

COMMENTARY

The “Media Case” before the Rwanda Tribunal:

The *Nahimana et al.* Appeal Judgement

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The Prosecutor v. Nahimana, Barayagwiza and Ngeze, popularly dubbed the *Media* case, involved the prosecution of three individuals alleged to have been the masterminds behind a media campaign to desensitize the Hutu population and incite them to murder the Tutsi population in Rwanda in 1994.

Ferdinand Nahimana and Jean-Bosco Barayagwiza were both influential members of the “Comité d’Initiative” (the Steering Committee) which founded *Radio Télévision Libre des Mille Collines* (“RTLM”), a radio station that from July 1993 – July 1994, broadcast virulent messages branding Tutsis as the enemy and Hutu opposition members as accomplices. Nahimana, a former university lecturer and Director of the Office of Information (ORINFOR), was alleged to have been the ideologue behind the creation of RTLM and was seen as the director of the company. Barayagwiza, a former Director of Political Affairs at the Foreign Ministry of Rwanda was considered the second in command of the radio station. Additionally, Barayagwiza was a founding member of the *Coalition pour la Défense de la République* (“CDR”) and, in 1994, the chairman of its regional committee for Gisenyi *préfecture*.

Hassan Ngeze was the owner, founder and editor of the *Kangura* newsletter, which was published from 1990-1995¹ and was widely read across Rwanda. Like the emissions of RTLM, *Kangura* produced hate-filled messages, characterizing Tutsis as enemies who wanted to subvert the democratic system and seize power for themselves. Additionally Ngeze was a founding member of the CDR and was alleged to have participated in distributing firearms, supervising roadblocks and ordering massacres in the Gisenyi *préfecture*.

On 3 December 2003, the Trial Chamber found all three defendants guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and persecution and extermination as crimes against humanity. However all three were acquitted of complicity in genocide and assassination

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¹ There were no editions published between April and July 1994.

as a crime against humanity. Barayagwiza was also found to be not guilty of serious breaches of Common Article 3 of the Geneva Conventions and Additional Protocol II.

The three accused lodged an appeal against the Trial Judgement on various grounds of errors of fact and law. The appeal was heard in January 2007 and the verdict was rendered on 28 November 2007. In its judgement, the Appeals Chamber reversed several aspects of the Trial Judgement. It acquitted all three of conspiracy to commit genocide, and all genocide charges relating to their involvement with RTLM and *Kangura* respectively, as well as extermination as a crime against humanity. While Nahimana and Ngeze were still found guilty of direct and public incitement to commit genocide, Barayagwiza's guilty verdict in relation to this offence was reversed. Nahimana and Ngeze's respective sentences were consequently reduced from life imprisonment to 30 years while Barayagwiza's already reduced sentence was changed to 32 years.

The Appeals Judgement contains numerous thorough analyses of legal and factual issues. However due to space restrictions, this article will discuss only the most salient features of the Judgement, focusing mainly on the central legal issues of the judgement, namely: right to a fair trial right (1), temporal jurisdiction (2), elements of genocide (3) including direct and public incitement to commit genocide (4), and crimes against humanity (5).

1. RIGHT TO A FAIR TRIAL

The three appellants raised numerous grounds of appeal relating to the independence and impartiality of the Trial Chamber. Barayagwiza contended that the Trial Chamber could not be considered as "independent" as it had been influenced by pressure exerted by the Rwandan government, which had threatened to suspend co-operation with the Tribunal following the Decision of 3 November 1999.² However, the Appeals Chamber concluded that while pressure may have been exerted, the Appellant did not establish that the judges of the Trial Chamber were in fact influenced by such pressure.³ The Appeals Chamber furthermore dismissed Barayagwiza's complaints in relation to the partiality of the judges, deciding that a trip to Rwanda by Judges Pillay and Møse shortly before the commencement of the trial was not improper as it was undertaken in their respective capacities as President and Vice-President of the Tribunal.⁴ Furthermore, the appellants' allegations of partiality on the basis of Judge Pillay's

² *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-T, Appeals Judgement, 28 November 2007 ("*Nahimana et al.* Appeals Judgement"), para. 30. Available at: <http://www.haguejusticeportal.net/eCache/DEF/8/674.html> (French only).

³ *Nahimana et al.* Appeals Judgement, para. 36.

⁴ *Nahimana et al.* Appeal Judgement, para. 67.

participation in the *Akayesu* case⁵ and Judge Møse and Pillay's participation in the *Ruggiu* case⁶ (which both concerned similar facts to those of the trial) were also dismissed.⁷

Barayagwiza additionally argued that his right to a fair trial was breached by the Trial Chamber's decision to continue the proceedings in his absence, and in the absence of his counsel. The Appeals Chamber dismissed the argument that the Trial Chamber erred in continuing proceedings in the absence of the accused, recalling that it was Barayagwiza himself who refused to attend the hearing and his decision was free, informed and unequivocal.⁸ However, the Appeals Chamber held that the Trial Chamber should not have continued proceedings where the counsel and the co-counsel of the accused were both absent from the courtroom.⁹ The Appeals Chamber ruled that where no legal representative of the Accused is in the courtroom, the Trial Chamber must adjourn proceedings until the representative arrives.¹⁰ If necessary, it must furthermore sanction the counsel's behaviour accordingly.¹¹ The Appeals Chamber therefore ruled that certain testimonies – heard when Counsel Barletta-Carldarera and Pognon were absent – had to be excluded. Additionally, the Appeals Chamber held that witness testimony heard during the period between the dismissal of Barayagwiza's original counsel and the arrival of his new counsel, was also heard in breach of the accused's right to examine the witnesses against him and these testimonies also had to be excluded.¹² However, notwithstanding the exclusion of this evidence, there was no miscarriage of justice as the findings of the Trial Chamber were not solely based on the evidence in question.¹³

Ngeze raised another aspect regarding the right to a fair trial right, arguing that the Trial Chamber had based its judgement on a material fact not pleaded in the indictment. The Appeals Chamber declared that where there were material facts which could support separate charges, and which were not pleaded in the indictment, the Prosecutor had a responsibility to seek leave to amend the indictment.¹⁴ In the present case, a competition organized by *Kangura* and RTLM in 1994 caused the recirculation of pre-1994 *Kangura* editions which readers had to look through to find responses to questions posed by the competition. Because the competition, which was the only potential legal basis for the Court to

⁵ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC1), 2 September 1998. Available at: <http://www.haguejusticeportal.net/eCache/DEF/735.html>.

⁶ *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement and Sentence (TC1), 1 June 2000. Available at: <http://www.haguejusticeportal.net/eCache/DEF/9/162.html>.

⁷ *Nahimana et al.* Appeals Judgement, paras. 78-87.

⁸ Under Rule 82 *bis* (introduced into the ICTR Rules in May 2003) a trial may proceed in the absence of the accused as long as the accused has made an initial appearance and his/her interests are represented by counsel.

⁹ *Nahimana et al.* Appeals Judgement, para. 138.

¹⁰ *Nahimana et al.* Appeals Judgement, para. 139.

¹¹ *Ibid.*

¹² *Nahimana et al.* Appeals Judgement, para. 173.

¹³ *Nahimana et al.* Appeals Judgement, paras. 155-157.

¹⁴ *Nahimana et al.* Appeals Judgement, para. 406.

base its findings on pre-1994 editions (given the temporal jurisdiction limitations discussed below), was not mentioned in the indictment, the Appeals Chamber reversed all findings of guilt based on these 1990-1993 editions.¹⁵

2. TEMPORAL JURISDICTION

All three of the appellants claimed that the Trial Chamber had transgressed the limits of its temporal jurisdiction by basing findings of guilt on conduct which occurred prior to 1 January 1994, in breach of Article 7 of the ICTR Statute, which specifically confines the Tribunal's mandate to events occurring in 1994. The Trial Chamber's decision to include evidence from prior to 1994 was based, in part, on the Chamber's characterization of inchoate crimes (namely conspiracy to commit genocide and direct and public incitement to commit genocide) as "continuous crimes" which extended in time until the achievement of the crimes' intended purpose (*i.e.* genocide). Delving into the drafting of the Statute and analyzing the submissions of the various delegations to the Drafting Committee, the Appeals Chamber concluded that the 1 January 1994 (rather than 6 April, the actual start of the genocide) was specifically chosen as the starting date of temporal jurisdiction of the Tribunal to incorporate crimes associated with the planning of the genocide.¹⁶ The Appeals Chamber held that therefore responsibility for a crime could only be established if all of the elements of the crime existed in 1994.

However, the Appeals Chamber noted that the temporal jurisdiction of the Tribunal did not forbid the admission of all evidence relating to the accused's conduct prior to 1994. Relevant and probative evidence of prior events could be admitted provided there was no compelling reason to exclude it.¹⁷ For example, a Trial Chamber could admit evidence which clarified a particular context, established the elements of criminal conduct (which occurred in 1994) by inference (in particular, criminal intent) or which showed a continuing pattern of conduct.¹⁸

The Appeals Chamber rejected the Trial Chamber's definition of "continuous crimes", deciding that where continuous criminal conduct began prior to 1 January 1994 and continued during 1994, a finding of guilt could only be based on the events that occurred in 1994.¹⁹ It decided to sidestep the issue of whether conspiracy to commit genocide was a continuous crime as it had reversed the findings of guilt in relation to all three Appellants and hence did not find it necessary to decide on this point. However whether direct and public incitement was a continuous crime was considered in the judgement.

Though the Trial Chamber had claimed that public and direct incitement to commit genocide was a "continuous crime",²⁰ the Appeals Chamber rejected this

¹⁵ *Nahimana et al.* Appeals Judgement, para. 410.

¹⁶ *Nahimana et al.* Appeals Judgement, paras. 311-313.

¹⁷ *Nahimana et al.* Appeals Judgement, paras. 315.

¹⁸ *Ibid.*

¹⁹ *Nahimana et al.* Appeals Judgement, para. 317.

²⁰ *Nahimana et al.* Appeals Judgement, para. 716.

characterization (with Judges Pocar and Shahabuddeen dissenting). Speeches, emissions and articles were discrete actions which finished as soon as they were said, dispersed or published. Hence the majority ruled that the Trial Chamber erred in concluding that it had competence over incitement to commit genocide which occurred prior to 1994, such as RTLM broadcasts or *Kangura* newspaper editions.²¹ Nonetheless, according to the Appeals Chamber, these broadcasts and newspaper editions prior to 1994 could be used to establish context or to better understand the broadcasts and editions in 1994.²²

3. GENOCIDE

In the discussions on genocide, the Appeals Chamber addressed the critical issue of the definition of a “protected group”. Nahimana and Ngeze both argued that the Trial Chamber had made an error in expanding the notion of a protected group to include moderate Hutus.²³ This ground of appeal was based on the Trial Chamber’s discussion of Article 2 of the Statute, where the Chamber stated that “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.”²⁴ Because the Trial Chamber referred solely to Tutsi murders in deciding on the responsibility of the appellants for genocide, the Appeals Chamber was not convinced that the Trial Chamber had in fact intended to extend the offence to include the murders of moderate Hutus.²⁵ Nonetheless, the Appeals Chamber reiterated that acts committed against Hutus could not be incorporated as acts of genocide, for the victim would not have been killed on the basis that (s) he belonged to a “protected group”.²⁶ However the Appeals Chamber conceded that the perception of the offenders could, in certain circumstances, be taken into account when determining whether an individual belonged to a protected group.²⁷ Presumably, this might include the case where offenders considered all Hutus who supported Tutsis as Tutsis and classed them in the same category.²⁸ In such limited cases, Hutu victims could be considered as having belonged to a protected group for the purpose of Article 2. In the present case, the Appeals Chamber concluded that there was no evidence of such perceptions of the accused,²⁹ or such linkage with the Tutsi population, hence the murder of moderate Hutus could not be considered as genocide.

²¹ *Nahimana et al.* Appeals Judgement, para. 723.

²² *Nahimana et al.* Appeals Judgement, para. 725.

²³ *Nahimana et al.* Appeals Judgement, para. 493.

²⁴ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence (TC1), 3 December 2003 (“*Nahimana et al.* Trial Judgement”), para. 948. Available at: <http://www.haguejusticeportal.net/eCache/DEF/8/747.html>.

²⁵ *Nahimana et al.* Appeals Judgement, para. 497.

²⁶ *Nahimana et al.* Appeals Judgement, para. 496

²⁷ *Ibid.*

²⁸ This was the argument of the Prosecutor. *Nahimana et al.* Appeals Judgement, para. 494.

²⁹ *Nahimana et al.* Appeals Judgement, para. 496.

The Appeals Chamber further held that there was insufficient evidence of a causal connection between RTLM broadcasts prior to 6 April 1994 and acts of genocide which had occurred.³⁰ However, broadcasts post- 6 April were substantially more virulent and hence it was not unreasonable for the Trial Chamber to conclude that they substantially contributed to genocide.

Nonetheless, Nahimana, whom the Trial Chamber had found guilty under Article 6(1) for instigating genocide, was not found by the Appeals Chamber to have played an active role after 6 April 1994, hence his conviction for genocide was reversed.³¹ Although the Appeals Chamber did not dispute the Trial Chamber's finding that Nahimana was the founder of the RTLM,³² it did disagree that Nahimana was the "ideologue" of the media organization and that he used it as a vehicle for inciting the massacre of Tutsis.³³ Though he may have been in charge of the RTLM and gave orders to journalists, there was no actual evidence to show that he had in fact ordered the journalists to incite the murder of Tutsis.³⁴ Because he was not charged under Article 6(3), Nahimana's potential "superior responsibility" was not considered in relation to this crime.

Barayagwiza was convicted by the Trial Chamber under Article 6(3) for superior responsibility but he too was acquitted because the Appeals Chamber held that there was insufficient evidence to prove beyond reasonable doubt that Barayagwiza exercised effective control over journalists after 6 April 1994.³⁵

Ngeze was also acquitted of genocide in relation to *Kangura* newsletters (though not regarding his CDR activities) because the Appeals Chamber considered that a reasonable trier of fact could not have found beyond all reasonable doubt that *Kangura* editions had contributed significantly to the commission of acts of genocide. The reason is that none of the witnesses explicitly referred to made explicit reference as to the impact of *Kangura* editions published after 1 January 1994 and whether or not these editions resulted in the murder of Tutsis.³⁶ Though the Appeals Chamber found it clear that *Kangura* did contribute to the genocide by encouraging a climate of violence and hatred, it determined that this was not sufficient to show that the magazine provoked or *substantially* contributed to the genocide.³⁷

³⁰ The main causal link between RTLM broadcasts and genocide established by the Trial Chamber was the murder of certain Tutsis soon after their names were read out in RTLM broadcasts. The Appeals Chamber looked at 4 specific cases of emissions prior to 6 April 1994, but concluded that there was insufficient evidence to prove that these broadcasts substantially contributed to the murder of these 4 people. In two cases, the Appeals Chamber held that the murders were not sufficiently established and in relation to the other two, the Appeals Chamber concluded that the period between the emission and the murder was long enough to suggest that there may have been intervening events which could have caused the deaths: *Nahimana et al.*, Appeals Judgement, paras. 507-513.

³¹ *Nahimana et al.* Appeals Judgement, para. 589.

³² *Nahimana et al.* Appeals Judgement, para. 594.

³³ *Nahimana et al.* Appeals Judgement, para. 596.

³⁴ *Nahimana et al.* Appeals Judgement, para. 597.

³⁵ *Nahimana et al.* Appeals Judgement, para. 635.

³⁶ *Nahimana et al.* Appeals Judgement, para 519.

³⁷ *Ibid.*

4. DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

Another important aspect of the judgement is the Appeals Chamber's discussion of direct and public incitement to commit genocide. Before the Trial Chamber's judgement in this case, one had to probe as far back as the International Military Tribunal to find relevant case law on the criminalization of speech inciting genocide.³⁸ Relying on this limited case law and on international jurisprudence in relation to freedom of speech and hate speech,³⁹ the Trial Chamber seemed to suggest a definition that had a wider and somewhat nebulous ambit. For example, in its analysis of this crime, the Trial Chamber looked at the distinction between ethnic consciousness and the promotion of ethnic hatred and examined certain RTLM emissions to determine if they carried harmful ethnic stereotypes.⁴⁰ By doing this, the Trial Chamber seemed to stray from the strict question of whether there was a direct call to commit genocide. An *amicus curiae* prepared by the Open Society Justice Initiative, which was permitted by the Appeals Chamber, claimed that the Trial Chamber may have blurred the distinction between hate speech and public and direct incitement to commit genocide and requested clarification from the Appeals Chamber.⁴¹

The Appeals Chamber discussed at length direct and public incitement to commit genocide, explaining first the difference between "instigation" of a crime such as genocide under Article 6(1) and direct and public incitement to commit genocide under Article 2(3). It noted that Article 6(1), a mode of responsibility, required proof that the accused's acts substantially contributed to the commission of one of the crimes listed in Articles 2 to 4. Article 2(3), on the other hand, was a crime in itself and could be established even if no genocide in fact occurred.⁴²

The Appeals Chamber was not of the opinion that the Trial Chamber had confused hate speech with public and direct incitement to commit genocide.⁴³ It agreed with the Trial Chamber that that cultural context, including the nuances of the *Kinyarwanda* language, could be evaluated to determine if the words used were clearly understood by the intended audience, thereby rejecting the Appellants' argument that only an explicit call for genocide is covered by Article 2(3).

The Appeals Chamber held that while RTLM broadcasts between 1 January and 6 April 1994 did not constitute a direct and public incitement to commit genocide, certain emissions after 6 April 1994 did. Nonetheless, the Appeals Chamber reversed the findings of the Trial Chamber that Barayagwiza exercised effective control over RTLM journalists after 6 April and hence acquitted him of this charge (under Article 6(3)) in relation to RTLM broadcasts. Nahimana

³⁸ *Nahimana et al.* Trial Judgement, paras. 981-982. The Trial Judgement referred specifically to the cases of *Streicher* and *Fritzsche*.

³⁹ *Nahimana et al.* Trial Judgement, paras. 983-999. The Trial Chamber looked at the International Covenant on Civil and Political Rights, the European Convention on Human Rights.

⁴⁰ *Nahimana et al.* Trial Judgement, paras. 1020-1024.

⁴¹ *Nahimana et al.* Appeals Judgement, para. 698.

⁴² *Nahimana et al.* Appeals Judgement, paras. 678-679.

⁴³ *Nahimana et al.* Appeals Judgement, paras. 695 -696.

was found to have been a superior of RTLM staff with the power to prevent or punish criminal speeches and his conviction under Article 6(3) was therefore affirmed. However, his conviction under Article 6(1) was reversed as the Appeals Chamber did not believe that he had sufficient personal involvement after 6 April to have “instigated” the RTLM broadcasts (for the same reasons that he was acquitted of genocide under Article 6(1)). In relation to Ngeze, the Appeals Chamber concluded that there were certain articles published in 1994 that did constitute direct and public incitement to commit genocide, hence the conviction was affirmed.⁴⁴

5. CRIMES AGAINST HUMANITY

The Appeals Chamber held that a reasonable trier of fact could not conclude that there had been a systematic or widespread attack against Tutsi civilians during the period from 1 January to 6 April 1994.⁴⁵ Furthermore, RTLM broadcasts, *Kangura* newsletters and CDR activities which took place before 6 April 1994 could not be considered as being part of the systematic or widespread attack after 6 April 1994.⁴⁶ However according to the Appeals Chamber these activities could support other modes of liability such as planning, incitement and adding and abetting, provided that they significantly contributed to the attacks after 6 April 1994.⁴⁷

The Appeals Chamber held that it could not be established beyond reasonable doubt that pre-6 April RTLM emissions significantly contributed to the killing of Tutsis. Although post-6 April broadcasts were found to have significantly contributed to the killings, both Nahimana and Barayagwiza (for the reasons discussed in relation to the charge of genocide)⁴⁸ were found not to have had sufficient personal involvement in RTLM broadcasts after 6 April 1994 and were therefore acquitted of this charge in relation to the broadcasts. Barayagwiza was nonetheless found guilty of extermination as a crime against humanity in relation to his CDR activities, as was Ngeze.

Concerning persecution as a crime against humanity, the Appeals Chamber held that hate speech could be considered to be as serious as other crimes against humanity where, as in the present case, it is accompanied by a massive campaign of persecution characterized by acts of violence and destruction of property.⁴⁹ Although the appellants and the *amicus curiae* submitted that hate speech which does not incite violence does not constitute persecution as a crime against

⁴⁴ These articles were: “The Last Lie”, published in January 1994 (*Nahimana et al.* Appeals Judgement, para. 771); “Who will survive the March war?”, published in January 1994 (*Nahimana et al.* Appeals Judgement, para. 772); “How will the UN troops be killed?”, published in February 1994 (*Nahimana et al.* Appeals Judgement, para. 773).

⁴⁵ *Nahimana et al.* Appeals Judgement, para. 932.

⁴⁶ *Nahimana et al.* Appeals Judgement, para. 933.

⁴⁷ *Nahimana et al.* Appeals Judgement, para. 934.

⁴⁸ Nahimana, as with the crime of genocide, was not charged under Article 6(3) for extermination as a crime against humanity. Hence his potential “superior responsibility” was not considered.

⁴⁹ *Nahimana et al.* Appeals Judgement, para. 988.

humanity, the Appeals Chamber refused to rule on this issue, leaving the question open.⁵⁰ It did however note that the acts of persecution need not be considered individually but should be looked at cumulatively to determine if they reach the same gravity as other crimes against humanity.⁵¹

Assessing the facts, the Appeals Chamber concluded that RTLM broadcasts before 6 April did not constitute persecution because there was no widespread attack until after 6 April 1994.⁵² However the Chamber did declare that broadcasts after 6 April constituted persecution as a crime against humanity.⁵³ As *Kangura* had not been published between 6 April and 17 July 1994, it could not be concluded that the newsletter caused persecution as a crime against humanity. Geze's conviction was therefore reversed.⁵⁴

CONCLUSION

In the *Nahimana et al.* case, the Appeals Chamber laid down important principles and an interpretation of the law that will reverberate in many cases to come. In rejecting the argument that inchoate crimes (or at least direct and public incitement to commit genocide) are continuous crimes, the Appeals Chamber has strictly limited the evidence that can be used to establish the guilt of an accused. Where, as in this case, accused are charged with having sown the seeds of hatred long before the genocide was unleashed, it will be harder for the prosecution to establish a case against such individuals. Nonetheless, the Appeals Chamber's interpretation of temporal jurisdiction is more consistent with the drafting history of the Statute than the Trial Chamber's view. Additionally, the Appeals Chamber has further delineated the difference between hate speech, direct and public incitement to commit genocide and persecution as a crime against humanity, though some ambiguities still remain.

⁵⁰ *Nahimana et al.* Appeals Judgement, para. 987.

⁵¹ *Ibid.*

⁵² *Nahimana et al.* Appeals Judgement, paras. 993-994.

⁵³ *Nahimana et al.* Appeals Judgement, para. 995.

⁵⁴ *Nahimana et al.* Appeals Judgement, para. 1013.