

Summer 2008

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Dr. George William Mugwanya

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Recommended Citation

Dr. George William Mugwanya, *Recent Trends in International Criminal Law: Perspectives from the U.N. International Criminal Tribunal for Rwanda*, 6 NW. J. INT'L HUM. RTS. 415 (2008).
<http://scholarlycommons.law.northwestern.edu/njihr/vol6/iss3/3>

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Recent Trends in International Criminal Law: Perspectives from the U.N. International Criminal Tribunal for Rwanda

Dr. George William Mugwanya*

I. INTRODUCTION

¶1 This commentary appraises recent developments in international criminal law, with an emphasis on the jurisprudence engendered by the U.N. International Criminal Tribunal for Rwanda (“ICTR” or “Tribunal”) during 2007. It evaluates trends in the ICTR’s jurisprudence during the year 2007 in relation to substantive, procedural and evidentiary aspects of international criminal law.

¶2 In dealing with several issues addressed by the ICTR, the ICTR’s jurisprudence is examined in a comparative perspective, drawing on the experiences of other Tribunals, particularly the U.N. Tribunal for the Former Yugoslavia (“ICTY”). Along with its Statute and Rules of Procedure and Evidence, since its inception, the permanent International Criminal Court (“ICC”) has also rendered a few decisions that contribute to the current corpus of international criminal law. A couple of the ICC decisions have dealt specifically with issues similar to those addressed by the ICTR. Where relevant to this commentary, the ICTR’s jurisprudence is compared and contrasted with the ICC’s decisions and relevant provisions of the ICC Statute and Rules of Procedure and Evidence. In some instances, comparative criminal law from some national jurisdictions is also invoked.

* Senior Appeals Counsel, U.N. International Criminal Tribunal for Rwanda; Advocate of Uganda’s Courts of Judicature; formerly Senior Lecturer, Faculty of Law, Makerere University; LL.D, Notre Dame Law School (United States); LL.M, Birmingham, (United Kingdom); LL.M, Pretoria, (South Africa); LL.B, Makerere, (Uganda); Postgraduate Diploma in Legal Practice (Law Development Center). The views expressed herein are personal.

¶3 It is noteworthy that over the course of 2007, by and large, the ICTR did not break much new ground in the arena of international criminal law. Nevertheless, the ICTR addressed some critical issues that deserve evaluation. Some of the decisions reached by the ICTR provide important elaboration as to the position of international criminal law, while others raise controversies. Moreover, a number of decisions reached by the ICTR's Appeals Chamber—a chamber also shared by the ICTY, and the only appellate and highest court—were not unanimous. Many of these decisions generated important dissents, thus pointing to conflicting signals from the ICTR. While absence of unanimity by the judges raises challenges as to the current status of international law, arguably it equally creates some room for the possibility of remedying some questionable positions in the future, and thus may lead to the improvement of international criminal jurisprudence.

¶4 In appraising the issues addressed by the ICTR over the course of 2007, this Article is arranged as follows: Part II evaluates the ICTR's approach to the elements, participation in, and proof of the crime of rape, as well as issues arising from the Tribunal's approach. The issues raised include the status of circumstantial evidence, and its application to the crime of rape, the scope of commission as a mode of criminal participation, and the status in the Tribunal's jurisprudence of the concepts of 'lesser included or subsumed' crimes or modes of liability and 're-qualification' of crimes. Part III deals with the ICTR's approach to extermination as a crime against humanity, while the crimes of direct and public incitement to commit genocide, conspiracy to commit genocide, and persecution as crime against humanity are covered in Parts IV, V and VI respectively. These are followed by some procedural and evidentiary aspects of the Tribunal's jurisprudence, namely, specificity in pleading and the status quo of hearsay evidence. They are addressed in Parts VII and VIII respectively. Concluding the analysis is Part IX, which also comments, in brief, on other issues addressed by the Tribunal, including the notion of 'witness proofing;' the scope of the rights of the accused, such as the right to be tried in one's presence and the right to compensation; joint criminal enterprise liability; the powers of Trial Chambers to control proceedings, and issues arising from the Tribunal's plea of guilty jurisprudence.

II. THE CRIME OF RAPE: ELEMENTS, PARTICIPATION IN AND PROOF OF THE CRIME

¶5 The ICTR's jurisprudence during the period under review (particularly the Appeals Chamber jurisprudence¹) dealt with the elements of the crime of rape in international law. It also addressed issues relating to the proof of the elements of the crime, in particular, the proof of penetration. While reiterating established ICTR jurisprudence that a single witness's testimony may suffice to prove rape (and therefore that corroboration is not mandatory), the jurisprudence analyzed the status quo, the probative value and the manner in which 'circumstantial evidence' is to be approached and assessed. The ICTR's approach to some of these issues is controversial. In other respects, the jurisprudence raises questions as to the scope of 'commission' as a mode of criminal participation, and whether or not, in dealing with rape, the Appeals Chamber lowered the threshold established in past cases for justifying appellate intervention in factual findings reached by a Trial Chamber.

¶6 In relation to the elements of rape, it appears that during the period under review, the ICTR reiterated the position in earlier judgments, notably *Gacumbitsi v. Prosecutor*² (a position similar to that taken by the ICTY in the *Prosecutor v. Kunarac* Judgment³) that, unlike other acts of sexual violence, rape requires proof of acts of penetration of the victim's vagina or anus by the perpetrator's penis or any other object used by the perpetrator, without the consent of the victim. The need to prove these elements appears to underpin the Appeals Chamber's 21 May 2007 Judgment in *Muhimana v. Prosecutor*,⁴ where the Chamber did not disturb the Trial Chamber's legal findings on the elements defining rape in international law. While the *Muhimana* Trial Chamber in its

¹ The Tribunal's Statute establishes three courts of first instance entitled Trial Chambers. Under Article 24 of the Statute, both the Prosecution and the Defense may appeal a judgment of a Trial Chamber. Appeals lie to the Appeals Chamber, which is the only and last court of appeal. The Appeals Chamber of the ICTR also serves the ICTY.

² For the ICTR's previous judgments see *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Appeals Judgment, ¶¶ 147-157 (July 7, 2006) [hereinafter *Gacumbitsi* Appeals Judgment].

³ *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1e-A, Appeals Judgment, ¶ 127 (June 12, 2002).

⁴ See *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Appeals Judgment, ¶¶ 101-104 (May 21, 2007) [hereinafter *Muhimana* Appeals Judgment].

Judgment of 28 April 2005 appears to have “preferred”⁵ the definition of rape as enunciated in *Prosecutor v. Akayesu* (namely that rape and sexual violence means a physical invasion of a sexual nature committed on a person under circumstances which are coercive⁶), the same Chamber also notes that the *Akayesu* definition is not incompatible with that in *Kunarac*.⁷ As noted above, the *Kunarac* Judgment expressly requires proof of the said elements.

¶7

In addressing matters of evidence and proof of the elements of rape (in particular penetration of the victim), however, it is noteworthy that during the period under review, and specifically in the *Muhimana* Appeals Judgment, the ICTR adopted a controversial approach. It is noteworthy that the Tribunal reiterates the positions adopted in earlier cases: first, that to establish any crime under the Tribunal’s jurisdiction (including the crime of rape—a crime in relation to which some national systems take approaches that discriminate against rape victims⁸), corroboration is not mandatory (such that a Chamber may rely only on single piece of evidence, as long as it is credible⁹),—a position similar to that taken by the ICTY¹⁰ and the ICC¹¹; and secondly, that circumstantial evidence may sustain a conviction.¹² The ICTR’s application of these

⁵ See *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment, ¶ 551 (Trial Chamber III, Apr. 28, 2005) [hereinafter *Muhimana* Trial Judgment].

⁶ *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-1996-4-T, Judgment, ¶¶ 598 & 688 (Trial Chamber I, Sept. 2, 1998) [hereinafter *Akayesu* Trial Chamber Judgment].

⁷ *Muhimana* Trial Judgment, *supra* note 5, ¶ 550.

⁸ For instance, some require corroboration of the evidence of the victim, while others allow the admission of the sexual history of the victims. See generally Susan Power, *Critical Legal Studies and the Potential for the Reform of Irish Law*, available at http://www.nuigalway.ie/law/GSLR/2006/Critical%20Legal%20Studies%20And%20The%20Potential%20For%20The%20Reform%20Of%20Irish%20Rape%20Law%20_Power_.pdf.

⁹ *Muhimana* Appeals Judgment, *supra* note 4, ¶ 101 (invoking with approval previous judgments, namely, *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶ 72, & *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Appeals Judgment, ¶ 92 (July 9, 2004) [hereinafter *Niyitegeka* Appeals Judgment]).

¹⁰ See, e.g., *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 506 (Feb. 20, 2001).

¹¹ Under Rule 63(4) of the ICC’s Rules of Procedure and Evidence, “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any criminal court, *in particular, crimes of sexual violence*” (emphasis added).

¹² *Muhimana* Appeals Judgment, *supra* note 4, ¶ 49 (citing with approval the *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶ 115). The ICTY takes a similar

principles in the *Muhimana* Appeals Judgment, however, raises important questions. In that judgment, the majority of the Appeals Chamber (Judge Shahabuddeen and Judge Schomburg dissented in part) vacated the Trial Chamber's conviction of Muhimana for rape as a crime against humanity. According to the majority, there was insufficient evidence to prove that Muhimana personally raped the two victims in order to hold him culpable for committing the crime pursuant to Article 6(1) of the Tribunal's Statute.¹³ Paragraph 6 of the indictment alleged that Muhimana had committed the rapes:

On or about 7 April 1994 in Gishyita town Gishyita sector, Gishyita commune, Mikaeli Muhimana brought two civilian women Gorette Mukashyaka and Languida Kamukina into his house and raped them. Thereafter he drove them naked out of his house and invited *Interahamwe*¹⁴ and other civilians to come and see how naked Tutsi girls looked like. Mikaeli Muhimana then directed the *Interahamwe* to part the girls' legs to provide onlookers with a clear view of the girls' vaginas.¹⁵

The Appeals Chamber found fault with the Trial Chamber's reliance on the evidence of a sole Prosecution witness, "AP", and the Trial Chamber's following reasoning:

Although Witness AP was not an eye witness to the rape of Gorette and Languida, the Chamber infers that the Accused raped them on the basis of the following factors: the witness saw the Accused take

position. See, e.g., Prosecutor v. Kupreskic, Case No. IT-95-16-A, Appeals Judgment, ¶ 303 (Oct. 23, 2001).

¹³ *Muhimana* Appeals Judgment, *supra* note 4, ¶¶ 46-53. While the Chamber focuses on the crime of rape in general, it appears that the main issue concerns one of the elements of rape, namely whether the Accused personally *penetrated* the victims. Otherwise, it appears that the other element, namely, absence of consent, was not in issue.

¹⁴ The *Interahamwe* was a paramilitary or militia group that physically committed the majority of the crimes perpetrated during the atrocities of 1994 in various locations in Rwanda.

¹⁵ Prosecutor v. Muhimana, Case No. ICTR-95-1B-I, Revised Amended Indictment, at 4 (July 7, 2004).

the girls into his house; she heard them scream, mentioning the Accused's name and stating that they 'did not expect him to do that' to them; finally the witnesses saw the Accused lead the victims out of his house, stark naked, and she noticed that they were walking 'with their legs apart.'¹⁶

While pointing out that Muhimana could bear responsibility for *aiding and abetting*¹⁷ the rapes (but could not be so held culpable as the indictment did not charge him for that mode of responsibility), the Appeals Chamber overturned Muhimana's culpability for committing rape on the following reasoning:

[I]t is apparent from witness AP's testimony that the Appellant was not alone with the young women in the house at the relevant time. Witness AP testified that '[a]mong the voices coming from inside the house, the witness also recognized the voice of Bourgmester Sikubwabo, telling the girls to 'shut up.'" Consequently, the Appeals Chamber is not persuaded that the Trial Chamber acted reasonably in determining that it was the Appellant who raped the two women, rather than another person present in the house, such as Sikubwabo.¹⁸

The Appeal Chamber's approaches in *Muhimana* are controversial, and, in some instances, they appear to represent problematic postures that undercut the evolution of international criminal law. The following issues are noteworthy.

¹⁶ *Muhimana* Trial Judgment, *supra* note 5, ¶ 32.

¹⁷ Article 6(1) of the ICTR's Statute, which is equivalent to Article 7(1) of the ICTY Statute, enshrines several modes of criminal participation. In addition to prescribing 'committing' and 'aiding and abetting' as modes, these provisions prescribe criminal responsibility for those who plan, instigate or order the crimes.

¹⁸ *Muhimana* Appeals Judgment, *supra* note 4, ¶ 51.

A. The Status Quo of Circumstantial Evidence and the Threshold for Appellate Intervention in Relation to Factual Findings Concerning the Crime of Rape: Did the Appeals Chamber Depart From Existing Jurisprudence?

¶8

Firstly, with respect to the Appeals Chamber's approach to circumstantial evidence as it relates to the crime of rape, it may be argued that the Chamber adopts a stance somewhat different from its jurisprudence with respect to the *margin of deference* that must be accorded to Trial Chambers as 'triers of fact' in assessing and evaluating evidence. Earlier in the same judgment, the Chamber explained that with respect to errors of fact, the established jurisprudence of the Chamber is that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber:

Where the Defence¹⁹ alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it 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*. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.²⁰

The same approach is adopted in earlier ICTR judgments,²¹ as well as those by the ICTY Appeals Chamber.²² The *Muhimana* Appeals Judgment does not elaborately explain how the threshold underlined in the above quotation was met as to justify appellate intervention with respect to the Trial Chamber's findings in relation to

¹⁹ Other Appeals Chamber judgments are clear that this position similarly applies when the Prosecution alleges an erroneous finding of fact by a Trial Chamber. See, e.g., *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Appeals Judgment, ¶¶ 21-23 (May 26, 2003) [hereinafter *Rutaganda* Appeals Judgment].

²⁰ *Muhimana* Appeals Judgment, *supra* note 4, ¶ 8 (emphasis added).

²¹ See, e.g., *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶ 8; *Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Appeals Judgment, ¶ 5 (May 23, 2005).

²² See, e.g., *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeals Judgment, ¶ 40 (Apr. 19, 2004); *Prosecutor v. Kordic*, Case No. IT-95-14/2-A, Appeals Judgment, ¶¶ 18-19 (Dec. 17, 2004); *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Appeals Judgment, ¶¶ 29-30 (Oct. 23, 2001) [hereinafter *Kupreskic* Appeals Judgment].

the rape of the two victims. Indeed, as Judges Shahabuddeen and Schomburg explained in their partly dissenting opinion, although there might have been multiple possibilities as to who raped the victims (and it was the duty of the Trial Chamber to sort out those possibilities),²³

[i]t was open to the Trial Chamber to determine that rape had been committed. Indeed, we do not find that the Appeals Chamber holds otherwise. Its difficulty was whether it was the appellant who raped the girls. On this, we consider that it was open to the Trial Chamber to find that it was the appellant who raped the girls: it was he who led them into his house, who led them out of it, and whose name they called out saying that they ‘did not expect him to do that’ to them. Furthermore, when he led them out of the house they were ‘stark naked’ and were walking ‘with their legs apart.’²⁴

While it is not clear if the *Muhimana* Appeals Judgment could have reached a different position if the same evidence in question related to a crime other than rape (e.g., a murder²⁵), the approach adopted by the Appeals Chamber may raise controversy as to whether the threshold for appellate intervention was not lowered in the instant case with respect to the crime of rape. Arguably, the Trial Chamber’s factual findings were reasonable, and appellate intervention was thus unwarranted.

¶9

It is noteworthy that the Tribunal has previously established a high threshold of caution with respect to relying on circumstantial evidence.²⁶ The Trial Chamber’s approach appears to have met

²³ *Muhimana* Appeals Judgment, *supra* note 4, Joint Partly Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg ¶ 3.

²⁴ *Id.* ¶ 2.

²⁵ In other words, if the evidence showed that Muhimana took the victims to the house, and that witnesses heard the victims crying and blaming Muhimana prior to their murder, and later Muhimana was seen taking out the victim’s bodies, it is not clear whether the Chamber would have questioned Muhimana’s specific role in the murders (e.g., whether he is the one who personally struck the victims to death).

²⁶ In a subsequent judgment, *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 906 (Nov. 28, 2007) [hereinafter *Media Appeals Judgment*], the Appeals Chamber held that in order to ground a conviction on the basis of circumstantial evidence, the only reasonable inference to draw from

this threshold, and its findings do not appear to have been erroneous. Arguably, the evidence in relation to the rape of the two victims involved both direct and circumstantial evidence that was credible, detailed and consistent, and no reasonable doubt could be entertained by a trier of fact that Muhimana raped the two victims. It is arguable that several of the facts adduced actually constitute direct evidence: that Muhimana brought the victims to his house; that the victims cried out mentioning Muhimana's name and stating that they did not expect him to "do that" to them; that Muhimana led the victims out of the house stark naked; and that they were then seen leaving the house walking with their legs apart. Arguably, the more indirect or circumstantial evidence relates to whether Muhimana personally 'penetrated' the victims. Even in relation to the latter category of evidence, it was reasonable for the Trial Chamber to consider the circumstantial evidence in a holistic way, and find that Muhimana personally raped the victims. The Appeals Chamber's concern that a person other than Muhimana may have raped the victims appears to ignore the fact that the victims screamed out questioning why Muhimana had done "it" to them. In the circumstances, "it" could reasonably be construed to refer to rape.²⁷ The rest of AP's testimony (e.g., that Muhimana took the victims to his own house and that after the alleged rape he led them out of the house, stark naked, and that they were walking with their legs apart), holistically examined, points to the only reasonable conclusion: that Muhimana himself raped the victims.

B. The Scope of Commission as a Mode of Criminal Participation: Commission Through the Instrumentality of Others

¶10

It may be argued that even assuming doubt could be entertained that Muhimana personally raped the victims (and thus

such evidence must be that the accused was guilty of the crime in question. An analysis of the Media Appeals Chamber judgment as it relates to the crime of conspiracy to commit genocide is addressed *infra* in Part V, but some aspects of the analysis are equally relevant to the issues being addressed with respect to the Appeals Chamber's reversal of the rape count. The Media Appeals Judgment is in French, and at the time of writing this article, the author relied on a draft English translation.

²⁷ As argued below, even assuming the victims were blaming him for the rapes committed by others, in the circumstances of the case, those other perpetrators acted as Muhimana's 'instruments,' and therefore Muhimana was culpable for committing the rapes.

could not be held liable for ‘personal commission’), it was open for the Chamber to find that Muhimana committed the rape of the victims through the instrumentalities of others. Such a finding could legitimately be made regardless of whether it was actually Muhimana who had personally raped the victims. The Appeals Chamber’s jurisprudence in the *Gacumbitsi Appeals Judgment*²⁸ supports that view, and the material facts in *Muhimana* are similar to those in the *Gacumbitsi* case, notwithstanding that the criminal conduct in *Gacumbitsi* was killings (in support of the charge of genocide), while in *Muhimana* it was rape (in support of the charge of crime against humanity).

¶11 In *Gacumbitsi*, the evidence presented during trial was that the Accused personally killed one victim (Mr. Murefu) at Nyarubuye Church, but he was found guilty for committing genocide in relation to the massacres of tens of thousands of other victims; those massacres were perpetrated by other assailants at the same church immediately following Gacumbitsi’s killing of Murefu. In finding that Gacumbitsi was culpable for ‘committing’ genocide in relation to the massacres at the church (other than mere instigating or ordering the massacres), the Appeals Chamber explained as follows:

As the Trial Chamber observed, the term ‘committed’ in Article 6(1) of the Statute has been held to refer ‘generally to the direct and physical perpetration of the crime by the offender himself.’ In the context of genocide, however, ‘direct and physical perpetration’ need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime. Here, the accused was physically present at the scene of the Nyarubuye Parish massacres, which he ‘directed’ and ‘played a leading role in conducting and, especially supervising.’ It was he who personally directed the Tutsi and Hutu refugees to separate – and that action, which is not adequately described by any other mode of Article 6(1) liability, was as much an integral part of the genocide as were the killings which it enabled. More-

²⁸ *Gacumbitsi Appeals Judgment*, *supra* note 2, ¶ 60; *see also id.* Separate Opinion of Judge Shahabuddeen ¶ 24.

over, these findings of fact were based on allegations that were without question clearly pleaded in the Indictment.

The Appeals Chamber is persuaded that in the circumstances of this case, the modes of liability used by the Trial Chamber to categorize this conduct – ‘ordering’ and ‘instigating’ – do not, taken alone, fully capture the Appellant’s criminal responsibility. The Appellant did not simply ‘order’ or ‘plan’ genocide from a distance and leave it to others to ensure that his orders and plans were carried out; nor did he merely ‘instigate’ the killings. Rather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed. The Appeals Chamber finds by majority, Judge Güney dissenting, that this constitutes ‘committing’ genocide.²⁹

Muhimana’s role in the rapes of the victims (even assuming he did not physically rape either of the two victims), does not substantially differ from Gacumbitsi’s role in the massacres at Nyarubuye Church. In *Muhimana*, it was not in dispute that Muhimana took the victims to his own house, where they were raped, and his role was not merely passive, given that he was present throughout the victims’ ordeal. After their rape, Muhimana led the victims out of the house, stark naked and they were walking with their legs apart. Muhimana thus played a critical or leading role in the rapes. Even assuming he raped no one, Muhimana created the conditions under which the victims were raped, and/or set in motion their rape, and he was present throughout their ordeal, arguably to ensure that the rapes were carried out. After ensuring that the victims were raped, it was Muhimana who drove the victims out of his house stark naked and invited *Interahamwe* and other civilians to come and see what naked Tutsi girls looked like. Muhimana then directed the *Interahamwe* to part the girls’ legs to provide onlookers with a clear view of the girls’ private parts. Thus, even assuming Muhimana did not personally rape the victims, whoever physically car-

²⁹ *Gacumbitsi Appeals Judgment*, *supra* note 2, ¶¶ 60-61.

ried out the rapes, acted as his instrument. Indisputably there was an “immediacy of relationship between the accused and the result of his action.”³⁰ In these circumstances, proof that Muhimana personally raped the victims was not required to show “‘the direct and physical perpetration of the crime by the offender himself.’ To hold the contrary [would] be too narrow.”³¹ Once the above tests or requirements are met, the nature of the charge or crime is immaterial—in *Muhimana*, the fact that the crime at issue was rape is an irrelevant consideration. As explained by Judge Shahabuddeen, “even in relation to the charge of genocide by ‘killing members of the group,’ the ‘direct and physical perpetration’ test can be fulfilled even if it is not proved that the appellant himself killed anyone.”³² The same principle should apply even if the crime in question is rape.

C. The Concepts of Lesser Included or Subsumed Crimes or Modes of Criminal Participation and Re-qualification of Crimes

¶12 Turning to the Appeals Chamber’s holding that although Muhimana’s conduct could be characterized as aiding and abetting the rapes of the two victims, he could not be so held culpable because the indictment did not specifically plead that mode of liability, issues arise as to whether the Appeals Chamber was not unduly strict. Could the Chamber have drawn some inspiration from some national systems which tend to view aiding and abetting as being ‘subsumed’ or ‘encompassed’ within the primary crime? Moreover, was it open for the Chamber to find that, while Muhimana was charged with “committing rape” on the basis of the material facts pleaded in the indictment and the evidence adduced during trial, he was nevertheless culpable of ‘aiding and abetting’ the rape? Or alternatively, could Muhimana be found culpable for ‘committing’ a re-characterized crime, for instance the crime against humanity of an ‘other inhumane act’?

¶13 It is noteworthy that the constitutive Statute of the ICTR, like that of the ICTY, incorporates criminal offences and modes of criminal liability in separate provisions. Articles 2 to 4 incorporate the crimes (genocide, crimes against humanity and war crimes), while Articles 6(1) and 6(3) enshrine modes of criminal participa-

³⁰ *Id.* Separate Opinion of Judge Shahabuddeen ¶ 24.

³¹ *Id.* ¶ 25 (quoting *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶ 60).

³² *Id.*

tion, that is to say, the methods by which the crimes in Article 2 to 4 may be perpetrated.³³ These methods are committing, planning, ordering and aiding and abetting, as well as command or superior responsibility for crimes committed by one's subordinates, if the superior knew or had reason to know that the subordinates were about to commit or had committed the crimes, but failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Thus, aiding and abetting (like other modes of participation above) is enshrined not as a 'lesser or related' crime (as is the case in some national jurisdictions³⁴), but as a separate and distinct mode of criminal liability. Prior to the period under review, existing jurisprudence of the ICTR, like that of the ICTY, has required that an indictment should plead with specificity not only the crimes, but also the specific mode of criminal responsibility by which an accused is alleged to have perpetrated or participated in the crime.³⁵ The ICTR jurisprudence explains the reason for requiring such specificity in pleading as being the need to ensure that an accused has adequate notice of the charges against him to enable him to prepare his defense.³⁶ Failure to do so, for instance, by lifting the entire provisions of Article 6(1) without identifying in which particular mode of liability the accused is alleged to have engaged, may cause ambiguity, which may prejudice the rights of the accused just mentioned.³⁷ Existing Tribunal jurisprudence therefore holds that unless a defect in the indictment is cured by the post-indictment communication of clear, consistent and timely information, a failure to plead the mode of criminal participation (like the material facts underpinning the crime) may be fatal.³⁸

³³ In *Prosecutor v. Ntakirutimana*, the Appeals Chamber held generally that these modes of participation apply to all the crimes in Article 2 to 4 of the Statute. Case Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgment, ¶ 546 (Dec. 13, 2004) [hereinafter *Ntakirutimana* Appeals Judgment].

³⁴ See *infra* notes 39-41.

³⁵ *Ntakirutimana* Appeals Judgment, *supra* note 33, ¶¶ 469-476 (also invoking the ICTY's Judgments in *Kupreskic* Appeals Judgment, *supra* note 22, and *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Appeals Judgment, (Sept. 17, 2003)).

³⁶ *Id.* ¶¶ 12, 470. For a similar position at the ICTY, see *Kupreskic* Appeals Judgment, *supra* note 22, ¶¶ 88-89.

³⁷ *Id.* ¶ 473 (citing with approval the ICTY Appeals Chamber Judgment in *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgment, ¶ 319 (Mar. 24, 2000)).

³⁸ As noted above, the ICTR jurisprudence justifies the requirement of specific-

¶14 It follows that Tribunal jurisprudence does not endorse the approach coming from some national jurisdictions which, once proven that an accused is responsible for a crime, does not require detailed account of the manner in which an accused participated in the crime.³⁹ As well, Tribunal jurisprudence does not follow the approach from some national jurisdictions where once a primary offence is properly charged, a conviction for a lesser and/or related offence may follow if the evidence adduced supports that offense. For instance, in the United States federal criminal case *U.S. v. Moore*,⁴⁰ the accused was charged for possession of a firearm. Although the accused was not charged as an aider and abettor, the Seventh Circuit Court of Appeals held that it was unnecessary that the indictment specifically charge aiding and abetting. The Federal Court of Justice of Germany (Bundesgerichtshof) endorses a similar approach. In a recent case, the Court has held that while there was insufficient evidence to sustain a conviction for drug traffick-

ity in pleading modes of criminal responsibility because of the need to ensure that an accused has adequate notice of the charges against him to enable him to prepare his defense. *See, e.g., Ntakirutimana Appeals Judgment, supra* note 33, ¶¶ 12, 470. For the ICTY, see e.g. *Kupreskic Appeals Judgment, supra* note 22, ¶¶ 88-89. According to the jurisprudence, given that Article 6(1) of the ICTR's Statute (like Article 7(1) of the ICTY's Statute) enshrines different modes of criminal responsibility (namely, planning, instigating, ordering, committing, and aiding and abetting), if the indictment merely lifts the entire provisions of Article 6(1) without identifying the particular mode of liability, ambiguity arises, and such ambiguity may prejudice the right of the accused to be informed in order to properly prepare his defense. *See Ntakirutimana Appeals Judgment, supra* note 33, ¶ 473 (citing the ICTY Appeals Chamber Judgment in *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Judgment, ¶ 319 (Mar. 24, 2000)).

³⁹ *See* ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 421 (5th ed. 2006) (describing modes of criminal responsibility in relation to English law).

⁴⁰ In *U.S. v. Moore*, 936 F.2d 1508, 1526-1527 (7th Cir. 1991), the court explained as follows: "The aiding and abetting charge under 18 U.S.C. § 2(a) need not be specifically pleaded and a defendant indicted for a substantive offense can be convicted as an aider and abettor upon a proper demonstration of proof so long as no unfair surprise results. If the trial court determines that the evidence warrants an aiding and abetting instruction, it is immaterial, although preferable, whether 18 U.S.C. § 2 is actually charged in the indictment. An aider is punishable as a principal." *Id.* at 1526 (citations and quotations omitted). The Court went on to observe: "it is well established that a defendant need not be charged separately with aiding and abetting for that theory of liability to be presented to the jury, so long as the evidence warrants the instruction and no unfair surprise results Moreover, because aiding and abetting does not constitute a separate crime, all indictments are to be read as if the alternative provided by the aiding and abetting statute, 18 U.S.C. § 2, is included therein." (citations and quotations omitted).

ing on the basis of the evidence adduced, a conviction for aiding and abetting the crime could be substituted.⁴¹ The German Court also did not reduce the sentence imposed, notwithstanding the substituted conviction.

¶15 It is arguable that during the period under review, and more specifically in *Muhimana*, it was open for the Appeals Chamber to further develop the law by drawing some inspiration from the jurisprudence from national jurisdictions like those mentioned above. Notwithstanding that the ICTR Statute, like that of the ICTY, enshrines crimes and modes of criminal participation in separate provisions, this should not close the doors for the Tribunal to draw such inspiration from national jurisdictions. Indeed, given that a critical criterion in determining whether a defect in an indictment is fatal or whether it has been cured is whether an accused suffered prejudice, or whether the trial was rendered unfair by the defect,⁴² doors are open to a Chamber to closely address matters of pleading on a case-by-case basis. In *Muhimana*, despite the fact that the indictment was limited to the charge of “committing rape,” based on the facts pleaded in the indictment, and the evidence adduced during trial, two additional options⁴³ were arguably available to the Chamber. First, the facts pleaded in the indictment support an aiding and abetting charge, and the Chamber could re-characterize or re-qualify the mode of criminal participation as such without an additional factual allegation. On the basis of the facts pleaded in the indictment, the Accused would not have suffered prejudice by such re-qualification. For instance, it was clear from paragraph 7 of the indictment that it was the Accused who brought the victims to his house. After the rape, he drove the victims out of the house stark naked and invited *Interahamwe* and other civilians to come and see what naked Tutsi girls looked like. He then directed the *Interahamwe* to part the girls’ legs to provide on lookers with a clear view of the girls’ private parts. These material facts were pleaded in the indictment and the Accused was provided all the opportunity to dispute these charges in addition to disputing that he personally raped the victims. The Accused would thus arguably have not been prejudiced if the Chamber had re-qualified the mode

⁴¹ BGH 2 StR 516/06 (28 February 2007).

⁴² *Ntakirutimana* Appeals Judgment, *supra* note 33, ¶ 27.

⁴³ As argued *supra*, the other option available was to find that the Accused committed the rape.

of criminal participation. The situation would have been different (and the Accused would likely have been prejudiced) if the material facts pleaded were very brief or generalized. Such would have been the case, for instance, if the indictment merely pleaded that ‘on or about 7 April 1994 at Gishyita sector Muhimana raped two victims in his home,’ without providing the other details enshrined in paragraph 7 of the indictment. However, paragraph 7 of the indictment laid down clear and detailed material particulars that at the very least supported a finding of aiding and abetting the crime of rape.

¶16 The other option available to the Chamber was to re-qualify as the crime against humanity of an ‘other inhumane act.’ Some of the facts pleaded in paragraph 7 of the indictment could likely also have sustained this crime. Again, on the basis of the same facts summarized above as pleaded in paragraph 7 of the indictment, the Accused would not suffer prejudice by the re-qualification because the indictment provided him with sufficient notice of the material facts and the opportunity to dispute those facts. Arguably, by failing to pursue these alternative options in the particular circumstances of *Muhimana*, during the period under review, the Appeals Chamber undercut its contribution to the evolution of international criminal law.

¶17

III. EXTERMINATION AS CRIME AGAINST HUMANITY: CAN AN ACCUSED BE CULPABLE IF HE DID NOT PERSONALLY MURDER THE VICTIMS? ARE ALTERNATIVE CONVICTIONS PERMISSIBLE?

¶18 According to existing Tribunal jurisprudence prior to the period under review, as well as that of the ICTY, “the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result.”⁴⁴ During the period under review, in the case of *Ndindabahizi v. Prosecutor*,⁴⁵

⁴⁴ *Ntakirutimana* Appeals Judgment, *supra* note 33, ¶ 522; *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶ 86. For the ICTY, see *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment, ¶¶ 259, 260 (March 22, 2006) [hereinafter *Stakic* Appeals Judgment].

⁴⁵ Case No. ICTR-01-71-A, Appeals Judgment (Jan. 16, 2007) [hereinafter

the Appeals Chamber (Judge Güney dissenting) addressed whether an accused can be culpable of committing extermination if he did not personally murder the victims.

¶19

In *Ndindabahizi*, the Appeals Chamber upheld the Trial Chamber's finding that the Accused was culpable for the commission of extermination in circumstances which showed that he did not physically kill the victims, but found that it was impermissible for the Trial Chamber to at the same time *alternatively* find the accused culpable of instigating and of aiding and abetting the crime of extermination. It is noteworthy that the evidence admitted during trial showed that the Accused had not physically killed anyone, but had instead transported attackers to the massacre scene, provided them with weapons and encouraged them to kill the Tutsi. On the basis of this evidence, the Trial Chamber found that:

[T]he Accused himself committed the crime of extermination. He participated in creating, and contributed to the conditions for the mass killing of Tutsi on Gitwa Hill on 26 April 1994, by distributing weapons, transporting attackers, and speaking words of encouragement that would have reasonably appeared to give official approval for an attack. *Alternatively*, the Chamber finds that by these words and deeds, the Accused directly and substantially contributed to the crime of extermination committed by the attackers at Gitwa Hill, and is thereby guilty of both instigating, and of aiding and abetting, that crime.⁴⁶

In relation to finding the Accused culpable of the crime on the basis of *alternative* modes of criminal participation, the Appeals Chamber found that approach impermissible, because it creates ambiguity as regards the scope of the Accused's criminal responsibility. The Appeals Chamber explained as follows:

Ndindabahizi Appeals Judgment].

⁴⁶ Prosecutor v. *Ndindabahizi*, Case No. 01-71-T, Trial Judgment, ¶ 485 (Trial Chamber I, July 15, 2004) (emphasis added) [hereinafter *Ndindabahizi* Trial Judgment].

While an accused can be convicted for a single crime on the basis of several modes of liability, alternative convictions for several modes of liability are, in general, incompatible with the principle that a judgment has to express unambiguously the scope of the convicted person's criminal responsibility. This principle requires, *inter alia*, that the sentence corresponds to the totality of guilt incurred by the convicted person. This totality of guilt is determined by the *actus reus* and the *mens rea* of the convicted person. The modes of liability may either augment (*e.g.*, commission of the crime with direct intent) or lessen (*e.g.*, aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime. Thus the criminal liability of a convicted person has to be established unequivocally.⁴⁷

With regard to the Trial Chamber's finding that the Accused 'committed' extermination, however, the Appeals Chamber (Judge Güney dissenting), upheld it, but offered limited analysis of the Trial Chamber's approach, apart from stating, in a footnote, as follows:

The Trial Chamber stated that '[e]xtermination may be committed less directly than murder, as by participating in measures intended to bring about the deaths of a large number of individuals, but without actually committing a killing of any person' (Trial Judgment, para. 479). The words 'without actually committing a killing' could mean in the ordinary sense of the word, 'without causing death.' The Appeals Chamber finds, however, that the words 'actually' in this context rather describes what other judgments have referred to as 'indirectly' causing death, in particular as these judgments are referred to in para. 479 of the Trial Judgment: *Krstić* Trial Judgment, para. 498; *Vasiljević* Trial Judgment,

⁴⁷ *Ndindabahizi* Appeals Judgment, *supra* note 45, ¶ 122.

para. 227; *Kayishema* and *Ruzindana* Trial Judgment, paras. 143, 146.⁴⁸

The issue arising from the Appeals Chamber's approach is whether it is legally correct to hold an accused culpable for committing extermination if he did not physically, with his own hands, kill anyone. According to Judge Güney, such a conviction cannot be sustained. Judge Güney criticized the majority for upholding the Trial Chamber's finding (that the Appellant was liable for committing extermination) without assessing the correctness of the Trial Chamber's approach on the evidence.⁴⁹ Judge Güney argued that the actions of the Appellant could not amount to commission, as the Accused had not physically killed anyone. It was the assailants who the Appellant had transported, given weapons and encouraged to kill, that committed extermination, and not the Appellant.⁵⁰ Judge Güney concluded that the Appellant could only be held culpable for instigating and aiding and abetting extermination.⁵¹ In addition, Judge Güney noted that the Appellant's actions could not amount to creating the conditions of living that would inevitably lead to the death of a large number of victims as to amount to extermination, and moreover, "it cannot be maintained that the killing of the refugees at Gitwa Hill would have occurred without the actions of the attackers themselves."⁵²

¶20

The failure by the Appeals Chamber to provide detailed elaboration as to why the Appellant's actions amounted to the commission of extermination undercuts its contribution to the evolution of international criminal law. The Appeals Chamber provided no elaboration as to the scope of an important way in which accused persons may participate in extermination, namely, by "systematically subjecting a number of people to conditions of living that would inevitably lead to death."⁵³ Arguably many forms of *actus reus* are embraced by this.

⁴⁸ *Id.* n.268.

⁴⁹ *Id.* Partially Dissenting Opinion of Judge Güney ¶ 2.

⁵⁰ *Id.* ¶ 5.

⁵¹ *Id.* Partially Dissenting Opinion of Judge Güney ¶ 2.

⁵² *Id.* ¶ 3.

⁵³ *Ntakirutimana* Appeals Judgment, *supra* note 33, ¶ 522; *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶ 86. For the ICTY, see *Prosecutor v. Stakic*, Case No. IT-97-24-A, Appeals Judgment, ¶¶ 259, 260 (Mar. 22, 2006).

¶21 Moreover, the Appeals Chamber’s position, like the position taken by the Trial Chamber in the same case, appears to be underpinned by the approach taken by the majority in the *Gacumbitsi* Appeals Judgment, namely, that ‘committing’ encompasses not only physically perpetrating the *actus reus* of the crime, or participating in a joint criminal enterprise, but also other forms of criminal participation, including an accused’s use of the instrumentality of others. Unfortunately, the *Ndindabahizi* Appeals Judgment fails to provide elaboration. Judge Güney criticizes the majority’s apparent reliance on the *Gacumbitsi* approach just mentioned, observing that their approach

[b]lurs the essential distinction between ‘committing’ a crime and other forms of liability recognized by the [ICTR] Statute and the jurisprudence. If any act of participation in a crime amounts to committing a crime, then all modes of liability are subsumed in the expression ‘committed’ in Article 6(1) of the Statute and becomes redundant. This, at the very least, runs contrary to the principle of *ut res magis valeat quam pereat*, according to which all provisions in the Statute should be given effect.⁵⁴

As argued above (in relation to the Appeals Chamber’s approach to the crime of rape in *Muhimana*), in situations where an accused’s criminal participation may not adequately be described or captured by any of the modes of criminal participation in Article 6(1) (such as was the situation in *Gacumbitsi*), or where an accused employs the instrumentality of others to perpetrate crimes,⁵⁵ it may be legally correct to find that the accused ‘committed’ a crime under the Tribunal’s Statute. The concern expressed by Judge Güney (of blurring the distinction between commission and other forms of criminal participation) is noteworthy, but such blurring could be avoided in a specific case if the Chambers examine each case on its

⁵⁴ *Ndindabahizi* Appeals Judgment, *supra* note 45, Partially Dissenting Opinion of Judge Güney ¶ 4. According to the Osborn’s Concise Law Dictionary, the principle of *ut res magis valeat quam pereat* requires that it is better for a thing (such as the provisions of the law) to have effect than to be made void, citing the English case of *Roe v. Tranmarr*, (1757) Willes, R. 682. OSBORN’S CONCISE LAW DICTIONARY 336 (7th ed. 1983).

⁵⁵ *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶¶ 60-61 & Separate Opinion of Judge Shahabuddeen ¶ 24.

merits. Such case-by-case examination would assist the Chambers to determine whether in a given case, the accused's criminal conduct is inadequately captured by other modes of criminal participation other than commission, or whether his criminal conduct transcended those modes of criminal responsibility (for instance where an accused uses those who physically carried out the crime as his instruments) so as to constitute commission.

¶22

It is argued that the Appeals Chamber's approach in *Gacumbitsi* in relation to when an accused's criminal participation amounts to commission, notwithstanding that the Accused did not physically perpetrate the crime or participated in a joint criminal enterprise, is not intended to lay a 'fixed' rule which is only applicable if all the facts in *Gacumbitsi* are met (for instance, when an accused is present at the scene of the crime and participates in directing the crimes). Instead, whether or not the *Gacumbitsi* threshold is met, is to be a case-by-case determination. Depending on the circumstances of a given case, even if an accused was not present at the massacre scene to direct the perpetration of the crimes, it does not automatically follow that the *Gacumbitsi* threshold is not met. Arguably, in *Ndindabahizi*, the Appeals Chamber could have considered, *inter alia*, the role the Accused's criminal conduct played in ensuring that the massacres were perpetrated, as well as his status in the community vis-à-vis the assailants who physically carried out the massacres,⁵⁶ in determining whether the assailants were merely the instruments that the Accused employed to perpetrate the crime of extermination. In upholding the Trial Chamber's finding that the Accused committed extermination, the Appeals Chamber should have elaborated its reasoning on whether the Accused's criminal conduct constituted either the creation or the subjection of victims to conditions of living that inevitably led to their death, or criminal conduct that transcended mere instigation and aiding and abetting of the crime and thus constituted commission.

⁵⁶ Arguably, these factors may, for instance, assist in assessing to what extent the accused could direct the perpetrators to implement his will, as was the case in the *Gacumbitsi* case. *Gacumbitsi* Appeals Judgment, *supra* note 2, ¶¶ 60-61. It is argued that the capacity of an accused to give directions to perpetrators (combined with other factors, such as the first one, i.e., the role played by the accused's criminal conduct in perpetrating the crimes) may go a long way in demonstrating that the accused used the instrumentalities of others to perpetrate crimes. In the instant case, the Accused held positions of leadership both at the local and national level, and thus he could give directions to broad categories of the population.

IV. THE CRIME OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE VIS-À-VIS HATE SPEECH: IS THE CRIME A CONTINUOUS OFFENSE?

¶23 During the period under review, the Appeals Chamber also addressed for the first time in detail the contours of the crime of direct and public incitement to commit genocide. The Appeals Chamber particularly addressed the manner in which the crime relates to the use of public media. Prior to that, the existing jurisprudence was from trial chambers, notably the Media Trial Judgment. Importantly, the Media Appeals Judgment examined the relationship between hate speech and genocide. Because the Appellants in the Media case did not impugn the Trial Chamber’s approach to the notion of ‘public,’ which forms part of the definition of the crime,⁵⁷ the Media Appeals Judgment concentrated on the notions of ‘direct incitement.’

¶24 With respect to the ‘direct’ element of the crime of incitement to commit genocide, the Appeals Chamber upheld existing trial chamber jurisprudence⁵⁸ and drew inspiration from the *Mugesera* decision of the Supreme Court of Canada,⁵⁹ holding that direct incitement to commit genocide assumes that the speech is a direct

⁵⁷ The Trial Chamber in the ‘media case’ addressed the crime of direct and public incitement to commit genocide. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 978-1039 (Trial Chamber I, May 12, 2003) [hereinafter Media Trial Judgment]. With respect to the elements of the crime, the Chamber generally referred to an earlier Judgment, the *Akayesu* Trial Chamber Judgment, *supra* note 6. Citing the approach taken in civil law systems, *Akayesu* observed that words would be ‘public’ if they were spoken aloud in a place that were public in nature. *Id.* ¶ 556. In determining whether the ‘public’ element of the crime is met, *Akayesu* holds that two factors are pertinent, namely: the place where the incitement occurred, and whether or not assistance was selective or limited. *Id.* Also invoking the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind (1996), the Trial Chamber held that “‘public’ incitement is characterized by a call for criminal action to a number of people in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.” *Id.* According to *Akayesu*, “[a]t the time the Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for punishment only the truly public forms of incitement.” *Id.*

⁵⁸ See Media Appeals Judgment, *supra* note 26, ¶ 692 (citing Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment, ¶ 852 (Trial Chamber II, Dec. 1, 2003); *Akayesu* Trial Chamber Judgment, *supra* note 6, ¶ 557).

⁵⁹ *Mugesera v. Canada* (Minister of Citizenship and Immigration), [2005] S.C.R. 100, 2005 SCC 40, ¶ 87 (Can.).

appeal to commit an act referred to in Article 2(2) of the Statute; the speech has to be more than a mere vague or indirect suggestion.⁶⁰

¶25 With respect to the contours of the crime, the Media Appeals Judgment explains that while in most cases the crime is preceded or accompanied by hate speech, an accused cannot be guilty of the crime for hate speech that does not directly call for the commission of genocide.⁶¹ Thus, unlike the Media Trial Judgment, which extensively cited hate speech jurisprudence from the U.N. Human Rights Committee and the European Court of Human Rights as useful guides regarding the factors to be considered in defining the elements of the crime as applied to mass media, the Media Appeals Judgment itself specified the limits of hate speech jurisprudence. Thus, to the extent that not all hate speech constitutes direct and public incitement to commit genocide, the jurisprudence on incitement to hatred and discrimination (i.e., hate speech) is not directly applicable in determining what constitutes direct and public incitement to commit genocide.⁶²

¶26 Like the existing jurisprudence from trial chambers, the Appeals Chamber in the ‘media case’ explained that to determine whether speech constitutes direct (and public) incitement to commit genocide (and to distinguish it from other forms of speech such as hate speech), the exercise is a case-by-case determination that must take account of the context and language of the people in the society in question.⁶³ The rationale for that exercise is to assess how the intended audience understood a given speech. Thus, the key consideration is the meaning of the words used in the specific context, such that even if the message in question seems equivocal to another audience in a different society or context, that is of little relevance.⁶⁴ It follows that if the speech is still equivocal even when considered in its context, it cannot constitute the crime of direct and public incitement to commit genocide.⁶⁵

¶27 The Appeals Chamber in the Media Appeals Judgment, however, rejected existing trial chamber jurisprudence holding that

⁶⁰ Media Appeals Judgment, *supra* note 26, ¶ 692.

⁶¹ *Id.* ¶ 693.

⁶² *Id.*

⁶³ *Id.* ¶ 700.

⁶⁴ *Id.* ¶ 701.

⁶⁵ *Id.*

incitement is a continuous crime which continues in time until the completion of the acts contemplated.⁶⁶ Instead, the Appeals Chamber emphasized that the crime is an inchoate offense (*crime formel* in civil law) which is completed by the use of the means or process aimed at producing a harmful effect, irrespective of whether that effect is produced.⁶⁷ The Appeals Chamber further noted that the crime is completed as soon as the accused's envisaged statements are made or published, even if the effects of the incitement can extend in time.⁶⁸ Nevertheless, in the context of the temporal jurisdiction of the Tribunal (which limits the crimes to 1994 only), the Appeals Chamber explained that although pre-1994 speeches or broadcasts may not be the basis of a conviction, they may be relevant as contextual elements of the speeches or broadcast made in 1994.⁶⁹ Such contextual elements may include a determination of how listeners perceived or understood the speeches or broadcasts made in 1994, and the impact such speeches or broadcasts may have had.⁷⁰ However, based on Appeals Chamber jurisprudence to date, it is not clear why an accused's criminal conduct cannot be considered continuing if a pre-1994 publication inciting genocide is maintained in public circulation and is recited in 1994 with the accused's knowledge and acquiescence (and without him taking an action to retract it). It may be argued that the Appeals Chamber in the Media Appeals Judgment correctly rejects the Trial Chamber's general statement of law that incitement is a continuous crime, *which continues in time until the completion of the acts contemplated*,⁷¹ because the interpretation appears to contradict the inchoate nature of the crime. Nevertheless, it may be argued that the crime cannot be denied a continuing attribute, if the circumstances, such as the situation described above,⁷² are proven on the evidence. That situation arguably meets the threshold delineating the concept of a continuing

⁶⁶ That position had been taken by the Media Trial Judgment, *supra* note 57, ¶ 1017.

⁶⁷ Media Appeals Judgment, *supra* note 26, ¶ 720.

⁶⁸ *Id.* ¶ 723.

⁶⁹ *Id.* ¶ 725.

⁷⁰ *Id.*

⁷¹ That position had been taken by the Media Trial Judgment, *supra* note 57, ¶ 1017 (emphasis added).

⁷² That is to say, where an accused's pre-1994 inflammatory publication is maintained in public circulation and is recited in 1994 with the accused's knowledge and acquiescence (and without him taking any action to retract it).

crime as identified by the Media Appeals Judgment, and an ICTR accused in such a situation may be held culpable for the crime, notwithstanding that the inciting material initially was distributed prior to 1994. According to the Chamber, a continuing crime implies an ongoing criminal responsibility.⁷³ The Black's Law Dictionary, also invoked by the Chamber,⁷⁴ defines a continuing crime as "a crime that continues after an initial illegal act is consummated; a crime that involves ongoing elements A crime (such as driving a stolen vehicle) that continues over an extended period of time."⁷⁵ On the basis of this definition, while it is clear that in the context of the ICTR's temporal jurisdiction, an accused may be culpable for the crime if it is proven that during 1994, he re-circulated a pre-1994 publication (as was the situation in the 'media case' where the accused were alleged to have re-circulated in 1994 some pre-1994 issues of the Kangura newspaper that incited genocide⁷⁶), the jurisprudence has yet to address whether an accused would be culpable if the inflammatory publication was re-cited during 1994 with the accused's knowledge and acquiescence (and without him taking an action to retract it).

¶28

Another contentious aspect of the Media Appeals Judgment is its statement that "even if it could be concluded that all of the issues published in Kangura [newspaper] and the RTLM broadcasts constituted a continuing incitement to commit genocide . . . , it would remain that the [Accused] would be convicted only for acts of direct and public incitement to commit genocide *carried out* in 1994."⁷⁷ Arguably, the Appeals Chamber very restrictively construes the concept of 'carrying out' [a genocide-inciting publica-

⁷³ *Id.* ¶ 721.

⁷⁴ *Id.*

⁷⁵ BLACK'S LAW DICTIONARY 399 (8th ed. 2004).

⁷⁶ It is noteworthy that the Media Trial Chamber found the accused culpable for the crime on the basis that the pre-1994 inflammatory issues had been brought back into circulation through a competition jointly organized by RTLM and Kangura in 1994. On appeal, the Appeals Chamber quashed the conviction not because a 're-circulation' of pre-1994 material cannot legally amount to publication of the material during 1994, but because, according to the Appeals Chamber, the indictment had not pleaded that the Prosecutor would rely on the competition to support the crime—hence the indictment was defective. As well, the Chamber considered that there was not enough evidence to show that the competition had re-circulated all the pre-1994 issues of Kangura, or that those issues were available in 1994. See Media Appeals Judgment, *supra* note 26, ¶¶ 396-410.

⁷⁷ *Id.* ¶ 724 (emphasis added).

tion], and also denies the crime a continuing attribute, regardless of whether the circumstances or the evidence show that the crime fulfilled such an attribute. The Chamber's approach also tends to ignore that in scenarios such as the one described *supra*,⁷⁸ the accused may be held culpable for 'commission' of the crime by acting through the instrumentality of others (in line with the position taken in the *Gacumbitsi Appeals Judgment, supra*), or for commission by omission (i.e., for failing to retract or withdraw from public circulation the inflammatory statement). At the very least, the accused could be held culpable for tacitly encouraging others to recirculate or recite his inflammatory material—conduct that may fall within the scope of aiding and abetting the crime.

¶29 Finally, during the period under review, the Media Appeals Judgment provided some elaboration with respect to the *mens rea* requirements of the crime of direct and public incitement to commit genocide. The Appeals Chamber rejected an approach that would hold that once genocide in fact occurs, and is traceable from an accused's direct and public incitement to commit genocide, that alone is sufficient demonstration of the intent to incite genocide.⁷⁹ The Appeals Chamber jurisprudence instead takes the same position taken in trial chambers that proof of intent of the crime (like other crimes) must be holistic. Thus, the fact that genocide actually occurred following an accused's incitement may not be the only evidence adduced, but it can be some of the evidence to support proof of *mens rea* of the crime of direct and public incitement to commit genocide.

⁷⁸ That is to say, where an accused maintains in public circulation his pre-1994 inflammatory publication and the publication is recited in 1994 with the accused's knowledge and acquiescence (and without him taking any action to retract it).

⁷⁹ Media Appeals Judgment, *supra* note 26, ¶ 709. Although not specifically at issue in the 'media case,' in line with the provisions of the ICTR's Statute (including Articles 1-6, which empower the Tribunal to prosecute any person(s) responsible for the crimes), individual responsibility is not restricted to any particular class of persons, or profession. It follows that any person, whether or not he or she is a journalist, can be held individually culpable for the crime of direct and public incitement to commit genocide. The same approach applies to other crimes falling within the ICTR's jurisdiction. In *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeals Judgment, ¶¶ 438-446 (June 1, 2001), the Appeals Chamber confirmed that war crimes can be perpetrated by any person, regardless of whether he or she is a public agent (e.g., a member of government, army or a member of the other party to the armed conflict).

V. THE CRIME OF CONSPIRACY TO COMMIT GENOCIDE: ELEMENTS AND PROOF BASED ON CIRCUMSTANTIAL EVIDENCE

¶30 During the period under review, the Tribunal's Media Appeals Judgment also elaborated the elements of the crime of conspiracy to commit genocide and dealt with issues relating to proving the crime on the basis of circumstantial evidence. A majority of the judges reversed the conviction for conspiracy to commit genocide that had been entered by the Trial Chamber, with Judge Shahabuddeen dissenting. The jurisprudence engendered raises critical controversies.

¶31 The Appeals Chamber reiterated the elements of the *actus reus* of the crime as spelled out in previous jurisprudence, namely, an agreement between two or more persons to commit the crime of genocide.⁸⁰ The agreement need not be formal nor explicit (such that a tacit agreement can suffice), but the evidence must establish beyond a reasonable doubt an agreement and not mere similar conduct.⁸¹ Moreover, the Chamber reiterated the elements of the *mens rea* of the crime as established in previous jurisprudence: that the individual involved in the agreement to commit genocide must have the same intent required of genocide, namely the specific intent to destroy in whole or in part a national, ethnical, racial or religious group.⁸²

¶32 With respect to proof of the crime and the sufficiency of circumstantial evidence, the approach adopted by the Appeals Chamber in the Media Appeals Judgment is controversial. Some controversies are similar to those identified in the *Muhimana* Appeals Judgment in dealing with the crime of rape (see *supra* Part II.A). Invoking common law jurisprudence from the jurisdictions of the United States, Canada and United Kingdom, the Appeals Chamber took the position that the *actus reus* of conspiracy to commit genocide is not equivalent to proof of "planning meetings" as the Appellants had argued, but it could be inferred from other evidence, in particular the conduct of the conspirators.⁸³ The Appeals Chamber upheld the legal position previously taken by the Trial Chamber in the 'media case': that conspiracies can be in-

⁸⁰ Media Appeals Judgment, *supra* note 26, ¶¶ 894, 896.

⁸¹ *Id.* ¶ 898.

⁸² *Id.* ¶ 894.

⁸³ *Id.* ¶ 896.

ferred from, among other interactions, the interaction among institutions conspirators control. In so doing, the Tribunal affirmed the notion of institutional conspiracy.⁸⁴

¶33 However, it is noteworthy that the Appeals Chamber emphasized that proving conspiracy to commit genocide on the basis of circumstantial evidence (as was the situation in the ‘media case’), requires that a finding of a conspiracy to commit genocide be the only reasonable inference based on the totality of the evidence.⁸⁵ After reviewing the interaction among the Appellants and the institutions they controlled, the Appeals Chamber (by majority) reversed the conviction entered by the Trial Chamber. In the Appeals Chamber’s view, there was no reasonable doubt that the evidence adduced during trial was compatible with the existence of a “joint agenda” aiming at committing genocide, but it was not the only reasonable inference.⁸⁶ A reasonable trier of fact could also find that the institutions controlled by the defendants had interacted to promote the “Hutu power” ideology in the context of a political struggle between Hutus and Tutsis, or to disseminate ethnic hatred against the Tutsis, without going as far as the destruction, in whole or in part, of that group.⁸⁷

¶34 The Media Appeals Judgment contains limited elaboration as to why appellate intervention in the Trial Chamber’s findings of fact was warranted given existing prior jurisprudence from the same Appeals Chamber, like that of the ICTY, to the effect that such intervention is only to occur in exceptional circumstances, namely, where no reasonable trier of fact could not have reached the same finding or where the finding is wholly erroneous.⁸⁸ The judgment also contains limited elaboration as to how the Trial Chamber’s findings were unreasonable or wholly erroneous, and does not explain why the inference of conspiracy to commit genocide was not the only ‘reasonable’ inference to be drawn from the evidence, or why the alleged alternative inferences were actually ‘reasonable’ in the circumstances. The existence, in a given situation, of other alternatives inferences or explanations (besides conspiracy to commit genocide) does not, *per se*, mean that conspiracy

⁸⁴ *Id.* ¶ 907.

⁸⁵ *Id.* ¶¶ 897, 907.

⁸⁶ *Id.* ¶ 910.

⁸⁷ *Id.* ¶ 910.

⁸⁸ *Muhimana Appeals Judgment*, *supra* note 4, ¶ 8; *Rutaganda Appeals Judgment*, *supra* note 19, ¶¶ 21-23.

cannot be the only reasonable inference (or that it cannot be established beyond a reasonable doubt). This is because the nature of all the alternative inferences or explanations—for instance, whether they are founded or reasonable in the circumstances—must be taken into account. In such a situation, it is the duty of a Trial Chamber to sort out those multiple explanations or inferences and on the basis of the evidence before it determine which of them, if any, is reasonable or founded. The Media Appeals Judgment arguably fails to explain how the Trial Chamber erred in that exercise as to justify appellate intervention. Thus, even assuming other alternative inferences could also be drawn from the evidence, the judgment does not expound on how the inference of conspiracy to commit genocide was unreasonable or wholly erroneous.

¶35 A close examination of the reasoning of the majority judgment seems to suggest that they quashed the Trial Chamber's findings principally because in addition to conspiracy to commit genocide, there were other possible inferences or explanations about why the Accused might have collaborated. Instead, the focus should have arguably been placed on whether there was proof beyond a reasonable doubt that a conspiracy to commit genocide existed, notwithstanding other possible motivations for the Accused's collaboration. On a similar point, Judge Shahabuddeen expressed himself as follows:

[T]here is a consideration concerning the limited thrust of an argument that, in addition to the principle that guilt must be proved beyond reasonable doubt, in cases in which the evidence is purely circumstantial, the court must acquit unless facts are not only consistent with guilt but are also inconsistent with any other rational explanation. The principle sought to be invoked by the argument does not stand in glorious independence of the principle that guilt must be proved beyond reasonable doubt, but is a consequence of the latter: if another explanation can with equal reason be drawn, it follows that guilt has to be proved beyond reasonable doubt. No doubt, the rule about there being another equally reasonable explanation is suitable (particularly if there is a jury) of applying the general rule about

reasonable doubt in some cases of circumstantial evidence, and it has been employed by the Tribunal; but it does not introduce a separate or more stringent rule, being more a matter of form than of substance.⁸⁹

In addition, based on the judgment, it appears that the Appeals Chamber entertained no doubt that a conspiracy to commit genocide on the part of the defendants existed, given the Chamber's own statement that the evidence was compatible with a conspiracy to commit genocide, in addition to other alternative motivations.⁹⁰ On this point, in his partly dissenting opinion, Judge Shahabuddeen argues as follows:

[S]ince the Appeals Chamber had no 'doubt' that a genocidal purpose was 'compatible' with the 'joint agenda' of the appellants, the Appeals Chamber is to be taken to admit that there was evidence before the Trial Chamber on which it *could* reasonably hold that the purpose of their collaboration was to commit genocide. The Appeals Chamber has no basis for disagreeing with the holding which the Trial Chamber proceeded to make on that evidence; that holding is not shown to have been unreasonable.⁹¹

As well, Judge Shahabuddeen doubts that the alleged "other alternative" motivations or purposes for the defendants' collaboration were founded, or reasonable in the circumstances. According to him,

[t]here seems to have been no argument before the Trial Chamber as to whether the aim of any collaboration was the establishment of Hutu power by means short of genocide. Paragraph 906 of the Appeals Chamber Judgment does not suggest that there

⁸⁹ Media Appeals Judgment, *supra* note 26, Partly dissenting opinion of Judge Shahabuddeen ¶ 63.

⁹⁰ *Id.* ¶ 910.

⁹¹ *Id.* Partly dissenting opinion of Judge Shahabuddeen ¶ 60.

was any such argument. There was no such argument because the argument would imply that the appellants did collaborate in some matters – and this they stoutly denied. Thus the argument that the aim of any collaboration was limited to the establishment of Hutu power by non-genocidal means was not made. In the result, the Appeals Chamber is without the benefit of the views of the parties or the Trial Chamber on the argument.⁹²

Thus, it is arguable that, similar to the Appeals Chamber's reversal of one of the rape convictions in *Muhimana*, discussed *supra* in Part II, appellate intervention in the findings of the Trial Chamber in the 'media case' with respect to the count of conspiracy to commit genocide was unwarranted.

VI. PERSECUTION AS CRIME AGAINST HUMANITY: CAN HATE SPEECH SUFFICE?

¶36 The Media Appeals Judgment also addressed for the first time in some detail the scope of persecution as a crime against humanity when the underlying criminal acts of the accused are hate speech.

¶37 Firstly, the Appeals Chamber, invoking existing jurisprudence from the ICTY's Appeals Chamber, defined persecution as a crime against humanity as follows:

[a]n act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*). However, not every act of discrimination will constitute the crime of persecution: the underlying acts of persecution, whether considered in isolation or in conjunction with other acts must be of gravity equal to the crimes listed under Article 3 of the Statute. Furthermore, it is not necessary

⁹² *Id.* ¶ 61 (citations omitted).

that these underlying acts of persecution amount to crimes in international law. Accordingly, there is no need to review here the Appellants' arguments that mere hate speech does not constitute a crime under international criminal law.⁹³

While reiterating existing jurisprudence from the ICTY's Appeals Chamber, that violations of human dignity through harassment, humiliation and psychological abuses, if sufficiently serious, can constitute acts of persecution,⁹⁴ the Appeals Chamber confirmed that hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect to dignity—a right recognized under the 1948 Universal Declaration of Human Rights—of the members of the targeted group, and therefore constitutes “actual discrimination.”⁹⁵ Moreover, speech inciting violence against a population on the basis of ethnicity or any other form of discriminatory ground was found to violate the right to security of the members of the targeted group and therefore also constitutes “actual discrimination.”⁹⁶

¶38 However, Appeals Chamber jurisprudence on the crime of persecution has not been fully developed. In some instances the Chamber has clarified the scope of the crime and in other instances it has scaled it down, particularly when the underlying criminal act has been hate speech. Nevertheless, the Appeals Chamber's jurisprudence still leaves some issues unaddressed.

¶39 Prior to the period under review, the trial chamber in the Media case had taken the broad position that hate speech *per se* is persecutory because it constitutes a deprivation of several rights, including the right to life, liberty and basic human dignity, and denigrates the victims by creating a lesser status for them in the

⁹³ Media Appeals Judgment, *supra* note 26, ¶ 985 (citing, *inter alia*, the ICTY's Appeals Judgments in Prosecutor v. Krnojelac, Case No. IT-97-25-A, Appeals Judgment, ¶ 185 (Sept. 17, 2003); Prosecutor v. Simic, Case No. IT-95-9-A, Appeals Judgment, ¶ 177 (Nov. 28, 2006); Stakic Appeals Judgment, *supra* note 44, ¶¶ 327, 328; Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 101 (Dec. 17, 2004); Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeals Judgment, ¶ 131 (July 29, 2004); Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Appeals Judgment, ¶ 113 (Feb. 5, 2004); Prosecutor v. Brdanin, Case No. IT-99-36-A, Appeals Judgment, ¶ 296 (Apr. 3, 2007)).

⁹⁴ Media Appeals Judgment, *supra* note 26, ¶ 986.

⁹⁵ *Id.*

⁹⁶ *Id.*

eyes of the society.⁹⁷ Such denigration “in and of itself, as well as on its other consequences, can be an irreversible harm.”⁹⁸ On appeal, however, the Appeals Chamber held that hate speech alone cannot amount to a violation of the right to life, freedom and physical integrity of the human being.⁹⁹ Other requirements have to be met for such violation to materialize; “a speech cannot, in itself, directly kill members of the group, imprison or physically injure them.”¹⁰⁰ Secondly, the Appeals Chamber declined to decide whether hate speeches alone, that do not incite violence, are of gravity equal to other crimes against humanity, sufficient to constitute acts of persecution.¹⁰¹ The Appeals Chamber justified declining to decide the issue on grounds that it is not necessary that every single underlying act of the crime of persecution be of gravity equal to the other crimes against humanity: underlying acts of persecution can be considered jointly, and it is the cumulative effect of all the underlying acts of the crime of persecution which must be of gravity equal to the other crimes against humanity.¹⁰² In addition, the Appeals Chamber noted that the context in which the underlying acts of persecution take place is also important in assessing their gravity.¹⁰³

¶40 In the instant case, the Appeals Chamber concluded that hate speech made after 6 April 1994 met the requirement of gravity underpinning persecution as a crime against humanity because it was accompanied by speech calling for genocide against the Tutsi group. Moreover, all the speeches took place in the context of a vast campaign of persecution targeting Tutsis, a campaign that also included acts of violence (killings, ill-treatment, rapes).¹⁰⁴

¶41 While hate speech accompanied with violence is clearly persecutory, there is arguably no reason why hate speech unaccompanied by acts of violence may not, by itself, be persecutory. Given that such speech may not only expose the victims to dangers

⁹⁷ Media Trial Judgment, *supra* note 57, ¶ 1072 (citing Prosecutor v. Ruggiue, Case No. ICTR 97-32-T, Judgment and Sentence, ¶ 22 (Trial Chamber I, June 1, 2000)).

⁹⁸ *Id.*

⁹⁹ Media Appeals Judgment, *supra* note 25, ¶ 986.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* ¶ 987.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* ¶ 988.

(such as physical attacks from the population), but may also result in significant denigration and discrimination, such as the denial of access to employment and housing (which negatively impact other rights, such as the right to life¹⁰⁵), arguably, the underlying act of hate speech, either by itself, or as part of a cumulative non-violent impact on a target group, can in certain circumstances be of a gravity equal to the other crimes against humanity.

VII. SPECIFICITY IN PLEADING: WHAT ARE THE LIMITS OF CURES TO DEFECTIVE INDICTMENTS?

¶42 Tribunal jurisprudence prior to the period under review, like that of the ICTY, has provided direction as to the pleading requirements of indictments. Based on Articles 18(4),¹⁰⁶ 21(2) and 21(4)(a)-(b)¹⁰⁷ of the Tribunal's Statute, and Rule 47(c) of the Tribunal's Rules of Procedure and Evidence,¹⁰⁸ the ICTR has stated that there is "an obligation on the part of the Prosecutor to state the material facts underpinning the charges in the indictment, but not

¹⁰⁵ Human rights are interdependent, and the respect for, or denial of, one right may impact other rights. See Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., ¶ 5, U.N. Doc. A/CONF.157/243 (July 12, 1993). With respect to the right to life guaranteed under Article 6 of the International Covenant on Civil and Political Rights of 1966, the U.N. Human Rights Committee (now Human Rights Council) has emphasized that the right is not to be restrictively construed, and therefore states are under an obligation to take multiple steps to address vices that may violate the right, such as malnutrition and epidemics. See U.N. Human Rights Committee, *General Comment No. 6: The right to life* (art. 6), ¶ 5, (Apr. 30, 1982), available at <http://www.unhchr.ch/tbs/doc.nsf>. In *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545 (India), the judges underscored that the right to life is tempered not only by the execution of the death sentence, but also when one's livelihood is interfered with. The judges concluded that the eviction of the petitioners from the pavements and slums that they had set up near their places of employment deprived them of their livelihood, and consequently their right to life.

¹⁰⁶ The Article requires that an indictment must set out a concise statement of facts and the crime(s) with which the accused is charged. Statute of the International Criminal Tribunal for Rwanda, available at <http://www.un.org/ict>.

¹⁰⁷ Articles 21(2) and 21(4)(a)-(b) enshrine the rights of the accused to a fair hearing, to be informed of the nature of the charges against him and to have adequate time and facilities for the preparation of his defense. *Id.*

¹⁰⁸ Rule 47 (c) requires that an indictment shall set out not only the name and particulars of the suspect, but also a concise statement of the facts of the case. Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, available at <http://www.un.org/ict>.

the evidence by which such material facts are to be proven.”¹⁰⁹ Moreover, while recognizing that an indictment is the cardinal charging instrument, Tribunal jurisprudence, like that from the ICTY, has held that in exceptional situations, if an indictment fails to meet the test of conciseness, such defect may be cured through the prosecutor’s consistent, clear and timely notification of information to the accused by other means other than the indictment, such as through the pre-trial brief, disclosure of witness statements and other documents.¹¹⁰

¶43

During the period under review, the Tribunal reiterated the same jurisprudence, including in *Muhimana*.¹¹¹ However, in *Muhimana*, the Appeals Chamber addressed an interesting situation concerning the limits to ‘curing’ an indictment through the post-indictment communications just mentioned. In that case, the indictment alleged that towards the end of May 1994 at Nyakiyabo hill, in the Bisesero area, the Accused *ordered* an *Interahamwe* (named Gisambo) to kill Mukarema. However, the Prosecutor’s pre-trial brief and a witness statement attached to this brief somewhat modified this, alleging that the Accused actually murdered the victim in mid-May on another hill, in the Bisesero area. On appeal, the Accused impugned his conviction by the Trial Chamber for this murder, alleging that the indictment did not give him proper notice of the time and place of the murder, or his role in it. As well, he challenged the variance between the indictment and the post-indictment communication. The Accused contested the Trial Chamber’s finding that during trial, he did not object to the variance between the indictment and the post-indictment communications.¹¹² It is noteworthy that according to the Trial Chamber, the Accused had challenged lack of notice in the indictment in relation to the time and place of the alleged murder, and not as to the nature of his role in that murder.¹¹³

¹⁰⁹ *Ntakirutimana* Appeals Judgment, *supra* note 33, ¶ 25. For the ICTY, see e.g. *Kupreskic* Appeals Judgment, *supra* note 22, ¶ 88.

¹¹⁰ See, e.g., *Ntakirutimana* Appeals Judgment, *supra* note 33, ¶ 27. For the ICTY, see, e.g., *Kupreskic* Appeals Judgment, *supra* note 22, ¶¶ 117-120.

¹¹¹ *Muhimana* Appeals Judgment, *supra* note 4, ¶ 217.

¹¹² *Id.* ¶¶ 214-15, referring, *inter alia*, to *Muhimana* Trial Judgment, *supra* note 5, ¶¶ 403, 404, 575.

¹¹³ *Muhimana* Trial Judgment, *supra* note 5, ¶ 575. It is important to note that the failure of the Accused to object at trial, as to the variances between the indictment and post-indictment communications, at the time when the relevant evidence was adduced (like a failure in general to object to defects in the in-

¶44 The Appeals Chamber, by majority, held that the indictment was defective, because, as established in previous jurisprudence,

[w]here an accused is alleged to have personally committed a crime, the indictment must specify the criminal acts physically committed by the accused. An indictment lacking this precision is defective; however the defect may be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge.¹¹⁴

The indictment, concluded the majority, failed to allege the correct time and location of the murder, and that the Appellant had physi-

dictment), was not relevant as an admission as to the truthfulness of the post-indictment communication. Instead, in line with existing jurisprudence, such failure is relevant in determining whether or not the accused should be allowed to raise the objection based on lack of notice for the very first time longer after the relevant evidence was adduced (e.g., during closing arguments or during appeal). The underlying doctrine is that of waiver. As well, whether or not an accused raised an objection is crucial in determining who bears the burden of demonstrating whether the Accused was prejudiced by the defect in the indictment—the accused or the Prosecution. As explained in the *Niyitegeka* Appeals Judgment, “a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party. Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on grounds of waiver. 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 in order to respond to the unpleaded allegation.” *Niyitegeka* Appeals Judgment, *supra* note 9, ¶ 190. The jurisprudence, however, has underscored the importance of an accused’s right to be informed of the charges against him and the possibility of serious prejudice to the accused if material facts crucial to the Prosecution are communicated for the first time at trial. The jurisprudence thus stresses that the waiver doctrine does not extinguish the right of an accused to raise the objection at a latter stage. According to the *Niyitegeka* Judgment, “the waiver doctrine should not entirely foreclose an accused from raising an indictment defect for the first time on appeal. Where, in such circumstances, 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 defense was not materially impaired. All of this is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.” *Id.* ¶ 200.

¹¹⁴ *Muhimana* Appeals Judgment, *supra* note 4, ¶ 217 (citations omitted).

cally committed it.¹¹⁵ Moreover, by majority, the Appeals Chamber held that the defect was not cured principally because the post-indictment communication did not “simply add greater detail in a consistent manner with a more general allegation already pleaded in the indictment. Rather, [it] modifies the time, location, and physical perpetrator, matters that were already specifically pleaded in the indictment, albeit in a materially different manner.”¹¹⁶

¶45 The approach taken by the majority raises important questions. It is questionable whether a strict approach, as taken by the majority—that post-indictment communications cannot modify an indictment—is always appropriate in prosecuting international crimes. It appears that the Chamber took a rather strict approach mainly because, unlike in other cases, where post-indictment communications merely added greater detail to more general allegations in the indictment, in the instant case, the post-indictment communications ‘modified’ matters already *specifically* pleaded in the indictment.¹¹⁷ This, according to the Chamber, was prejudicial to the Accused in mounting his defense.¹¹⁸ Arguably, the most critical test should be whether or not the modification was communicated in a clear, consistent and timely manner, and that the Accused’s right to prepare his defense was not materially impaired. In addition, the Appeals Chamber should have taken account of whether the post-indictment communication in this case, or the manner in which the case unfolded, amounted to what may be described as the unpredictable and impermissible molding of the case as it progressed, thus prejudicing the Accused. It is questionable whether in the instant case the Accused suffered prejudice, given that he presented a defense to the allegation as contained in the post-indictment communication, and only complained at the end of the trial (i.e., in his closing brief) and did not make a contemporaneous objection when Prosecution witness AW testified that it was the Accused that had physically perpetrated the murder.¹¹⁹

¶46 In his partially dissenting opinion in the same case, Judge Schomburg took a more liberal approach. In his view, in prosecuting cases, because an indictment is not the only way of informing

¹¹⁵ *Id.* ¶ 218.

¹¹⁶ *Id.* ¶ 224.

¹¹⁷ *Id.* ¶ 224-225 (distinguishing the instant case from the scenario in the *Gacumbitsi* Appeals Judgment, *supra* note 2).

¹¹⁸ *Id.* ¶ 226.

¹¹⁹ *Id.* ¶ 218.

an accused about the charges against him, and that in many cases the prosecution will not be in position to know all of the evidence at the early stage of the proceedings in which the indictment is filed, it is natural that in some situations the case may change as it proceeds and fresh evidence may in some circumstances be adduced. According to Judge Schomburg,

[i]t is unrealistic to believe that the Prosecution is not confronted with changing evidence throughout the whole course of the proceedings. It would be incredible or, at the very least, surprising if the factual basis of an Indictment remained unchanged after the finalization of investigations. Even in cases where trial proceedings are already ongoing, it has to be and is possible to add fresh information to the case. As it is at the same time still important to keep the accused informed about the charges against him, it is a generally accepted principle in criminal law, both in Anglo-Saxon and Romano-Germanic influenced jurisdictions, that such additional information can also be given by an indication that the factual basis and/or the legal assessment might be varied.¹²⁰

Judge Schomburg also stressed that modification of the information, or the introduction of new facts, must be balanced with other factors, including the need to find the truth and the fundamental rights of the accused to be able to prepare his defense.¹²¹ In Judge Schomburg's view, the Accused in this case suffered no prejudice as he was informed of the charges and the possibility to defend himself against a slightly varied charge.¹²² Judge Schomburg thus concluded that it is unjustified to acquit an accused under these circumstances, and that the Appeals Chamber should have used the opportunity presented in this case to clarify the jurisprudence.¹²³ Judge Schomburg's dissent provides an important opportunity for the ICTR to clarify the jurisprudence in the future; it also provides

¹²⁰ *Muhimana* Appeals Judgment, *supra* note 4, Partly dissenting opinion of Judge Schomburg on the interpretation of the right to be informed ¶¶ 7-8.

¹²¹ *Id.* ¶ 12-16.

¹²² *Id.* ¶ 14-15.

¹²³ *Id.* ¶ 14-16.

an alternative approach that may inspire other international tribunals.

VIII. THE STATUS OF HEARSAY EVIDENCE: WHEN CAN IT GROUND A CONVICTION?

¶47 Before 2007, the Tribunal had established in general terms that hearsay evidence is not *per se* inadmissible, but during 2007, in the *Ndindabahizi* Appeals Judgment, the Tribunal was more directly confronted with assessing the adequacy of hearsay evidence in grounding a conviction.

¶48 In *Ndindabahizi*, the Appeals Chamber (by majority, with Judge Shahabuddeen dissenting) vacated one count of genocide and a count of murder as a crime against humanity arising from the alleged instigation by the Accused of the death of a victim at a roadblock.¹²⁴ According to the majority, it was not clear as to when the victim was killed following the Accused's instigation, given that the only prosecution witness (witness CGC) was not present at the roadblock during the killing. Furthermore, during trial, witness CGC was not asked, nor did he explain, how he came to learn that the victim was killed shortly after the Accused's departure from the roadblock.

¶49 According to the *Ndindabahizi* Appeals Judgment, hearsay evidence is admissible, but it must be clear (and not vague) and it must be verifiable.¹²⁵ In the instant case, according to the majority, it could not be verified as to how witness CGC knew the time when the victim was killed. Judge Shahabuddeen wrote a separate opinion on the issue.¹²⁶ According to Judge Shahabuddeen, witness CGC's evidence was not the only evidence which showed that

¹²⁴ See *Ndindabahizi* Appeals Judgment, *supra* note 45, ¶¶ 106-118. According to the indictment, during mid-April 1994, the Accused instigated and ordered persons at roadblocks in Kibuye prefecture to kill civilians identified as Tutsi. The public responses to his pronouncements were usually swift. Prosecutor v. *Ndindabahizi*, Case No. ICTR 01-71, Indictment, ¶ 25 (July 8, 2003). The Accused was convicted by the Trial Chamber for murder as crime against humanity, finding that in late-May 1994, the Accused visited one of the roadblocks (at a place called Gaseke), and *inter alia*, urged those manning the roadblock to stop and kill Tutsis. The Trial Chamber concluded that on the same day, shortly after his departure, a victim named Nors was apprehended there and killed at the Gaseke roadblock. *Ndindabahizi* Trial Judgment, *supra* note 46, ¶¶ 230-231.

¹²⁵ *Ndindabahizi* Appeals Judgment, *supra* note 45, ¶ 115.

¹²⁶ *Id.* Separate Opinion of Judge Shahabuddeen ¶¶ 1-22.

the victim was killed shortly after Ndindabahizi's departure from the roadblock. Defense witness DB's evidence showed that the victim was killed the same day the Accused passed through the roadblock. Furthermore, Judge Shahabuddeen observed that it was necessary to take account of the fact that throughout the trial and in his written submissions filed on appeal, the Accused contended that he did not visit the roadblock at all—that was his main argument until asked by the Appeals Chamber through oral submissions.¹²⁷ His original argument was therefore not that, despite visiting the roadblock, the interval between his visit (and therefore the instigation there) and the murder of the victim was too long as to establish a casual link between the two events.¹²⁸ Judge Shahabuddeen observed that although the Accused was free to argue the additional matters raised by the Appeals Chamber during oral arguments, "his original stand has to be taken into account for the purpose of evaluating his new position."¹²⁹

¶50 The approach taken by the *Ndindabahizi* Appeals Judgment also raises other interesting questions beyond the status of hearsay evidence. For instance, it raises questions as to how the Tribunal should approach the 'contribution' of an accused's criminal conduct to the perpetration of crimes. The majority found that Ndindabahizi could not be liable for instigation because prompting a crime through instigation requires a subsequent criminal act.¹³⁰ Given that evidence was lacking as to when persons instigated by the Accused murdered the victim, the Accused could not be liable for instigating the crime. Arguably though, instead of focusing on the substantial contribution of an accused's criminal conduct to the perpetration of a crime, focus should be put on the accused's conduct as a manifestation of a willingness to be associated with a crime and his support of the principal perpetrator of the crime. In the instant case, evidence showed that the Accused gave weapons and encouraged those at the roadblock to kill any Tutsi. Tutsis were actually killed prior to and after the Accused's visit to the

¹²⁷ *Id.* ¶ 4. Prior to the oral submissions on appeal, a letter from the Presiding Judge to the parties dated 26 June 2006 requested the parties to make oral submissions on, *inter alia*, the issue "whether, in case the Trial Chamber erred in finding that the killing of [the victim] occurred shortly after the Appellant's visit on 20 May 1994, it has been proven that the Appellant's actions substantially contributed to the killing of [the victim] on another date." *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Ndindabahizi* Appeals Judgment, *supra* note 45, ¶ 117.

roadblock. Evidence also showed that Tutsis (and not only the one victim) were killed at the roadblock. Thus, the Accused's criminal conduct (namely, urging those manning the roadblock to stop and kill any Tutsi passing there, and providing them with weapons and money to enable them accomplish the task of killing) was a clear manifestation of a willingness to promote the crimes at the roadblock. There is also need for judges to closely approach evidence adduced during trial in a holistic fashion, as opposed to a piecemeal examination and evaluation of it. This approach appears to have been emphasized by Judge Shahabuddeen in his separate opinion referenced above. As shown, his opinion closely examined both the original position taken by the Accused during trial and the position taken in submissions on appeal in defense of the murder charge, vis-à-vis his new position during oral submissions. As well, Judge Shahabuddeen closely examined the evidence adduced by the Accused's own witness (DB), who confirmed that the victim was killed the same day the Accused visited the roadblock.

IX. OTHER ISSUES AND CONCLUSION

¶51 In addition to the several issues discussed thus far, during the period under review, the Tribunal also addressed other important issues. However, it is not possible to engage in a detailed analysis of all of them. In summary, they include the following: firstly, the notion of witness proofing (i.e., the practice of the prosecution meeting with and preparing a witness prior to testimony). In 2006, a Trial Chamber of the International Criminal Court found that the practice was impermissible,¹³¹ while the ICTR found the reverse in 2007.¹³² In its jurisprudence on the issue in 2007, the ICTR explained that witness proofing was limited to witness preparation and did not extend to the manipulation of a witness's evidence.¹³³

¶52 Secondly, the Tribunal elaborated some rights of the accused. For instance, the Tribunal emphasized that an accused's right to be tried in his presence means that an accused has a right to

¹³¹ See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-679, Decision on the Practices of Witness Familiarisation and Witness Proofing, Public, at 21-22 (Pre-Trial Chamber I, Nov. 8, 2006).

¹³² See Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, ¶¶ 14-15 (Appeals Chamber, May 11, 2007).

¹³³ *Id.* ¶¶ 4, 12.

be *physically* present at trial.¹³⁴ However, an accused cannot claim violation of the right if he waives it, for instance, by refusing to attend court.¹³⁵ Thirdly, the Tribunal for the first time, awarded financial compensation to an acquitted accused for violation of his right to legal assistance.¹³⁶

¶53

In addition, during the period under review, the Appeals Chamber of the ICTR dealt with an appeal from an ICTR Trial Chamber conviction that, for the first time in the ICTR's life, was grounded in the joint criminal enterprise ("JCE") mode of criminal responsibility.¹³⁷ Arguably, however, the jurisprudence engendered raises some controversies in light of the then-existing jurisprudence elaborated by the Appeals Chamber of the ICTY. Although the Trial Chamber had found that there was a single JCE encompassing three geographically proximate massacre sites, it found the Accused culpable only for crimes committed at two massacre sites. The Prosecution appealed, arguing, *inter alia*, that the Trial Chamber erred by acquitting Simba for the massacres perpetrated at the third massacres site principally because he was not physically present when the crimes were perpetrated there. The Prosecution argued that the Trial Chamber required proof of physical presence at the third massacre site,¹³⁸ whereas established jurisprudence at the ICTY held that physical presence at the time the crime is committed is not required for JCE liability.¹³⁹ Instead, argued the Prosecution, the Chamber should have considered the Accused's presence and all his actions at the two massacre sites as proof of his active role in furthering the common purpose of the JCE that encompassed all three sites.¹⁴⁰ The Appeals Chamber rejected the appeal. It agreed with the Prosecution that indeed, the Trial Chamber had concluded that there was a single JCE encom-

¹³⁴ Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.10, Decision On Nzirorera's Interlocutory Appeal Concerning His Right To Be Present During Trial, ¶ 11 (Appeals Chamber, Oct. 5, 2007).

¹³⁵ Media Appeals Judgment, *supra* note 26, ¶¶ 93-116.

¹³⁶ See Rwamakuba v. The Prosecutor, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, ¶¶ 31-32 (Appeals Chamber, Sept. 13, 2007).

¹³⁷ See Simba v. Prosecutor, Case No. ICTR-01-76-A, Appeals Judgment (Nov. 27, 2007) [hereinafter *Simba* Appeals Judgment].

¹³⁸ The Prosecution's arguments are summarized in the *Simba* Appeals Judgment. *Id.* ¶¶ 289-292.

¹³⁹ See *e.g.*, Prosecutor v. Radoslav Kvočka, Case No. IT-98-30/1-A, Appeals Judgment, ¶¶ 112-113 (Feb. 28, 2005).

¹⁴⁰ *Simba* Appeals Judgment, *supra* note 137, ¶¶ 112-113.

passing all three massacre sites.¹⁴¹ However, regarding the Accused's personal responsibility, the Appeals Chamber took the position that in subsequent paragraphs of its judgment, the Trial Chamber had qualified its finding that a JCE encompassed all three sites.¹⁴² The Chamber concluded that while the Trial Chamber was not explicit, it found that there was in effect a separate JCE limited to the two massacre sites, in which the Accused was a participant.¹⁴³ Given that the Trial Chamber did not explain how the JCE which initially encompassed all the three locations subsequently became compartmentalized into two JCEs, the Appeals Chamber's finding is thus arguably controversial. The emphasis the Trial Chamber put on the Accused's presence at the two massacre sites in reaching his conviction for the massacres there, as well as the emphasis it put on his absence at the third massacre site in returning an acquittal verdict in respect of the third sites, arguably suggests that the Trial Chamber incorrectly read physical presence as if it was a constituent requirement of JCE liability. Moreover, given that the Accused made other forms of contribution to the JCE—such as providing weapons to the assailants and participating in planning the attacks at all three massacres sites—under the circumstances, his physical presence was not necessary to prove that he shared the intent to participate in the common purpose to kill victims at the third massacre site.¹⁴⁴ Ultimately, physical presence was not necessary to prove the culpability of the Accused with respect to the crimes committed pursuant to JCE at all three sites.¹⁴⁵

¶54 Furthermore, over the course of 2007, the Tribunal addressed some important issues relating to a Chamber's discretion to control proceedings. The Tribunal found that a Chamber may regulate the number of witness the prosecution or the defense may call.¹⁴⁶

¹⁴¹ *Id.* ¶ 295.

¹⁴² *Id.*

¹⁴³ *Id.* (citing Prosecutor v. Simba, Case No. ICTR-01-76-T, Trial Judgment, ¶¶ 415, 419 (Trial Chamber I, Dec. 13, 2005)).

¹⁴⁴ The approach taken was contrary to that taken by the Appeals Chamber. *Id.* ¶ 296.

¹⁴⁵ See *id.*; see also Prosecutor v. Brdjanin, Case No. IT-99-36-A, Appeals Judgment, ¶ 430 (Apr. 3, 2007) (holding that although an accused's contribution to a JCE need not be substantial, it should at least be a significant contribution to the crimes for which the accused is found culpable).

¹⁴⁶ See Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, Joint Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His List of Witnesses

¶55 The Tribunal also for the first time found a witness guilty of contempt of court for giving false testimony under solemn oath.¹⁴⁷ The witness was sentenced to nine months imprisonment.

¶56 Finally, the Tribunal rendered significant judgments following pleas of guilt. The sentences it imposed arguably raises issues as to the weight to be given such pleas vis-à-vis other considerations, including the gravity of the crimes.¹⁴⁸

¶57 Overall during 2007, the Tribunal did not break much new ground, but the Appeals Chamber did notably address some interesting and significant issues. The evolution of ICTR jurisprudence demonstrates that the process of elaborating international criminal law is a continuous one, and as such it can be anticipated that ongoing and future cases will likely raise further issues in the years to come.

Pursuant to Rule 73ter, 17-18 (Trial Chamber II, Feb. 15, 2008).

¹⁴⁷ Prosecutor v. GAA, Case No. ICTR-07-90-R77-I, Judgment and Sentence, at 6 (Trial Chamber III, Dec. 4, 2007).

¹⁴⁸ See, e.g., Prosecutor v. Rugambarara, Case No. ICTR-00-59-T, Sentencing Judgment, ¶ 61 (Trial Chamber II, November 16, 2007) (sentencing Rugambarara to eleven years imprisonment for extermination as crime against humanity); Prosecutor v. Nzabirinda, Case No. ICTR-2001-77-T, Sentencing Judgment, ¶ 116 (Trial Chamber II, Feb. 23, 2007) (sentencing Nzabirinda to seven years imprisonment for murder as crime against humanity).