

***Fostering/enhancing speedy trials in Africa as well as the role of prosecutors/defense attorneys in ensuring speedy trials***

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## INTRODUCTION

- ❖ Advocates and Prosecutors as well as other law enforcement officers has **distinct roles to play in order to achieve a trial without undue delay or a speedy trial.**
- ❖ This entails the fact that a criminal defendant must be brought to trial for his or her alleged crimes **within a reasonable time.**
- ❖ The right to trial without undue delay means the right to a trial which **produces a final judgment/decision “without undue delay” as well.**
- ❖ Unreasonable delay of a trial is a human rights violation and may sometimes lead to **public outcry.**

## Introduction Contn...

- ❖ When justice is not carried out at the right time-it leads to many questions.
- ❖ The right to a fair trial encompasses a *speedy trial inter alia*. It is both a standard of international and domestic laws signed by many African countries, intended to safeguard people from illegitimate and unnecessary delays.
- ❖ The *African Charter on Human and People's Rights* has provided for the "right to be tried within a reasonable time by an impartial court or tribunal

## Contn

- ▶ Extremely lengthy criminal investigations and court processes are unfavorable to those rightly presumed innocents.
- ▶ **Examples:** Rwanda has introduced **Informal and traditional mechanisms of justice accessible to all citizens while providing speedy, cheap and meaningful remedies** to people and this is seen as “*user friendly*” and provides a comparative advantage of both formal and traditional adjudication which creates an environment for a speedy process (Examples of Gacaca Courts and Abunzi)
- ▶ **In Rwanda,** any unnecessary delays brought about by any party to the case can lead to **sanctions by court especially in civil and commercial matters.**
- ▶ **However,** conducting a trial within reasonable time or not, should not be based on a **single factor or reasoning but cross-cutting factors** that will be discussed herein.
- ▶ What specifically constitutes a reasonable time should be a matter of **debates associated with the hearing, objections associated with the case** which are **admissible by the law, required expertise, evidentiary matters, litigation process and legislation itself.**

## ICTR Case Law

- ▶ **In Prosecutor Vs Setako**, the accused and his counsel raised the issue of violation of the right to trial within reasonable period arguing that the trial chamber violated his right to be tried without undue delay.
- ▶ The issue was about allowing the prosecution to amend the indictment was to improve trial fairness, such as better articulating its theories of criminal responsibility, removing any factual allegations it no longer wishes to pursue, and correcting or supplementing with additional detail of the existing factual allegations.
- ▶ Appeal chamber further ruled that it is not sufficient to demonstrate that the amendments were untimely or that they prejudiced *Setako*.
- ▶ **In the case of Prosecutor Vs Nahimana et al** the Tribunal went further to examine reasonable /possible causes for delays after the defense teams had claimed that the right to trial without undue delay guaranteed by the then Article 20(4)(c) of the ICTR Statute was violated, the Appeals chamber decided that in order to decide that such a right was violated, the following factors were relevant:
  - a) *The lengthy of the delay;*
  - b) *The complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law);*
  - c) *The conduct of the parties*
  - d) *The conduct of the authorities involved; and,*
  - e) *The prejudice to the accused, if any.*



# Role of Prosecutors

## 1. Objectives to be pursued

- ▶ Improve effectiveness and efficiency, **institutional capacity to be able to deliver fair and timely prosecutorial services** in order to help their respective governments to achieve accountable governance.

In order to realize this objective, there should be specific objectives that should be pursued:

- a) To increase the public satisfaction with the quality and timeliness of prosecution services;
  - b) To **minimize illegal/unnecessary detentions**
  - c) To accelerate most importantly the prosecution of **serious crimes** affecting the public
  - d) Speeding up the investigation and prosecution of **emerging crimes** and **cross border crimes** and **encouraging mutual legal assistance and cooperation in criminal matters**
- ▶ The reason behind suggesting these objectives is based on the fact that even if serious or international /cross border crimes takes much time due to required mutual legal assistance to support the prosecution evidence, however, domestic criminal investigations of suspects should always be expedited in a reasonable and timely manner to ensure rights of the accused are respected-notably, the right to be tried within the reasonable time.

## Role of Prosecutors

- ▶ With few human and logistic resources in many African countries (few lawyers, few prosecutors and insufficient judicial personnel) where the few human resource has also been investigating crimes such as genocide, war crimes & crimes against humanity, terrorism and other serious that attracts much time and affect the prosecution of the ordinary crimes.
- ▶ The number of judges in comparison with cases before them may lead to prioritizing serious crimes prosecutions than the ordinary, hence affecting the principal of a speedy trial which is a key component of the principle of a fair trial.
- ▶ For Prosecutor, it is important to adhering to the professional requirement not merely to seek conviction but also to initiate plea bargaining processes that does not only repair the victim of the crime but also serve as a mitigating circumstance. It is also important for the judges to remember their constitutional mandate as well as the professional obligation to protect the rights of the defendant and deliver justice rather than treat them as subjects to be quickly processed and sent to jail.

# Need for operation plans to enhance speedy trials

## Designing operational plans

- ▶ Prosecutors need to design the Action (Operational) Plan that makes a clear commitment to delivering a series of operational results or targets aimed at following up on speeding up the prosecution of cases submitted to court.
- ▶ Such a speedy trial must however be of **high-quality evidence**
- ▶ it's important to update with reports of achievements for decision makers to adjust to such progresses.
- ▶ A The Prosecutor **may decide to continue (if they find it tangible and evidential) or to discontinue any investigations** (as long as they don't find it appropriate for continuing prosecution. Such a decision will definitely have an impact on any speedy trial outcome.

## Quality Investigations to avoid backlogs

- ▶ It is important for prosecuting agencies to inspect the **quantity vs quality** of cases processed by all prosecutors in order to determine whether they are prosecutable or not.
- ▶ The more we have **backlogs** in our Court systems, the more justice is delayed (and hence denied)
- ▶ Any prosecuting agencies should be aware of the situation of avoiding unnecessary delays and take measures to **prevent the emergence of backlogs**. This helps in continuation and making the **follow up on indictments sent to court** and involve other institutions as well to ensure a speedy trial.



## Need for operation plans to enhance speedy trials

- ▶ It is equally important that the message should be delivered to the Investigators of crime, **to assess carefully, any cases to which they take decisions of arresting suspects, on whether such investigations require detention whatsoever.**
- ▶ The impact **of unnecessary delays is much reflected in cases related to those detained** who require access to a speedy trial.
- ▶ Due to **high increase of cases received with constraints of human & logistical resources** that remain constant, more efforts have to be put on handling cases received by the prosecution offices in order to fight against backlogs.
- ▶ **Provisional detention should be an exception.** There should be strategies are in place to expedite the prosecution of cases the detained suspects in order to avoid having many people in prison even where there no serious grounds to keep them detained.
- ▶ **Detention has special consequences on any citizen's life.** Prosecuting. Do prosecutors/Judges always have **serious grounds** to detain suspect?

## Effectiveness of a plea bargain procedure and its impact on speeding up trials

- ▶ In Rwanda as many other African countries, a plea-bargaining criminal justice process is enshrined under the Rwandan law since the 2019 criminal procedure came into force.
- ▶ Effective October 12 2022, the judiciary and prosecution rolled out the use of plea bargain in the prosecution of criminal cases,
- ▶ Ahead of the roll out, which has been coupled with a nationwide awareness drive, prosecution has issued guidelines on the processes
- ▶ A number of suspects in preliminary detention have preferred this procedure and it has enabled the judicial institutions to expedite their trials.
- ▶ .This has practically helped both prosecutors and defence lawyers to work together in speeding up the criminal cases especially cases of those who confess and enter plea.

## Role of defense counsel

### Advocates should avoid unnecessary application for adjournments and stays

- ▶ The role of Advocates should be clear as officers of court in seeking expeditious trials.
- ▶ There are some **delays brought about by advocates** or due to their **actions which leads to adjournments**.
- ▶ This affects a lot the other parties involved in the case when advocates look at the interests of their respective clients and disregard the concerns of the other parties to the case.
- ▶ Any adjournment of the case should always be **reasonable and appropriately submitted and explained before the court of law**.
- ▶ The role of Advocates(lawyers) in legal aid services should be a high aspiration for all people especially in Africa where it is not still accessible to many and remains remote for ordinary people.
- ▶ Advocates should not be the ones employing delaying tactics to cases that would rather requires a speedy trial.

## Role of defense counsel

- ▶ The responsibility to make **proposals that can contribute to the promotion of justice in general is a requirement for Advocates.**
- ▶ Promotion of justice itself entails the **responsibility of an advocate/lawyer to play a role in securing speedy trials before courts of law.** Among other responsibilities of Advocates is also to help the government in the provision of legal aid(*pro bono* where necessary)
- ▶ The Constitutional and international instruments guarantee of a speedy trial is an important safeguard **to prevent undue and possibly oppressive incarceration prior to a substantive trial,** to minimize concern accompanying public accusation and to limit possibilities that long delays will unpair the ability of an accused to defend him/herself.

# Factors that may lead to unnecessary delays in a judicial discourse

## Challenges

- ▶ A number of reasons continue to delay appropriate and timely trials:
- ▶ Sometimes the population of a country is bigger compared to the lower number of courts/judges.
- ▶ This may also be related to budget issues even when the ration of judges to the number of populations is reasonable, but the state cannot sustain the required resources for equitable and speedy justice.
- ▶ It is also important to note that the factor that Judges are independent, sometimes they may think they are not accountable to anyone, and the delays comes from within the court system malfunctioning related to leisure and inconsiderate conduct within the guarantors of justice of which the judiciary by itself should be held to account.
- ▶ Unnecessary adjournments by Courts/judges are also another main reason for delaying justice (because nobody will question them) as long as it is their absolute right to do so, even for flimsy reasons that may not be communicated.



# Rwanda: Historical background

## Background of the legal system, challenges and reforms

### Pre-1994

- ▶ For more than three decades up to 1994, Rwanda had known only regimes that had built their power on an indirect or direct massive violation of human rights, discrimination and divisions of the people that culminated into the genocide against the Tutsi in 1994.
- ▶ The rights of the accused including the right to a speedy trial were at stake for all that time.
- ▶ The pre-1994 Rwandan justice system was partly manned by judges and prosecutors who had no legal training and corruption within the system was appalling.

## Post- Genocide Rwanda

- ▶ The system of administration of justice after the genocide had to be rebuilt from scratch, to recruit new personnel, train and equip them, provide new infrastructure.
- ▶ Rwanda did not have enough lawyers (Judges, Prosecutors and Advocates) in its judiciary even prior to 1994. As the genocide began to unfold, most of the magistrates were either killed or fled, or participated in the genocide themselves and were in prison awaiting trial, in response to both domestic and International concerns, Rwanda chose to begin the trials using '*lay magistrates*', rather than wait until new judicial personnel had received years of legal training.

## Legal and Judicial Reform are necessary

- ❖ Rwanda experience necessitated legal and judicial reforms due to problems of a high magnitude that its judicial institutions would hardly operate with the perfection one would ideally desire..
- ❖ The recognition by the ICTR to transfer cases for trial before the Rwandan courts under rule *11 bis* is the recent step in realisation of the achievements recorded.
- ❖ Reforms are however an on-going process in the sense that any legal system would like to make reforms at particular time,

## Legal and Judicial Reforms in Rwanda

- ▶ To date, Rwanda has embarked on the continuation to update various laws and established a law reform commission in 2001 that continues to evaluate, review and update the laws and harmonize them with both regional and international instruments.
- ▶ This is done by continuous capacity building that improves the credibility, capacity of Rwandan judges, prosecutors and judicial police force as well as improving relationship with foreign jurisdictions through mutual legal cooperation.

## Pre-trial detention and its impact on speedy trials

- ▶ It is a **fundamental right to the detainee to be tried expeditiously** in case his/her defense cannot secure pretrial release or bail, to avoid undue delays. In attempting to define reasonable time before trial, the practice from the *Rwandan Criminal Procedure Code* is that a person detained under pre-trial detention may be detained for 30 days upon a Court decision.
- ▶ It could however be understood that **pretrial detention in many African countries is long and could not be reasonable** given the
- ▶ Fundamental right is liberty and **detention should always be an exception**
- ▶ Once the Police decides to detain and hand over the suspects to the prosecution, **they should have a prima facie case justifying this act** and in position to have a criminal case formed otherwise the procedural preventive detention is prone to abuse hence delayed justice..



## Pre-trial detention and its impact on speedy trials

- ▶ From Rwandan legal practice, *Article 79 of the Rwandan Code of Criminal Procedure*, six months is the maximum time set for a suspect to last in pre-trial detention.
- ▶ It is therefore understood that those suspects that have exceeded six months in prison, suspected to have committed felonies require a speedy adjudication of their criminal cases.
- ▶ Viewed in the context of the Rwandan law, one can conclude that reasonable time for pre-trial detention that should lead to a substantive hearing should be **six months maximum**
- ▶ **Beyond that**, a requirement for a speedy trial and the role of parties involved must be **actively pursued.**

## Application for compensation in view of unlawful and delayed detentions

- ❑ Speedy trials will not only guarantee citizens trust towards their judicial institutions but will also avoid illegal detentions.
- ❑ Many African countries that have ratified the ICCPR) will understand the remedies embodied into this International Covenant especially with regard to right to compensation to the victims of illegal detentions.
- ❑ African Lawyers/Advocates should always advance the rights of the accused persons under their respective domestic criminal laws specially to seek compensation in this regard.
- ❑ The ICCPR provides for a right to compensation for detainees whose rights have been abused. What the unlawful detention mentioned here is explained in article 9(1-4) of the ICCPR.
- ❑ The ICCPR states that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy not withstanding that the violations has been committed by the persons acting in an official capacity.
- ❑ Even though the role of criminal defense attorneys by noting that their responsibilities on speeding up trials especially in criminal matters is so limited. Their role in seeking legal redress/compensation is a contribution to speeding up a legal process.

# The Constitution

Constitution should always be the guiding Supreme Law

- ▶ It is important for advocates and prosecutors to always **invoke constitutional provisions in their defence** submissions rather than relying on procedural and substantive criminal law before their domestic courts.
- ▶ Judges always wish to hear and make their **arguments based on the supreme law of the land** before they embark on criminal procedures.
- ▶ It is the responsibility of Advocates especially defending their clients to ensure these **constitutional and criminal law provisions are clearly defended and understood to contribute to a speedy trial** in order to avoid lengthy and unnecessary detentions that may lead to abuse.

## Equality of arms/resources required for speedy trials

- ▶ The **discrepancy between the resources available to the African Prosecutors and those for African Bar Associations** and law firms defending the accused is significantly unequal.
- ▶ The prosecutor has not only the **tools of an office that is better funded, but typically has police department investigators and technical staff** available as well.
- ▶ This situation **does not allow things to get easier** especially on the side of the defense counsels.
- ▶ The **inability to access financial resources has hit the criminal defence** bar with full force and **sometimes advocates are not capable of visiting their own detained clients to have lawyer/client time** due to fewer available funds and towards indigent accused especially.
- ▶ The constituency for the indigent defendant charged with crime is for the **government to provide such indigent support**, however this takes a lot of time to secure and hence affects the effectiveness of a speedy trial we are advocating for.
- ▶ It is important for governments and private sector to **create a sustainable fund to indigent accused and to all those vulnerable suspects** who have no idea on how and when their cases will come to a conclusion.

## Equality of arms/resources required for speedy trials

- ▶ Challenges related to **inadequate funding** will definitely continue to impact the efforts to foster speedy trial before our domestic African courts.
- ▶ Defense lawyers need to courageously and persistently fight the battle for **increased funding** that shall enable them to pursue their client's cases in view of speeding up defense/trials in court.
- ▶ Advocates **availability at all times to access their detained clients** in criminal matters, get information from the defendant that is required to make an informed defence application is the beginning of Advocates roles in speeding up the trials.
- ▶ Counsel must **win the trust of the defendant(s)** by meeting them on a number of occasions.
- ▶ Justice delayed discourages the defendant and makes them **loose trust in their lawyers/advocates**. The loss of such trust that should rather have been automatic further complicate matters in as far as legal advisory is concerned.
- ▶ Though advocates are not the ones who determine on how justice should be served but their **critical defense role** in a judicious process should contribute to speeding up any trials.



## Discouraging unnecessary delaying conducts by authorities and parties

- ▶ Prosecutors and advocates together with courts should **discourage the delays attributable to parties and authorities involved in investigations** and urge them to comply with reasonable time requirement.
- ▶ It's also important to discourage **applicants requests for adjournments** or through failing to appear in court.
- ▶ Advocates especially have to address, through their Bar Associations, the issues related to **unusual length criminal investigations**, delays in relation with obtaining expert opinion in some cases, adjournments and stays of proceedings, delay of the judge in charge of the preparation for the trial in hearing experts and ordering expert opinions.

## Initiating private prosecution procedures as way of speeding up trials

- ▶ Lawyers as private practitioners **have limited capacity to change the system but can use existing mechanisms** and submit applications in the higher courts to expedite the matter delayed by lower courts stating the legally acceptable reasons.
- ▶ If the trial court does not address matters of clients that lawyers represent, it **is better to file an application in the higher court seeking direction to the lower court** to expedite the matter.
- ▶ A judicious process is always the best solution.
- ▶ In some African jurisdictions including Rwanda, **private prosecution is allowed in criminal matters for parties seeking damages/victims of crime in a criminal case where prosecution has preferred not to proceed with the case** or else taken too much time to complete investigations.
- ▶ Under Rwandan law, an individual or his/her advocate can always **initiate a case before the court by way of private prosecution**. Burden of proof under private prosecution circumstances is on the victim of the crime or his or rightful beneficiaries.
- ▶ This experience from Rwanda can be shared to other **African countries that do not practice it as it speeds up criminal trials especially initiated by the Advocates of the victims of crimes**, who have reasonable and tangible reasons that the public prosecution has not speeded up their trials, either for “*lack of prosecution evidence*” or any reason that may be advanced by the prosecutor. **A speedy trial through this process relieves the victims of crime from waiting for a longer time or getting through tedious processes requesting prosecutors to resume investigations that they had earlier closed.**

## Recommendations

- ▶ In view of the above, the right to be tried within a reasonable time is a fundamental right. The following three (3) key recommendations should be considered by law enforcement agencies involved in preliminary and subsequent investigations that lead to a court process. These are:
1. Establishing **appropriate remedies and sanctions in the event suspects rights to trial within a reasonable time is intendedly denied.** (Remedies such as reduction of sentences, compensation in case of acquittal after serving long pre-trial detentions as well as considerations to dismiss charges).
  2. Time limits should be **set and respected within which defendants must be brought to trial or else be granted bail immediately.** Computing the time within which the trial must be commenced is a key recommendation that should be enforced by all parties to the case. The principle of liberty is an exception to detention. Advocates should **challenge before courts of law any delays that hinder a speedy process as the law allows them to do so.** Criminal justice is mostly initiated by prosecution while defense lawyers should engage courts of law and other stakeholders in the judicial chain to ensure investigations commenced by the prosecution and sent to court for adjudication is are speeded at earliest convenience for the accused suspects.

## Conclusion

A speedy trial indicates that the defendant is tried for the alleged crimes within a reasonable amount of time after being arrested. The role of Advocates and Prosecutors as well as other law enforcement officers is paramount. **If the defendant is not tried when the demand for speedy trial is made, then the defendant should be given provisional release from prisons as long as conditions on his/her bail may be put in place.** Detention should always be an exception to the principle of liberty that should be enjoyed by everyone including those suspected of committing crimes in society. Once a decision to detain someone is taken, then guarantees for a speedy trial must be enforced to avoid justice delayed.

Many people want their case to resolve quickly, **The role of Prosecutors and advocates for speedy trials should therefore be viewed in effectively pushing different institutions to achieve such a right in order to further the interests of the public,** including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases-but also most effectively **utilize the few and scarce resources before the African judicial institutions.**

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