A. Trial Chamber - Paras 3 to 600

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: ICTR, The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Chamber 1, 2 September 1998; footnotes omitted; available on http://www.icty.org]

THE PROSECUTOR

v.

JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT [...]

1. INTRODUCTION [...]

6. [...] "The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the Tribunal, charges:

JEAN PAUL AKAYESU

with GENOCIDE, CRIMES AGAINST HUMANITY and VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as set forth below:

[...]

The Accused

1. Jean Paul AKAYESU, born in 1953 in Murehe sector, Taba commune, served as *bourgmestre* of that commune from April 1993 until June 1994. Prior to his appointment as *bourgmestre*, he was a teacher and school inspector in Taba.
2. As *bourgmestre*, Jean Paul AKAYESU was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

General Allegations

1. Unless otherwise specified, all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda.
2. In each paragraph charging genocide, a crime recognized by Article 2 of the Statute of the Tribunal, the alleged acts or omissions were committed with intent to destroy, in whole or in part, a national, ethnic or racial group.
3. The victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group.
4. In each paragraph charging crimes against humanity, crimes recognized by Article 3 of the Tribunal Statute, the alleged acts or omissions were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds.
5. At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda.
6. The victims referred to in this indictment were, at all relevant times, persons not taking an active part in the hostilities.
7. A. In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.
8. The accused is individually responsible for the crimes alleged in this indictment. Under Article 6(1) of the Statute of the Tribunal, individual criminal responsibility is attributable to one who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of any of the crimes referred to in Articles 2 to 4 of the Statute of the Tribunal.

Charges

1. As *bourgmestre*, Jean Paul AKAYESU was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as *bourgmestre*, Jean Paul AKAYESU must have known about them. Although he had the authority and responsibility to do so, Jean Paul AKAYESU never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.
2. A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the *bureau communal*. The majority of these displaced civilians were Tutsi. While seeking refuge at the *bureau communal*, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the *bureau*

communal premises. Displaced civilians were also murdered frequently on or near the *bureau communal* premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

3. B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the *bureau communal* premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities. [...]
4. On or about April 19, 1994, Jean Paul AKAYESU took 8 detained men from the Taba *bureau communal* and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by Jean Paul AKAYESU.
5. On or about April 19, 1994, Jean Paul AKAYESU ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwineze and her fiance (whose name is unknown), Tharcisse Twizeyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba *bureau communal*. [...]

Counts 7-8
(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation the murders of 8 detained men in front of the *bureau communal* as described in paragraph 19, Jean Paul AKAYESU committed:

COUNT 7: CRIMES AGAINST HUMANITY (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 8: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

Counts 9-10
(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the murders of 5 teachers in front of the *bureau communal* as described in paragraph 20, Jean Paul AKAYESU committed:

COUNT 9: CRIMES AGAINST HUMANITY (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 10: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal. [...]

Counts 13-15
(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the events at the *bureau communal*, as described in paragraphs 12(A) and 12(B), Jean Paul AKAYESU committed:

COUNT 13: CRIMES AGAINST HUMANITY (rape), punishable by Article 3(g) of the Statute of the Tribunal; and

COUNT 14: CRIMES AGAINST HUMANITY, (other inhumane acts), punishable by Article 3(i) of the Statute of the Tribunal; and

COUNT 15: VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ARTICLE 4(2)(e) OF ADDITIONAL PROTOCOL 2, as incorporated by Article 4(e)(outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) of the Statute of the Tribunal. [...]

6. THE LAW [...]

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide

1. Article 2 of the Statute stipulates that the Tribunal shall have the power to prosecute persons responsible for genocide, complicity to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. [...]

Crime of Genocide, punishable under Article 2(3)(a) of the Statute

1. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"). It states:

"Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

1. 1. a. Killing members of the group;
   b. Causing serious bodily or mental harm to members of the group;
   c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   d. Imposing measures intended to prevent births within the group;
   e. Forcibly transferring children of the group to another group."
2. The Genocide Convention is undeniably considered part of customary international law, [...].
3. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.
4. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.
5. Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".
6. Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the Chamber will first state its findings on the acts provided for under Article 2(2)(a) through Article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or dolus specialis necessary for genocide to take place.

Killing members of the group (paragraph (a)):

1. [...] It is accepted that there is murder when death has been caused with the intention to do so [...].

Causing serious bodily or mental harm to members of the group (paragraph b)

1. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable. [...]
2. For purposes of interpreting Article 2 (2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paragraph c):

1. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of

destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.
2. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d):

1. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.
2. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Forcibly transferring children of the group to another group (paragraph e)

1. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.
2. Since the special intent to commit genocide lies in the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.
3. On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.
4. [...] [T]he Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.
5. An ethnic group is generally defined as a group whose members share a common language or culture.
6. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.
7. The religious group is one whose members share the same religion, denomination or mode of worship.

[...]

8. As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged, listed in Article 2 (2) of the Statute, must have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".
9. Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator. [...]
10. In concrete terms, for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual. [...]
11. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act. [...]

6.5. Violations of Common Article 3 and Additional Protocol II (Article 4 of the Statute) [...]

1. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: [**See** UN, Statute of the ICTR] [...]
2. Prior to developing the elements for the above cited offences contained within Article 4 of the Statute, the Chamber deems it necessary to comment upon the applicability of common Article 3 and Additional Protocol II as regards the situation which existed in Rwanda in 1994 at the time of the events contained in the Indictment.

Paras 601 to 617

Applicability of Common Article 3 and Additional Protocol II

1. The four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto generally apply to international armed conflicts only, whereas Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international

conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian law, a clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.

2. The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to “armed conflicts not of an international character”, whereas for a conflict to fall within the ambit of Additional Protocol II, it must “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application.
3. It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria.
4. The Security Council, when delimiting the subject-matter jurisdiction of the ICTR, incorporated violations of international humanitarian law which may be committed in the context of both an international and an internal armed conflict:

“Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.

In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions.”

1. Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the ICTY, by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibilty of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the ICTY, during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are *beyond any doubt* part of customary law.
2. Notwithstanding the above, a possible approach would be for the Chamber not to look at the nature of the building blocks of Article 4 of the Statute nor for it to categorize the conflict as such but, rather, to look only at the relevant parts of Common Article 3 and Additional Protocol II in the context of this trial. Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council. Article 4 of the Statute would be applicable irrespective of the Additional Protocol II question, so long as the conflict were covered, at the very least, by the customary norms of Common Article 3. Findings would thus be made on the basis of whether or not it were proved beyond a reasonable doubt that there has been a serious violation in the form of one or more of the acts enumerated in Article 4 of the Statute.
3. However, the Chamber recalls the way in which the Prosecutor has brought some of the counts against the accused, namely counts 6, 8, 10, 12 and 15. For the first four of these, there is mention only of Common Article 3 as the subject matter jurisdiction of the particular alleged offences, whereas count 15 makes an additional reference to Additional Protocol II. To so add Additional Protocol II should not, in the opinion of the Chamber, be dealt with as a mere expansive enunciation of a *ratione materiae* which has been pre-determined by the Security Council. Rather, the Chamber finds it necessary and reasonable to establish the applicability of both Common Article 3 and Additional Protocol II individually. Thus, if an offence, as per count 15, is charged under both Common Article 3 and Additional Protocol II, it will not suffice to apply Common Article 3 and take for granted that Article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable.
4. It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the *Tadic* judgment that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there

exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope.

5. However, as aforesaid, Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law. The Appeals Chamber concurred with this view inasmuch as "[m]any provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law […]", but not all.
6. Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.

Individual Criminal Responsibility

1. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 and parts of Article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of Article 4 of the Statute – form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.
2. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the Tadic case. In the ICTY Appeals Chamber, the problem was posed thus:

"Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction."

1. Basing itself on rulings of the Nuremberg Tribunal, on "elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts", as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

"All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."

1. This was affirmed by the ICTY Trial Chamber when it rendered in the *Tadic* judgment.
2. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.
3. It should be noted, moreover, that Article 4 of the ICTR Statute states that, “The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977” (emphasis added). The Chamber understands the phrase “serious violation” to mean “a breach of a rule protecting important values [which] must involve grave consequences for the victim”, in line with the above-mentioned Appeals Chamber Decision in *Tadic*, paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 – which contains fundamental prohibitions as a humanitarian minimum of protection for war victims – and Article 4 of Additional Protocol II, which equally outlines “Fundamental Guarantees”. The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.
4. The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common Article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.

Paras 618 to 639 and Verdict

The nature of the conflict

1. As aforesaid, it will not suffice to establish that as the criteria of Common Article 3 have been met, the whole of Article 4 of the Statute, hence Additional Protocol II, will be applicable. Where alleged offences are charged under both Common Article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common Article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to afford protection to victims in conflicts not of an international character. Hence, the Chamber deems it reasonable and necessary that, prior to deciding if there have been serious violations of the provisions of Article 4 of the Statute, where a specific reference has been made to Additional Protocol II in counts against an accused, it must be shown that the conflict is such as to satisfy the requirements of Additional Protocol II.

Common Article 3

1. The norms set by Common Article 3 apply to a conflict as soon as it is an armed conflict not of an international character’. An inherent question follows such a description, namely, what constitutes an armed conflict? The Appeals Chamber in the *Tadic* decision on Jurisdiction held “that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and

organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached". Similarly, the Chamber notes that the ICRC commentary on Common Article 3 suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:

- That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
- That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
    a. That the *de jure* Government has recognized the insurgents as belligerents; or
    b. that it has claimed for itself the rights of a belligerent; or
    c. that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
    d. that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

2. The above reference criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections. The term, 'armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.
3. Evidence presented in relation to paragraphs 5-11 of the Indictment, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions.

Additional Protocol II

1. As stated above, Additional Protocol II applies to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".
2. Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:
    i. an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
    ii. the dissident armed forces or other organized armed groups were under responsible command;

iii. the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
iv. the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

3. As per Common Article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the Chamber making a finding thereon.
4. The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.
5. The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.
6. In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which was answerable to authority. The RPF had also stated to the International Committee of the Red Cross that it was bound by the rules of International Humanitarian law. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

Ratione personae

1. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II – the class of victims and the class of perpetrators.

The class of victims

1. Paragraph 10 of the Indictment reads, “The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities”. This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of “persons taking no active part in the hostilities” (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, “all persons who do not take a direct part or who have ceased to take part in hostilities”. These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous. Whether the victims referred to in the Indictment are indeed persons not taking an active part in the hostilities is a factual question, which has been considered in the Factual Findings on the General Allegations (paragraphs 5-11 of the Indictment).

The class of perpetrators

[**N.B.**: The Appeals Chamber reviewed the content of these paragraphs (See Part B. of this case, paras 430-446)]

[...]

Ratione loci

1. There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied “to all persons affected by an armed conflict as defined in Article 1”. The commentary thereon specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals Chamber in its decision on jurisdiction in *Tadic*, wherein it was held that “the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations”
2. Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front. From this follows that it is not possible to apply rules in one part of the country (i.e. Common Article 3) and other rules in other parts of the country (i.e. Common Article 3 and Additional Protocol II). The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives.

Conclusion

1. The applicability of Common Article 3 and Additional Protocol II has been dealt with above and findings made thereon in the context of the temporal setting of events alleged in the Indictment. It remains for the Chamber to make its findings with regard the accused’s culpability under Article 4 of the Statute. This will be dealt with in section 7 of the judgment.

7. LEGAL FINDINGS

7.1. Counts 6, 8, 10 and 12 – Violations of Common Article 3 (murder and cruel treatment) and Count 15 – Violations of Common Article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)

1. Counts 6, 8, 10, and 12 of the Indictment charge Akayesu with Violations of Common Article 3 of the 1949 Geneva Conventions, and Count 15 charges Akayesu of Violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto. All these counts are covered by Article 4 of the Statute.
2. It has already been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF in 1994 at the time of the events alleged in the Indictment. The Chamber found the conflict to meet the requirements of Common Article 3 as well as Additional Protocol II. [...]

8. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows: [...]

Count 7: Guilty of Crime against Humanity (Murder) [...]

Count 9: Guilty of Crime against Humanity (Murder) [...]

Count 13: Guilty of Crime against Humanity (Rape)

Count 14: Guilty of Crime against Humanity (Other Inhumane Acts) [...]

B. Appeals Chamber

[**Source**: ICTY, *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-A, Appeals Chamber, 1 June 2001; footnotes partially reproduced; available on http://www.icty.org]

[**N.B.**: The definition of genocide set out in paras 492-523 of the judgement of Trial Chamber I was not revised in the present Appeals Chamber judgement.]

THE PROSECUTOR

v.

JEAN-PAUL AKAYESU

JUDGEMENT [...]

IV. PROSECUTION'S GROUNDS OF APPEAL

A. First and Second Grounds of Appeal: Article 4 of the Statute (violations of Article 3 Common to

the Geneva Conventions and of Additional Protocol II)

1. The Prosecution raises two grounds of appeal relating to the Trial Chamber's analysis of Article 4 of the Statute. Akayesu was charged with five counts under Article 4 of the Statute and was acquitted on each of the said counts. The first Ground of Appeal alleges that the Trial Chamber erred in law in applying a "public agent or government representative test" in determining who can be held responsible for Serious Violations of Common Article 3 and Additional Protocol II thereto ("the public agent test"). The second Ground of Appeal is raised as an alternative ground of appeal, with the Prosecution submitting that it will only be necessary for the Appeals Chamber to consider it if it rejects the Prosecution's first Ground of Appeal. The Prosecution's second ground, alleges that, having applied the public agent or government representative test, the Trial Chamber erred in fact in finding that Jean Akayesu was not a public agent or government representative who could incur responsibility under Article 4 of the Statute.
2. As for the remedy sought, the Prosecution moves that with respect to the first Ground of Appeal, the Appeals Chamber set aside the Trial Chamber's findings on this issue. With respect to the second Ground of Appeal, the Prosecution moves the Appeals Chamber to hold that the Trial Chamber erred in applying the public agent test in its factual findings in this case. [...]

2. Discussion

1. The Trial Chamber found as follows:
    1. The four Geneva Conventions – as well as the two Additional Protocols – as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. *The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.*
    2. Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. *The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to 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 fulfil the war efforts.* The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols. [794]
2. Subsequently, having applied this finding to Akayesu's circumstance to determine whether he could be held individually responsible for the crimes charged under Article 4 of the Statute, the Trial Chamber held that:
    1. For Akayesu to be held criminally responsible under Article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is

otherwise directly engaged in the conduct of hostilities. Hence, the Prosecutor will have to demonstrate to the Chamber and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts. Indeed, the Chamber recalls that Article 4 of the Statute also applies to civilians. [795]

3. In the opinion of the Appeals Chamber, there is no doubt that the Trial Chamber applied the public agent test in interpreting Article 4 of the Statute, to consider subsequently the particular circumstances of Akayesu's case. While pointing out that the Geneva Conventions and the Protocols have an "overall protective and humanitarian purpose" [796]and consequently, "the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted" [797], the Trial Chamber found that the category of persons likely to be held responsible for violations of Article 4 of the Statute includes "only [...] individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to 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 fulfil the war efforts". The Trial Chamber, held that this approach would allow application of ... [sic] in a fashion which "corresponds best with the underlying protective purpose of the Conventions and the Protocols". [798]
4. The issue here is whether this interpretation is consistent with the provisions of the Statute in particular and international humanitarian law in general. To that end, it is necessary, firstly, to review the relevant provisions of the Statute as interpreted by the case-law of the Tribunals and, secondly, the object and purpose of Common Article 3 to the Geneva Conventions. [799]
5. The Appeals Chamber shall firstly recall the provisions of Article 4 of the Statute: [**See** UN, Statute of the ICTR] [...]
6. Article 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision. It provides only that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed" in particular, serious violations of Article 3 common to the Geneva Conventions. A reading of Article 4 together with Articles 1 and 5 of the Statute respectively relating to the Tribunal's overall competence and personal jurisdiction, sheds no further light on the class of persons likely to be prosecuted under these articles, in particular under, Article 4. [**See** UN, Statute of the ICTR] [...]
7. Thus, there is no explicit provision in the Statute that individual criminal responsibility is restricted to a particular class of individuals. In actuality, articles of the Statute on individual criminal responsibility simply reflect the principle of individual criminal responsibility as articulated by the Nuremberg Tribunal. An analysis of the provisions of the Statute is therefore not conclusive. As a result, the Appeals Chamber must turn to the article which serves as a basis for Article 4, to wit, Article 3 Common to the Geneva Conventions [...].
8. It must be noted that Article 3 common to the Geneva Conventions does not identify clearly the persons covered by its provisions nor does it contain any explicit reference to the perpetrator's criminal liability for violation of its provisions. The chapeau of Common Article 3 only provides that "each party to the conflict shall be bound to apply, as a minimum, the following provisions". The primary object of this provision is to highlight the "unconditional" [802] character of the duty imposed on each party to afford minimum protection to persons covered under Common Article 3. In the opinion of the Appeals Chamber, it does not follow that the perpetrator of a violation of Article 3 must of necessity have a

specific link with one of the above-mentioned Parties.

9. Despite this absence of explicit reference in the common Article 3 [803] ICTY Appeals Chamber nevertheless held that authors of violation of provisions of this article incur individual criminal responsibility. Furthermore, it developed a certain number of other tests for the application of article 3 which the Appeals Chamber can summarize here as follows:
    - The offence (serious violation) must be committed within the context of an armed conflict;
    - The armed conflict can be internal or international;
    - The offence must be against persons who are not taking any active part in the hostilities;
    - There must be a nexus between the violations and the armed conflict.
10. Although ICTY Appeals Chamber has, on several occasions, addressed the issue of the interpretation of common Article 3, it should be noted that it has never found it necessary to circumscribe the category of persons who may be prosecuted under Article 3. Therefore, no clarification has to date been provided on this point in the jurisprudence of the Tribunals, except for recent holdings by an ICTY Trial Chamber. The latter indeed found that “common Article 3 may also require some relationship to exist between a perpetrator and a party to the conflict.” [808] However, the Appeals Chamber observes that this holding finds no support either in statute or in case law. In any case, the Kunarac Trial Chamber has not found it necessary to elaborate on this point in light of the circumstances of the case.
11. In this context, the Appeals Chamber deems it appropriate to analyze the object and purpose of common Article 3 in particular, and of the Geneva Conventions, in general, which object and purpose, in its view, are determinative in the interpretation of Article 4 of the Statute.
12. ICRC commentaries outline the principles underlying the adoption of common Article 3:

“This Article is common to all four Geneva Conventions [...]. It marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in the form of international obligations. It is an almost unhoped for extension of Article 2 [...]. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle [the Red Cross] pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflicts, including those of an internal character”. [811]

1. Thus, common Article 3 seeks to extend to non-international armed conflicts, the protection contained in the provisions which apply to international armed conflicts. Its object and purpose is to broaden the application of the international humanitarian law by defining what constitutes minimum humane treatment and the rules applicable under all circumstances. Indeed, “[i]n the words of ICRC, the purpose of common Article 3 [is] to ensure respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself. These rules may thus be considered as the quintessence of humanitarian rules found in the Geneva Conventions as a whole”. [812] Protection of victims is therefore the core notion of common Article 3.
2. The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is

therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.

3. In paragraph 630 of the Judgment, the Trial Chamber found that the four Conventions "were adopted primarily to protect the victims as well as potential victims of armed conflicts". It went on to hold that "[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces". Such a finding is prima facie not without reason. In actuality authors of violations of common Article 3 will likely fall into one of these categories. This stems from the fact that common Article 3 requires a close nexus between violations and the armed conflict. This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.
4. Accordingly, the Appeals Chamber finds that the Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons, as defined by the Trial Chamber.
5. For the foregoing reasons, the Appeals Chamber entertains this ground of appeal and finds further that it is therefore not necessary to pass on the Prosecution's alternative ground of appeal. [...]

V. DISPOSITION

For these reasons, The Appeals Chamber, [...]

Unanimously dismmisses [*sic*] each of the grounds of appeal raised by Jean-Paul Akayesu,

Affirms the verdict of guilty entered against Jean-Paul Akayesu of all the counts on which he was convicted and the sentence of life imprisonment handed down, [...]

Considers the First, Third and Fourth Grounds of Appeal of the Prosecutor and Finds that, with respect to the points of law in issue in the Prosecution's appeal, this Judgement sets out the relevant legal findings thereon.

Done in English and French, the French text being authoritative.

Footnotes

- [794] Trial Judgment, paras 630 and 631 (emphasis added).
- [795] Trial Judgment, para. 640
- [796] Ibid. para. 631
- [797] Ibid.para. 631
- [798] Ibid. para. 631 (emphasis added).
- [799] Article 31(1) of the Vienna Convention on the Law of Treaties (1969) provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of

the treaty in their context and in the light of its object and purpose".

- [802] ICRC Commentary [of Convention IV] [available on http://www.icrc.org/ihl], p. 38
- [803] Tadic (Jurisdiction Decision), [**See** Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 128]
- [808] Kunarac Judgment, para. 407
- [811] ICRC Commentary [of Convention IV], [available on http://www.icrc.org/ihl] p. 26
- [812] Celebici Appeal Judgment, para. 143

Discussion

1. *(Trial Chamber, paras 492-499)*
    a. How would you define genocide in order to distinguish it from a crime against humanity?
    b. Is the obligation to sanction genocide an element of customary international law? Of customary IHL? Does the ICTR have the jurisdiction to prosecute individuals who committed genocide by virtue of its Statute alone? Must the State of which the accused is a national be a party to the Convention on Genocide? Must it have included repression of this crime in its national legislation?
    c. Is the expression "in part" attached to the extent of the crimes actually committed or to the perpetrators' intention? Do you agree with the Chamber when it rules that a crime committed with the intention to destroy part of a specific group constitutes genocide?
    d. What is the special intent (or *dolus specialis*) necessary for genocide to take place? How can we determine the existence of this special intent? (**See also** paras 517-523)
2. *(Trial Chamber, paras 510-523)*
    a. What do you think of the ICTR's definition of a protected group? Is the chamber using subjective or objective criteria? Is group membership not often a matter of "self-identification" by the members of the group or "stigmatization" by the group's enemies, and therefore would subjective criteria not be more appropriate?
    b. What does the expression "stable group" mean? Are only national, ethnic, racial and religious groups "stable"? Would this mean that the extermination of other groups (such as handicapped people, some political groups and homosexuals by the Nazi regime) would be qualified as a crime against humanity but not as genocide? Is "cultural genocide" recognized in international law? Do you think it should be?
3. (Trial Chamber, paras 601-610, 619-627)
    a. How does the ICTR qualify the conflict in Rwanda? Is Art. 3 common to the Conventions applicable? Is Protocol II applicable?
    b. What is the relevance of the qualification of the conflict to the case?
    c. Is there a difference of applicability between Art. 3 common to the Conventions and Protocol II?
4. Does Art. 4 of the ICTR Statute criminalize certain acts? Or does it give the ICTR jurisdiction over acts criminalized elsewhere? If so, where are those acts criminalized? [**See** UN, Statute of the ICTR]
5. *(Trial Chamber, paras 601-610)*
    a. What is the relevance, for the prosecution of the accused, of establishing whether the rules referred to in Art. 4 of the Statute were at the time of indictment part of customary international law?
    b. Why did the Court find it necessary to establish that Art. 3 common to the Conventions is part of

customary international law? What were the conclusions of the Court concerning Protocol II?

c. Was the Court correct to argue in its conclusion that at the time when Akayesu committed his crimes, Art. 4 was part of existing customary law?
d. Is it necessary for a rule of Art. 3 common to the Conventions or of Protocol II to be part of customary law for the ICTR to apply it under Art. 4 of its Statute? Why? Because of the principle of *nullum crimen sine lege*? Would the application of a purely treaty-based rule of Protocol II violate that principle? Even though Rwanda was, at the time of the crimes, party to Protocol II? At least for those rules which are neither incorporated into Rwandan legislation nor self-executing?
e. Did the Security Council not empower the ICTR through Art. 4 of its Statute to apply all rules of Protocol II? If so, does the Court consider that this would have violated the principle of *nullum crimen sine lege*?
f. Did the Chamber in the *Tadic* case [**See** ICTY, The Prosecutor v. Tadic [Part A., paras 89, 94 and 143]] consider that the ICTY may only apply customary rules? If one accepts such an interpretation, should it also apply to the ICTR?

6. *(Trial Chamber, paras 611- 617)*
   a. Why may the ICTR only prosecute violations of Art. 3 common to the Conventions and Protocol II for which customary law foresees individual criminal responsibility? Is the same reasoning applicable as for the ICTY in the Tadic case? Do you agree with the statement in para. 608 of the Trial Chamber decision that most States have criminalized violations of Art. 3 common to the Conventions in their domestic penal codes? Would that be necessary to claim that customary law criminalizes violations of common Art. 3? For the ICTR to try Akayesu?
   b. Would it have sufficed for the Rwandan criminal code to foresee individual criminal responsibility for the acts Akayesu was accused of? Can we assume that the acts committed by Akayesu were prohibited under Rwandan criminal law? Had the ICTR adopted such an approach, would it have violated the principle of *nullum crimen sine lege*?
7. *(Appeals Chamber, paras 430-445)*
   a. Who are the beneficiaries of the IHL of non-international armed conflicts? Who has to respect Art. 3 common to the Conventions? Protocol II? All individuals who commit a prohibited act during an armed conflict on the territory of the State in which the conflict is taking place? Must the act be linked to the conflict? [**See** ICTY, The Prosecutor v. Tadic [Part B.]] Must the perpetrator belong to a party to the conflict? Must he be a public agent for one of the parties? Must he be part of the armed forces of one of the parties?
   b. According to the Trial Chamber (**See** paragraphs of the Trial Chamber Judgement reproduced in para. 430 of the Appeals Judgement), is only a person who is mandated and supposed to be helping the war effort of one of the parties obliged to respect IHL? How do you interpret Art. 3 common to the Conventions and Protocol II on this issue? Do you think that the Appeals Chamber was right to decide that the Trial Chamber had committed an error?
   c. Is the Appeals Chamber's interpretation the only one that allows for individual criminal responsibility to be applied in non-international armed conflicts that take place in a failed State?