practice and shall report the incident to the Registrar forthwith.**
**(3) Counsel shall inform the Registrar of any alleged fee splitting arrangement by any member of his Defence team.**
**(4) Following receipt of information regarding possible fee splitting arrangements between Counsel and their clients, the Registrar shall investigate such information in order to determine whether it is substantiated.**
**(5) Where Counsel is found to have engaged in a practice of fee splitting or to have entered into a fee splitting arrangement with his client, the Registrar shall take action in accordance with Article 19 (A) (iii) of the Directive on assignment of Defence Counsel.**
**(6) In exceptional circumstances, and only where the Registrar has granted leave, Counsel may provide their clients with equipment and materials necessary for the preparation of their defence.**

**Article 6--diligence**

[4096] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 28

**Counsel must represent a client diligently in order to protect the client's best interests. Unless the representation is terminated, Counsel must carry through to conclusion all matters undertaken for a client within the scope of his legal representation.**

**Article 7—communication**

**Counsel must keep a client informed about the status of a matter before the Tribunal in which the client is an interested party and must promptly comply with all reasonable requests for information.**

**Article 8—confidentiality**

**(1) Whether or not the relation of Counsel and client continues, Counsel must preserve the confidentiality of his client's affairs and, subject to sub-article (2), must not reveal to any other person, other than to any assistants who need to know it for the performance of their duties, information which has been entrusted to him in confidence or use such information to his client's detriment or to his own or another client's advantage.**
**(2) Notwithstanding sub-article (1), and subject to Article 19 ("Conflicts"), Counsel may reveal information which has been entrusted to him in confidence in any one of the following circumstances:**
**(a) When the client has been fully consulted and knowingly consents; or**
**(b) When the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure; or**
**(c) When essential to establish a defence to a criminal or disciplinary charge or civil claim formally instituted against Counsel; or**
**(d) To prevent an act which Counsel reasonably believes:**
**(i) Is, or may be, criminal within the territory in which it may occur or under the Statute or the Rules; and**
**(ii) May result in death or substantial bodily harm to any person unless the information is disclosed.**
**(3) For the purposes of this Article, Counsel includes employees or associates of Counsel and all others whose services are used by Counsel.**

**Article 9--conflict of interest**

**(1) Counsel owes a duty of loyalty to his or her client. Counsel must at all times act in the best interests of the client and must put those interests before their own interests or those of any other person.**
**(2) In the course of representing a client, Counsel must exercise all care to ensure that no conflict of interest arises.**
**(3) Without limiting the generality of sub-articles (1) and (2), Counsel must not represent a client with respect to a matter if:**
**(a) Such representation will be or is likely to be adversely affected by representation of another client;**

**(b) Representation of another client will be or is likely to be adversely affected by such representation;**
**(c) The Counsels professional judgement on behalf of the client will be, or may reasonably be expected to be, adversely affected by:**
**(i) The Counsels responsibilities to, or interests in, a third party; or**
**(ii) The Counsels own financial, business, property or personal interests; or**
**(iii) The matter is the same or substantially related to another matter in which Counsel had formerly represented another client (the former client); and the interests of the client are materially adverse to the interests of the former client, unless the former client consents after consultation.**
**(4) Counsel must not accept compensation for representing a client from a source other than that client or, if assigned by the Tribunal, from a source other than the Tribunal, unless:**
**(a) That client consents after consultation; and**
**(b) There is no interference thereby with the Counsels independence of professional judgement nor with the client-Counsel relationship.**
**(5) Where a conflict of interest does arise, Counsel must:**
**(a) Promptly and fully inform each potentially affected client of the nature and extent of the conflict; and**
**(b) Either:**
**(i) Take all steps necessary to remove the conflict; or**
**(ii) Obtain the full and informed consent of all potentially affected clients to continue the representation, so long as Counsel is able to fulfil all other obligations under this Code.**

**Article 10--client under a disability**

**When a client's ability to make adequately considered decisions in connection with their representation is impaired because of minority, mental disability or any other reason, Counsel must:**
**(a) Inform the Judge or Chamber of the Tribunal hearing the matter, if any, of the disability;**
**(b) Take such steps as are necessary to ensure the adequate legal representation of that client; and**
**(c) As far as reasonably possible maintain a normal Counsel-client relationship with the client.**

**Article 11--accounting for time**

**Counsel should account in good faith for the time spent working on a case and maintain and preserve detailed records of time spent. Counsel is under a duty to set his bills and fees with moderation**.

**Article 12--rules of the Tribunal**

**(1) Counsel must at all times comply with the Rules and such rulings as to conduct**

**and procedure as may be applied by the Tribunal in its proceedings. Counsel must at all times have due regard to the fair conduct of proceedings.**
**(2) Counsel must not, unless permitted by the Rules or this Code or the Judge or Chamber hearing the matter:**
**(a) Make contact with a Judge or Chamber of the Tribunal without first or concurrently informing Counsel acting for any other party to the proceedings;**
**(b) Submit exhibits, notes or documents to the Judge without communicating them first or concurrently to Counsel acting for any other party to the proceedings.**

Duty Counsel's refusal to represent the accused at a deposition in Rwanda violated Rule 12(1)'s requirement that counsel comply with the Rules and rulings of the Tribunal and he was terminated as Duty Counsel for the accused.[4097]

**Article 13--candour toward the Tribunal**
**(1) Counsel is personally responsible for the conduct and presentation of their Client's case, and must exercise personal judgement upon the substance and purpose of statements made and questions asked.**
**(2) Counsel must not knowingly:**
**(a) Make an incorrect statement of material fact to the Tribunal; or**
**(b) Offer evidence which the Counsel knows to be incorrect.**
**(3) Despite sub-article (2) (a), Counsel will not have made an incorrect statement to another party to the proceedings or to the Tribunal simply by failing to correct an error on any matter stated to Counsel or to the Tribunal during proceedings.**
**(4) Counsel must take all necessary steps to correct an incorrect statement made by Counsel in proceedings before the Tribunal as soon as possible after Counsel becomes aware that the statement was incorrect.**

**Article 14--integrity of evidence**

**(1) Counsel must at all times maintain the integrity of evidence, whether in written, oral or any other form, which is or may be submitted to the Tribunal.**
**(2) If Counsel's representation of a client terminates for any reason, Counsel shall return evidence and other materials, which have come into his possession as a result of the said representation, to his former client, to the latter's Counsel, or under seal to the Registrar for onward transmission to the said client or Counsel, as appropriate.**

**Article 15--impartiality of the Tribunal**

**(1) Counsel must take all necessary steps to ensure that their actions do not bring proceedings before the Tribunal into disrepute.**
**(2) Counsel must not seek to influence a Judge or other official of the Tribunal by means prohibited by the Statute, the Rules or this Code.**

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[4097] *Prosecutor v Muvunyi*, No. ICTR-2000-55-I, *Decision of Withdrawal of Jesse Kiritta as Duty Counsel of the Accused Ildephonse Hategekimana and Appointment of Bharat Chadha as Duty Counsel for the Same Accused* (2 December 2003)

**Article 16--counsel as witness**

**Counsel must not act as advocate in a trial in which the Counsel is likely to be a necessary witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the client if that Counsel does not so act.**

**Article 17--fairness and courtesy**

**(1) Counsel must act fairly, honestly and courteously towards all persons with whom they have professional contact, namely other Counsel, their clients, Judges, members of the Office of the Prosecutor and Registry staff. Counsel shall recognize all other Counsel appearing or acting in relation to proceedings before the Tribunal as professional colleagues.**
**(2) Counsel must not communicate with the client of another Counsel except through or with the permission of that client's Counsel.**

**Article 18--dealing with unrepresented persons**

**(1) If, on behalf of a client, Counsel is dealing with a person who is not represented by Counsel, Counsel:**
**(a) Must not give advice to this unrepresented person if the interests of the person are, or have a reasonable possibility of being, in conflict with the interests of the Counsel's client; but**
**(b) May advise the unrepresented person to secure legal representation.**
**(2) Counsel must inform the unrepresented person of the role Counsel plays in the matter, the persons right to Counsel under the Rules, and the nature of legal representation in general. This information must be given whether or not a conflict exists or may exist with the interests of Counsel's client.**

**Article 19—conflicts**

**If there is any inconsistency between this Code and any other code which Counsel is bound to honour, the terms of this Code prevail in respect of Counsel's conduct before the Tribunal.**

The code of conduct of a counsel's national bar association has no direct application before the Tribunal. In determining whether there is an inconsistency in counsel's obligations, submissions concerning the content of a national code governing a counsel may be relevant.[4098]

**Article 20--misconduct**

[4098] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Maitre Paul Skolnik's Application for Reconsideration of the Chamber's Decision to Instruct the Registrar to Assign him as Lead Counsel* (25 March 2005) at para. 29

**It is professional misconduct for Counsel, inter alia, to:**
**(a) Violate or attempt to violate this Code or to knowingly assist or induce another person to do so, or to do so through the acts of another person;**
**(b) Commit a reprehensible act which reflects adversely on Counsel's honesty, trustworthiness or fitness as Counsel;**
**(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
**(d) Engage in conduct which is prejudicial to the proper administration of justice before the Tribunal; or**
**(e) Attempt to influence an officer of the Tribunal in an improper manner.**

Defence counsel warned for misrepresenting Appeals Chamber decision in motion filed with Trial Chamber.[4099]

**Article 21—reporting misconduct**

**(1) If:**
**(a) Counsel knows that another Counsel has breached this Code or has otherwise engaged in professional misconduct; and**
**(b) That violation or conduct raises a substantial question as to the other Counsel's honesty, trustworthiness or fitness as Counsel.**
**Counsel shall inform the Judge or Chamber of the Tribunal before which Counsel is appearing.**
**(2) The Registrar may also communicate any misconduct of Counsel to the professional body regulating the conduct of Counsel in his State of admission or, if a Professor and not otherwise admitted to the profession, to the governing body of his University.**

**Article 22—enforcement**

**Counsel must abide by and voluntarily submit to any enforcement and disciplinary procedures as may be established by the Tribunal in accordance with the Rules.**

**Article 23--amendment**

**This Code may be amended by the Registrar, after consultation with the Judges.**

[4099] *Prosecutor v Nshogoza*, No. ICTR-07-91-PT, *Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment* (17 December 2008) at para. 38