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## **Prosecution of War Crimes by the International Criminal Tribunal for Rwanda**

**Alex Obote Odora\***

### **Introduction**

Since its inception in 1995, the International Criminal Tribunal for Rwanda ("the Tribunal") has yet to convict an accused charged with committing war crimes in the 1994 internal armed conflict. The Tribunal in the Prosecutor v. Akayesu,<sup>1</sup> Kayishema & Ruzindana,<sup>2</sup> Rutaganda<sup>3</sup> and Musema<sup>4</sup> considered indictments that charged accused persons with the commission of war crimes. The Trial Chambers of the Tribunal dealt with, inter alia, interpretation of Article 4 of the Statute of the international Criminal Tribunal for Rwanda ("the Statute"), and proof of a link, or nexus, between war crimes and the internal armed conflict that took place in Rwanda between January 1 and July 17 of 1994.<sup>5</sup> In the above cases, the Trial Chambers held that the culpable acts of the accused were not linked to the internal armed conflict and, therefore, not a violation of Article 4 of the Statute. In other words, the culpable acts did not constitute war crimes.

This paper is not concerned with the correctness of the decisions of the Trial Chambers, or with the wisdom of the Trial Chamber's various attempts to check the limits and scope of application of Article 4 of the Statute. Rather, this paper is concerned with the philosophical approach that the Trial Chambers appear to have adopted in reaching its decision that no war crimes were committed because the Prosecutor did not prove beyond a reasonable doubt, a nexus between war crimes and armed conflict. It is argued that no coherent philosophy emerges to

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1 Case No. ICTR-96-4-T, The Prosecutor v. Jean-Paul Akayesu, (Sept. 2, 1998).

2 Case No. ICTR-95-I-T, The Prosecutor v. Clement Kayishema and Obed Ruzindana, (May 21, 1999).

3 Case No. ICTR-96-3-T, The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, (December 6, 1999).

4 Case No. ICTR-96-13-T, The Prosecutor v. Alfred Musema, (Jan. 27, 2000).

5 See Case No. ICTR-97-20, The Prosecutor v. Laurent Semanza, at Annex A, paragraph 3; In determining that the internal armed conflict in Rwanda commenced on 1 January and ended on 17 July 1994. (Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54).

which the Trial Chambers consistently appeal in reaching the decisions that the Prosecutor did not establish a nexus between war crimes and internal armed conflict as stipulated in Article 4 of the Statute. It is further argued that the Trial Chamber's reluctance to provide a positive definition of the concept of "nexus" that it has or acts upon in reaching decisions, as against a negative definition used in determining that a nexus has not been established, tends to undermine a constructive legal effort to examine the concept of nexus the Trial Chambers have or act on when determining the existence, or lack thereof, of a nexus between war crimes and armed conflict.

Based on the jurisprudence of the Tribunal, it is argued that the Trial Chambers and the Prosecutor appear to have different perceptions of the term "nexus," particularly when interpreting Article 4 of the Statute. These differences appear to be based on their choice as to whether to adopt the principle of judicial activism, also known as liberal interpretation of statutes, on the one hand or the principle of judicial restraint, known as strict interpretation of statutes, on the other, when considering whether a nexus exists between war crimes and internal armed conflict.

The principle of judicial activism holds that courts should work out principles of legality, revise these principles from time to time in the light of what seems to the court fresh moral insights, and then interpret the statutes accordingly.<sup>6</sup> Therefore, the principle of judicial activism is intended to take into account changing circumstances not foreseen at the time the Statute was adopted. The principle of judicial activism presupposes a certain objectivity of moral principle; in particular it presupposes that citizens do have certain moral rights against the state. Only if such moral rights exist in some sense, can activism be justified as a program based on something beyond the judge's personal preferences.

On the other hand, the principle of judicial restraint attacks activism at its roots; it argues that in fact individuals have no such moral rights against the state. They have only such legal rights as the law grants them, and these are limited to the plain and uncontroversial violations that the framers must have actually had in mind, or that have been established in a line of precedents.<sup>7</sup>

Therefore, the principle of judicial restraint holds that courts should not consider changing circumstances because those who drafted the Statute did not consider it. Consideration of what the drafters might have done if they had current facts is mere speculation. Consequently,

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6 This is the most common denominator of the principle of "judicial activism." Its proponents generally qualify it in ways that are not considered in this analysis since it does not affect the premises of my submission.

7 See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, 137-140 (Harvard University Press, 1977).

the principle of judicial restraint advances the view that courts should interpret statutes strictly and if decisions of courts conflict with fresh moral insights, then it is the responsibility of the legislature to amend the law in a manner such that it reflects the new situation that the old statute did not cater to. It is not the duty of the courts to generously interpret the law so that it takes care of a new situation that the courts are not legally mandated under existing law to attend to. Such an action would amount to courts taking over the functions of the legislature.

However, a distinction between judicial activism and judicial restraint may be confusing because the two principles, while addressing the same issue, adopt different approaches. Therefore, these two different approaches should be separated. The first approach is to consider whether the court should adhere to the strict text of the statute, and not consider the intention of those who drafted the statute, hence not evaluate or admit into evidence new circumstances that did not exist at the time the statute was drafted. This approach would be characterized as judicial restraint or strict interpretation of statutes. On the other hand, when applying the principle of judicial activism, the same or similar issue would be framed thus: “should the courts consider, or admit into evidence, new facts, moral insights or circumstances that may affect or alter the outcome of a case. The first approach is a negative and narrow interpretation of a statute while the second approach is positive and expansive.

Determining the perception held by the Security Council on what it meant by the term nexus when it adopted Article 4 of the Statute requires an examination of the proceedings of the Security Council,<sup>8</sup> while that of the Trial Chambers rests on examining its decisions.

In considering what the Security Council might have meant by the term “nexus,” when it adopted Article 4, let us suppose that when the Security Council adopted the Article, what the term nexus “meant” was limited to the instances that they had in mind as constituting a nexus, or, at least, to those instances that the Security Council would have thought were a nexus between war crimes and internal armed conflict if they had them in mind. Further, suppose that at the time of the adoption of Article 4 of the Statute the Security Council did not know of the existence, or if they knew, they did not know the extent of the role played by, the Interahamwe<sup>9</sup> in the Rwanda armed conflict.

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8 S.C. Res. 955, U. N. SCOR, 49th Sess., 3453 mtg., Annex, art. 4, U.N. Doc. S/RES/955 (1994).

9 The Interahamwe were members of the youth wing of the MRND, the majority political party in the Interim Government between 1 January and 31 December 1994. The members and leaders of the Interahamwe were given military training by the Rwanda Armed Forces (“the FAR”), and supplied with guns, grenades, machetes, etc. The Interahamwe supported the FAR in its war efforts against the Rwanda Patriotic Front (“RPF”), specialising in killing Tutsi civilians deemed accomplices,

Arising from the above, it would be reasonable for the Tribunal to determine what the Security Council meant by the term nexus at the time Article 4 was adopted. After a determination is made, it would not do for the judges of the Trial Chambers to substitute their own ideas of what may or may not constitute a nexus between war crimes and internal armed conflict for those of the Security Council.

This approach, to some extent, would operate to limit the Trial Chamber's ability to consider, and admit in evidence, culpable acts of the Interahamwe. Consequently, the interpretation yields a narrow view because it prevents the Trial Chamber from examining the intention of the drafters of the Statute and the factual situation on the ground, and other circumstantial evidence that led to the violation of Article 4 during the internal armed conflict and the information that was discovered after the adoption of the statute that could provide a better understanding of the circumstances under which the Interahamwe committed the culpable acts.

This strict method of interpretation of statutes forces those who favor a more liberal approach to concede that they are departing from strict legal authority; a departure they must then seek to justify by appealing only to the desirability of the results reached.<sup>10</sup> For example, they would appeal to moral sentiments and argue that to ignore newly discovered relevant facts would allow the guilty to go free and unpunished.

While the distinction between "strict" or "liberal" interpretation of statutes, or application of the principle of "judicial activism" or "judicial restraint" is important, it is equally important to make a distinction between concept and conception, particularly when viewed in the context of establishing a nexus between war crimes and internal armed conflict.

In making a distinction between concept and conception, let us suppose that a group of persons form an organization, for example a Chess Club. In this club, one of its rules provides that members of the Chess Club hold in common a belief that certain acts, if committed while playing a game of chess, may result in a moral defect which shall be deemed unfair. An act deemed unfair results in a wrongful division of benefits and burdens, or a wrongful attribution of praise or blame to the member committing such an act. Further, according to the rules and practices of the Club, the members agree on a great number of standard cases of unfairness and use these as benchmarks against which to test other, more controversial alleged acts of unfairness.

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agents or spies of the RPF. Many of the persons killed by the Interahamwe were civilian men, women and children.

<sup>10</sup> See Dworkin, *supra* note 7 at p.134-135 (stating, "this theory, however, ignores a distinction that philosophers have made but lawyers have not yet appreciated").

According to the above example, the Chess Club has a concept of unfairness. Members of the Club may appeal to that concept in moral argument in proving whether or not a particular act committed by one or more members against another member constitutes unfairness, or unequal division of benefits and burden. But each member of the Chess Club may nevertheless differ over a large number of these controversial acts, in a way that suggests that each member of the Chess Club either has or acts on a different theory of why some acts constitute acts of unfairness and others do not. The result is that some members may differ on which fundamental principles, standards if you will, must be relied upon to show that a particular act is unfair.

For all members to agree that an act constitutes unfairness, it is important that the Chess Club formulate a concept of fairness that is uniformly understood by all. Similarly, it is necessary that the Trial Chamber formulate the concept of nexus it has or acts upon when deciding cases. A positive formulation of the concept of nexus would make it objectively possible to provide a philosophical explanation of why testimony presented by the Prosecutor and admitted into evidence by the Trial Chamber does not establish, beyond a reasonable doubt, the nexus between war crimes and internal armed conflict.

The application of different concepts and conceptions of a nexus between war crimes and armed conflict by the two organs of the Tribunal may result in the Trial Chamber and the Prosecutor talking at each other, rather than to one another. It is therefore pertinent that the two organs of the Tribunal agree on which concept of nexus it has or acts upon subsequently, if the Prosecutor has or acts on a different concept, she will then be in a position to know which concept the Trial Chamber has or acts upon, and therefore be in a better position to adduce evidence that may prove, beyond a reasonable doubt, a nexus between war crimes and internal armed conflict.

While it is reasonable for the Trial Chamber and the Prosecutor to differ on the conception of a nexus, both organs of the Tribunal should be able to agree on the concept itself. If the Trial Chamber and the Prosecutor do not agree on the concept of nexus, for example, the threshold or benchmark against which to test whether the evidence adduced by the Prosecutor objectively establishes a nexus, then the two organs of the Tribunal may be doing two different things simultaneously, and therefore are more likely not to agree on the final decision.

To illustrate the point, let us re-visit the Security Council deliberation and consider what it might have meant by the term nexus when it adopted Article 4 of the Statute. Let us suppose that the Security Council left to the Trial Chambers the responsibility to determine for themselves what constitutes a nexus. If this were the authority the Council extended to the Tribunal, the Trial Chambers would have the responsibility to develop and apply their own conception of nexus.

Further, the Trial Chambers would have the mandate to change their conception of nexus as they decide each case that brought before them by the Prosecutor. However, that is not the same thing as granting the Trial Chamber unlimited discretion to act as it likes; it simply sets a standard which the Trial Chamber must try—and may fail—to meet, because each Trial Chamber may assume that one conception of nexus, for example, a conception the Prosecutor or another Trial Chamber, say Trial Chamber I, has or acts on, is different from that, for instance, Trial Chamber II has or acts on.

When the different Trial Chambers of the Tribunal, the Prosecutor or the Defense, appeal to the concept of nexus in a particular way, each understands that each may have its own conception, but each party will hold this conception only as its own theory of how the standard it sets must be met, so that when the theory changes, the standard has not.

On the other hand, assume that the Security Council laid down a particular conception of a nexus that the Trial Chambers must apply. The Security Council would have done this, for example, if it had listed acts that constitute a nexus, specified controversial situations that could arise and provided an explicit theory for determining the nexus. The difference in this case is a difference not just in the detail of the instructions given by the Security Council, but in the kind of instructions that the Security Council gave to the Trial Chambers. Thus, when the Trial Chambers appeal to the concept of a nexus, it must be construed that the Chambers appeal to what nexus, as formulated by the Security Council, means, and the Trial Chambers give their views on that issue no special standing. However, when the Trial Chambers lay down a conception of a nexus, the Chambers lay down what it means by nexus, its interpretation of a nexus, and the views of the Chambers are the heart of the matter.

This distinction is important, and should, therefore, be taken into account, in unraveling why and how the Trial Chambers reach its decisions, when deciding cases that involve the determination of the existence, or lack thereof, of a nexus between war crimes and armed conflict under Article 4 of the Statute.

## **I. The ICTR Jurisprudence**

### *A. An overview of Article 4 of the Statute*

Article 4 of the Statute authorizes the Tribunal to prosecute persons who committed serious violations of Common Article 3, Additional Protocol II (“Protocol II”), and the four 1949 Geneva Conventions, in the Rwanda internal armed conflict that took place between January 1 and December 31 of 1994.<sup>11</sup> Significantly, Article 4

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<sup>11</sup> S. RES. 955, *supra* note 9, art. 4: Article 4 of the Statute reads:

of the Statute makes two new innovations. First, it criminalizes Common Article 3. The four 1949 Geneva Conventions, or customary international law, do not criminalize Common Article 3 or Additional Protocol II. Second, Article 4 of the Statute includes within the subject-matter jurisdiction of the Tribunal Additional Protocol II to the 1949 Geneva Conventions regardless of the fact that Protocol II is not universally recognized as forming part of customary international law.

A report by the United Nations Secretary General published after the adoption of the Statute rationalized the inclusion within the subject-matter jurisdiction of the Tribunal, as legal norms regardless of whether they were recognized as part of customary international law, or whether they have customarily entailed individual criminal responsibility of the perpetrator of the crime under Article 4 of the Statute. The report reads in part as follows:

“The Security Council elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the International Criminal Tribunal for the former Yugoslavia (“the ICTY”) and included within the subject-matter jurisdiction of the ICTR international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary

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The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any of corporal punishment;
- (b) Collective punishment;
- (c) Taking hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people;
- (h) Threats to commit any of the foregoing.

*See UN Doc.S/RES/955, annex (1994)*



international law, and for the first time criminalizes common Article 3 ...”<sup>12</sup>[Emphasis added]

By “electing to take a more expansive approach to the choice of applicable law than the one underlying the Statute of the ICTY,” the Security Council appears to have authorized the Trial Chambers of the Tribunal to also adopt a more expansive view of Article 4 including an expansive definition of a nexus between war crimes and internal armed conflict,<sup>13</sup> and the Trial Chambers have therefore liberally interpreted issues that relate to Common Article 3 and Protocol II.

In *Kayishema & Ruzindana*, for example, the Trial Chamber first noted that Common Article 3 and Protocol II were indisputably in force in Rwanda at the time, as Rwanda became a Party to the Conventions of 1949 on May 5, 1964 and to Protocol II on November 19, 1984,<sup>14</sup> and thereafter that as all offences enumerated in Article 4 of the Statute also constituted offences under the laws of Rwanda, there was no doubt that persons responsible for the breaches of these international instruments during the events in the Rwanda territories in 1994 could be subject to prosecution.<sup>15</sup> These findings were affirmed in *Rutaganda*.<sup>16</sup> The applicable law with regards to the crimes committed in Rwanda prior to the adoption of Article 4 by the Security Council is therefore not *ex post facto*.

In *Akayesu*, the Trial Chamber acknowledged the binding nature of the obligation as well, but focused upon customary international law as the source of this obligation rather than treaty law. With regards to Common Article 3 specifically, the Trial Chamber held that the “norms of Common Article 3 had acquired the status of customary law in that most states, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3.”<sup>17</sup>

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<sup>12</sup> Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955, U.N. SCOR, 50th Sess., at parag. 12, U.N. Doc. S/1995/134 (1995).

<sup>13</sup> In making this submission, the principle of legality is indeed taken into account. It is important that criminal acts are defined clearly and precisely. However, it is important to recognize that the Security Council was dealing with massive and systematic killings, the type of crimes organized by the Rwanda state, its agents including the military and other organized armed groups created and supported by the state. The criminal acts alleged to have been committed by the individuals in the Rwanda internal armed conflict go beyond the scope of national criminal law.

<sup>14</sup> The Prosecutor v. Clement Kayishema and Obed Ruzindana, Judgment, ICTR-95-1-T at para. 56-158 (May 21, 1999).

<sup>15</sup> *Id.*

<sup>16</sup> *Rutaganda*, I.C.T.R. 96-3-T at 90.

<sup>17</sup> *Akayesu*, I.C.T.R. 96-4-T at 608.

The ICTR jurisprudence is consistent with the view of the ICTY Trial Chambers<sup>18</sup> and the ICTY Appeals Chambers<sup>19</sup> stipulating that Common Article 3, beyond a doubt, form part of customary international law.

With respect to Protocol II, the Trial Chamber in Akayesu stated that although not all of Protocol II could be said to be customary law, the guarantees contained in Article 4(2), which re-affirm and supplement Common Article 3, form part of existing customary international law.<sup>20</sup> All of the norms reproduced in Article 4 of the Statute are covered by Article 4 of the Statute are also covered by Article 4(2) of Protocol II.

It is submitted that the Trial Chambers have, consistent with the Security Council's expansive approach of interpreting Article 4 of the Statute, interpreted expansively the law applicable to internal armed conflict. Therefore, it is suggested that it is prudent for the Trial Chamber, when considering the existence, or lack thereof, of a nexus between war crimes and armed conflict, to interpret Article 4 expansively because, inter alia, Common Article 3 does not in itself define "armed conflict not of an international character."

In Musema, for instance, when dealing with the lack of definition of "armed conflict not of an international character," the Trial Chamber noted that the expression "armed conflict" introduces two important material conditions to be satisfied. First, the requirement of the existence of open hostilities between armed forces, which are organized to a greater or lesser degree.<sup>21</sup> Second, the existence of situations in which hostilities break out between armed forces or organized armed groups within the territory of a single state.<sup>22</sup>

In circumstances where the material requirements of applicability of Protocol II are met, it follows that those requirements also satisfy the threshold of the broader Common Article 3. The conditions to be met in order to satisfy the requirements of applicability of Protocol II at the time of the events alleged in Rwanda between January 1 and July 17 1994 are: first, that an armed conflict took place in Rwanda, between its armed forces and dissident armed forces or other armed groups and secondly, that the dissident armed forces or other organized armed groups were under responsible command, able to exercise such control over a part of their territory as to enable them to

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18 Dusko Tadic, IT-94-I (May 7, 1997).

19 See The Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of Oct. 2, 1995.

20 Akayesu, I.C.T.R. at 610.

21 Musema, I.C.T.R. at 248.

22 See Trial Chamber cited ICRC Commentary on Additional Protocol II, paragraph 4338-4341, in support of its decision.

carry out sustained and concerted military operations, and able to implement Protocol II.<sup>23</sup> The Protocol applies automatically as soon as the material conditions, as defined in Article 1 of Protocol II, are fulfilled.

When the conditions under Common Article 3 and Protocol II, as incorporated in Article 4 of the Statute, are established, the Prosecutor must proceed to prove, beyond a reasonable doubt, that there is nexus between the offence committed and the armed conflict before the culpable acts committed by the accused will be held to be in serious violation of Article 4 of the Statute.

*1. The Prosecutor v Akayesu*

Jean-Paul Akayesu, the accused, served as bourgmestre of Taba Commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, Akayesu was a teacher and school inspector in Taba Commune.

As bourgmestre, Akayesu was responsible for the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the Prefect. Akayesu had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, subject only to the Prefect's authority.

In the indictment, the Prosecutor alleged, inter alia, that between April 7 and the end of June 1994 hundreds of displaced civilians sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia or communal police and subjected to sexual violence, or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence, which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats to death or bodily harm. The female displaced civilians lived in constant fear of their physical and psychological health, and such health deteriorated as a result of the sexual violence, beatings or killings. Akayesu encouraged these activities.<sup>24</sup>

On or about April 19, 1994, before dawn, in Gishyeshye sector, Taba Commune, a group of men, one of whom was named Francis Ndimubanzi, killed a local teacher, Sylvere Karera, because he was accused of associating with the Rwanda Patriotic Front ("RPF") and

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<sup>23</sup> See Article 1 of Protocol II.

<sup>24</sup> Akayesu, I.C.T.R. 96-4-T at 12 A and 12B.

plotting to kill Hutus. One of the persons alleged to be associated with the RPF was turned over to Akayesu, but he failed to take measures to have him arrested or to investigate the allegation of association with the RPF.<sup>25</sup> The morning of April 19, 1994, following the killing of Sylvere Karera, the accused led a meeting in Gishyeshye sector at which he sanctioned the death of Sylevere Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean the Tutsi. Over 100 people were present at the meeting. The killing of Tutsis in Taba Commune began shortly after the meeting.<sup>26</sup>

At the same meeting in Gishyeshye sector on April 19, 1994, Akayesu named at least three prominent Tutsis who had to be killed because of their alleged relationships with the RPF. Later that day, two of the three persons named by Akayesu as persons with relationships with the RPF were killed, one at Kanyinya, and the other in front of the Taba bureau communal.<sup>27</sup>

In determining Akayesu's individual criminal responsibility for the alleged crimes, and whether Akayesu's culpable acts formed a nexus with the internal armed conflict that took place between the RPF dissident force and the Rwanda Army ("FAR"), the Trial Chamber made two observations. First, that:

"The Indictment does not specifically aver that the accused falls in the class of persons who may be held responsible for serious violations of Common Article 3 and Additional Protocol II. It has not been alleged that the accused was officially a member of the Rwanda 'armed forces' (in its broadest sense). It could, hence, be objected that, as a civilian, Article 4 of the Statute, which concerns the law of armed conflict, does not apply to him."<sup>28</sup>

Having made that observation, the Trial Chamber continued:

"For Akayesu to be held criminally responsible under Article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective objectives. Akayesu

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<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Id.* at 14.

<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.* at 632; however, the Trial Chamber proceeds to state: "It is, in fact, well-established, at least since the Tokyo Trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking. Other post-World War II trials unequivocally support the imposition of individual criminal liability for crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities."

would incur criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of hostilities. Hence the Prosecutor will have to demonstrate and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or de facto representing the Government, to support or fulfill the war efforts.”<sup>29</sup> [Emphasis added]

The second observation made by the Trial Chamber was that the Prosecutor must establish a link, or nexus, between the war crimes allegedly committed by Akayesu and the internal armed conflict. In discharging this burden, the Trial Chamber stated:

“The Prosecutor must prove that there is a nexus between the actions of the accused and the conflict. The Prosecutor must produce sufficient evidence to demonstrate how and in what capacity the accused was supporting the Government efforts against a dissident armed force or other armed force.”<sup>30</sup> [Emphasis added]

These are, *prima facie*, the benchmarks against which the evidence adduced by the Prosecutor must be judged in discharging the burden of proof in establishing the guilt of the accused beyond a reasonable doubt.

According to the record of the trial proceedings, testimony presented by the Prosecutor and admitted into evidence established that at the time of the events alleged in the indictment, Akayesu embodied the communal authority and that he held an executive civilian position in Taba Commune. At the time the crimes alleged in the indictment were committed, Akayesu wore a military jacket and openly carried a rifle. Akayesu also assisted the military on their arrival in Taba Commune by undertaking a number of tasks including reconnaissance and mapping the Commune, and the setting up of radio communications. Further, Akayesu allowed the military to use his office premises in support of the war efforts.

Akayesu’s conduct constitutes a *prima facie* act of war. Under the laws of war, support for a third party’s act of war shall generally be rated as an act of war of the supporting party if it is related to measures harmful to the adversary.<sup>31</sup> Akayesu’s war efforts in support of the FAR against the RPF, both being the principal parties to the internal armed

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<sup>29</sup> *Id.* at 640.

<sup>30</sup> *Id.* at 641.

<sup>31</sup> CHRISTOPHER GREENWOOD, *SCOPE OF APPLICATION OF HUMANITARIAN LAW: THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, AT 50 (Oxford University Press, 1995).

conflict in Rwanda, may be construed as acts of war in support of a third party and harmful to the adversary.

Further, under the laws of war, irregular forces or unlawful combatants, under a proper command or deploying preparatory to attack, and wear identifiable marks, military uniforms or openly carry guns are deemed combatants and parties to armed conflict.<sup>32</sup> Akayesu wore a military uniform and openly carried a rifle.

It is submitted that the Prosecutor rightly relied in part on the facts admitted in evidence by the Trial Chamber to demonstrate that there was a nexus between the actions of Akayesu and the internal armed conflict. Further, the trial record shows that the Prosecutor argued that reference by Akayesu to individuals as Rwanda Patriotic Front ("RPF") accomplices was indicative of Akayesu's intention to connect his actions to the conflict between the Interim Government, the FAR and the RPF. Akayesu, by conduct and intent, having allied himself to the Interim Government forces, the FAR, a party to the internal armed conflict against the Rwanda Patriotic Army ("RPA"), the military wing of RPF, though a civilian, was, under the laws and customs of war, a combatant and was directly engaged in hostilities by supporting the FAR against the RPF within the meaning of Article 4 of the Statute.

However, the Trial Chamber rejected the Prosecutor's submission and held that:

"The Prosecutor did not bring sufficient evidence to show how and in what capacity Akayesu was supporting the Government effort against the RPF. The evidence as pertains to the wearing of a military jacket and the carrying of a rifle...are not sufficient in demonstrating that Akayesu actively supported the war effort. Furthermore, the Chamber finds that the limited assistance given to the military by the accused in his role as the head of the Commune does not suffice to establish that he actively supported the war effort. Moreover, the Chamber recalls it has been proved that references to RPF accomplices in the context of the events, which occurred in Taba, were to be understood as meaning Tutsi."<sup>33</sup>  
[Emphasis added]

The Akayesu decision that the acts or omissions of the accused "are not sufficient in demonstrating that Akayesu actively supported the war efforts" or evidence that the accused in his role as the head of the commune, directly or indirectly, participated in the internal armed conflict "does not suffice to establish that he actively supported the war effort." It is submitted that the Trial Chamber ought to have positively formulated the threshold for establishing a nexus between war crimes

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32 L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT*, at 114 (Manchester University Press, 1993).

33 Akayesu, ICTR-96-4-T at 642.

and armed conflict. The Trial Chamber's rejection of the Prosecutor's submission, in a negative form, without spelling out what must be proved, circumvents a legal consideration of the nexus issue.

The Trial Chamber, for example, should have stated the threshold of how and in what capacity an accused that supported the Interim Government's, or the FAR's; war efforts against the RPF ought to have been established by the Prosecutor. In the absence of a positive formulation of the concept of nexus, or the Trial Chamber's criteria for establishing a nexus, it becomes difficult for the Prosecutor to formulate an objective criterion for challenging the Trial Chamber's decision.

### *2 The Prosecutor v. Kayishema and Ruzindana*

The Akayesu decision, to the extent that there was no nexus between war crimes and internal armed conflict, was adopted and followed in Kayishema & Ruzindana.<sup>34</sup>

Kayishema, the first accused, like Akayesu, was a civilian. Kayishema was appointed a Prefect of Kibuye on 3 July 1992 and acted in that capacity until his departure to Goma in Zaire (now Democratic Republic of Congo) in July 1994<sup>35</sup>.

The allegations against Kayishema are that by April 17, 1994, thousands of men, women and children from various locations had sought refuge in the Catholic Church and Home St. Jean complex ("the Complex") located in Kibuye town. These men, women and children were unarmed and were prominently Tutsis. They were in the Complex seeking protection from attacks on the Tutsi, which had occurred throughout the Prefecture of Kibuye. Some of the people who sought refuge in the Complex did so because Kayishema ordered them to go there. The Prosecutor alleged that when the accused ordered people to the Complex, he knew or had reason to know, that an attack on the Complex was going to occur.<sup>36</sup>

After people gathered in the Complex, persons under Kayishema's control, including members of the Gendarmerie Nationale and the Interahamwe, surrounded the Complex. These persons prevented the men, women and children within the Complex from leaving the Complex at a time when Kayishema knew, or had reason to know, that an attack on the Complex was going to occur.<sup>37</sup>

On or about April 17, 1994, Kayishema ordered members of the Gendarmerie Nationale, the communal police of Gitesi commune, members of the Interahamwe and armed civilians to attack the complex, and he personally participated in the attack. The attackers used guns,

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<sup>34</sup> Ruzindana, ICTR-95-I-T at 130.

<sup>35</sup> *Supra* note 24.

<sup>36</sup> *Id.* at 25-26.

<sup>37</sup> *Id.* at 27.

grenades, machetes, spears, cudgels and other weapons to kill the people in the Complex. The attack resulted in thousands of deaths and numerous injuries to the people within the Complex. The Prosecutor alleged that before the attack on the Complex, the accused did not take measures to prevent an attack, and after the attack Kayishema did not punish the perpetrators.<sup>38</sup>

Ruzindana, the second accused, was also a civilian and a commercial trader in Kigali during the period in which the crimes alleged were committed.<sup>39</sup> Ruzindana was jointly charged with Kayishema for the massacres in the Area of Bisesero. The area of Bisesero spans over two communes of the Kibuye Prefecture. From about April 9, 1994 through June 30, 1994, thousands of men, women and children sought refuge in the area of Bisesero. These men, women and children were predominantly Tutsi and were seeking refuge from attacks on Tutsi, which had occurred throughout the Prefecture of Kibuye. The area of Bisesero was regularly attacked, on almost a daily basis, throughout the period of about April 9, 1994 through about June 30, 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. At various times the men, women and children seeking refuge in Bisesero attempted to defend themselves from these attacks with stones, sticks and other crude weapons.<sup>40</sup>

The Prosecutor alleged that at various locations and times throughout April, May and June 1994, and often in concert, Ruzindana and Kayishema brought to the area of Bisesero members of the Gendarmerie Nationale, communal police of Gishyita and Gisovu, commune, Interahamwe and armed civilians, and directed them to attack the people seeking refuge there. In addition, the Prosecutor alleged that at various locations and times, and often in concert, Ruzindana and Kayishema personally attacked and killed persons seeking refuge in Bisesero. The attacks resulted in thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero.<sup>41</sup>

In the Kayishema and Ruzindana decision, the Trial Chamber, with approval, cited Akayesu<sup>42</sup> and the proceedings of the Preparatory

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<sup>38</sup> *Id.* at 28-30.

<sup>39</sup> *Id.* at 24.

<sup>40</sup> *Id.* at 45-46.

<sup>41</sup> *Id.* at 47-48.

<sup>42</sup> *Id.* at 186. In paragraph 186 the Trial Chamber stated: "In the Akayesu Judgment, the Trial Chamber found that '...it has not been proved beyond reasonable doubt that acts perpetrated by Akayesu...were committed in conjunction with the armed conflict.' Such a conclusion means that, in the opinion of the Chamber, such a connection is necessary."



Commission for the International Criminal Court<sup>43</sup> and thereafter stated that:

“[T]he term “nexus” should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually. No test, therefore, can be defined in *abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecutor to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists.”<sup>44</sup>

It is good practice for the Trial Chamber to consider the existence, or lack thereof, of a nexus between war crimes and armed conflict on a case-by-case basis. However, as in *Akayesu*, the Trial Chamber did not formulate any guideline, benchmark, or suggest the quality of evidence the Prosecutor must adduce in order to prove, beyond a reasonable doubt, that such a nexus exists. It would have been useful, particularly to the Prosecutor, had the Trial Chamber formulated a benchmark or threshold requirement for proof of a nexus that may be applied on a case-by-case basis. This approach would assist both the Prosecutor and the Defense Counsel in conceptualizing, and simultaneously providing, the criteria for assessing the quality of evidence that may prove the existence, or lack thereof, of a nexus between war crimes and internal armed conflict.

The Trial Chamber’s decision not to provide a positive definition of the concept of nexus, nor state the threshold required, as opposed to a negative definition of what a nexus is not, has tended to create a subjective criteria for determining the existence, or lack thereof, of a nexus between war crimes and internal armed conflict. For example, in arguing that there was a nexus between the culpable acts the accused were alleged to have committed and the internal armed conflict, the Prosecutor had submitted:

“That the evidence shows, beyond a reasonable doubt, that for each of the alleged violations there was a nexus between the crimes and the armed conflict that was underway in Rwanda. The Tutsis who were massacred in Kibuye went to the four sites seeking refuge from attacks that were occurring on the Tutsis throughout Kibuye and Rwanda. These attacks were occurring because hostilities had broken out between the RPF and the FAR and the Tutsis were being

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43 *Id.* at 187. In paragraph 187 the Trial Chamber states: “This issue was discussed recently at the first session of the Preparatory Commission for the International Criminal Court (16 to 26 February 1999). From the point of view of the participants, war crimes would occur if the criminal conduct took place in the context of and was associated with armed conflict.” (Second Discussion Paper—PCNICC/1999/WGE/RT/2).

44 *Id.* at 188.

sought out on the pretext that they were accomplices of the RPF and were 'the enemy' and/or were responsible for the death of the President."<sup>45</sup>

The Trial Chamber, not having formulated a clear concept of a nexus, subjectively rejected the Prosecutor submission without suggesting any guideline on how the concept of a nexus must be established beyond a reasonable doubt, or why the Prosecutor did not discharge the burden of proof beyond a reasonable doubt.

However, in rejecting the Prosecutor's submission, the Trial Chamber advanced four unpersuasive reasons. First, that the Tutsi were attacked by neither the RPF nor the FAR in the places where they sought refuge in Kibuye but by the civilian authorities as a result of a campaign to exterminate the Tutsi population in the country. Consequently the Chamber held: "there [was] no ground to assert that there was a nexus between the committed crimes and the armed conflict."<sup>46</sup> Second, the Trial Chamber held that while it was true that hostilities had broken out between the RPF and the FAR during this period of time, the Prosecutor did not produce evidence that the military operations that occurred in Kibuye Prefecture when the alleged crimes were committed were connected with armed conflict. Third, the Trial Chamber held that the Prosecutor did not show that there was a direct link between crimes committed against these victims and the hostilities mentioned by the Prosecutor. Fourth, the Trial Chamber held that the Prosecutor did not prove that the victims were accomplices of the RPF and/or were responsible for the death of the President.

The Trial Chamber's conclusion is apparently based on its subjective interpretation of the term "pretext." In rejecting the Prosecutor's submission and her reference to the word "pretext" in describing the Tutsi civilians as accomplices, the Trial Chamber observed:

"The Prosecutor herself recognized that the Tutsis were being sought out on the pretext that they were accomplices etc. These allegations show only that the armed conflict had been used as pretext to unleash an official policy of genocide. Therefore, such allegations cannot be considered as evidence of a direct link between the alleged crimes and the armed conflict."<sup>47</sup>[Emphasis in the original]

While the Trial Chamber cannot be faulted on its conclusion in respect of crimes of genocide, its conclusion that "these allegations show only that the armed conflict had been used as a pretext to unleashed an official policy of genocide" is not the only inference that may be drawn

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<sup>45</sup> *Id.* at 601.

<sup>46</sup> *Id.* at 602.

<sup>47</sup> *Id.* at 603.

from the Prosecutor's use of the term "pretext." On the contrary, the term "pretext" could mean that the accused decided to kill Tutsi civilians before they could be recruited and trained by the RPF to fight the FAR regardless of whether or not the Tutsi civilians were in fact accomplices of the RPF. This form of killing would be directed at Tutsi civilians considered fit for military duties. Thus, this preemptive strike, or reprisal, would have as its objective the killing of all Tutsi civilians for the simple reason that they are, or may be, potential allies, spies or agents, and therefore accomplices, of the RPF. Acts of reprisal, under the laws of war, are generally considered war crimes.

From an objective point of view, the assumption may be false because while some Tutsi civilians, given an opportunity for recruitment and extending support to the war efforts of the RPF, may in fact, accept recruitment and play a direct role in supporting the war effort of the RPF, there is no certainty, based on an objective assessment, that all Tutsi civilians, given similar opportunity, would opt to support the war efforts of the RPF against the FAR and therefore fit the classification of accomplices. The possibility that some Tutsi civilians might choose to remain neutral will always exist. Yet, the fact that the possibility of neutrality exists as an option for the Tutsi civilians, would not stop the Interahamwe from targeting for killing, all Tutsi civilians on the baseless assumption that the Tutsi civilians are accomplices of the RPF when in fact not. Consequently, the killing of some Tutsi civilians would constitute a war crime, while the killing of other Tutsi civilians would constitute crimes of genocide or crimes against humanity. This is one interpretation to the Prosecutor's use of the term "pretext."<sup>48</sup>

Second, the term "pretext" as used by the Prosecutor could mean that while some Tutsi civilians were in fact accomplices of the RPF, many other Tutsi civilians were not, but the accused decided to target all Tutsi civilians for elimination regardless of whether they were actually accomplices or not. In this context, the term "pretext" was used in justifying the killing of only Tutsis who were not accomplices of the RPF. The killing of Tutsi civilians who were accomplices would constitute war crimes, and those who were not accomplices, would constitute crimes of genocide or crimes against humanity because same set of acts may disclose two or more crimes under the Statute.<sup>49</sup>

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48 This argument does not affect a charge on a count of genocide since the same set of facts would disclose war crimes and crimes of genocide. Further, the ICTR Statute does not provide a hierarchy of crimes hence while genocide is a very serious crime, it does not necessarily take precedence of war crimes. The Trial Chamber may therefore convict an accused on war crimes and crime of genocide.

49 However, the flaw in the Prosecutor's case in respect of this line of interpretation is her failure to adduce evidence of participation of Tutsi civilian accomplices in the internal armed conflict. It is not

The Trial Chamber's strict interpretation, or subjective use, of the term "pretext" appears to have been rooted in the ambiguous manner in which the Trial Chamber used the term "nexus" throughout its judgment, and consequently did not pay the necessary attention to the pivotal role played by members or leaders of the Interahamwe, particularly in killing those Tutsi civilians who were in fact accomplices, spies or agents of the RPF.

### *3 The Prosecutor v. Rutaganda*

In the Rutaganda case, the Trial Chamber followed the Akayesu and Kayishema & Ruzindana precedents. Rutaganda was general manager and proprietor of Rutaganda SARL. He was also a member of the National and Prefectorial Committees of the Mouvement Republicain National pour le Developpement et la Democratie ("the MRND") and a shareholder of Radio Television Libre des Mille Collines ("the RTLM"). On April 6, 1994, he was serving as the second vice president of the National Committee of the Interhamwe, the youth militia of the MRND political party.<sup>50</sup>

The allegations against Rutaganda are that on or about April 6, 1994 the accused distributed guns and other weapons to members of Interahamwe in Nyarugenge commune of Kigali. On or about April 10, 1994, the accused stationed members of Interahamwe at roadblocks near his office at the "Amgar" garage in Kigali. Shortly after the accused left the area, the members of Interhamwe started checking identity cards of people passing the roadblock. The Interhamwe ordered persons with Tutsi identity cards to stand on one side of the road. Eight persons identified as Tutsi were killed. The victims included men, women, children and an infant who was carried on the back of one of the Tutsi women.<sup>51</sup>

In April 1994, on a date unknown, Tutsis who had been separated at a roadblock in front of the Amgar garage were taken to Rutaganda and questioned by him. Thereafter, the accused directed that these Tutsis be detained with others at a nearby building. Later, the accused directed the Interhamwe under his control to take 10 Tutsi detainees to a deep, open hole near the Amgar garage. On the order of the accused, the Interahamwe killed the 10 Tutsi civilians with machetes and threw their bodies into the hole.<sup>52</sup>

From April 7 to April 11, 1994, thousands of unarmed Tutsi men, women and children and some unarmed Hutus sought refuge at the

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sufficient to allege accomplice participation, the Prosecutor must identify and prove that the victim of an alleged crime was, as a matter of fact, an accomplice.

<sup>50</sup> Rutaganda, ICTR-96-3-T at 2.

<sup>51</sup> *Id.* at 10-11.

<sup>52</sup> *Id.* at 12.

Ecole Technique Officielle ("ETO School") in Kicukiro sector, Kicukiro commune. The ETO School was considered a safe haven because Belgian soldiers, part of the United Nations Assistance Mission for Rwanda forces (hereafter UNAMIR), were stationed there. On or about April 11, 1994, immediately after the Belgians withdrew from the ETO school, members of FAR, the gendarmerie and militia, including the Interahamwe, attacked the ETO school and, using machetes and guns, killed the people who had sought refuge there. The Interahamwe separated Hutus from Tutsis during the attack, killing Tutsis. The accused participated in the attack at the ETO school, which resulted in the deaths of a large number of Tutsis.<sup>53</sup>

Rutaganda, using members of the Interhamwe, forcibly transferred the men, women and children who survived the ETO school attack, to a gravel pit near Nyanza primary school. More members of the Interahamwe converged upon Nyanza primary school and surrounded the group of survivors. The survivors who were able to prove that they were Hutu were permitted to leave the gravel pit. Tutsis who presented altered identity cards were immediately killed. Most of the remainder of the group of survivors were attacked and killed by grenades or shot to death. Those who tried to escape were attacked with machetes. The accused, among others, directed and participated in the attacks.<sup>54</sup>

In April 1994, on dates unknown, in Masango commune, Rutaganda and others unknown to the Prosecutor, conducted house-to-house searches for Tutsis and their families. Throughout these searches, Tutsis were separated from Hutus and taken to a river. The accused instructed the Interahamwe to track all the Tutsi and throw them into the river. On or about April 28, the accused, together with members of the Interahamwe collected Tutsi residents in Kigali and detained them near Amgar garage. The accused and the Interahamwe demanded identity cards from the detainees. A number of persons, including Emmanuel Kayitare, were forcibly separated from the group. Later that day, Emmanuel Kayitare attempted to flee from where he was being detained and the accused pursued him, caught him and struck him on the head with a machete and killed him. In June 1994, on a date unknown, the accused ordered people to bury the bodies of victims in order to conceal his crimes.<sup>55</sup>

In considering the case against Rutaganda, the Trial Chamber quoted Akayesu with approval. The relevant part read:

"In addition to the offence being committed in the context of armed conflict not of an international character satisfying the material requirements of Common Article 3 and Additional Protocol II, there

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<sup>53</sup> *Id.* at 13-15.

<sup>54</sup> *Id.* at 16.

<sup>55</sup> *Id.* at 17-19.

must be a nexus between the offence and the armed conflict for Article 4 of the Statute to apply. By this it should be understood that the offence must be closely related to the hostilities or committed in conjunction with armed conflict.”<sup>56</sup>[Emphasis added]

Further, the Trial Chamber, with approval, cited Kayishema and Ruzindana thus:

“The term nexus should not be defined in abstractio. Rather, the evidence adduced in support of the charges against the accused must satisfy the Chamber that such a nexus exists. Thus, the burden rests on the Prosecutor to prove beyond a reasonable doubt that, on the basis of the facts, such a nexus exists between the crime committed and the armed conflict.”<sup>57</sup>[Emphasis added]

Again, as in earlier cases, the Trial Chamber did not formulate the benchmark, nor the quality of the evidence the Prosecutor must adduce in order to discharge the burden of proof beyond a reasonable doubt, that a nexus exists between war crimes and internal armed conflict.

As regards the testimony presented by the Prosecutor and admitted in evidence, the Trial Chamber accepted that the victims of the offences were unarmed civilians, men, women and children who had been identified as “targets” on the basis of their ethnicity. Those persons who had carried weapons were disarmed by the UNAMIR troops on entering the ETO compound. The Trial Chamber did not consider that the bearing of these weapons prior to being disarmed deprived the victims of the protection afforded to them by Common Article 3 and Additional Protocol II. Indeed, the Chamber was of the opinion that these “armed” civilians were not taking a direct part in hostilities, but rather finds that bearing of these weapons was a desperate and futile attempt at survival against the thousands of armed assailants.<sup>58</sup> Consequently, the Chamber ruled that it was satisfied that the Tutsi civilians were persons taking no active part in the hostilities and were thus protected persons under Common Article 3 and Additional Protocol II.

The Trial Chamber also admitted into evidence the Prosecutor’s testimony that as second vice-president of the Interahamwe, being the youth wing of the majority political party in the Interim Government in April 1994, the accused was in a position of authority vis-à-vis the Interahamwe and therefore falls within the category of persons who can be held individually responsible, under Article 6(3), for serious violations of Article 4 of the Statute. This conclusion, the Trial Chamber observed, is supported by evidence indicating that the accused exerted control over the Interahamwe, that he distributed weapons to them during

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<sup>56</sup> *Id.* at 104.

<sup>57</sup> *Id.* at 105.

<sup>58</sup> *Id.* at 437.

the events alleged in the Indictment, aiding and abetting in the commission of the crimes and directly participating in the massacres with the Interahamwe. Significantly, the Trial Chamber admitted in evidence the Prosecutor's testimony that "the Interhamwe served in a supporting capacity, the FAR against the RPF, and that there was a nexus between the crimes committed by the accused and the armed conflict."<sup>59</sup>

However, the Trial Chamber pointed out that although the genocide against the Tutsis and the conflict between the FAR and the RPF are undeniably linked, the Prosecutor couldn't merely rely on a finding of genocide and consider that, as such, serious violations of Common Article 3 and Additional Protocol II are therefore automatically established. Rather, "the Prosecutor must discharge her burden by establishing that each material requirement of offences under Article 4 of the Statute is met."<sup>60</sup> The Trial Chamber, therefore, held that "it had not been proved beyond reasonable doubt that there existed a nexus between the culpable acts committed by the accused and the armed conflict."<sup>61</sup> Consequently the Chamber found the accused not guilty as charged.

#### *4 The Prosecutor v. Musema*

Alfred Musema was a civilian and the Director of Gisovu Tea Factory, a public enterprise. He was also a member of the "Conseil prefectorial" in Buyumba Prefecture and a member of Technical Committee in the Butare Commune. Both positions of responsibility involved socio-economic and developmental matters and did not focus on Prefectorial politics. Though the Head Office of the Gisovu Tea Factory was located in Kibuye, Musema's area of responsibility encompassed the Prefectures of Kibuye and Gikongoro.<sup>62</sup>

In the indictment, Musema was charged with, inter alia, serious violations of Common Article and Protocol II, as incorporated in Article 4 of the Statute. The Prosecutor alleged that during the months of April, May and June 1994, in Gisovu and Gishyita communes, Kibuye Prefecture in the Territory of Rwanda, did commit or ordered others to commit crimes. In support of the allegations, the Prosecutor averred in the concise statement of facts that at various occasions and times throughout April, May and June 1994, and often in concert with others, Musema brought to the area of Bisesero armed individuals and directed them to attack the people seeking refuge there.<sup>63</sup>

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<sup>59</sup> *Id.* at 440.

<sup>60</sup> *Id.* at 443.

<sup>61</sup> *Id.* at 444.

<sup>62</sup> Musema, ICTR-96-13-I at 10-16.

<sup>63</sup> See, Musema, ICTR-96-13-I at 44-45.(Annex A). The area of Bisesero spans two communes in the Kibuye Prefecture. From about 9 April 1994 through 30 June 1994, thousands of men, women

The Prosecutor alleged that Musema committed acts of rape and encouraged others to capture, rape and kill Tutsi women seeking refuge from attacks within the area of Bisesero in Gisovu and Gisgitya communes, Kibuye Prefecture. In addition, the Prosecutor alleged that at various locations and times, and often in concert with others, Musema personally attacked and killed persons seeking refuge in Bisesero; specifically that on April 14, 1994, Musema, in concert with others, ordered and encouraged the raping of Annunciata, a Tutsi woman and thereafter, ordered, that she be killed together with her son Blaise. On May 13, 1994, Musema in concert with others, raped and killed Immaculee Mukankasi, a pregnant Tutsi and thereafter ordered others accompanying him, to rape and kill Tutsi women seeking refuge from attack; and on the same day, Musema, acting in concert with others, raped Nyiramusugi, a Tutsi woman and encouraged others accompanying him to rape and kill her.<sup>64</sup> The attacks described above resulted in thousands of deaths and numerous injuries to men, women and children within the area of Bisesero in Gisovu and Gishyita communes, Kibuye Prefecture.<sup>65</sup>

In the judgment, the Trial Chamber adopted its earlier reasoning in Akayesu, Kayishema & Ruzindana and Rutaganda and therefore neither defined, nor formulated a benchmark for determining the concept or conception of a nexus between war crimes and armed conflict. The Trial Chamber observed that the burden rests on the Prosecutor to establish, on the basis of the evidence adduced during trial, that there exists a nexus, on the one hand, between the acts for which Musema is individually criminally responsible, including those for which he is individually criminally responsible as a superior, and, on the other, the armed conflict.<sup>66</sup> In the opinion of the Chamber, the Prosecutor failed to establish that there was a nexus.<sup>67</sup> Consequently the Chamber found that Musema was not guilty for violations of Common Article 3 and Protocol II.<sup>68</sup>

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and children sought refuge in various locations in Bisesero. These men, women and children were predominantly Tutsi and were seeking refuge from attacks on Tutsi which had occurred throughout the Prefecture of Kibuye. The individuals seeking in the Bisesiro were regularly attacked, throughout the period of about 9 April through about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero.

64 *Id.* at 4.4-4.10 (Annex A).

65 *Id.* at 4.10 (Annex).

66 *Id.* at 974.

67 *Id.*

68 *Id.* at 975



## B. The Concept of Nexus

In Akayesu, Kayishema & Ruzindana, Rutaganda and Musema, different Trial Chambers of the Tribunal that presided over the cases did not provide positive definition of the concept of nexus between war crimes and armed conflict. Further, the different Trial Chambers did not consider the different conceptions of nexus between war crimes and internal armed conflict.

The Trial Chambers of the ICTY, in deciding cases that involved consideration of the law applicable to the internal aspect of the international armed conflict of the former Yugoslavia, also declined to formulate or define a positive concept of a nexus between war crimes and internal armed conflict.

In Dusko Tadic, the Trial Chamber of the ICTY, for instance, made the formulation that: "The only question to be determined in the circumstances of each individual case was whether the offence were closely related to the armed conflict as a whole."<sup>69</sup> [Emphasis added]. The Trial Chamber did not suggest any criteria for a determination, "whether the offence is closely related to the internal armed conflict as a whole."

Similarly, in Zejil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo (hereafter Celebici) the Trial Chamber of the ICTY without formulating or defining the concept or conception of a nexus between war crimes and internal armed conflict simply substituted the phrase "closely related to armed conflict as a whole" used in Tadic with "an obvious link." The Trial Chamber stated, "There must be an obvious link between the criminal act and the armed conflict."<sup>70</sup> [Emphasis added].

Therefore, according to the ICTY, the term nexus may mean "closely related to the armed conflict as a whole," as used in Tadic, or "an obvious link between the criminal act and the armed conflict," as used in Celebici. In the absence of a definition or a formulation of the concept of a nexus, such general description is legally unhelpful because the thresholds for proof of a nexus beyond a reasonable doubt is vague and undefined.

The Trial Chamber of the ICTR did make an interesting observation:

"When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of armed conflict. However, it does not mean that all such crimes have a direct link with the armed conflict and all the

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<sup>69</sup>The Prosecutor v. Dusko Tadic, ICTR-94-I-T at 573 (May 7, 1997).

<sup>70</sup>The Prosecutor v. Pavo and Zenga, ICTR-96-21 at 193 (Nov. 16, 1998).

victims of these crimes are victims of armed conflict.”<sup>71</sup>[Emphasis added]

Thus, it is reasonable to infer that in the Rwanda internal armed conflict and the killing of some Tutsi civilians by members or leaders of the Interahamwe, constitute a nexus between war crimes and internal armed conflict, and are therefore war crimes, while the killing of other Tutsi civilians may not constitute war crimes but crimes of genocide or crimes against humanity. This interpretation would be consistent with the Prosecutor’s use of the term “pretext” in her submission in the Rutaganda case.

The Trial Chamber’s unsuccessful attempt at justifying its decision in Kayishema & Ruzindana, appears to be based on the ambiguous definition of the concept of nexus, and subsequently the Trial Chamber’s finding that while the Tutsi civilians went to sites seeking refuge from attacks that were occurring on the Tutsis throughout Kibuye and Rwanda, the Tutsi civilians were attacked by neither the RPF nor by the FAR, is inconsistent with the testimony presented by the Prosecutor and admitted in evidence by the Trial Chamber.<sup>72</sup> Further, the Trial Chamber’s conclusion that there was no ground to assert that there was a nexus between the crimes committed and the internal armed conflict that took place at the time, but that the crimes were committed as a result of a campaign to exterminate the Tutsi population in the country, resulting in genocide, which was not directly connected with the internal armed conflict, is not supported by the testimony presented by the Prosecutor and admitted in evidence by the Trial Chamber.<sup>73</sup>

It is submitted that in reaching the above conclusions, the Trial Chamber did not take into account, inter alia, the fact that the number of Tutsi civilians killed by the FAR and the Interahamwe increased proportionately in relation to the loss the FAR suffered at the hands of the RPF in the course of the armed conflict. The FAR routinely carried out reprisals against the Tutsi civilians after suffering defeats at the hands of the RPF in combat.<sup>74</sup> Thus, the killing of Tutsi civilians constituted crimes of genocide or crimes against humanity, were also linked to the internal armed conflict, and thus constituted war crimes. The same set of acts or omissions committed by members or leaders of the Interahamwe resulted in violations of Articles 2, 3 or 4 of the Statute,

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<sup>71</sup> Ruzindana, ICTR 95-1-T at 600.

<sup>72</sup> *Id.* at 602.

<sup>73</sup> *Id.*

<sup>74</sup> The fact that the FAR routinely carried out reprisals against the Tutsi civilians after suffering defeats at the hands of the RPF in combat places a duty on the Prosecutor to adduce evidence of Tutsi civilian accomplices and link that evidence with proof that the Tutsi civilians were killed because they were RPF accomplices.

that is, the commission of crimes of genocide, crimes against humanity or war crimes.

The findings and conclusions of the Trial Chambers in Akayesu, Kayishema & Ruzindana, Rutaganda, and Musema, *inter alia*, that it did not follow from participation of the accused, as members or leaders of the Interahamwe in these massacres that the culpable acts were connected with the FAR or other organized-armed groups; that there was insufficient evidence adduced by the Prosecutor to prove that the crimes were committed against the RPF and/or its accomplices, and that the civilian authorities of Rwanda Interim Government, particularly the members and leaders of the Interahamwe committed crimes against the Tutsi ethnic group, not because of the armed conflict, but as a result of the implementation of the policy of genocide by the Interim Government of Rwanda in 1994 ignore the active role the Interahamwe played in supporting the FAR and the Interim Government in the war against the RPF, and goes against historical facts and conventional wisdom.<sup>75</sup>

In deciding as it did, the Trial Chamber appears to not only have overlooked the active military and political support the accused extended to the FAR, but it also did not carefully evaluate the fact that the FAR trained and armed the Interahamwe with the sole objective of supporting FAR against the RPF in the internal armed conflict. Had the Trial Chamber considered and evaluated the objective of the FAR in training and arming members or leaders of the Interahamwe, the political philosophy of the Interim Government, the FAR, Hutu Power and its extremist ideology, it is possible that the Trial Chamber might have reached not only a different conclusion, but also defined the concept of nexus liberally, particularly if the Trial Chambers had considered the intention behind the adoption of Article 4 of the Statute, and the fact that the Security Council elected to adopt an expansive approach with regard to interpretation of Article 4. Further, it would have been useful had the Trial Chambers taken time to consider whether the Security Council had in mind the punishment of persons who participated in the armed conflicts, particularly the role of members or leaders of Interahamwe when it adopted Article 4 of the Statute.

### **C. The Interahamwe**

Considering the pivotal role played by members or leaders of the Interahamwe in the internal armed conflict that took place in Rwanda from January 1 to December 31, 1994 between the FAR and the RPF, can the Interahamwe, as an institution, be considered a party to the armed

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<sup>75</sup> See GERARD PRUNIER, *THE RWANDA CRISIS 1959-1994: HISTORY OF A GENOCIDE*, (Hurst, 1995); HUMAN RIGHTS WATCH, "LEAVE NONE TO TELL THE STORY" GENOCIDE IN RWANDA (Human Rights Watch, New York, International Federation of Human Rights, Paris, 1999); AFRICAN RIGHTS, *RWANDA: DEATH, DESPAIR AND DEFIANCE* (Africa Rights, London, Revised 1995 Edition).

conflict under the laws and customs of war? In other words, do members or leaders of the Interahamwe satisfy the legal requirements for classification as lawful combatants, unlawful combatants or parties to the internal armed conflict within the meaning of Common Article 3 or Protocol II, as incorporated in Article 4 of the Statute? Further, based on the acts or omissions of members or leaders of the Interahamwe before or during the armed conflict, was the Interahamwe, as an institution, a party organ of the MRND, an agent, or a de facto representative of the Interim Government or the FAR, and supported the war efforts against the RPF, violated Article 4 of the Statute?

Under customary international law, a member of an “armed force” is defined as including the army properly so called, including the militia, the national guards and other armed bodies which fulfill the following conditions: (a) that they are under the direction of a responsible command; (b) that they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps; (c) that they carry their arms openly.<sup>76</sup>

The Third Geneva Convention defines members of the “armed forces” to include: members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteers corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly and (d) that of conducting their operations in accordance with the laws and customs of war.<sup>77</sup>

Article 1(1) of Additional Protocol II to the four 1949 Geneva Conventions defines “armed forces” to include the regular armed forces of a High Contracting Party, dissident armed forces, or other organized armed groups which, under responsible command, exercise such control

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<sup>76</sup> See Green, *supra* note 32 at p.103-104.

<sup>77</sup> Article 4(2) of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August, 1949. See also Knut Ipsen, “Combatants and Non-combatants” in Dieter Fleck (ed.), *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT*, at 70 (Oxford University Press, 1995):

“The armed forces of a party to a conflict consist of all its organized armed forces, groups, and units. They also include militias and voluntary corps integrated in the armed forces. The armed forces shall be:

- under a command responsible to that party for the conduct of its subordinates, and
- subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict (Art.43 (1) of Additional Protocol I to the four 1949 Geneva Conventions.)

over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement Protocol II.

Thus, under the laws and customs of war, the term "armed forces" is so broadly defined as to cover the Interahamwe as an organized armed group. This conclusion is reinforced by the fact that the Interahamwe, *inter alia* had a clear and defined command structure, with Rutaganda, the accused as its national vice-president. Although prior to the armed conflict the Interahamwe was a civilian youth wing of the MRND political party, it was later militarily trained and armed by the FAR and the Interim Government.

After completing military training, the members or leaders of the Interahamwe, participated directly or indirectly in the internal armed conflict, and provided military, political or propaganda in support of the war efforts to the FAR against the RPF and its allies who were characterized by the Interahamwe as accomplices, spies or agents encompassing Tutsi civilians. It is submitted that the Interahamwe meets conditions for classification as an organized armed group under the laws and customs of war.

Under customary international law, Protocol II or the ICTR Statute, individuals of all ranks who belong to the armed forces under the military command of either of the belligerent parties fall within the class of perpetrators who may be prosecuted for violating Article 4 of the Statute. If individuals do not belong to the armed forces, in other words they are civilians, they could still bear criminal responsibility if a nexus exists beyond a reasonable doubt between their culpable acts and the armed forces.

In the Akayesu, Kayishema & Ruzindana, Rutaganda and Musema decisions, the Trial Chambers acknowledged that government armed forces are often under the permanent supervision of public officials, who happen to be civilians, representing the government and have to support the war efforts and fulfill certain mandate. In Akayesu the Trial Chamber described these types of public officials as, "[I]ndividuals who are legitimately mandated and expected as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government to support or fulfill the war efforts."<sup>78</sup>

It is submitted that based on the above definitions, members or leaders of the Interahamwe were members of an armed force, they wore distinctive marks or military uniforms, openly carried arms and directly or indirectly, participated in the armed conflict that took place in Rwanda between January 1 and December 31, 1994.

In Akayesu, Kayishema & Ruzindana, Rutaganda and Musema, the Trial Chambers admitted in evidence, the Prosecutor's testimony to the effect that the Interahamwe comprise of youth who are members of

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<sup>78</sup> Akayesu, ICTR-96-4-T at 631.

the youth wing of the majority political party in government (the MRND) and were trained and armed by FAR. The Interim Government, the MRND political party and FAR provided guns, grenades or machetes used by the Interahamwe. The Interahamwe was transformed by the FAR from a civilian youth wing of MRND political party to an armed group and an effective killing machine. The primary objective of the Interahamwe was to provide military and political support to the Interim Government and FAR against the RPF and its accomplices, agents or spies. In providing these support, the Interahamwe killed Tutsis because they were deemed to support the RPF as accomplices, agents, spies or collaborators, and Hutus who were opposed to the Interim Government. Leading members of the Interim Government, particularly members of the MRND and CDR political parties, the FAR and many members of the business community in Rwanda were also members or leaders of the Interahamwe.

Before and during the internal armed conflict, the Interahamwe dedicated itself to the elimination of the Tutsi civilians, not because of the armed conflict per se, but parallel to the process of implementing the Hutu extremist ideology and its policy of genocide. The Interahamwe had a two-pronged strategy: to kill all Tutsi civilians who were accomplices, spies or agents of the RPF, and to kill the rest of the Tutsi population in the process of implementing the Hutu extremist ideology.

Based on Article 6(1) and 6(3) of the Statute, whether members or leaders of the Interahamwe are combatants in the armed conflict between the FAR and the RPF, and are therefore individually responsible for their culpable acts, it is submitted, is determined on a case-by-case basis because the members or leaders of the Interahamwe played different roles and carried out different functions in the course of the armed conflict. The exercise of determining a nexus between the culpable acts committed by the Interahamwe and the armed conflict would necessitate considering the totality of the evidence adduced by the Prosecutor against each accused member or leader of the Interahamwe in order to determine whether the accused acted personally, as a subordinate or as a superior. Consequently the evidence produced by the Prosecutor in the Akayesu, Kayishema & Ruzindana, Rutaganda and Musema, may or may not be sufficient depending on the criteria used by the Trial Chamber in determining the existence, or lack thereof, of a nexus between the culpable acts of members or leaders of the Interahamwe and armed conflict on the one hand, and the quality of the evidence adduced by the Prosecutor, on the other hand.

## **Conclusion**

The nexus requirement between war crimes and internal armed conflict is of great importance since Common Article 3 and Protocol II are designed to protect all victims of internal armed conflicts. War

crimes are inevitably connected with violations of Common Article 3 and Protocol II. War crimes may also be committed parallel to, or simultaneously with, crimes of genocide or crimes against humanity. War crimes will occur if the criminal conduct of the accused took place in the context of armed conflict, by a person or persons classified as a perpetrator and the act or omission, or a series of acts or omissions alleged to have been committed constitute violations of Article 4 of the Statute. Criminal acts committed during or as a result of internal armed conflict but for personal motives or reasons are not considered as having any nexus with armed conflict.

In adopting Article 4 of the Statute, the Security Council took an expansive approach. It would be prudent for the Trial Chambers to take a similar approach and therefore adopt and apply the principle of judicial activism in interpreting, or liberal interpretation of, Article 4 of the Statute. This approach would be consistent with the objective of the Security Council when it adopted the Statute.

In reaching its decisions the Trial Chamber should endeavour to give examples of standard cases of nexus and use these benchmarks against which to test other more controversial cases for the purpose of determining nexus between war crimes and armed conflict. For example, where the Prosecutor proves that an accused wore a military uniform, before or during a military engagement against a party to an armed conflict, carried guns or weapons openly, or a member or leader of an armed group, the evidential burden should shift to the accused to prove that he was not a party to an armed conflict. Upon the failure of the accused to discharge that evidential burden, and where the Prosecutor establishes a link between the alleged crimes committed by accused and the internal armed conflict, the Trial Chamber should proceed to convict.

This approach would provide the necessary legal premise upon which the Trial Chambers and the Prosecutor may legally disagree if each has or acts on a different theory of why the standard cases should or should not constitute nexus between war crimes and armed conflict. The advantage of this approach is that each party will have knowledge of the concept of nexus upon which they disagree and will, in principle, differ only on which conception each organ of the Tribunal rely upon to show that a particular act or omission, or a series of acts or omissions constitute a nexus between war crimes and armed conflict.

In the absence of a formulation or a definition of the term nexus, the Trial Chambers and the Prosecutor are more likely to have different concepts or conceptions of what constitute nexus between war crimes and armed conflicts. Therefore, whether there is a nexus between the alleged war crimes and internal armed conflict in a given case is proved beyond a reasonable doubt will ultimately depend on whether the Trial Chambers formulate a concept of a nexus between war crimes and armed conflict, and the Prosecutor is able to conceptualize that nexus and

subsequently adduce sufficient evidence to prove the existence, or lack thereof, of a nexus between war crimes and armed conflict, beyond a reasonable doubt.