
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

CRIMINAL PROSECUTION UNDER THE
STATUTE OF THE INTERNATIONAL
CRIMINAL TRIBUNAL FOR RWANDA
OF
PUBLIC OFFICIALS

Prepared by Walter S. Murray
UCWR
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I. Introduction

A. QUESTION PRESENTED

This legal memorandum is based upon the following question presented by the Office of the Prosecutor (the “Prosecutor”) for the International Criminal Tribunal for Rwanda (the “ICTR” or “Tribunal”):

For purposes of establishing the culpability of an accused before the ICTR under Article 4 of the Statute for Rwanda (the “Statute”), what are the nexus requirements that need to be proved both in relation to the war crimes alleged and the person(s) who commit them?¹

B. SCOPE OF THE QUESTION

On September 2, 1998 and May 21, 1999, the ICTR rendered decisions in the *Akayesu* and *Kayishema-Ruzindana* cases respectively.² More specifically, the ICTR acquitted Akayesu of five counts of alleged violations of Article 4 of the Statute³ and Kayishema and Ruzindana were similarly acquitted of eight and two counts respectively of alleged violations of Article 4 of the Statute.⁴ As the question presented and the acquittals of the accused suggest, the Trial Chambers held that Prosecutor did not establish the requisite nexus required in order to convict the accused of violations under Article 4 of the Statute.

¹ United Nations International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topic No. 8, Facsimile dated 26 August 1999. The full question presented by the Prosecutor is as follows: “Both in the *Akayesu* Judgement and in the *Kayishema-Ruzindana* Judgment the accused were acquitted for war crimes under Article 4 of the Statute. The Tribunal seems to have applied different link or nexus requirements both in relation to the crimes and the persons who committed them. Please analyze these requirements in the light of international humanitarian law.”

² *Akayesu* Judgement at 1; *Kayishema-Ruzindana* Judgement at 1. [reproduced tab 1]

³ *Akayesu* Judgement at 189. [reproduced tab 1]

⁴ *Kayishema-Ruzindana* Judgement at 235 and 236. [reproduced tab 2]

Charges for having committed violations of Common Article 3 and Additional Protocol II, the two underlying legal instruments that comprise the whole of Article 4 of the Statute, are generally brought against a member of one of the military parties to a conflict.⁵ Thus, in order to be found guilty of violations under Article 4 of the Statute, it must first be factually proven that the individual(s) accused were members of the military class of perpetrators at the time the alleged crimes were committed. In *Akayesu*, Akayesu was an appointed Bourgmestre (i.e., Mayor) in the Taba commune.⁶ In *Kayishema-Ruzindana*, Kayishema was an appointed Prefect (i.e., Governor) in the Kibuye Prefecture⁷ and Ruzindana was a businessman in Remera, Kigali.⁸ Ultimately, the ICTR acquitted the above individuals based solely upon their civilian status. Therefore, the scope of the question presented will be limited to determining what the nexus requirements are for finding civil authorities guilty of violations under Article 4 of the Statute.

II. SUMMARY OF ARGUMENTS

FIRST: Article 4 of the Rwanda Statute consists of two legal documents: (1) Common Article 3, and (2) Additional Protocol II. Article 4 applies only to internal armed conflicts. The ICTR's applicability test for determining whether Article 4 applies to a conflict generally, and to a particular defendant specifically, is based upon the Prosecutor's ability to factually prove at trial the following four elements: (1) prove the existence of an internal armed conflict, (2) prove that the alleged crime(s) were committed *ratione personae* and *ratione loci*, (3) prove a nexus

⁵ Jordan J. Paust, M. Cherif Bassiouni, Sharon A. Williams, Michael Scharf, Jimmy Gurule, and Bruce Zagaris, *International Criminal Law*, at 978 (1996). [reproduced tab 3]

⁶ *Akayesu* Judgement paras. 2 and 3 at 6. [reproduced tab 1]

⁷ *Kayishema-Ruzindana* Judgement para. 20 at 6. [reproduced tab 2]

⁸ *Kayishema-Ruzindana* Judgement paras. 11 and 12 at 14. [reproduced tab 2]

between the alleged crime(s) and the armed conflict, and (4) prove the existence of a nexus between the accused and the armed services. Notwithstanding the general applicability of Common Article 3 and Additional Protocol II to the Rwanda conflict, the ICTR ultimately held, in both *Akayesu* and *Kayishema-Ruzindana*, that the Prosecutor failed to factually elements three and four above. The result of the ICTR's holding is that each of the accused was acquitted of all Article 4 war crimes under the Rwanda Statute.

SECOND: Concerning element three in the above ICTR Article 4 applicability test, requirement of a nexus between the alleged crime(s) and the armed conflict, the ICTR interpreted the nexus requirement to mean that the Prosecutor must factually prove a "direct" connection between the alleged crime(s) and the conflict. The ICTR defined the word "direct" to mean that the Prosecutor must factually prove that existence of a military presence in the area wherein the crimes were allegedly committed. Ultimately, the ICTR ruled that the Prosecutor failed to factually prove the existence of a nexus between the alleged crime(s) and the conflict in both *Akayesu* and *Kayishema-Ruzindana*. The narrow understanding and application of the ICTR's nexus requirement between the crime and the conflict, as it was applied in *Akayesu* and *Kayishema-Ruzindana*, is erroneous and not consistent with other international humanitarian law.

THIRD: Concerning element four in the above ICTR Article 4 applicability test, requirement of a nexus between the accused and the armed services, the ICTR argued that in order to hold an accused criminally responsible under Article 4 of the Statute, the Prosecutor must factually prove beyond a reasonable doubt that the accused acted for either the Government (i.e., FAR or Interahamwe) or the RPF *in the execution of their respective conflict objectives* and that the accused supported FAR government forces *against* the RPF (emphasis added).

Ultimately, the ICTR ruled that the Prosecutor failed to factually prove that the accused were ever members of FAR or that they ever supported the government in the war effort against the RPF. The narrow understanding and application of the ICTR's nexus requirement between the accused and the military, as it was applied in both *Akayesu* and *Kayishema-Ruzindana*, is erroneous and not consistent with other international humanitarian law.

III. LEGAL DISCUSSION

A. ARTICLE 4 OF THE STATUTE

Under Article 4 of the Statute of the ICTR, the United Nations granted the ICTR and the Prosecutor "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."⁹ Article 4 of the Statute applies only to internal armed conflicts¹⁰ and extends only to war crimes alleged to have been committed between 1 January 1994 and 31 December 1994.¹¹ Thus, before Article 4 of the Statute can even be considered applicable, the ICTR must first find that: (1) an internal armed conflict existed in Rwanda, and (2) that the alleged crimes took place during the statutorily prescribed time period.

To determine whether an internal armed conflict exists requires a careful examination of the criteria set forth for doing so in the two legal instruments that comprise Article 4 of the

⁹ Volume 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 4 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994)* (Annex), 8 November 1994. See full text of Statute for specific violations under Article 4 of the Statute. [reproduced tab 4]

¹⁰ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 206 (1998). [reproduced tab 5]

¹¹ Volume 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994)* (Annex), 8 November 1994. See full text of Statute for specific violations under Article 4 of the Statute. [reproduced tab 4]

Statute: (1) Common Article 3 to the Geneva Conventions of 12 August 1949, and (2) Additional Protocol II of 8 June 1977.¹²

1. COMMON ARTICLE 3

Common Article 3 was made a part of the four Geneva Conventions in 1949¹³ and established, for the first time, a minimum standard of conduct in internal armed conflicts.¹⁴ The main purpose of Common Article 3 is to protect the victims of war by helping to ensure that such victims would be treated humanely during the time of conflict. To that end, Common Article 3 established a protected class of persons including “persons taking no active part in the hostilities [and] members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause....”¹⁵ The application of Common Article 3 does not require both parties to the conflict to also be parties to the Geneva Conventions.¹⁶ Moreover, the insurgent party to the conflict does not have to be a signatory to the Geneva Conventions in order to be bound by Common Article 3.¹⁷

¹² *Akayesu* Judgement para. 611 at 160. [reproduced tab 1]

¹³ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). The four Geneva Conventions that were established in 1949 are: (1) Geneva Convention for the Amelioration of the Condition of the Wounded in the field, (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (3) Geneva Convention Relative to the Treatment of Prisoners of War, and (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War. [reproduced tab 5]

¹⁴ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). [reproduced tab 5]

¹⁵ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). [reproduced tab 5]

¹⁶ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 455 (1996). [reproduced tab 6]

¹⁷ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 455 (1996). [reproduced tab 6]

The criteria for determining whether an internal armed conflict exists under Common Article 3 is broad and is based upon, *inter alia*, a showing of any one of the following conditions: (1) an insurgent party, in revolt against a lawful government, has an organized military force and an authority responsible for its actions in control of a determinate territory and has the means of respecting Common Article 3; (2) a legal government utilizes its regular military forces against an insurgent party which has an organized military in control of a determinate territory; or (3) armed forces act under an organized authority and are willing to follow the laws of war.¹⁸

Lastly, violations of Common Article 3 differ from violations under Articles 2 and 3 of the Statute in two material respects: (1) unlike the crime of genocide, no specific intent has to be shown to violate Common Article 3,¹⁹ and (2) unlike crimes against humanity, violations under Common Article 3 require no showing of widespread or systematic conduct.²⁰ Thus, a single act could constitute a violation of Common Article 3.²¹

2. ADDITIONAL PROTOCOL II

Additional Protocol II was created to supplement and strengthen Common Article 3.²² Additional Protocol II expanded the protected class of victims under Common Article 3 in order to extend greater protection to civilians during an internal armed conflict. Accordingly, the class

¹⁸ *Kayishema-Ruzindana* Judgement para.169 at 68. [reproduced tab 2]

¹⁹ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). [reproduced tab 5]

²⁰ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). [reproduced tab 5]

²¹ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). [reproduced tab 5]

²² Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 208 (1998). [reproduced tab 5]

of protected persons was extended to include, “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted....”²³

Unlike Common Article 3, Additional Protocol II has a stricter and more limiting criteria for determining whether an internal armed conflict exists. To meet the criteria of Additional Protocol II, it must be shown that all of the following conditions are met: “(1) Protocol I does not apply, and an armed conflict is taking place between the armed forces of a High Contracting Party to Protocol II and dissident armed forces;²⁴ (2) the dissident armed forces are under responsible command;²⁵ (3) the dissident forces exercise control over a portion of the territory, enabling them to carry out sustained and concerted military operations;²⁶ and (4) the dissident forces are capable of implementing Protocol II.”²⁷

B. APPLICABILITY OF COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II TO KAYISHEMA-RUZINDANA AND AKAYESU

As stated above, the fundamental element that is necessary to establish before Common Article 3 and Additional Protocol II will be enforced against the parties to a conflict is the legal finding that an internal armed conflict does, in fact, exist.²⁸ In *Kayishema-Ruzindana*, the

²³ Volume 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 209 (1998). [reproduced tab 5]

²⁴ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 456 and 457 (1996). [reproduced tab 6]

²⁵ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 456 and 457 (1996). [reproduced tab 6]

²⁶ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 456 and 457 (1996). [reproduced tab 6]

²⁷ M. Cherif Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia* 456 and 457 (1996). [reproduced tab 6]

²⁸ *Kayishema-Ruzindana* Judgement para.169 at 68. [reproduced tab 2]

Tribunal did not dispute the general application of both Common Article 3 and Additional Protocol II to the armed conflict that occurred in Rwanda between the Tutsi controlled RPF and the Hutu government controlled FAR.²⁹ Likewise, the *Akayesu* Tribunal did not dispute the general applicability of Article 4 of the Statute to the Rwandan conflict either.³⁰ Moreover, both Tribunals argued, *inter alia*, that Article 4 of the Statute would have been applicable to the conflict regardless of the characterization of the conflict because both FAR and RPF forces voluntarily agreed to be bound by it.³¹

Notwithstanding the general applicability of Common Article 3 and Additional Protocol II to the conflict, however, the ICTR deemed it necessary to expand the applicability test to determine more precisely the *ratione personae* (class of perpetrators and class of victims),³² and the *ratione loci* (relationship of crimes to the conflict). The ICTR further expanded the Article 4 applicability test by requiring the Prosecutor to also factually prove the existence of a nexus between the alleged crime(s) and the conflict³³ and a nexus between the accused and the

²⁹ *Kayishema-Ruzindana* Judgement paras. 156 and 157 at 64; Note that references to FAR and the Interahamwe or FAR/Interahamwe throughout this memorandum are to be construed as meaning that both FAR and the Interahamwe are to be considered as being one and the same entity. The significance of this is far reaching insofar as many of the allegations contained in the Judgements do not make specific references to the presence of FAR forces at the time a crime was committed. The presence of the Interahamwe, however, is referenced quite frequently. The distinction between the two will have a factual impact on the outcome of determining whether there exists the ICTR's requisite nexus between the accused and the armed parties to the conflict. As for the assertion that FAR and the Interahamwe are one and the same, See Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons From Rwanda*, 24 Yale J. Int'l L. 365, 389 (Summer 1999). [reproduced tab 2]

³⁰ *Akayesu* Judgement para. 639 at 167. [reproduced tab 1]

³¹ *Kayishema-Ruzindana* Judgement paras. 156 and 157 at 64. Note: Article 4 of the Statute was adopted by Rwanda on 19 November 1984 and the RPF stated to the International Red Cross Committee that they intended to be bound by it; See also *Akayesu* Judgement para. 617 at 161. [reproduced tab 1 and 2]

³² See *Akayesu* Judgement paras. 611 and 628 at 160 and 164 respectively. The ICTR argued that since Article 6 of the Statute criminalizes violations under Article 4 by creating individual criminal liability, it is therefore necessary to define a class of perpetrators and class of victims respectively for the purpose of determining who can be charged and who can bring charges against an individual under Article 4 of the Statute. [reproduced tab 1]

³³ *Kayishema-Ruzindana* para. 188 at 74. [reproduced tab 2]

military.³⁴ Concerning the establishing of a nexus, the ICTR stated that “[t]he term ‘nexus’ should not be understood as something vague and indefinite....”³⁵ In other words, the Prosecutor needs to specifically aver in the Indictment, and factually prove at trial, that: (1) the alleged crimes were directly linked to the conflict, and (2) the accused was directly linked to the military.

Having considered the foregoing, the ICTR’s complete test for determining the applicability of Article 4 of the Statute requires the Prosecutor to factually prove at trial the following four elements: (1) prove the existence of an internal armed conflict,³⁶ (2) prove that the alleged crime(s) were committed *ratione personae* and *ratione loci*.³⁷ (3) prove a nexus between the alleged crime(s) and the armed conflict,³⁸ and (4) prove the existence of a nexus between the accused and the armed services.³⁹ Elements two through four respectively are discussed at length below.

1. *RATIONE PERSONAE*: CLASS OF PERPETRATORS

According to the ICTR, the class of perpetrators includes “individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties.”⁴⁰ Stated differently, the class of perpetrators “would in most cases be limited to commanders, combatants and other members of the armed forces.”⁴¹ The ICTR argued the need for a

³⁴ *Kayishema-Ruzindana* para. 188 at 74. [reproduced tab 2]

³⁵ *Kayishema-Ruzindana* para. 188 at 74. [reproduced tab 2]

³⁶ *Kayishema-Ruzindana* Judgement para. 169 at 68. [reproduced tab 2]

³⁷ *Kayishema-Ruzindana* Judgement para. 169 at 68. [reproduced tab 2]

³⁸ *Kayishema-Ruzindana* Judgement para. 169 at 68. [reproduced tab 2]

³⁹ *Kayishema-Ruzindana* Judgement para. 169 at 68. [reproduced tab 2]

⁴⁰ *Kayishema-Ruzindana*, para. 175 at 70. [reproduced tab 2]

⁴¹ *Akayesu* Judgement para. 630 at 165. [reproduced tab 1]

classification of perpetrators due to the fact that Article 6(1) of the Statute imputes criminal liability on individuals for Article 4 violations of the Statute.⁴²

2. *RATIONE PERSONAE*: CLASS OF VICTIMS

The ICTR argued that if there exists a class of perpetrators under Article 4 of the Statute, then there must also exist a class of victims who can bring charges under Article 4. The ICTR considers the class of victims to consist of non-combatants and individual civilians or a civilian population.⁴³ A civilian population is further defined by the ICTR as being comprised of persons who are not members of the armed forces.⁴⁴ Protocol II declares that civilians shall enjoy protection unless and for such time as they take a direct part in the hostilities.⁴⁵

3. *RATIONE LOCI*: RELATIONSHIP OF CRIME(S) TO CONFLICT

According to international law *ratione loci* means that Common Article 3 and Additional Protocol II apply to the entire territory of Rwanda and that all criminal acts under the Statute “shall remain prohibited at any time and in any place whatsoever.”⁴⁶ In *Tadic*, the International Criminal Tribunal for Yugoslavia (“ICTY”) concluded that:

[T]he geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of Common Article 3 of the Geneva

⁴²Under Article 6(1), “[a] person who planned, instigated, ordered, committed or otherwise aided and 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. Statute of the International Tribunal for Rwanda, S/RES/955 (1994)* (Annex), 8 November 1994. [reproduced tab 4]

⁴³ *Akayesu* Judgement paras. 629 and 630 at 165; See also *Kayishema-Ruzindana* Judgement para. 175 at 70. [reproduced tab 1]

⁴⁴ *Kayishema-Ruzindana*, para. 180 at 71. [reproduced tab 2]

⁴⁵ *Kayishema-Ruzindana*, para. 180 at 71. [reproduced tab 2]

⁴⁶ *Kayishema-Ruzindana*, para. 182 at 72. [reproduced tab 2]

Conventions are those taking no active part (or no longer taking an active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations.⁴⁷

The implication of the ICTY's understanding of *ratione loci* to *Akayesu* and *Kayishema-Ruzindana* is significant and critically important for the Prosecutor to understand, as it greatly expands the ICTR's nexus requirement between the accused, alleged war crime(s), and the conflict. Notwithstanding the fact that the ICTR accepted the ICTY's understanding of *ratione loci*, the ICTR nonetheless failed to apply it in *Akayesu* and *Kayishema-Ruzindana*, which ultimately resulted in the acquittal of the accused of all alleged Article 4 violations. If, as the ICTR suggests, the applicability of Article 4 to an armed conflict is supposed to be "interpreted in a broad territorial and temporal framework,"⁴⁸ then the ICTR should have applied that principle to *Akayesu* and *Kayishema-Ruzindana*. Instead, by acquitting the accused of Article 4 war crimes, the ICTR emphasized form over substance.

4. NEXUS BETWEEN CRIME AND CONFLICT

In *Kayishema-Ruzindana*, the ICTR held that, "[a] direct connection between the alleged crimes [...] and the armed conflict should be established factually."⁴⁹ Moreover, the ICTR specifically stated that "[i]f there is not a direct link between the offences and the armed conflict, then there is no ground for the conclusion that Common Article 3 and Protocol II have been violated."⁵⁰ Similarly in *Akayesu*, the ICTR held that the Prosecutor must factually prove that

⁴⁷ *Kayishema-Ruzindana*, para. 182 at 72. [reproduced tab 2]

⁴⁸ *Kayishema-Ruzindana*, para. 597 at 218 and 219. [reproduced tab 2]

⁴⁹ *Kayishema-Ruzindana* para. 188 at 74. [reproduced tab 2]

⁵⁰ *Kayishema-Ruzindana*, para. 185 at 74. [reproduced tab 2]

Akayesu was a member of the armed forces.⁵¹ The ICTR interprets the word “direct” to mean that in order for a nexus between the crime and the conflict to be established, there must be an actual military presence in the area wherein the crimes were allegedly committed.⁵²

The narrow understanding and application of the ICTR’s nexus requirement between the crime and the conflict is, as it was applied in both *Akayesu* and *Kayishema-Ruzindana*, erroneous and not consistent with other international humanitarian law.

5. NEXUS BETWEEN ACCUSED AND MILITARY

The ICTR argues that violations of Common Article 3 and Additional Protocol II can only occur during or as a result of military operations.⁵³ Thus, according to the ICTR, Article 4 of the Statute basically applies only to members of the military.⁵⁴ Moreover, the ICTR reasoned that if only members of the military can commit violations of Article 4, then it stands to reason that only members of either FAR/Interahamwe or RPF can be convicted of Article 4 crimes under the Statute, if factually proven.⁵⁵ Thus, the ICTR argued that only military combatants should be charged for Article 4 violations.⁵⁶

Accordingly, the ICTR in *Kayishema-Ruzindana* held that in order “to hold [an] accused criminally responsible for serious violations of Common Article 3 and Protocol II it should be proved that there was some sort of a link [or nexus] between the armed forces and the

⁵¹ *Akayesu* Judgement para. 643 at 168. [reproduced tab 1]

⁵² *Kayishema-Ruzindana*, para. 183 at 73. [reproduced tab 2]

⁵³ *Kayishema-Ruzindana*, para. 174 at 69. [reproduced tab 2]

⁵⁴ *Kayishema-Ruzindana*, para. 174 at 69. [reproduced tab 2]

⁵⁵ *Kayishema-Ruzindana*, para. 174 at 69 and 70. [reproduced tab 2]

⁵⁶ *Kayishema-Ruzindana*, para. 174 at 69. [reproduced tab 2]

accused.”⁵⁷ Similarly, the ICTR held in *Akayesu* that in order “[f]or 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 [i.e., FAR and/or the Interahamwe] or the RPF *in the execution of their respective conflict objectives* (emphasis added). [...] Hence, the Prosecutor will have to demonstrate to the Chamber and prove that Akayesu was [...] a member of the armed forces under the military command of either of the belligerent parties.”⁵⁸ The ICTR also held in *Akayesu* that the Prosecutor must “establish sufficient evidence that showed exactly how and in what capacity Akayesu supported the FAR government forces *against* the RPF (emphasis added).”⁵⁹

The narrow understanding and application of the ICTR’s nexus requirement between the accused and the military, as it was applied in both *Akayesu* and *Kayishema-Ruzindana*, is erroneous and not consistent with other international humanitarian law.

Knowing precisely how the ICTR is interpreting and applying the phrase “in the execution of their respective conflict objectives” and the word “against” in the above section is critical for the Prosecutor to understand, since the failure to do so will inevitably result in the acquittal of more public officials of all Article 4 violations.

⁵⁷ *Kayishema-Ruzindana*, para. 616 at 224. [reproduced tab 2]

⁵⁸ *Akayesu* Judgement para. 640 at 167. [reproduced tab 1]

⁵⁹ *Akayesu* Judgement para. 642 at 168. Note that the ICTR held that the mere fact that Akayesu wore a military jacket, carried a rifle, and assisted the FAR military in Taba by mapping out the commune and setting up offices was not sufficient, according to the ICTR, to establish the requisite link between Akayesu and the military for purposes of convicting him of Article 4 violations. [reproduced tab 1]

C. CONFLICT OBJECTIVES

1. CONFLICT OBJECTIVES: “In the Execution of Their Respective Conflict Objectives”

The phrase “in the execution of their respective conflict objectives” requires, to some degree, the ICTR and the Office of the Prosecutor to make certain precise determinations as to what the conflict objectives of the FAR/Interahamwe and the RPF are and how those objectives relate to the nexus requirement between the alleged crimes and the conflict for purposes of establishing the applicability of Article 4 of the Statute to the accused.

In *Tadic*, Tadic was a former Reserve Traffic Police Officer and Secretary of Kozarac Local Commune who was convicted of Article 4 type war crimes.⁶⁰ The ICTY convicted Tadic based upon the factual finding that his conduct related directly to the hostilities in the former Republic of Yugoslavia insofar as “the nature of the armed conflict [w]as an ethnic war and the strategic aims of the Republika Srpska [i.e., Serb Republic] [was] to create a purely Serbian State.”⁶¹ Thus, “the acts of the Accused during the armed take-over and ethnic cleansing of Muslim and Croat areas of opstina Prijedor were directly connected with the armed conflict.”⁶² Moreover, the ICTY found that Tadic’s acts were committed in a camp that was controlled by authorities of the newly formed Serbian Republika Srpska.⁶³ Thus, Tadic’s acts were perpetrated “with the connivance or permission of the authorities running these [prison] camps and indicate that such acts were part of an accepted [Serb] policy [...] in opstina Prijedor.

⁶⁰*Tadic* Judgement para. 190. [reproduced tab 7]

⁶¹*Tadic* Judgement para. 574 at 923. [reproduced tab 7]

⁶² *Tadic* Judgement para. 574 at 923. [reproduced tab 7]

⁶³ *Tadic* Judgement para. 575 at 923. [reproduced tab 7]

Indeed, such treatment effected the objective of the Republika Srpska to ethnically cleanse, by means of terror, killings or otherwise, the areas of the Republic of Bosnia and Herzegovina controlled by Bosnian Serb forces. Accordingly, those acts too were directly connected with the armed conflict.⁶⁴

Under The Rome Statute, the Article 4 war crimes that Tadic was convicted of are defined as constituting, *inter alia*, the intentional targeting, murder, and mutilation of all civilians or a civilian population.⁶⁵ Thus, according to international humanitarian law, there exists *ipso facto* a nexus between the conflict objectives of a belligerent party, the Article 4 violations, and the accused so long as the Prosecutor can factually prove that the conduct of the accused relates to one of the belligerent party's conflict objective. Once again, Tadic was found guilty of Article 4 violations because the ICTY found that the conflict was, in fact, an ethnic war and that the conduct of Tadic was related to the conflict objectives of one of the belligerent parties.

Therefore, for the purpose of establishing the applicability of Article 4 of the Statute to the accused, the only nexus requirement the Prosecutor has to factually prove is that the conduct of the accused was related to or in some way furthered the military conflict objectives of one of the belligerent parties to the conflict. Thus, the Prosecutor does not, as the ICTR insists, have to factually prove that the accused is a card-carrying member of one of the belligerent parties. Instead, the Prosecutor simply has to prove that the conduct of the accused relates to a specific conflict objective of one of the belligerent parties.

In both *Akayesu* and *Kayishema-Ruzindana*, the ICTR never legally concluded that the Rwanda conflict was an outright ethnic war and that the sole military conflict objective of

⁶⁴ *Tadic* Judgement para. 575 at 923. [reproduced tab 7]

⁶⁵ See *United Nations: Rome Statute of the International Criminal Court*, 37 I.L.M. 999, 1006 citing to The Rome Statute, Article 8 Sec. 2(c)(i) and 2(e)(i)(xi) and 2(x). [reproduced tab 8]

FAR/Interahamwe was to create a purely Hutu state.⁶⁶ Moreover, the ICTR in *Akayesu* argued that Akayesu was a civilian⁶⁷ and that Article 4 does not apply to him.⁶⁸ In fact, the ICTR held that the Prosecutor failed to specifically aver and prove that Akayesu was a member of FAR/Interahamwe in even the broadest sense.⁶⁹

The ICTR's strict holding in *Akayesu* relative to the requirement of the Prosecutor having to factually prove that Akayesu was a member of a belligerent party is not consistent with other international humanitarian law on the subject.

⁶⁶ See *Akayesu* Judgement para. 169 at 51. Although the ICTR marginally acknowledged "that the acts of violence which took place in Taba during this time were part of this effort," the ICTR never fully acknowledged, as it should have, that all attacks against the Tutsi civilian population were *ipso facto* part of the government's (i.e., FAR/Interahamwe) conflict objective to destroy all Tutsis everywhere. Therefore, the question to the ICTR concerning whether Article 4 crimes attach to a particular individual should not be framed from the perspective of determining whether a particular Tutsi's death should or should not be considered as having occurred as part of the FAR/Interahamwe conflict objectives, but rather what the official status is of the individual perpetrator and whether such individual, as a result of that status, is brought under and is therefore bound by and subject to charges under Common Article 3 and Additional Protocol II. To illustrate this point, if a Tutsi civilian was killed in the Taba commune by a non-military and non-public official person (i.e., a private citizen) then there would be no doubt that Common Article 3 and Additional Protocol II would NOT apply to the accused, since international law recognizes that Common Article 3 and Additional Protocol II apply only to belligerent parties to the conflict or, as the ICTR stated in *Akayesu* in para. 640 at 167, public officials who are "legitimately mandated and expected" to "support or fulfill the war efforts." If, however, that same Tutsi civilian was killed by a member of FAR/Interahamwe or by the accused in their capacity as public officials, then Common Article 3 and Additional Protocol II should apply, since the killing of Tutsis (any Tutsi) would be considered as supporting the conflict objective of FAR/Interahamwe. Why then were the accused acquitted of Article 4 violations? The reason, once again, is that the ICTR doesn't view the indiscriminate killing of all Tutsis everywhere as being the direct result of a military (i.e., FAR/Interahamwe) objective. If the ICTR viewed the conflict as an ethnic war, as the ICTY did in *Tadic*, then the deaths of all Tutsis everywhere would be considered as being directly connected to the FAR/Interahamwe conflict objective; that being the case, for purposes of establishing the applicability of Article 4 of the Statute, the only thing left for the Prosecutor to do is to factually prove, and for the ICTR to legally find, that the accused was either a member of the military or a public official at the time the accused allegedly committed the crime. [reproduced tab 1]

⁶⁷ Another critical distinction for the Prosecutor to understand is the erroneous finding that Akayesu was a civilian and therefore Article 4 does not apply to him. It is well established international humanitarian law that once a civilian takes a direct part in the hostilities, as did both Akayesu and Kayishema, he forfeits the status of being considered a civilian. Thus, if he is no longer considered to be a member of the protected class, then he must be considered as having become a member of the class of perpetrators. Therefore, by virtue of the fact that Akayesu and Kayishema lost their status as civilians when they actively engaged in the conflict objectives of FAR/Interahamwe, the ICTR's requisite nexus between the accused and the armed forces is *ipso facto* established. See Additional Protocol limitations to the status of civilians under the *Ratione Personae*: Class of Victims section.

⁶⁸ *Akayesu* Judgement para. 632 at 165. [reproduced tab 1]

⁶⁹ *Akayesu* Judgement para. 632 at 165. [reproduced tab 17]

In the International Military Tribunal for the Far East (the “IMTFE”), there were fifty-five counts of Article 4 type war crimes brought against twenty-five civilian officers.⁷⁰ The most notable civilian officer tried was Hirota, Foreign Minister of Japan.⁷¹ The IMTFE held that civilian officers can be held responsible for war crimes.⁷² Ultimately, all twenty-five civilian officers were convicted of war crimes in one form or another and received either the death penalty, life in prison, or up to twenty-year prison sentences.⁷³ In the Judgement, the Tribunal held, *inter alia*, that Japan was not only the aggressor in WWII,⁷⁴ but that the atrocities perpetrated by Japan “followed such a pattern in all theaters that they were obviously either ordered or willfully committed.”⁷⁵ Likewise in Rwanda, it can be argued that the FAR/Interahamwe forces were the primary aggressors and that the atrocities committed against the Tutsi in all theaters should be considered to have been ordered and willfully committed.⁷⁶ Moreover, like *Tadic* and the twenty-five defendants convicted in the IMTFE, both Akayesu and Kayishema were civilian officers or public officials.

⁷⁰ John A. Appleman, *Military Tribunals and International Crimes*, 250 and 259 (1971). In the Judgement, the IMTFE defined some of the Article 4 type of crimes, including “killings, rapes, abuses, murders [...] various tortures, such as those by water, electric shock, burning, suspension, knee spread, vivisection, and by such acts as cannibalism....” [reproduced tab 1]

⁷¹ *Akayesu* Judgement para. 633 at 166. [reproduced tab]

⁷² John A. Appleman, *Military Tribunals and International Crimes*, 250 (1971). [reproduced tab 17]

⁷³ John A. Appleman, *Military Tribunals and International Crimes*, 238 (1971). [reproduced tab 17]

⁷⁴ John A. Appleman, *Military Tribunals and International Crimes*, 259 (1971). [reproduced tab 17]

⁷⁵ John A. Appleman, *Military Tribunals and International Crimes*, 250 (1971). [reproduced tab 17]

⁷⁶ See Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal For The Former Yugoslavia and Rwanda*, 33 Int’l Law. 549, 554 (Summer 1999). Hutu Prime Minister Jean Kambanda admitted “that the government not only followed the massacres [of Tutsi] without attempting to stop them, but also effectively assumed responsibility for the actions of the Interahamwe.” [reproduced tab 9]

Although the Prosecutor and the rest of the world seem to understand that the clear military objective of the FAR/Interahamwe is to ethnically cleanse Rwanda of all Tutsi,⁷⁷ the ICTR, however, is still viewing the massacring of Tutsi as a “pretext” for some other unstated FAR/Interahamwe conflict objective.⁷⁸ Unless and until the Prosecutor convinces the ICTR to characterize the conflict in Rwanda as an outright ethnic war, the requisite nexus between the conduct of the accused, the alleged Article 4 crimes, and the conflict objectives of the belligerent parties simply will not be established and public officials like the accused will be acquitted of all Article 4 crimes under the Statute.

2. CONFLICT OBJECTIVES: In Support of One Party “AGAINST” the Other

In the ICTR’s above statement requiring the Prosecutor to factually prove “how and in what capacity Akayesu supported the FAR government forces *against* the RPF,” the word “against” becomes of significant importance insofar as it relates to the Prosecutor’s ability to establish the requisite nexus between the accused, the crime, and the conflict.

In both *Akayesu* and *Kayishema-Ruzindana*, the ICTR narrowly interprets the word “against” to mean that not only does the accused have to be linked to either of the belligerent parties to the conflict, but (more importantly) that the alleged crime has to be perpetrated by one belligerent party directly “against” the other. In other words, the ICTR specifically interprets the word “against” to mean that either a member of FAR/Interahamwe or the RPF must perpetrate a

⁷⁷See generally Arlene S. Kanter & Theogene Rudasingwa, *Fifty Years of the U.N. Genocide Convention: What Does it Mean for Africa?*, 26 Syracuse J. Int’l L. & Com. 173, 176 (Spring 1999). No longer is the acquisition of territory and the toppling of other governments the main objective of warring parties to a conflict. The main objective now is to eliminate whole populations. In Rwanda, the conflict was never about a battle for the control of territory; See also Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 Yale J. Int’l L. 365, 390 and 391 (Summer 1999). The only goal of the Hutu government was to exterminate the Tutsi and their moderate Hutu sympathizers. Moreover, the massacre of hundreds of thousands of Tutsi was done at the hands of Hutu FAR and Interahamwe government troops. [reproduced tab 10 and 11]

⁷⁸ *Kayishema-Ruzindana* Judgement para. 603 at 220. [reproduced tab 2]

crime directly against the other in order for the crime to be considered an Article 4 crime under the Statute.

In effect, by requiring Article 4 crimes to be perpetrated by one member of a party “against” the other, the ICTR has erroneously done three things: (1) linked the conflict objectives of one party to the other thereby creating one common conflict objective between the parties, namely the destruction of one party by the other,⁷⁹ (2) restricted the class of victims to members of one belligerent party or the other,⁸⁰ and (3) restricted the class of perpetrators of Article 4 crimes to members of the belligerent parties.⁸¹

The conflict objective of one party may be the same as the other (i.e., the acquisition of the same territory). However, the conflict objective of one party can be mutually exclusive as to the conflict objective of the other party. For example, in the Rwanda conflict, the main military objective of FAR/Interahamwe, on the one hand, is to ethnically cleanse Rwanda of all Tutsi.⁸² The main objective of the RPF, on the other hand, is most likely to simply restore the pre-colonial socio-economic and political power that the Tutsi once enjoyed.⁸³ Thus, two belligerent

⁷⁹ Creating a direct link between the belligerent parties, as the ICTR has done, necessarily creates the assumption that that the conflict objective of each party is to kill and destroy the other.

⁸⁰ It is certainly conceivable that civilians will get caught up in the cross-fire between two military combatants and thereby be counted amongst the class of victims to the battle or crime as the case may be. However, by requiring that Article 4 crimes must be committed by one party “against” the other, as the ICTR has done, the class of victims has essentially been greatly reduced to consisting of members of the belligerent parties to the conflict. Any deaths that may occur to civilians are really incidental to the conflict as opposed to the purposeful targeting and destruction of a whole civilian population as is the case in Rwanda.

⁸¹ See argument propounded in footnote 68 above. The class of victims would essentially be limited to members of either FAR/Interahamwe or the RPF.

⁸² See Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal For The Former Yugoslavia and Rwanda*, 33 Int'l Law. 549, 553 (Summer 1999). Hutu Prime Minister Jean Kambanda admitted “that there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them; See also Josue Rubambana, *Exterminating Your Neighbor*, (April 16, 1994). “Hutu civilians and Interahamwe arrived with machetes and clubs studded with nails. Many of them threw rocks and chanted, ‘Yee tubatsembatsembe,’ meaning ‘exterminate them.’”; See also Covert Action Quarterly: Genocide in Rwanda, *U.S. Fiddles While Rwanda Burns*, (November 13, 1999). [reproduced tab 9]

parties to the same conflict can have divergent conflict objectives. The impact that the ICTR's view of the conflict objectives has on the requisite nexus between the alleged Article 4 crime and the conflict is significant and the Prosecutor must understand the implications of it in order to be able to convict public officials under Article 4 of the Statute.

Although the main conflict objective of each of the belligerent parties is as it has been explained above under the "divergent conflict objective" theory, the ICTR, however, is indirectly super-imposing the "same conflict objective" theory on both parties by requiring the Prosecutor to factually prove that an Article 4 crime was perpetrated by one belligerent party "against" the other. The inevitable result of having to prove such a narrow nexus requirement between the belligerent parties is that the class of victims against whom an Article 4 crime can be perpetrated against is consequently limited. By way of illustration, if a member of either FAR/Interahamwe or the RPF commits an Article 4 crime directly against the other, then the ICTR would hold, as it should, that the nexus requirement between the crime and the conflict was satisfied because the Article 4 crime was perpetrated, as the ICTR has narrowly required, by one belligerent party "against" the other. If, however, a member of one of the belligerent parties commits an Article 4 crime against a non-member of a belligerent party, then the ICTR would hold that the nexus requirement between the Article 4 crime and the victim was not met because the victim was not also a member of a belligerent party. This result is erroneous and not consistent with other international humanitarian law.

⁸³ See *Akayesu* Judgement paras. 80 and 83 at 28 and 29 respectively. The ICTR took judicial notice that although the Tutsi comprised only 15% of the population during the pre-colonial and colonial period, as opposed to 84% of the population being Hutu, the Tutsi nonetheless exercised most, if not all, of the political power in Rwanda. [reproduced tab 1]

The “Medical Case” was one of several cases heard by the Nuremberg International Military Tribunal.⁸⁴ Count 2 of the Indictment pertained to “war crimes” and Count 3 pertained to “crimes against humanity.”⁸⁵ Both counts were considered by the Nuremberg Tribunal to be very “similar in character” and involved “the killing or maiming of vast numbers of persons through medical experimentation of one type or another.”⁸⁶ Nearly all twenty-three of the defendants were non-military medical men.⁸⁷ For example, defendant Dr. Gebhardt was the President of the German Red Cross, a civilian organization.⁸⁸ Defendant Dr. Rostock was a dean of medical faculty at the University of Berlin.⁸⁹ Fifteen out of the twenty-three civilian medical personnel were convicted and sentenced to either death, life in prison, or up to twenty years in jail.⁹⁰

⁸⁴ John A. Appleman, *Military Tribunals and International Crimes*, 139 (1971). [reproduced tab 17]

⁸⁵ John A. Appleman, *Military Tribunals and International Crimes*, 139 (1971). [reproduced tab 17]

⁸⁶ John A. Appleman, *Military Tribunals and International Crimes*, 141 (1971). Note: Unlike the Nuremberg Trial where the crimes listed under the war crimes and crimes against humanity are very similar, the ICTR in both *Akayesu* and *Kayishema-Ruzindana*, considers the crime of extermination to be an Article 3 crime against humanity, not an Article 4 war crime. Accordingly, the ICTR held “that extermination is a crime against humanity, pursuant to Article 3(c) of the Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder. The Chamber defines the essential elements of extermination as the following: 1. the accused or his subordinate participated in the killing of certain named or described persons; 2. the act or omission was unlawful and intentional; 3. the unlawful act or omission must be part of a widespread or systematic attack; 4. the attack must be against the civilian population; [and] 5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.” *Akayesu* Judgement para. 592 at 154. The fact that the ICTR is unwilling to consider extermination as an Article 4(a) crime is critical for the Prosecutor to understand because such a holding is in stark contrast to (1) The Rome Statute, (2) the holding in *Tadic*, and (3) the holding in the Nuremberg Trials. Moreover, the unwillingness of the ICTR to consider extermination as constituting an Article 4 crime makes it very difficult, if not impossible, for the Prosecutor to establish the requisite nexus between the Article 4 crime and the accused. Considering the foregoing, it is therefore incumbent upon the Prosecutor to convince the ICTR that: (1) the conflict in Rwanda is an outright ethnic war, (2) the sole conflict objective of FAR/Interahamwe is to exterminate all Tutsis, and (3) extermination is a war crime under Article 4(a) of the Statute. [reproduced tab 17]

⁸⁷ John A. Appleman, *Military Tribunals and International Crimes*, 141 (1971). [reproduced tab 17]

⁸⁸ John A. Appleman, *Military Tribunals and International Crimes*, 141 (1971). [reproduced tab 17]

⁸⁹ John A. Appleman, *Military Tribunals and International Crimes*, 142 (1971). [reproduced tab 17]

⁹⁰ John A. Appleman, *Military Tribunals and International Crimes*, 140 (1971). [reproduced tab 17]

The importance of the holdings in the Medical Case to the ICTR holdings in *Akayesu* and *Kayishema-Ruzindana* are significant. Unlike the ICTR's requirement of proving that the alleged Article 4 crimes were perpetrated by one belligerent party "against" the other, the Nuremberg Tribunal allowed Article 4 war crimes to be perpetrated by non-members of either of the belligerent parties (i.e., civilian doctors) against individuals who were likewise clearly non-members of either of the belligerent parties (i.e., civilian Jews). By allowing Article 4 charges to be perpetrated by civilians "against" civilians, so long as the crime is still somewhat linked to the conflict, the Nuremberg Tribunal has expanded the class of perpetrators and the class of victims beyond the belligerent parties, not restrict it like the ICTR has done. Thus, the only actual nexus that linked the Article 4 crimes to the perpetrators and the perpetrators to the victims is the relationship between each of the above to the conflict objectives of one of the belligerent parties. In other words, the only nexus that the Prosecutor had to establish was that the medical experiments conducted on the Jews was part of the Nazi's (i.e., belligerent party's) conflict objective; having factually proved that by the Prosecutor, the crime then became an Article 4 crime and consequently attached to the perpetrators.

If the ICTR applied the Nuremberg Tribunal's nexus requirement to *Akayesu* and *Kayishema-Ruzindana*, then both of them would have been successfully convicted of Article 4 war crimes under the statute, since the conflict objective of the belligerent party (i.e., FAR/Interahamwe) was to exterminate the Tutsi and the conduct of the accused related to that conflict objective. Furthermore, the fact that both of the accused were public officials who ordered the FAR/Interahamwe to kill the Tutsi creates an even stronger nexus between the class of perpetrators and class of victims than the nexus that was established between the civilians in the Medical Case.

D. TUTSIS AS MILITARY TARGETS

As stated in the conflict objectives section above, the single most important fact the Prosecutor needs to establish is the fact that the conflict in Rwanda, at least from a Hutu perspective, is first and foremost an outright ethnic war.⁹¹ The Prosecutor should specifically aver in the Indictment and factually prove at trial that the downing of President Juvenal Habyarimana's plane did not merely serve as a "pretext" for the massacring of Tutsi civilians.⁹² Rather, the Prosecutor needs to have the ICTR legally find that the massacring of the Tutsi civilian population was *ipso facto* the paramount military objective of both FAR, the Interahamwe, and all public officials who took part in the furtherance of that objective.⁹³ There is more than ample evidence to suggest to the ICTR that the conflict in Rwanda was inherently and ethnic war.

Based upon testimony given by Lindsey Hilson, a journalist who was in Kigali from before the downing of President Habyirama's plane until mid-April, the ICTR found that the ensuing attack upon Tutsi civilians was connected to the downing of the president's plane.⁹⁴ Accordingly, Ms. Hilson stated that she saw "wounded men, women and children of all ages

⁹¹ As stated in the conflict objectives sections, the paramount military objective of the Hutu FAR/Interahamwe is to ethnically cleans Rwanda of all Tutsi. Thus, from the perspective of the Hutu, the conflict should be characterized by the ICTR as an ethnic war. Perhaps part of the confusion as to why the ICTR does not look at the killing of all Tutsi everywhere in Rwanda as being inherently connected to the conflict objectives of the FAR/Interahamwe is because the conflict objective of the RPF is different. The RPF simply want to re-establish political control, not to exterminate the Hutu. From the perspective of the Hutu FAR/Interahamwe, the RPF and Tutsi are simply in the way of their overall objective to create a pure Hutu state. The dynamic between how the ICTR characterizes the conflict relative to the belligerent parties' conflict objectives has a significant impact on the applicability of Article 4 crimes to the accused.

⁹² *Kayishema-Ruzindana* Judgement para. 603 at 220. [reproduced tab 2]

⁹³ *Akayesu* Judgement para. 169 at 51. [reproduced tab 1]

⁹⁴ *Akayesu* Judgement para. 160 at 49. [reproduced tab 1]

packed into the wards, and hospital gutters were running red with blood.”⁹⁵ The ICTR also took judicial notice through Dr. Zachariah’s expert testimony that from the outset of the conflict between FAR and RPF forces in early April, 1994, “Tutsi civilians were being targeted for attack on a massive scale.”⁹⁶ Dr. Zachariah also testified about personally witnessing the massacring of thousands of Tutsi civilians in Kigali at road blocks, check points, churches, and along the road side.⁹⁷

As to whether there can be any doubt as to the military intent or conflict objective of the FAR and Interahamwe, it should be stressed to the ICTR that the FAR and Interahamwe were so committed to the ethnic cleansing of Tutsi that they even targeted and killed moderate Hutus that were considered to be Tutsi sympathizers. According to expert witness Alison Desforges, “Tutsi and so-called moderate Hutu civilians were targeted for attacks on a massive scale in Rwanda at the time of the events which are the subject of this Indictment.”⁹⁸

The impact that the characterizing of the conflict as an “ethnic war” has on the Prosecutor’s ability to establish the ICTR’s requisite nexus requirements for purposes of establishing the applicability of Article 4 crimes to an accused is profoundly significant. In short, if the ICTR continues to view the actual outbreak of the conflict as a mere “pretext” for the killing of Tutsi, then it will be very difficult, if not impossible, to factually establish the following: (1) the requisite nexus between the accused non-military public official and one of the belligerent parties, (2) the requisite nexus between the crime(s) and the conflict, and (2) the

⁹⁵ *Akayesu* Judgement para. 160 at 49. [reproduced tab 1]

⁹⁶ *Akayesu* Judgement para. 158 at 48. [reproduced tab 1]

⁹⁷ *Akayesu* Judgement para. 158 at 48. [reproduced tab 1]

⁹⁸ *Akayesu* Judgement para. 163 at 50. [reproduced tab 1]

individual criminal liability of the accused under a chain-of-command theory under Article 6(3) of the Statute.

E. ANALYSIS OF NEXUS BETWEEN CRIME AND CONFLICT

Under the ICTY's understanding of *ratione loci*, the only nexus that is required between the crime and the conflict is one that simply shows "a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle."⁹⁹ Moreover, "[i]t is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred [...] nor is it necessary that the crime alleged takes place during combat. [...] The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole."¹⁰⁰

Therefore, all the Prosecutor factually has to prove at trial is that the crime was committed in relation to the conflict, not that there was actual hostilities occurring in the area between the FAR/Interahamwe and the RPF at the time the crimes were committed. Once again under *Tadic*, it is sufficient to merely show that a conflict between FAR/Interahamwe and RPF forces was taking place at large within the statutorily defined geographical area covered by Article 1 of the Statute and that the alleged crimes somehow relate either directly or indirectly to that conflict.

Contrary to the ICTY's understanding of *ratione loci*, however, the ICTR argued that although hostilities between FAR and RPF forces had broken out generally, there was no specific evidence presented by the Prosecutor at trial evidencing that "military operations occurred in the

⁹⁹ *Kayishema-Ruzindana*, para. 183 at 73. [reproduced tab 2]

¹⁰⁰ *Tadic* Judgement para. 573 at 923. Note that all of the Article 4 type violations alleged in the Indictment against *Tadic* pertained to events that occurred between early June of 1992 and late July of 1992, approximately three weeks after Serb forces had already pulled out of opstina Prijedor. Thus, no actual military presence of either of the belligerent parties is required at the time the crime was committed. See Counts 2, 3, 5, 6, 8, 9, 10, 12, 13, 15, 16, 18, 19, 21, 22, 24, 25, 27, 29, 30, 32 and 33 of the Indictment and *Tadic* Judgement para. 565 at 921. [reproduced tab 7]

Kibuye Prefecture when the alleged crimes were committed.”¹⁰¹ Accordingly, the ICTR held that the four attacks against the Tutsi in Kibuye that Kayishema was involved with “show[ed] only that the armed conflict had been used as [a] 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.”¹⁰² Similarly, in *Akayesu* the ICTR held that “it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu in the commune of Taba at the time of the events alleged in the Indictment were committed in conjunction with the armed conflict.”¹⁰³

The ICTR holdings in both *Akayesu* and *Kayishema-Ruzindana* are erroneous and simply do not comport with the ICTY’s understanding of how the principle of *ratione loci* is to be applied when establishing the requisite nexus between the alleged crime(s) and the conflict. The ICTY specifically held that Article 4 war crimes could occur “outside the narrow geographical context of the actual theatre of combat operations.”¹⁰⁴

¹⁰¹ *Kayishema-Ruzindana*, para. 603 at 220. [reproduced tab 2]

¹⁰² *Kayishema-Ruzindana* Judgement para. 603 at 220. [reproduced tab 2]

¹⁰³ *Akayesu* Judgement para. 643 at 168. [reproduced tab 1]

¹⁰⁴ *Kayishema-Ruzindana* Judgement para. 182 at 72. See also the Medical Case from the Nuremberg International Military Tribunal discussed in the Conflict Objectives section supra: The war crimes committed by the accused do not have to occur in the presence of either of the belligerent parties to the conflict. It is sufficient that the conduct of the accused merely related to the conflict objectives of one of the belligerent parties. [reproduced tab 2]

F. COMMAND RESPONSIBILITY

Article 6(3) of the ICTR Statute pertains to command responsibility and states the following:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁰⁵

In *Celebici*, the ICTY held that “command responsibility extends not only to military commanders, but also to individuals in non-military positions of superior authority.”¹⁰⁶ Therefore, the concept of a superior within a chain of command is to be construed in the broader context of a hierarchical control structure.¹⁰⁷ Moreover, a non-military individual may “incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as *de jure* positions as superiors.”¹⁰⁸ A superior will ultimately incur direct

¹⁰⁵ Volume 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 4 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994)* (Annex), 8 November 1994. See full text of Statute for specific violations under Article 4 of the Statute. [reproduced tab 4]

¹⁰⁶ Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 33 Int'l Law. 549, 552 (Summer 1999). [reproduced tab 9]

¹⁰⁷ Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability For The Actions Of Subordinates: The Doctrine Of Command Responsibility And Its Analogues In United States Law*, 38 Harv. Int'l L.J. 272, 291 (Winter 1997). [reproduced tab 12]

¹⁰⁸ Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 33 Int'l Law. 549, 552 (Summer 1999). [reproduced tab 9]

responsibility for a crime that he or she “ordered or actively supervised”¹⁰⁹ if the superior failed to take measures to prevent a crime even if those measures fall outside the competence of the superior so long as the superior had a “material possibility”¹¹⁰ of preventing the crimes.

Therefore, in order to convict a civilian superior for the Article 4 violations of a subordinate, it must be determined: (1) that the superior falls within a hierarchical control structure that, by virtue of the position, grants power to the superior over the subordinate within that hierarchical structure, and (2) whether the accused had a duty to prevent the crime.¹¹¹

In *Akayesu*, it was established through Witness K that Akayesu ordered members of the Interahamwe¹¹² to murder eight Tutsi refugees that were being locked up in prison¹¹³ by Akayesu at the bureau communal in Taba.¹¹⁴ Acting upon Akayesu’s direct orders, the Interahamwe lined

¹⁰⁹Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability For The Actions Of Subordinates: The Doctrine Of Command Responsibility And Its Analogues In United States Law*, 38 Harv. Int’l L.J. 272 (Winter 1997). [reproduced tab 12]

¹¹⁰Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 33 Int’l Law. 549, 552 (Summer 1999). [reproduced tab 9]

¹¹¹Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability For The Actions Of Subordinates: The Doctrine Of Command Responsibility And Its Analogues In United States Law*, 38 Harv. Int’l L.J. 272, 292 (Winter 1997); It should be noted at this point that there has obviously been no discussion as to the individual criminal responsibility of Ruzindana for Article 4 violations. This is because, as the ICTR pointed out, Ruzindana was a businessman in Kigali. He was neither a member of either of the belligerent parties in the broadest sense, nor did he possess either *de jure* or *de facto* powers during the conflict. Accordingly, the ability of the Prosecutor to establish the ICTR’s nexus requirements between the accused, the crime, and the conflict would be impossible upon the facts alleged in the Indictment. Therefore, Ruzindana has been omitted from any substantive discussion within this memorandum. [reproduced tab 12]

¹¹²See *Akayesu* Judgement para. 164 at 50; noting that the ICTR took judicial notice through the testimony of UNAMIR force commander General Romeo Dallaire that FAR/Interahamwe forces were under the direct control of the Hutu government in Rwanda. Thus, the nexus requirement between the accused and one of the belligerent parties is satisfied in order to convict Akayesu of Article 4 crimes. [reproduced tab 1]

¹¹³Note that the ICTR established that Tutsi were actually imprisoned at the bureau communal (a State controlled facility) in Taba. In *Tadic*, the importance of his control over a state operated prison was significant in establishing the nexus between Tadic’s conduct and the conflict objectives of the Serb belligerent party. Thus, the fact that Akayesu turned the state run public facility into a prison and killed Tutsi in furtherance of the Hutu government’s conflict objectives is likewise sufficient to establish the ICTR’s requisite nexus between the conduct of the accused and the conflict.

¹¹⁴*Akayesu* Judgement paras. 275 and 284 at 75 and 77 respectively. [reproduced tab 1]

up the eight Tutsi refugees against a fence and shot them after Akayesu told the Interahamwe to “do it quickly.”¹¹⁵ Through Witness K the Prosecutor also established that “many people [were] being brought to the bureau communal and killed, some of the victims only making it as far as the front of the entrance of the bureau communal before being killed.”¹¹⁶ Lastly, Witness K stated, and the ICTR found,¹¹⁷ that “the true reason for the killings of the teachers and the refugees [at the bureau communal] was because they were Tutsi.”¹¹⁸

In *Akayesu*, as to the killing of the eight refugees by the Interahamwe per order of Akayesu, the Chamber ultimately found that “Akayesu released the eight detained men [...] over to the Interahamwe.... [T]hat Akayesu ordered the militia¹¹⁹ to kill them.... [T]hat the eight refugees were killed by the Interahamwe in the presence of Akayesu.... It has [also] been proved beyond reasonable doubt that the eight refugees were killed because they were Tutsi.”¹²⁰

In *Tadic*, it is also necessary to point out the fact that the ICTY also held that “no general cessation of hostilities had occurred [in Kozarac] or elsewhere in the territory of the former

¹¹⁵ *Akayesu Judgement* Judgement para. 276 at 75 and 76. [reproduced tab 1]

¹¹⁶ *Akayesu Judgement* para. 280 at 76. [reproduced tab 1]

¹¹⁷ See *Akayesu Judgement* para. 301 at 81. Note that the Chamber ultimately found the testimony of Witness K to be reliable as to events, dates and locations. The Chamber ultimately based its factually findings relative to this crime on the testimony of Witness K. [reproduced tab 1]

¹¹⁸ *Akayesu Judgement* para. 282 at 76. It is critical for the Prosecutor to note that if the ICTR does not view the atrocities committed by the Hutu government against Tutsis as an “ethnic war,” then the ability of the Prosecutor to establish the ICTR’s requisite nexus between the crime and the conflict will be greatly diminished. [reproduced tab 1]

¹¹⁹ It is critical for the Prosecutor to point out to the ICTR that based upon the ICTR’s own findings relative to the role that Akayesu played in ordering the state controlled “militia,” which is understood to be the Interahamwe, establishes the ICTR’s own requisite link between the accused and the Hutu state military or belligerent party. The nexus between the accused and the military here could not be made any clearer or stronger by the Prosecutor.

¹²⁰ *Akayesu Judgement* para. 309 at 83 and 84; Again, the ICTR’s required nexus between the Article 4 crime and the conflict could not be any clearer. This further illustrates the Prosecutor’s need to characterize the conflict as an ethnic war for the purpose of solidifying the link between the conduct of the accused and the conflict objectives of either of the belligerent parties. [reproduced tab 1]

Yugoslavia. The ongoing conflicts before, during and after the time of the attack on Kozarac... were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the Government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, [...] and various paramilitary groups, all of which had occupied or were proceeding to occupy a significant portion of the territory of that State.”¹²¹ Similarly, it can be argued in both Akayesu and Kayishema that there was no cessation of hostilities between FAR/Interahamwe and RPF forces at the time of the alleged crimes.

For purposes of establishing a chain of command case against both Akayesu and Kayishema, it is also important to point out the fact that the ICTR acknowledged that it is possible for public officials to be guilty of violations of Article 4, since the military is under the supervision of government officials and that such officials are responsible for supporting the war efforts and carrying out certain fundamental mandates.¹²² In fact, the ICTR stated that the laws of war apply to civilians in certain circumstances, if factually proven.¹²³ Thus, the class of perpetrators could include “individuals who were 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.”¹²⁴

In the proceedings before the International Military Tribunal for the Far East, it was pointed out that Japan was not only the aggressor in WWII, but that the atrocities perpetrated by Japan “followed such a pattern in all theaters that they were obviously either ordered or willfully

¹²¹ *Tadic* Judgement para. 566 at 922. [reproduced tab 7]

¹²² *Kayishema-Ruzindana*, para. 174 at 69; See also *Akayesu* Judgement para. 631 at 165. [reproduced tab 2]

¹²³ *Kayishema-Ruzindana*, para. 176 at 70. [reproduced tab 2]

¹²⁴ *Kayishema-Ruzindana*, para. 175 at 70: Although the ICTR acknowledges that the laws of war apply to both the military and public officials, the ICTR set a very high standard for determining whether a public official actually aided and abetted in the war effort. [reproduced tab 2]

committed.” In effect, the IMTFE imputed complicity in the crimes against the defendants. Similarly, given the fact that Hutu’s were the aggressors in the Rwanda conflict and that the more than 800,000 Tutsi deaths were the result of a widespread and systematic attack upon them, the ICTR should likewise impute complicity upon all public officials if the Prosecutor can factually establish, as the ICTR requires in a chain of command case, that a public official “was mandated and expected [...] to support or fulfill the war efforts.”¹²⁵

G. RELATIONSHIP OF ACCUSED TO INTERAHAMWE

Omar Serushago was the first member of the Interahamwe paramilitary group to confess to having committed Article 4 war crimes.¹²⁶ Through his admissions, Serushago was able to link several high ranking government public officials to the Interahamwe, including Hutu Prime Minister Jean Kambada.¹²⁷ During Prime Minister Kambada’s trial, he admitted “that the government not only followed the massacres [of Tutsi] without attempting to stop them, but also effectively assumed responsibility for the actions of the Interahamwe.”¹²⁸

In *Akayesu*, the Prosecutor established through Witness DAAX that all of the bourgmestres were threatened by Prime Minister Kambada to support the Interahamwe in the

¹²⁵ *Kayishema-Ruzindana*, para. 175 at 70; See also *Akayesu* Judgement paras. 184, 186, 187 and 193 at 55, 56, 57 and 58 respectively. The Interahamwe threatened to kill Akayesu if he refused to cooperate in the massacring of Tutsis. The ICTR ultimately found that after 18 April 1994, Akayesu did not prevent the massacring of Tutsi in his commune. In fact, evidence established that Akayesu participated in and ordered the Interahamwe to kill the Tutsi. Accordingly, the ICTR should impute complicity upon Akayesu because he clearly supported and furthered the FAR/Interahamwe conflict objective. [reproduced tab 1 and 2]

¹²⁶ Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 33 Int’l Law. 549, 554 (Summer 1999). [reproduced tab 9]

¹²⁷ Farah Stockman, *Militia Leader Who Confessed To Genocide Gets Fifteen Years in Prison*, AfricaNews, 2 (February 5, 1999); See also Farah Stockman, *Former Rwandan Militia Leader Asks For The Forgiveness Of Rwanda*, AfricaNews, 1 (January 29, 1999); See also Farah Stockman, *Rwandan Militia Leader Accused Of Genocide Sheltered Tutsis, Court Hears*, AfricaNews, 1 (February 10, 1999). [reproduced tabs 13-15 respectively]

¹²⁸ Maury D. Shenk, Carrie A. Rhoads, Amy L. Howe, *International Criminal Tribunal for the Former Yugoslavia and Rwanda*, 33 Int’l Law. 549, 554 (Summer 1999). [reproduced tab 9]

ethnic cleansing of Tutsis at an April 18, 1994 meeting of the bourgmestres.¹²⁹ In fact, the bourgmestre of Mugina was killed by the Interahamwe as an example of what would happen to those public officials who did not support the conflict objectives of the Interahamwe.¹³⁰

Furthermore, the ICTR established through Witnesses E, W, PP, V and G that shortly after the April 18, 1994 meeting, Akayesu began collaborating with the Interahamwe in the Taba commune.¹³¹ The ICTR ultimately held that Akayesu willfully participated in and ordered the Interahamwe to kill the Tutsi.¹³²

Similarly in *Kayishema-Ruzindana*, the ICTR established through Witness W that Kayishema, as Prefect of Kibuye, ordered and directed members of FAR, Interahamwe, and the gendarmerie to attack and kill Tutsi who were seeking refuge in a cave in the Bisesero area.¹³³ The ICTR further established that Kayishema had transported members of the Far, Interahamwe and gendarmerie to the stadium in Kibuye where he ordered them to massacre hundreds of Tutsi who were being imprisoned there.¹³⁴

The term Interahamwe itself means to “work” or “attack” (Inter) “together” (hamwe).¹³⁵ Thus, both Akayesu and Kayishema did in fact stand side-by-side with the Interahamwe as they attacked the Tutsis together. The *ipso facto* relationship the accused had with the Interahamwe establishes beyond question the ICTR’s requisite nexus requirement between the accused, the

¹²⁹ *Akayesu* Judgement, para. 186 at 57. [reproduced tab 1]

¹³⁰ *Akayesu* Judgement, para. 186 at 57. [reproduced tab 1]

¹³¹ *Akayesu* Judgement, para. 186 at 57. [reproduced tab 1]

¹³² *Akayesu* Judgement, para. 193 at 58. [reproduced tab 1]

¹³³ *Kayishema-Ruzindana* Judgement paras. 501 and 502 at 191. [reproduced tab 2]

¹³⁴ *Kayishema-Ruzindana* Judgement paras. 503 at 191. [reproduced tab 2]

¹³⁵ *Akayesu* Judgement para. 151 at 46. [reproduced tab 1]

crime, and the conflict. If such conduct does not rise to the ICTR's arbitrary level of what it considers to be "legally mandated" by the government and "in support of the war effort," then no conduct will. Once again, the ICTR chose form over substance.

H. RELATIONSHIP OF ACCUSED TO POLICE

In *Akayesu* and *Kayishema-Ruzindana*, the ICTR found that Akayesu and Kayishema did, in fact, exercise both *de jure* and *de facto* control over the police.¹³⁶ In *Kayishema*, the ICTR found that Kayishema ordered the police to surround Tutsi civilians who were imprisoned at the Kibuye stadium and to shoot them.¹³⁷ In *Akayesu*, the ICTR held that Akayesu ordered the police to shoot Ephrem Karangwa's three brothers (Simon Mutijima, Thadee Uwanyiligira, and Jean Chrysostome).¹³⁸ The three brothers were shot dead according to Akayesu's orders.¹³⁹ The Chamber specifically concluded that Akayesu "participated in the killings of the three brothers [...] by ordering their deaths and being present when they were killed by policemen, under the immediate authority of the Accused as bourgmestre of Taba commune."¹⁴⁰

Once again, the ICTR failed to apply Article 4 crimes to any police related crimes. The ICTR's justification for this is that it considers the "communal police [a]s a civilian police whose members do not fall under the military penal code. Sanctions and procedures for sanctions are the subject of administrative law."¹⁴¹ The ICTR's rejection of the applicability of Article 4

¹³⁶ *Kayishema-Ruzindana* Judgement para. 482 at 185; See also *Akayesu* Judgement para. 63 at 26. [reproduced tab 2]

¹³⁷ *Kayishema-Ruzindana* Judgement paras. 501 and 502 at 191. [reproduced tab 2]

¹³⁸ *Akayesu* Judgement para. 257 at 71 and 72. [reproduced tab 1]

¹³⁹ *Akayesu* Judgement para. 257 at 72. [reproduced tab 1]

¹⁴⁰ *Akayesu* Judgement para. 268 at 72 and 74. [reproduced tab 1]

¹⁴¹ *Akayesu* Judgement para. 64 at 26. [reproduced tab 1]

crimes to police related crimes based on the assumption that the police are not governed by a military penal code is erroneous and inconsistent with international law.

In the so called “dirty war” in Argentina, thousands of civilians were killed by military leaders and police officials between 1976 and 1983.¹⁴² Among those convicted of war crimes were two police chiefs (Ramon J. Camps and Ovidio Riccheri), one chief of detectives (Miguel Etchecolatz), one police corporal (Norberto Cozzani) and one police doctor (Jorge Berges).¹⁴³ The criminal code that was applied in the Argentine military trials stated that “[w]hen a crime was committed in the execution of an order of service, the superior who gave the order will be the sole responsible person, and the subordinate will only be considered an accomplice when he exceeded the fulfillment of such order.”¹⁴⁴ Moreover, if an act “constitutes a war crime, then, being unjustified by the laws of war, the [military] penal code may [be] applied.”¹⁴⁵ Lastly, the ICTY convicted Tadic, a Reserve Traffic Police Officer, of Article 4 war crimes.¹⁴⁶ Therefore, in light of the Argentine military trials and the holding in *Tadic*, any superior who orders a subordinate policeman to commit an Article 4 war crime could be found guilty of that crime according to international law.

¹⁴²International Legal Materials, *Argentina: National Appeals Court (Criminal Divisions) Judgement on Human Rights Violations By Former Military Leaders*, 26 I.L.M. 317, 318 and 328 (March 1987). [reproduced tab 16]

¹⁴³ International Legal Materials, *Argentina: National Appeals Court (Criminal Divisions) Judgement on Human Rights Violations By Former Military Leaders*, 26 I.L.M. 317, 327 (March 1987). [reproduced tab 16]

¹⁴⁴ International Legal Materials, *Argentina: National Appeals Court (Criminal Divisions) Judgement on Human Rights Violations By Former Military Leaders*, 26 I.L.M. 317, 322 (March 1987). [reproduced tab 16]

¹⁴⁵ John A. Appleman, *Military Tribunals and International Crimes*, 295 (1971). [reproduced tab 17]

¹⁴⁶ *Tadic* Judgement para. 190. [reproduced tab 7]

IV. CONCLUSION

For the foregoing arguments, it is clear that the ICTR's narrow application of the *ratione loci* principle has had a limiting affect on the class of perpetrators and the class of victims. As a result, the ICTR has made it exceptionally difficult for the Prosecutor to factually prove the nexus between the accused, the crime, and the conflict. Unless and until the ICTR views the Rwanda conflict as an outright ethnic war by the Hutu against the Tutsi, the Prosecutor will continue to struggle in the effort to prosecute public officials for Article 4 war crimes under the Rwanda Statute.