

**Analysis Of The First Judgment Of The ICTR In Light Of International  
Criminal Law As Applied By ICTY And Its Predecessors**  
in particular, findings on crime of complicity  
and violations of Common Article III

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MEMORANDUM

TO: ICTR Prosecutor

FROM: Erin McBee, New England School of Law

SUBJECT: Jean-Paul Akayesu, Case No. ICTR-96-4-T

DATE: December 18, 1998

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**I. Introduction and Summary of Conclusions**

The Rwanda Tribunal erred in holding that Common Article III of the Geneva Convention did not apply to Mr. Akayesu. As Bourgmestre, Common Article III should apply to Mr. Akayesu. The strict standard used by the Chamber will result in few defendants being held liable under Article III. The Rwanda Tribunal also erred in holding that one can only be found guilty of genocide or complicity to commit genocide, but not both.

The judgment against Akayesu sets the tone for the rest of the ICTR proceedings. The Chamber's narrow interpretations of the laws will make it very difficult to prosecute those who participated in the genocide. This will give the ICTR the appearance of being lenient and will send the wrong message to future participators in genocide. Future wrongdoers will be encouraged to hide their association with the military to avoid liability under

Common Article III. In the long run, this would make it more difficult to get enough evidence to prosecute those who commit genocide.

## II. Factual Background

Jean-Paul Akayesu was bourgmestre of Taba commune from April 1993 to June 1994.<sup>1</sup> He did nothing to stop the killings in his commune nor did he solicit assistance from other authorities, although he was responsible for the maintenance of law and order in his commune.<sup>2</sup>

## III. Legal Discussion

### A. *Applicable Law*

Rwanda is a party to both the 1949 Geneva Conventions and Protocol 11.<sup>3</sup> Common Article III of the Geneva Conventions is now regarded as customary international law.<sup>4</sup> It applies "to all parties to a conflict regardless of their legal status or reciprocity" and "offers a minimal

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<sup>1</sup> *The Prosecutor vs. Jean-Paul Akayesu*, 1998 ICTR-96-4-T (Judgment Sept. 2, 1998) at 4 (Section 1.2) <<http://www.un.org/ict/english/judgements/akayesu.html>, visited 9/11/98> [hereinafter ICTR Judgment].

<sup>2</sup> ICTR Judgment at 4-5 (Section 1.2).

<sup>3</sup> 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, 143 n.607 (1998).

<sup>4</sup> Steven R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 92 (1997). See also JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 8 (1998) {quoting Report to the Secretary-General submitted pursuant Security Council Resolution 808 (1993)}.

level of protection for persons not taking part in the hostilities."s

The International Criminal Tribunal for Rwanda was established by the United Nations Security Council by Resolution 955 of November 1994.<sup>6</sup> The statute of the Rwanda Tribunal is annexed to Resolution 955.<sup>7</sup> Common Article III applies to the conflict in Rwanda since it is an internal conflict and the Tutsis are a protected group(based on **ethnicity**).<sup>8</sup> However, the Tribunal found that the acts of Mr. Akayesu did not meet its standard. It held that it was not proven "beyond reasonable doubt that [his] acts . . . were committed in conjunction with the armed conflict.,<sup>9</sup>

The standard of applicability for Common Article III used by the Rwanda Tribunal is in conflict with the Yugoslavia Tribunal's standard. In the Statute for the Rwanda Tribunal, the prosecutor's burden of proof for a finding that Mr. Akayesu violated Article IV was to demonstrate that Mr. Akayesu:

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<sup>5</sup> STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 42 (1997).

<sup>6</sup> ICTR Judgment at 2 (section 1.1) .

ICTR Judgment at 2 (Section 1.1) .

ICTR Judgment at 106 (Section 6.5) .

<sup>9</sup> ICTR Judgment at 108 (Section 7.1) .

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 fulfil[1] the war efforts.<sup>10</sup>

The Trial Chamber held that this burden had not been met and therefore the defendant "did not incur individual criminal responsibility under counts 6,8,10,12 and 15 of the Indictment."<sup>11</sup> Counts 6, 8, 10, 12, and 15 were the counts which charged Akayesu with violations of Common Article III of the 1949 Geneva Conventions and the 1977 Additional Protocol.<sup>12</sup>

Although the Chamber found Common Article IIT applied to the internal armed conflict in Rwanda and it also protected the victims of the genocide,<sup>13</sup> it found that there was not enough evidence to demonstrate how Akayesu was aiding the effort against the RPF nor in what capacity and he was therefore not guilty under COMITton Article 111.<sup>14</sup>

Article 6 of Statute of the International Criminal Tribunal for Rwanda states, "a person who planned, instigated, ordered, committed or otherwise aided and

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<sup>10</sup> ICTR Judgment at 108 (Section 7.1) .

<sup>14</sup> ICTR Judgment at 108 (Section 7.1) .

<sup>12</sup> ICTR Judgment at 108 (Section 7.1) .

<sup>13</sup> ICTR Judgment at 106 (Section 6.5)

abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.<sup>14</sup> Article 4 includes violations of Common Article III of the Geneva Conventions and of Additional Protocol 11.<sup>16</sup>

The Rwanda Tribunal stated that Mr. Akayesu had to be found, beyond a reasonable doubt, to have acted "either for the Government or the Hutu military in the execution of their respective conflict objectives."<sup>17</sup> It reasoned that he would incur individual criminal responsibility only if it was shown that "by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of hostilities."<sup>18</sup>

*B. Common Article III Is Applicable To Akayesu In His Position As Bourgmestre*

The test of applicability for Common Article III used by the Rwanda Tribunal contradicts Article 6. While Article 6 assigns individual criminal responsibility to anyone who

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<sup>14</sup> ICTR Judgment at 108 (Section 7.1) •

<sup>15</sup> ICTR - Statute of the Tribunal <<http://www.un.org/ictt/statute.html>> (visited Nov. 11, 1998).

<sup>16</sup> ICTR - Statute of the Tribunal <<http://www.un.org/ictt/statute.html>> (visited Nov. 11, 1998).

<sup>17</sup> ICTR Judgment at 108 (Section 7.1).

<sup>18</sup> ICTR Judgment at 108 (Section 7.1).

violates Common Article 111,<sup>19</sup> the Rwanda Tribunal has inferred an additional requirement of military participation or coercion by the Government. This additional requirement limits the reach of Article 6.

Under this more specific standard, Akayesu was found not guilty of violations of Common Article 111.<sup>20</sup> Even though Akayesu was seen numerous times wearing a military jacket and gave limited assistance to the Interahamwe military in his role as Bourgmestre,<sup>21</sup> he was not found to have met its standard for liability.

#### *1. Acting in Military Capacity*

This standard sets a dangerous precedent. If wearing a military jacket and working with the Interahamwe the military is not evidence of support for the Government's action or membership in the military, then what is? It is especially difficult in an internal armed conflict to determine who is or is not a member of the military.

In a civil war, the country is in a state of chaos and the military for both sides generally will not be as organized as those of individual states in international

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<sup>19</sup> 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 5 (1998).

<sup>20</sup> ICTR Judgment at 120 (Section 8) .

<sup>21</sup> ICTR Judgment at 108 (Section 7.-1).

conflicts. This makes it more difficult to ascertain who is and who is not a member of the military partly because ordinary citizens will participate and assist the armed forces in varying capacities. There is a fine line between being an innocent civilian and a member of the military. There is less organization in times of civil war and actors may participate in the war effort or genocide without other members of the effort and official military knowing about it.

The fact that the military unit may not have ordered the acts or known about them does not mean that the actor is not acting in a military capacity. As bourgmestre, Akayesu "had exclusive control over the communal police. [and authority over] any gendarmes put at the disposal of at the commune[.],<sup>22</sup> Therefore, his authority is equivalent to that of a military leader in the Taba commune.<sup>23</sup> However, Akayesu would be no less culpable if he was an official member or leader in the military.

Akayesu was in a position of authority as bourgmestre similar to that of Yamashita as military governor of the

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<sup>22</sup> ICTR Judgment at 20 (Section 1.5).

<sup>23</sup> The Rwanda Tribunal found that "the bourgmestre is the most powerful figure in the Commune." *Id.* at 20 (Section 1.5).

Philippines during World War II.<sup>24</sup> Their respective positions imposed an affirmative duty on them to "take such measures as were within [their] power and appropriate in the circumstances to protect prisoners of war and the civilian population."<sup>25</sup> However, Yamashita was found liable for war crimes committed under his regime while Akayesu was not.<sup>26</sup>

The Rwanda Tribunal did not view the police force of Taba as equivalent to a military unit<sup>27</sup> nor Akayesu as equivalent to a military leader. This conflicts with the commentary to Common Article III which listed police forces in its definition of armed forces.<sup>28</sup> Therefore, as bourgmestre with "exclusive control over the communal police[,]U29 Akayesu may be seen as a leader of an armed forces unit.

## 2. *Acting Under Mandate of Government*

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<sup>24</sup> *In Re Yamashita*, 327 U.S. 1, 2.7 (1946).

<sup>25</sup> *In Re Yamashita*, 327 U.S. 1, 27 (1946). Akayesu performed executive functions and maintained public order within his commune as bourgmestre. ICTR Judgment at 17 (Section 1.5). He had exclusive control over the communal police as well. *Id.*

<sup>26</sup> See *In Re Yamashita*, 327 U.S. 1 (1946) and ICTR Judgment.

<sup>27</sup> **Even if Akayesu had been issued the gendarmes he requested from the Prime Minister**, (ICTR Judgment at 39 (Section 5.2.1), the chamber would likely still not find that he had "command authority over a military force." ICTR Judgment at 19 (Section 1.5).

<sup>28</sup> 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 146 n. 617 (1998).

<sup>29</sup> ICTR Judgment at 19 (Section 1.5).

The presence of Interahamwe personnel and lack of support from governmental officials when Akayesu requested it, suggest coercion by the government. However, this does not appear to be the case since Akayesu directed the Interahamwe to commit acts of violence. Another reason is that Akayesu did not claim that he was mandated to support the war effort.

The Rwanda Tribunal broke from past practice in holding that Akayesu would only be liable if he acts under the military command or is "legitimately mandated and expected, as a public official<sup>h</sup> to support the war effort."<sup>30</sup> In the 1919 Paris Peace Treaty, it was agreed that anyone can be tried and punished by the military courts of their adversary for violations of the laws of war.<sup>31</sup> This was also recognized in the Military Tribunals in occupied Germany where "any person without regard to nationality or the capacity in which he acted" could be convicted if he was a principal, accessory, "took a consenting part", was connected with the plans, or "was a member of any organization or group connected with the commission of any

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<sup>30</sup> ICTR Judgment at 108 (Section 7.1).

<sup>31</sup> International Human Rights Reports, Vol. 4, No.3, Sept. 1997, The International Criminal Tribunal for the Former Yugoslavia, Opinion and Judgment of May 1997, Prosecutor v. Dusko Tadic, p. 804-805.

such crime           <sup>32</sup> The broad language of the Paris Treaty and the TMT for Germany imply that civilians as well as members of the military and Government could be liable for violations of the laws of war, including Common Article III.

The standard used by the Rwanda Tribunal contradicts the Yugoslavia Tribunal's standard of applicability for Common Article III as well. The Yugoslavia Tribunal required the acts be: "(i) [] committed within the context of an armed conflict; (ii) have a close connection to the armed conflict; and (iii) [be] committed against persons taking no active part in hostilities."<sup>33</sup>

### 3. *Analogy to Tadic Case*

In *Prosecutor v. Dusko Tadic*, Tadic was found guilty for violations of Common Article III and Additional Protocol II. The Statute for the Yugoslavia Tribunal used the same standard as Article 6 of the Statute for the Rwanda Tribunal.<sup>34</sup> However, the Tribunal for the Yugoslavia Tribunal did not further specify and narrow the

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<sup>32</sup> International Human Rights Reports, Vol 4, No.3, *Sept.* 1997, The International Criminal Tribunal for the Former Yugoslavia, Opinion and Judgment of May 1997, *Prosecutor v. Dusko Tadic*, p. 805.

<sup>33</sup> International Human Rights Reports, Vol. 4, No.3, *Sept.* 1997, The International Criminal Tribunal for the Former Yugoslavia, Opinion and Judgment of May 1997, *Prosecutor v. Dusko Tadic*, p. 785.

<sup>34</sup> Article 6 of the Rwanda Tribunal is identical to Article 7 of the Yugoslavia statute. JOHN R.W.D.JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* 72 (1998).

applicability of this article as that of the Rwanda Tribunal did.<sup>35</sup> There was no question whether Tadic could be found liable under Common Article III. The status of Akayesu and Tadic are the same. Both he and Akayesu were local civilian leaders. Akayesu was a member of a group connected with the commission of these crimes in that he was a government official and a member of the ruling party which was advocating the crimes against humanity.<sup>36</sup> He was a member of MDR.<sup>37</sup> Further evidence of his political activity are his candidacy and subsequent election to the position of Bourgmestre.<sup>38</sup>

Neither Tadic nor Akayesu were members of the military. Tadic was a traffic Cop<sup>39</sup> and leader of the Serb party in the town of Kozarac, who spoke out on his views of Serbian nationalism<sup>40</sup> and ethnic cleansing well before the Serbs

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<sup>35</sup> The Yugoslavia Tribunal held that Common Article III applied to Tadic. International Human Rights Reports, Vol. 4, No.3, Sept. 1997, The International Criminal Tribunal for the Former Yugoslavia, Opinion and Judgment of May 1997, Prosecutor v. Dusko Tadic, p.785. They only required that the offenses be "closely related to the armed conflict as a whole." Id. at 771.

<sup>36</sup> ICTR Judgment at 17 (Section 1.5) .

<sup>37</sup> ICTR Judgment at 17 (Section 1.5) .

<sup>38</sup> ICTR Judgment at 17 (Section 1.5) .

<sup>39</sup> See Tadic Judgment ¶190.

<sup>40</sup> See Tadic Judgment ¶182.

took over Kozarac (where Tadic lived) .<sup>41</sup> Unlike Tadic, Akayesu spoke out against the violence at first, but later participated in the genocide.<sup>42</sup> It is incongruous for Tadic to be held liable under Common Article III and for Akayesu not to be.

The standard of article 7(1) of the Yugoslavia Tribunal Statute and Article 6(1) of the Rwanda Tribunal Statutes applied to anyone who violated provisions of the Rwanda Statute including violations of Common Article 111.<sup>43</sup> Mr. Akayesu should have been found guilty under this standard. Mr. Akayesu "aided and abetted in the preparation or execution"<sup>44</sup> of mass killings, torture and rape of Tutsis by standing silently by while these actions were carried out in Taba. As Bourgmestre, he had the authority to put a stop to these acts, especially when the ones committed just outside

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<sup>41</sup> See Tadic Judgment ¶182 & 187.

<sup>42</sup> See ICTR Judgment at 38 (Section 5.2.1).

<sup>43</sup> **The Statutes of both the Yugoslavia and Rwanda Tribunals "make culpable those who 'planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution' of one of the enumerated crimes."** RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 119 (1997). (citing Yugoslavia Tribunal Statute, art. 7(1); Rwanda Tribunal Statute, art. 6(1) and referencing 1996 ILC Report, at 18 (art. 2), 22-27 and Torture Convention, art. 4(1), at 198).

<sup>44</sup> RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 119 (1997) (citing Yugoslavia Tribunal statute, art. 7(1); Rwanda Tribunal Statute, art. 6(1) and referencing 1996 ILC Report, at 18 (art. 2), 22-27 and Torture Convention, art. 4(1), at 198).

of his bureau office.<sup>45</sup> His implicit approval of these acts, by his presence at many of the atrocities and his inaction and silence, encouraged the actors to continue their systematic destruction of Tutsis in Taba.

The Rwanda Tribunal applied the Geneva Conventions to "persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities."<sup>46</sup> Akayesu was "otherwise engaged in the conduct of the hostilities" by virtue of his authority.<sup>47</sup> His acts included rounding up Tutsis and ordering that they be killed, among others.<sup>48</sup> He was able to perform these acts because he had the authority and the resources.<sup>49</sup> As bourgmestre, Akayesu was "the most important person in the commune."<sup>50</sup> He used his authority to order both the

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<sup>45</sup> ICTR Judgment at 5 (Section 1.2).

<sup>46</sup> ICTR Judgment at 106 (Section 6.5).

<sup>47</sup> His position as bourgmestre gave him much authority and allowed him to order others around.

<sup>48</sup> Others include direct and public incitement to commit genocide and working with the Interahamwe. ICTR Judgment at 116, 55 (Section 7.8 & 5.2.4 (Indictment ¶19)).

<sup>49</sup> As an authority figure, Akayesu could direct citizens and use them to capture Tutsis. "The people generally followed orders given by the authorities even if the order leads to any wrongful conduct." ICTR Judgment at 47 (Section 5.2.3) (Indictment ¶18, Testimony of Witness S). "Witness S, Witness V, and Ephrem Karangwa, the current bourgmestre of Taba, all testified that the people of the commune respected and followed every order of the Accused [Akayesu], as bourgmestre." Id. at 37 (Section 5.2.1 (Indictment ¶12)).

<sup>50</sup> Id. at 37 (Section 5.2.1 (Indictment ¶12)).

Interahamwe and the people to find Tutsi teachers and kill them.<sup>51</sup> The Interahamwe and the people of Taba complied with his orders.<sup>52</sup>

The Rwanda Tribunal further specified to whom it found the Geneva Conventions to apply.<sup>53</sup> It required Akayesu to be a member of the military or a Government official who was mandated or expected "to support or fulfil[1] the war efforts"<sup>54</sup> This standard reflected the Tribunal's view of the need for there to be a nexus between the military or Government and those who are "otherwise engaged in the conflict of hostilities."<sup>55</sup> This more specific standard may be easier to apply; however, it leads to incongruous results, as seen in the above comparison with the Tadic case.<sup>56</sup>

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<sup>51</sup> See *Id.* at 56 (Section 5.2.4 (Indictment ¶20)).

<sup>52</sup> See *Id.* at 56 (Section 5.2.4 (Indictment ¶20)).

<sup>53</sup> See **ICTR Judgment at 108 (Section 7.1)**. The test created by the Rwanda Tribunal for liability under Article III required that Akayesu "actively support the war effort", commit the acts in "conjunction with the armed conflict", be "a member of the armed forces", or be "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 fulfil the war efforts." *Id.*

<sup>54</sup> ICTR Judgment at 108 (Section 7.1)

<sup>55</sup> ICTR Judgment at 106 (Section 6.5)

<sup>56</sup> See *infra* page 10, section B. 3.

The distinction in the Rwanda Tribunal's standard between those who are members of the military or conscripted by the government and those acting on their own is illogical. A person participating in genocide on their own initiative would be more morally culpable than one who was pressured to join in or commanded to.

### C. *Complicity*

Akayesu should have been found guilty of complicity in genocide. In Count 2, the Rwanda Tribunal for Akayesu's case held that he was not guilty of complicity, but, in the alternative, was guilty of genocide.<sup>57</sup> Common Article III does not contain a definition of conspiracy or complicity.<sup>58</sup> Other tribunals and codes have conflicting definitions of these terms.<sup>59</sup> Since the Statute did not provide a definition of complicity, the Tribunal defined it "as per the Rwandan Penal Code [.J]"<sup>60</sup> The Chamber held an accused is guilty of complicity as an accomplice to genocide if: "he

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<sup>57</sup> ICTR Judgment at 119(Section 7.8).

<sup>58</sup> RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 119 (1997).

<sup>59</sup> RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 119 (1997). Common Article 3 of the Geneva Convention on the Prevention and Punishment of the Crime of Genocide provides that conspiracy to commit genocide, complicity in genocide and genocide are punishable. (ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR, 1948 *United Nations Convention, Genocide* 159) .

<sup>60</sup> ICTR Judgment at 90 (Section 6.3.2) .

or she knowingly and willfully aided or abetted or instigated another to commit a crime of genocide, while being aware of his genocidal plan, even where the accused had no specific intent to . . . [commit genocide] .”<sup>61</sup>

The Rwanda Tribunal ruled that complicity and conspiracy to commit genocide are “mutually exclusive by definition” and therefore Mr. Akayesu could not be found guilty of both crimes for the same act.<sup>62</sup> If different acts constitute different crimes, then one can be found guilty of both. In the case of conspiracy, one can be found liable for the underlying acts of the conspiracy as well as for conspiracy itself. However, in the case of complicity, the Rwanda Tribunal held that one cannot be found to be both the principal and an accessory for the same offense.<sup>63</sup>

The judges found Akayesu acted with specific intent to commit genocide and therefore, was guilty of genocide and not complicity.<sup>64</sup> To be found guilty of complicity, they reasoned that only “knowledge of the genocidal plan/<sup>65</sup> was

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<sup>61</sup> ICTR Judgment at 118 (Section 7.8) •

<sup>62</sup> ICTR Judgment at 115 (Section 7.8)

<sup>63</sup> ICTR Judgment at 115 (Section 7.8)

<sup>64</sup> ICTR Judgment at 120 (Section 7.8)

<sup>65</sup> ICTR Judgment at 91 (Section 6.3.2)

required and not a specific intent to commit genocide.<sup>66</sup> They reasoned that because Akayesu acted with the specific intent of destroying the Tutsis "while inflicting acute suffering on its members[,]1167 he should be guilty of genocide, not complicity.<sup>68</sup> This appears to be inconsistent with their definition of complicity which does not require a lack of specific intent; it instead only states that one is not required to be found guilty of complicity. In its holding, the Chamber effectively abandoned the crime complicity in favor of genocide.

Since the Chamber requires a positive act in its definition of complicity,<sup>69</sup> Akayesu was not found guilty of complicity for abetting for the instances where he stood idly by while Tutsis were beaten, raped and killed by others.<sup>70</sup> Their reasoning is inconsistent with their definition of complicity, "knowingly and willfully aided or abetted or instigated another to commit a crime of genocide.<sup>1171</sup> "[I]nternational law generally recognized that

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<sup>66</sup> ICTR Judgment at 119 (Section 7.8).

<sup>67</sup> ICTR Judgment at 119 (Section 7.8)

<sup>68</sup> ICTR Judgment at 120 (Section 7.8) .

<sup>69</sup> ICTR Judgment at 92 (Section 6.3.2)

<sup>70</sup> ¶12(A) and ¶12(B) of the Indictment refer to Akayesu's inaction. ICTR Judgment at 5 (Section 1.2) .

<sup>71</sup> ICTR Judgment at 118 (Section 7.8).

persons may be held culpable for various acts associated with a recognized crime, even if they did not directly commit it.”<sup>72</sup> After April 18, 1994, he no longer tried to prevent killings of Tutsis in Taba and instead chose to collaborate in violence against Tutsis instead.<sup>73</sup>

Therefore, he should be held liable for complicity in addition to his conviction for abetting “in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on [its] members [.]”<sup>74</sup> The judges were concerned that this would be unfair in that it would hold the Defendant liable for two crimes for the same acts.<sup>75</sup> Additionally, they held that this would in effect deem Akayesu liable as both the principal and an accessory for the same acts which is illogical.<sup>76</sup>

However, he would not be held liable as the principal for acts in Paragraphs 12(A) and (B), but instead an accomplice. According to the Rwandan Penal Code, one “who

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<sup>72</sup> RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 118 (1997).

<sup>73</sup> ICTR Judgment at 40 (Section 5.2.1) .

<sup>74</sup> ICTR Judgment at 116 (Section 7.8)

<sup>75</sup> ICTR Judgment at 89 (Section 6.3.2) .

<sup>76</sup> ICTR Judgment at 115 (Section 7.8)

knowingly aids and abets the perpetrator' are deemed accomplices.<sup>77</sup> Akayesu knew his assisting the Interahamwe in rounding up Tutsis would aid and abet them in their plan to commit genocide. Following the logic of the Chamber, Akayesu could not be a principal for these acts since no specific intent was proven for these instances which they find to be necessary to be liable for genocide. However, this intent may be implied through his inaction.

This distinction based on specific intent is a different standard than seen in earlier war crimes cases. In a case tried before the French Permanent Military Tribunal, the intent required for complicity could include a specific intent where the accomplice knew his acts would lead to the commission of a war crime and he either intended for it to happen or the intent could be found in reckless indifference to the commission of the war crime.<sup>78</sup>

However, Akayesu claims and the Rwanda Tribunal agreed, that before April 18, 1994, he had no specific intent to commit genocide, instead, he tried to prevent violence in

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<sup>77</sup> ICTR Judgment at 89 (Section 6.3.2).

<sup>78</sup> **International Human Rights Reports**, Vol. 4, No.3, Sept. 1997, The International Criminal Tribunal for the Former Yugoslavia, Opinion and Judgment of May 1997, Prosecutor v. Dusko Tadic, p. 813 (citing *Gustav Becker, Wilhelm Weber and 18 Others*, Vol. VII *Law Reports* 67, 71).

Taba.<sup>79</sup> Therefore, he should be held liable for complicity in genocide for his acts before that date. He had stood idly by while genocidal acts were committed just outside of his bureau office.<sup>80</sup>

The Chamber distinguished complicity from aiding and abetting. It reasoned that "complicity requires a positive act, **i.e.** an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action."<sup>81</sup> This is inconsistent with the ICTY

In this case, Akayesu did not shoot or kill all of the Tutsi victims in the Taba commune. Regarding those victims, he did aid and abet in their killings and torture and ordered others to do so.<sup>82</sup> He should have been found guilty of complicity in genocide as well as for genocide. Under Australian common law "the most marginal act of assistance or encouragement can amount to an act of complicity in the crime, and avers that "aiding and abetting includes all acts

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<sup>79</sup> ICTR Judgment at 38-40 (Section 5.2.1).

<sup>80</sup> ICTR Judgment at 38 (Section 5.2.1). Akayesu did not even try to prevent killings of Tutsi after April 18, 1994. Id. "[H]e consciously chose the course of collaboration with violence against Tutsi rather than shielding them from it." Id.

<sup>81</sup> ICTR Judgment at 92 (Section 6.3.2).

<sup>82</sup> ICTR Judgment at 55 (Section 5.2.4 ¶19-20) in ¶19 Akayesu "order the local militia to kill" eight men he was holding in the bureau communal and he ordered; in ¶20 he ordered the Interahamwe to bring him teachers and ordered local people and the Interahamwe to "kill 'intellectual people'".

of assistance by words, by acts, by encouragement, support or again by presence.<sup>83</sup> Under that standard his omission to act would be grounds for finding him guilty of complicity.

Akayesu could be found liable for complicity and not abetting genocide if the acts of those he ordered were imputed to him. The doctrine of command responsibility may apply to Mr. Akayesu. Command responsibility is a special form of culpability recognized by international law for "those not directly engaging in the crime."<sup>84</sup> This doctrine applies certain legal responsibilities on commanders for acts of their subordinates.<sup>85</sup> As Bourgmestre, Mr. Akayesu was in charge of the police which acted as a militia. He allowed the resources of his police station to be used by the Interahamwe to track down and kill Tutsis.<sup>86</sup> He also

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<sup>83</sup> International Human Rights Reports, Vol 4, No.3, Sept. 1997, The International Criminal Tribunal for the Former Yugoslavia, Opinion and Judgment of May 1997, Prosecutor v. Dusko Tadic, p. 807.

<sup>84</sup> RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 119 (1997).

<sup>85</sup> RATNER & ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 119-120 (1997).

<sup>86</sup> ICTR Judgment at 55 (Section 5.2.4 - Factual Findings). Paragraph 19 states that Akayesu handed over eight prisoners to the Interahamwe and ordered the "local militia to kill them. Id.

used his authority and the resources of his office to track down, kill and torture Tutsis on his own initiative.<sup>87</sup>

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<sup>87</sup> rCTR Judgment at 45-46 (Section 5.2.3). Testimony of Witness S discussing the use of local police and citizens by Akayesu to surround the house of Ephrem Karangwa to prevent him from escaping as well as to capture the three brothers who were in the house. rd. Akayesu also ordered the Interahamwe around and ordered them to bring teachers to him and to kill 'intellectual people.' rd.