A. Military Court of Cassation - Paras 1 to 7

[**See also** ICTR, The Prosecutor v. Jean-Paul Akayesu, **and** Switzerland, Military Penal Code [hereafter MPC]]

[**N.B.**: In accordance with the practice of Swiss tribunals, the name of the accused is not published in the public decisions of this case. However, we have taken the liberty to reveal it as was done by the Federal Council in its message to Parliament on the Rome Statute of the ICC of 15 November 2000, *Feuille fédérale* (Federal Gazette) 2001, 487, n. 270, and Luc REYDAMS, "International Decisions, Niyonteze v. Public Prosecutor", AJIL 96 (2002), pp. 231-236.]

[In order to facilitate comprehension of this case, the decision of the Court of Cassation (27 April 2001) is reproduced below before the Appeals Chamber Judgement of 26 May 2000.]

A. Military Court of Cassation

[**Source**: Switzerland, *Tribunal militaire de cassation* (Military Court of Cassation), decision of 27 April 2001 in the N. case, available (in French) at https://www.vbs.admin.ch/fr/home.html; unofficial translation.]

THE MILITARY COURT OF CASSATION
[the supreme military tribunal of Switzerland]
rules as follows
at its hearing of 27 April 2001 in Yverdon-les-Bains, [...]
on the application for judicial review
filed by
N., represented by [...],
and by
the Prosecutor of Divisional Chamber 2, Lieutenant-Colonel [...],
against
the decision handed down on 26 May 2000 by Military Appeals Chamber 1A,
in which N. was found guilty of breaches of the laws of war
(Art. 109 of the Swiss military code), sentenced to 14 years' imprisonment
(less the time already spent in pre-trial detention) and deportation

from Switzerland for a period of fifteen years,
and ordered to pay the costs of the case

Details of the case:

A. An investigation in support of evidence, followed by an ordinary military criminal investigation, were ordered on 3 July and 20 August 1996 respectively, with regard to N., a Rwandan citizen living in Switzerland as a refugee.
The Prosecutor of Military Divisional Chamber 2 (hereinafter referred to as "the Prosecutor,") prepared an indictment on 3 July 1998. In substance, the facts alleged against the Accused were as follows: between the beginning of the month of May and 15 July 1994, during which time a widespread or systematic attack was in progress against the Hutu opposition and the Tutsi minority, acting in his capacity as *bourgmestre* of Mushubati commune, Prefecture of Gitarama, Rwanda, he called together a number of the residents of his commune, which was poorly regarded by those in power, at the top of a hill named Mont Mushubati, where he exhorted or ordered them to kill other Rwandans, namely Tutsis and moderate Hutus who were not taking part in the conflict; during the same period, in the refugee camps at Kabgayi in Rwanda, he encouraged a number of Tutsis and moderate Hutus from his commune to return there, with the intention of having them killed, perpetrating acts of violence against them and despoiling them of their property, and also ordered the soldiers accompanying him to kill two persons; finally, he took no steps to prevent the massacre of the Tutsi and moderate Hutu population in his commune. The facts set out in the indictment are to be seen in the context of the massacres that occurred in Rwanda between April and July 1994.

B. In its judgment delivered on 30 April 1999, Military Divisional Chamber 2 (hereinafter referred to as "the Divisional Chamber") found N. guilty of murder (Art. 116 of the Military Penal Code, [hereinafter referred to as "the MPC"], [...] of incitement to murder (Articles 22 and 116 MPC), of attempted murder (Articles 19a and 116 MPC) and of grave breaches of international conventions governing the conduct of hostilities and the protection of persons and property (Art. 109 MPC) and sentenced him to life imprisonment and to deportation from Switzerland for a period of 15 years. The Divisional Chamber found the accused guilty on the first two counts, regarding the meeting on Mont Mushubati and the events in the camps at Kabgayi, but found him not guilty on the third count related to breach of his duty as *bourgmestre*.

C. N. lodged an appeal against this judgment. Military Appeals Chamber 1A (hereinafter the Appeals Chamber) heard the appeal between 15 and 26 May 2000. In its decision handed down on 26 May, it allowed N.'s appeal in part. The Chamber found him guilty of breaches of the laws of war (Art. 109 MPC) and sentenced him to 14 years' imprisonment and deportation from Switzerland for a period of 15 years [...].

D. N. applied for review [...]. He claimed [...] that there had been a breach of the provisions of the MPC that deal with breaches of the law of nations during armed conflict (Military Penal Procedure, hereafter MPP, Art. 185 (1) (d) as it relates to Articles 108 and 109 of the MPC [...]).

E. The Prosecutor also applied for review [...], maintaining that in respect of one matter the Appeals Chamber had dealt with the facts in an arbitrary manner by rejecting one of the counts on which the Divisional Chamber had found N. guilty. He also criticized the length of sentence imposed. [...]

Whereas: [...]

II. Application for judicial review filed by N. (hereinafter "the accused") [...]

1. In order to deal with the accused's claims regarding the taking of evidence or the contents of the indictment, it is first necessary to outline the elements constituting the offence of which he has been found guilty, so as then to be able to determine the pertinent or essential facts (**see** MPP Art. 185 (1) (f) [Military Penal Procedures]) to the application of criminal law.
    a. The Appeals Chamber has found the accused guilty under Art. 109 MPC (breaches of the laws of war). That article forms part of the chapter of the MPC that deals with breaches of the law of nations during armed conflicts (Articles 108 to 114 MPC). Paragraph 1 of that article reads as follows:

"Any person violating the provisions of international conventions concerning the conduct of hostilities or the protection of persons and property,

any person violating other recognized laws and customs of war, shall, unless more stringent provisions apply, be subject to imprisonment.

The penalty for grave breaches shall be imprisonment." [...]

In principle, the provisions of Articles 108 to 114 MPC apply where war has been declared and to other conflicts between two or more States (Art. 108 (1) MPC). However, Art. 108 (2) MPC stipulates that breaches of international agreements are punishable if those agreements specify a broader field of application. It therefore follows that the 'international conventions governing the conduct of hostilities and the protection of persons and property' that apply to non-international conflicts, and which hence have a wider field of application than those of the conventions applicable exclusively to international conflicts, also fall under the provisions of Art. 109 (1) MPC.

a. a. [...] The impugned judgment also refers to [...] Protocol II of 8 June 1977, which came into force for Switzerland on 17 August 1982 and for Rwanda on 19 May 1985 and which "develops and supplements Art. 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application." (Protocol II, Art. 1 (1)). In particular, it sets out in more detail than does common Article 3 the fundamental guarantees for humane treatment of "persons who do not take a direct part or who have ceased to take part in hostilities." (Protocol II, Art. 4). Specifically, it prohibits at any time and in any place whatsoever: "violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment." (Protocol II, Art. 4 (2) (a)).
    b. It is not in dispute that Article 3 common to the four Geneva Conventions (hereinafter 'common Article 3'), along with the further provisions of Protocol II, forms part of the 'provisions of international conventions' mentioned under Art. 109 (1) MPC, thereby making it possible to punish breaches of common Article 3 and of Protocol II Art. 4 under that provision. Furthermore, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has recently confirmed the conclusion that a breach of common Article 3 constitutes a crime and can hence lead to criminal prosecution under the domestic legislation of a State (see the judgment of

20 February 2001 in the *Celebici* case, para. 168). Nor is it in dispute that a foreign perpetrator of breaches of the laws of war, acting against foreigners, during a non-international conflict on the territory of another State, can be prosecuted and sentenced by the Swiss courts under Art. 109 MPC, as ordinary Swiss criminal law contains no comparable provisions. This extension of the territorial jurisdiction of Swiss criminal law arises out of Art. 2 (9) MPC, which provides that civilians (by which are meant persons not liable for military service in Switzerland) who, during an armed conflict, commit breaches of the law of nations (Articles 108 to 114) are subject to Swiss military criminal law. This rule must be read in conjunction with Art. 9 MPC, which states that the MPC applies to offences committed in Switzerland and in other countries. Courts-martial have jurisdiction, as Art. 218 MPC stipulates that all persons subject to military law are liable to be tried before courts-martial (para. 1), even if the offence has been committed outside Switzerland (para. 2). [...]

1. [...] the accused claims a breach of an essential element of procedure, on the grounds that the Appeals Chamber found him guilty of acts not mentioned in the indictment [...]. [...] the Appeals Chamber points out that the eldest daughter of one witness (Witness 21, whose anonymity is guaranteed under this procedure, a protective measure afforded to most witnesses from Rwanda), first name D., aged 23, and the wife of the uncle of Witness 3, were killed following the Mont Mushubati meeting and that these two deaths were a result of the accused's speech inciting the population of his commune to eliminate Tutsis. According to the accused, the victims had to be cited by name in the indictment and this procedural error prevented the Appeals Chamber from convicting him on the corresponding count. [...]
    a. [...] The indictment mentions the meeting on top of Mont Mushubati, during which the accused is alleged to have "exhorted, then given the formal order to the participants [...] to commit murder, kill and attack the property of opposition Hutus mentioned above and the Tutsi minority." It does not give further details as to the identities of the victims, but does state that they "were not participating in the conflict."

       The alleged breach of common Article 3 (via Art. 109 MPC) is in this instance related to "murder of all kinds" (common Article 3 (1) and (2) (a)). In other words, and in terms of Swiss law, the accused is alleged to be the indirect perpetrator or instigator of murders which, in the context of the massacres carried out in Rwanda during this period, were alleged to be a direct consequence of the meeting on Mont Mushubati. Criminal proceedings for breaches of the laws of war do not automatically require that the precise identity of the victims be given. Mentioning certain of these victims in the judgment could be seen as providing additional information in the context already defined at the opening of the trial by the indictment; this would add detail to the accusation presented by the Prosecutor, without modifying the objective in terms of the alleged facts [...].

       Furthermore, the accused advances a rule supposedly applicable before the ICTR, the effect of which would be that the victims must be named where breaches of common Article 3 are alleged. In his arguments, the accused cites no provision of that tribunal's statute or rules of procedure, nor any precise jurisprudence of the tribunal. In any case, the Swiss courts are not bound to apply foreign or international rules of procedure. [...] This ground for review is therefore unfounded.
2. The accused criticises the examination of evidence in a number of respects [...].
3.

a. The Appeals Chamber found (in Chapter 3 of the impugned judgment) that the accused, who had returned to Mushubati in the night of 18/19 May 1994 following a period spent in Europe between 12 March and 14 May 1994, returning via Libreville, Kinshasa and Goma, summoned the population of the commune to a meeting on top of Mont Mushubati somewhere in the second half of May 1994, acting in his capacity as *bourgmestre*. On the appointed day, part of the population made their way to the top of the hill via various paths. On arrival, following approximately 1 ½ hours' walk, the accused gave a speech in front of a crowd of some two hundred persons, probably using a public address system or a megaphone. He was accompanied by a number of soldiers. The substance of his speech was that Mushubati commune was poorly regarded by the government because, during his absence, the population had merely killed Tutsis' livestock and burned down their houses, allowing them to escape to the camps at Kabgayi. The authorities were accusing the inhabitants of Mushubati of having allowed numerous Tutsis and moderate Hutus to escape the large-scale massacre that had recently taken place in the region.

   At the time of the meeting there were few Tutsis remaining in the commune and they were in hiding, particularly in the forests on Mont Mushubati. The aim of the meeting was to flush out any surviving Tutsis and to incite hatred of Tutsis among those present. During his speech, the accused exhorted the population to kill the surviving Tutsis, together with pregnant Hutu women where the father of the child was a Tutsi. More precisely, he issued a formal instruction to those present to carry out "ground clearing" ["débroussaillage" in French], by which was meant to kill Tutsis and moderate Hutus of the opposition, and to attack their property. The participants at the meeting obeyed the orders and exhortations of their bourgmestre, which led to the deaths of an unknown number of persons, including the daughter of Witness 21, D., aged 23, and the wife of the uncle of another witness (Witness 3). D. (whose father was a Tutsi) was killed on the Kabgayi road the day of the Mont Mushubati meeting and her body was thrown into a latrine. She is on a list of missing persons. The (Tutsi) wife of the uncle of Witness 3 was killed and her body thrown into a river.

   [...] According to the accused, the decision to call the population together had been taken at a meeting attended by the *bourgmestre* and the councillors of the commune's sectors, the aim being to organize community work in the form of "ground clearing" in the normal sense of the word, i.e. clearing away undergrowth along the forest paths on the slopes of Mont Mushubati. The work was intended to facilitate action against looting, arson, illegal logging, banditry and the activities of the Interahamwe (the Interahamwe movement was at the origin of the youth wing of the majority party, the MRND and, in 1994, the members of that movement played an active role in the massacre of the Tutsis). The accused agreed that it had taken approximately 1 ½ hours to climb the hill. He claimed to have made a speech thanking those present for attending, encouraging them to fight bandits and the Interahamwe and calling on them to resist incitation to hatred or violence.

   The Appeals Chamber found that the accused's version of the aims of the Mont Mushubati meeting, the "ground-clearing" and the content of his speech (discouraging aggression and re-establishing security) was not plausible. By contrast, the Chamber had been convinced by the statements of witnesses, of which it had summarized the decisive elements.

b. In his application for review, the accused calls into question the credibility of the witnesses whose testimony the Appeals Chamber has accepted. He points out numerous contradictions between their depositions. From those discrepancies he concludes that these depositions are generally unconvincing.

   [...] It is true that discrepancies or errors in witnesses' testimony can raise questions as to their credibility. In referring to the first-instance judgment, the Appeals Chamber took account of the specific situation applying to witnesses who had experienced the bloody events of spring 1994 in Rwanda, who had in many cases lost members of their families and suffered trauma, some of whom were illiterate and had no knowledge of calendars. These are not typical situations for Swiss courts. Furthermore, the judges of the ICTR have also pointed out the specificities of this situation as it applies to assessing the probative value of testimony. They have noted in this context that, unlike the leaders of Nazi Germany, who went to great lengths to record their deeds committed during the Second World War, the planners and perpetrators of the Rwandan massacres in 1994 left virtually no trace of what they had done, making the testimony of survivors all the more important (see the ICTR judgment in the *Kayishema and Ruzindana* case, 21 May 1999, para. 65). In the view of the ICTR, therefore, one must take into account the influence of traumatic experiences on witnesses' testimony, but one should not dismiss such testimony merely because it relates to traumatic events; certain discrepancies and errors are to be expected under such circumstances (*ibid.*, para. 75). In the instant case, Swiss judicial bodies took steps to render themselves capable of assessing the reliability of testimony in this particular context: examining magistrates and trial judges traveled to Rwanda, heard numerous witnesses in Rwanda and in Switzerland of the events of 1994, and also heard journalists and specialists on the contemporary history or the culture of the country. The Appeals Chamber was also able to draw on the book by US historian and leader of a group of experts Alison Des Forges (*Leave None to Tell the Story: Genocide in Rwanda*, published by Human Rights Watch and the International Federation for Human Rights, Paris, 1999), which presents a survey of events in Rwanda during 1994, together with their historical, political and cultural background. The book, which mentions neither the accused nor the massacres in Mushubati commune, does not constitute evidence, but the work of historians does represent an important and uncontested documentary resource for a Swiss judge called upon to consider related testimony. [...]

c. Turning to the first-instance judgment, the Appeals Chamber found that the version of the facts presented by the accused was of itself implausible. For the Divisional Chamber, it was in particular hardly likely that "ground clearing" would succeed in re-establishing security and that priority would be given in wartime to the problems of arson, illegal logging and illegal charcoal-making. It was not untenable [for the Divisonal Chamber] to take such elements into account. But, above all, the Appeals Chamber was able to base its decision on statements from persons who claimed to have attended the Mont Mushubati meeting and from others to whom the speech made by the accused at that meeting had been communicated. [...]

   To support his version of the events concerning the Mont Mushubati meeting, the accused stated that "ground clearing" or clearing the edges of the forest along the forest paths was necessary at the time, that the work was intended to prevent illegal usage of the forest and that this was borne

out by an expert opinion concerning the condition of vegetation in the area, submitted in evidence. However, there is little to be gained from discussing the necessity or existence of forestry work in 1994; even if one accepts that it was necessary to clear away undergrowth along the forest paths, none of the testimony heard indicates that this was the purpose – even the secondary purpose – of the meeting in question. [...]

Paras 8 to 16

1.
    a. In considering the personal situation of the accused (Chapter 3 of the impugned judgment), the Appeals Chamber summed up the circumstances under which the accused decided to return to Rwanda following the outbreak of the conflict and of the massacres. The Chamber also mentioned the activities of the accused during the weeks he spent in his commune (from 18/19 May to 11/12 June 1994) and the manner in which his departure and that of his family for Zaire (now the Democratic Republic of the Congo) was arranged.
    [...] The Chamber also found that on returning to Mushubati the accused enjoyed effective and significant powers. [...]
    b. The factual conclusions regarding the political affiliation and the powers of the bourgmestre of Mushubati in May 1994 could also be relevant to application of Art. 109 MPC as it applies to common Article 3 (see 3. above and 9. below). Action against breaches of the laws of war presupposes that certain objective conditions are met with respect to the perpetrator and the context in which he acts uring the course of a conflict. [...]
    The accused does not dispute the extent of the powers exercised by a *bourgmestre* in peacetime, but claims that following the outbreak of the conflict, and in particular after the interim government was set up in Gitarama, a few kilometres from Mushubati, he exercised no more than purely administrative power in his commune, owing to the presence of large numbers of soldiers and militia. In support of his arguments, the accused outlined the conditions under which he had acted during the events set out in the impugned judgment. Clearly, it is difficult for a foreign court to determine, several years after the event, the extent of the powers exercised by an agent of the Rwandan civilian administration in dramatic circumstances over a period of a few weeks. However, all the facts established show that the accused retained certain of his powers, that his authority as *bourgmestre* was not called into question and that there was no direct confrontation with the government, the prefect, the army or the militia regarding the administration of his commune or his political status. In this very special situation, where State bodies at all levels could no longer function as they had hitherto and where institutions were no longer as structured or as effective as before, a *bourgmestre* clearly did not exercise as much power as he would under normal circumstances. Indeed, the impugned judgment speaks of a “chaotic situation”, and one that left the accused with only limited freedom of decision and action in comparison with a normal situation. This being so, the Chamber’s findings with regard to the extent of the powers enjoyed by the accused under these circumstances appears neither untenable nor manifestly at variance with the actual situation as it emerges from the proceedings and testimony. On this point, therefore, the factual findings of the impugned judgment are not arbitrary.
2. The accused claims that criminal law has not been respected [...], specifically in relation to Arts. 108 (3), and 109 (1) of the MPC, Article 3 common to the Geneva Conventions, Articles 146 and 147 of the

Fourth Geneva Convention and Art. 4 of Additional Protocol II. He claims that the actions of which he is accused [...] have no proximate connection with the armed conflict in Rwanda and that he therefore does not fulfil the objective conditions required in order to be considered the perpetrator of breaches of these provisions of international humanitarian law. [...]

a. As mentioned above, [...] a conviction can be secured only on the basis of Art. 109 MPC, and the "provisions of international conventions" to which that article refers are those of common Article 3 and of Art. 4 of Protocol II. Article 108 (2) MPC does not apply in this context. Articles 146 and 147 of the Fourth Geneva Convention (relative to the protection of civilian persons in time of war) set out the obligations on the Contracting Parties: to enact legislation to provide penal sanctions for persons committing grave breaches of the Convention, to search for persons alleged to have committed breaches of the Convention and to try such persons or surrender them to another State for trial. They do not contain any rules directly applicable to the conduct of hostilities. Moreover, by enacting Art. 109 MPC, Switzerland has discharged the obligation to enact legislation contained in Art. 146 (1) of the Fourth Convention [...].

   The category into which the Rwandan conflict of 1994 falls is not in dispute [...]: this was an armed conflict not of an international character within the meaning of common Article 3. The conflict also falls within the scope of Protocol II, which is somewhat narrower than that of common Article 3: it corresponds to the definition of Protocol II, Art. 1 (1): a conflict taking 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 (common Article 3 applies only to conflicts of lesser intensity [...]).

   The accused does not dispute the fact that the acts of which he is accused, and the reality of which is not contested (see 6. and 7. above) could be classified as intentional homicides, with him the indirect perpetrator, co-perpetrator or instigator. The victims of these acts, of whom an unknown number were killed, in particular Tutsis hiding in Mushubati or refugees in Kabgayi, were "persons taking no active part in the hostilities" protected by common Article 3 and Protocol II. The violence to life perpetrated upon these persons is explicitly prohibited by these instruments of international humanitarian law (common Article 3 (1), (2) (a) and Protocol II, Art. 4 (2) (a)) which prohibit various forms of participation in homicide [...]. This is in accordance with the point generally accepted under international criteria, that the notion of intentional homicide or murder covers all situations in which the perpetrator, by his behaviour, causes the death of a person and acts with intent as regards his behaviour and the expected result (see the message from the Swiss federal council regarding the Rome Statute of the International Criminal Court, the Swiss federal law on cooperation with the ICC and the revision of criminal law, *Feuille fédérale* 2001 I, p. 474, n. 5.3.2.1).

   Nonetheless, for common Article 3 and Art. 4 of Protocol II to be applicable under Art. 109 MPC, there must be a certain nexus between the acts (and their perpetrator) and the armed conflict, as not every act of violence to life that occurs in the territory of a country involved in such a conflict is covered by international humanitarian law. The Appeals Chamber found that this condition was satisfied. The accused disputed this. [...]

b. According to the impugned judgment, there is no justification for applying the criteria of the ICTR, which would require a proximate connection between the offence and the armed conflict and would restrict the scope of the Geneva Conventions to persons holding functions in either the armed

forces or the civilian government. In the view of the Appeals Chamber, the concept of perpetrator should be seen in the broad sense; any person, military or civilian, who attacks a person protected by the Geneva Conventions breaches these provisions and falls under Art. 109 MPC. Moreover, a link must still exist between the offences and the armed conflict. Having established these principles, the Appeals Chamber ruled on the relationship between the functions of the accused, which conferred upon him a certain degree of power over the population of his commune, the armed forces and the militia, and the acts committed with regard to the meeting on Mont Mushubati and the visits to Kabgayi. The Chamber found that the accused met the objective criteria for being the perpetrator of the offences of which he was accused, and that a connection existed between his actions and the armed conflict.

c. Certain first-instance judgments of the ICTR have described in some detail the twofold condition of a nexus between the accused and the armed forces and between the armed conflict and the crime. In its judgment of 21 May 1999 in the *Kayishema and Ruzindana* case, Trial Chamber II of the ICTR found that persons who were not members of the armed forces could only be held criminally responsible if a link existed between them and the armed forces. As the armed forces were at all times under the authority of officials representing the government, such officials were expected to support the war effort and to play a certain role (*see Kayishema and Ruzindana* judgment, para. 175). In its judgment of 2 September 1998 in the *Akayesu* case (Akayesu having been bourgmestre of Taba commune), Trial Chamber II of the ICTR found that the list of persons subject to the provisions of common Article 3 and Protocol II included 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 effort. In spring 1994, it was not to be excluded that a *bourgmestre* – who was not simply a civilian – might belong to this category (see Akayesu judgment, paragraphs 631 and 634).
As regards the link between the armed conflict and the crime, Chamber II of the ICTR had mentioned a “direct connection” and not some vague and indefinite link. However, the Chamber did not attempt to define a test *in abstracto* (*Kayishema and Ruzindana* judgment, para. 188). In the *Akayesu* judgment (para. 641), Chamber I of the ICTR also mentioned the need for a “nexus,” without describing it in more detail.
It should be pointed out that in the above two cases tried in first instance by the ICTR, both of which involved civilians (a *bourgmestre*, a prefect and a businessman), the Chamber found that the prosecution had not proved the existence of a nexus between the alleged crimes and the armed conflict (see *Akayesu*, para. 643 and *Kayishema and Ruzindana*, paragraphs 615 and 623).
The Appeals Chamber also cited the judgment handed down by ICTR Chamber I on 27 January 2000 in the *Musema* case. That judgment made reference to the two judgments cited above regarding the nexus between the crime and the armed conflict, i.e. the condition that the crimes be closely linked with the hostilities or committed in connection with the armed conflict (paragraphs 259 and 260). That judgment also refers to the principle set out in the other judgments regarding the criminal responsibility of civilians with respect to breaches of the laws of war (para. 264 *et seq.*). The Chamber found that Musema, the director of a tea factory appointed by the State, could fall into the category of individuals liable to be held responsible for grave breaches of international humanitarian law (para. 275). However, this question was left undecided, as the prosecution failed

to prove the nexus required beyond all reasonable doubt (para. 974).

d. In its role as supreme court, the Military Chamber of Cassation interprets Art. 109 MPC independently. It has not previously had the opportunity to rule on the conditions under which, in the context of a non-international armed conflict, civilians can be held responsible for breaches of the laws of war or the provisions of international humanitarian law set out in common Article 3 and Protocol II. [...]

   The criteria applied by the Trial Chambers of the ICTR to decide whether a breach of common Article 3 or of Protocol II has occurred need not necessarily be applied by the Swiss courts. However, it is difficult to find grounds for not doing so, particularly in view of the fact that these criteria are relatively broad. The criterion of a "direct" connection, i.e. not vague or indeterminate, between the offences and the armed conflict is not very precise, and rests on an assessment of the specific case. Regarding the categories of civilians who may be the perpetrators of such crimes, the ICTR has adopted a concept that does not appear particularly restrictive: all 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 effort. The ICTR does not exclude the possibility that a Rwandan *bourgmestre* could be subject to the corresponding provisions. In the instant case, one must therefore take these criteria and interpret them in the light of the concrete situation of the accused.

   It is unfortunate that the Appeals Chamber stated that it was departing from current jurisprudence of the ICTR whereas, notwithstanding that statement, it applied that jurisprudence to the specific case of the criteria outlined above. There is hence no need to analyse further this alleged divergence in the interpretation of international humanitarian law. However, it is necessary to verify whether, in applying these criteria on the basis of facts established in a non-arbitrary manner, the Appeals Chamber was correct in finding that the elements constituting the crime described under Art. 109 MPC were present.

e. Under the Rwandan administrative system, the *bourgmestre* is considered an agent of the State. The position is a prominent one, as the number of communes is limited (145 in 1991, with a typical population of between 40,000 and 50,000. See Des Forges, *op. cit.*, p. 55 in the French version). While the *bourgmestre* has no official military function, the case has shown that the accused was regularly accompanied by soldiers, over whom he exercised a certain degree of authority. Both during the Mont Mushubati meeting and during his visits to Kabgayi, he acted using his functions as *bourgmestre* or taking advantage of the authority that the position of *bourgmestre* conferred upon him, giving orders to inhabitants of his commune. His aim was to "support or fulfil the war efforts," to use the terminology of the ICTR, in other words to promote the achievement by the government of the day of its aim of massacring Tutsis and moderate Hutus. [...]

   It is clear both that there is a sufficient nexus between the crimes committed at Mont Mushubati and Kabgayi and the armed conflict, and that his position and the manner in which he discharged his function of *bourgmestre* mean that he fulfilled the conditions for being subject to common Article 3 and the provisions of Protocol II as a perpetrator of crimes. The complaint of a violation of Art. 109 MPC is therefore groundless.

3. The accused claims that criminal law has not been respected (Art. 185 (1) (d) MPP), criticizing the penalty of deportation from Switzerland for fifteen years. He criticizes the Chamber for not having taken into account his status of refugee in Switzerland, where he is well-integrated and where his wife and two children are also living, likewise as refugees. [...]

a. [...]
b. As concerns deportation of a refugee on penal grounds, Art. 44 MPC should be interpreted and applied in the light of Art. 32(1) of the Convention relating to the Status of Refugees [...] and of Art. 65 of the law on asylum, hereinafter referred to as "Lasi" [**available at** http://www.admin.ch/ch/f/rs/c142_31.html], that is, in a manner more restrictive than in respect of other foreigners [...]. Those provisions allow deportation on grounds of public order. In view of the acts of which the accused has been convicted, those grounds apply. Consequently, there is no need to first consider whether the accused does indeed enjoy the protection of the above Convention. Article 1 (F) (a) of the Convention stipulates that it does not apply to persons who have committed "a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes," nor to consider whether there are grounds for revoking asylum or refugee status. Those measures are provided for under Lasi Art. 63 if the refugee has obtained asylum or refugee status by making false declarations or concealing essential facts, or if he has committed particularly reprehensible crimes. It is not for a judge in criminal proceedings to order such revocation. Furthermore, the fact that the family of the accused is living in Switzerland does not exclude deportation, given the seriousness of the crime (see Art. 8 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, [**available at** http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm]).
c. The Appeals Chamber applied legal criteria to determine whether and for how long the accused should be deported from Switzerland. Given the nature of the crimes committed, it is clearly legitimate to cite the protection of public security and the impugned decision does not appear excessively severe on this point. The Appeals Chamber has not, therefore, abused its powers of discretion in applying Art. 40 (1) MPC. [...]

III. Application for judicial review by the Prosecutor [...]

1. The Prosecutor maintains that, in determining the duration of imprisonment, the Appeals Chamber did not take sufficient account of the extreme gravity of the crimes committed by the accused, and that the cumulation of offences also constituted aggravating circumstances. According to the Prosecutor, a sentence of 20 years' imprisonment was the only possibility.
   a. While the Military Chamber of Cassation does enjoy liberty to determine whether there has been a breach of federal law it cannot, in view of the discretionary powers conferred to lower courts in this domain, allow an appeal regarding sentencing unless the sentence: departs from the legal framework, is based on criteria other than those of Art. 44 MPC, fails to take account of the factors set out therein or appears so excessively severe or lenient that the question arises of abuse of such discretionary powers [...].
   b. A sentence of 14 years' imprisonment is of itself severe. It is true that the Trial Chambers of the ICTR have imposed longer sentences on persons responsible for the genocide or massacres in Rwanda, particularly in the case of the *bourgmestre* of Taba, Jean-Paul Akayesu, but this is not a decisive factor. It is not certain that the sentencing criteria in the Statute of this international tribunal correspond to those of Art. 44 MPC, nor that one can compare the actions of the accused with those of Akayesu. But be that as it may, the sentence handed down in the instant case, based on an assessment made in accordance with legal criteria, does not appear to be excessively lenient. The Prosecutor's appeal is therefore also unfounded on this point. [...]

2. The Military Chamber of Cassation confirms the sentence of 14 years' imprisonment [...].

For the foregoing reasons

The Military Chamber of Cassation finds as follow:

1. The appeal lodged by N. is allowed in part, the impugned judgment is quashed in part insofar as it orders the deportation of the appellant and the case is returned to Military Appeals Chamber 1A for a new decision as to whether or not to grant a stay of deportation.
   On all other points, the motion for review brought by N. is dismissed.
2. The motion for review brought by the Prosecutor of Divisional Chamber 2 is dismissed.
3. The period that the accused has spent in pre-trial detention between the date on which the appeal decision was handed down and the date of the present decision, being 336 (three hundred and thirty-six) days, shall be deducted from the sentence.
4. The sentence of 14 years' imprisonment is confirmed [...].

B. Appeals Decision - Factual questions

[**Source**: Switzerland, *Tribunal militaire d'appel* (Military Appeals Chamber) 1A, decision of 26 May 2000 in the N. case, available (in French) at http://www.vbs.admin.ch/internet/vbs/fr/home/documentation/oa009.parsys.0008.downloadList.00081.DownloadFile.tmp/urteiln2instanz.pdf]

MILITARY APPEALS CHAMBER 1A
Sitting from 15 May to 26 May 2000
Palais de Justice, salle G3, GENEVA [...]
CASE:

N, [...] currently in pre-trial detention [...]

accused of:

I. Murder (Art. 116 MPC),
II. Incitement to murder (Articles 116 and 22 MPC),
III. Violation of the laws of war (Art. 109 MPC), namely:
   a. breach of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Art. 3 (1) (a) and (1) (c), Art. 3 (2) and Articles 12, 13 and 50),
   b. breach of the Geneva Convention relative to the Treatment of Prisoners of War (Art. 3 (1) (a) and (c), 13, 14, 129 and 130),
   c. breach of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Art. 3 (1) (a) and (c) 16, 27, 31, 32, 146 and 147),
   d. breach of the Protocol Additional to the Geneva Conventions, and relating to the Protection of

Victims of Non-International Armed Conflicts (Articles 4, 5 and 13).

IS CALLED

The accused is present, assisted by his appointed counsel. [...]

II. FACTUAL QUESTIONS

CHAPTER 1 – PRELIMINARY REMARKS

[...] In establishing the facts, the Chamber will draw on the testimony gathered by the examining magistrate, that presented to the Divisional Chamber and this Chamber, and all documents and statements filed. The Appeals Chamber will also examine the deliberations of the impugned judgment regarding assessment of the evidence in general and of testimony in particular. In assessing the testimony, it is important to bear in mind the system of norms and values obtaining in Rwanda, the time that has elapsed since the alleged offences and the level of education of the witnesses. The Chamber finds it unnecessary to examine minor discrepancies in detail to assess the plausibility or otherwise of testimony; rather, one must take the testimony as a whole. This is all the more so in view of the fact that the defence has questioned the credibility of certain witnesses only at the appeal stage, when they were not in a position to explain discrepancies that might cast doubt upon their statements. [...]

CHAPTER 2 – THE PERSONAL CIRCUMSTANCES OF THE ACCUSED

A) N. was born in the commune of M. [...] He is a Roman Catholic. He has three brothers and ten half-brothers and sisters. His parents are farmers. [...] In 1980, he underwent senior secondary education, specializing in sciences (mathematics, physics and chemistry) in Nyanza, Butare Prefecture. In 1983, he obtained the certificate of secondary education, which qualified him for university entry or for a career. Between 1983 and 1984, the accused attended an advanced course at the national postal and telecommunications college in Kigali, qualifying as a telecommunications technician. He then studied at the *Institut africain de statistique et d'économie* in Kigali, leaving in 1986 with a teaching diploma in economics and statistics. He pursued his career [...] until April 1993, when he took up his post as *bourgmestre* in the commune of Mushubati, with a monthly salary of 30,000 Rwandan francs (approximately $ 300). He had been elected *bourgmestre* in autumn 1992 in the first round of elections, with 83% of the votes cast by an electoral college consisting of representatives of the various political parties, denominations and administrative bodies of the commune.

The accused married Ms M. in 1989. He has two children [...]. He first joined the opposition MDR (Mouvement démocratique républicain) in 1991, as an activist. He lived in Kigali from 1983 to 1993. Starting in April 1986, he served a number of internships abroad (in Canada, Italy and the United States). He went to France on 12 March 1994, to attend a course on local government. [...] He remained in Paris until 13 May 1994, while seeking the best way to return to his country. On 14 May 1994 he flew to Kinshasa via Libreville and then continued to Goma where he stayed for two days. From there he rented a vehicle and arrived in Mushubati on the night of 18/19 May 1994. By that time, the large-scale massacres had already ended and

there were very few Tutsis in his commune, whereas they had previously accounted for 15% of the population. They were now dead, in hiding or had taken refuge in the parishes of Kabgayi and Nyarusange. [...]

CHAPTER 5 – BREACH OF THE DUTIES OF A *BOURGMESTRE*

The Divisional Chamber did not find it proven beyond reasonable doubt that the accused personally distributed rifles or grenades to certain persons, nor that he trained them in their use. The trial judges did find that the accused had acted in his capacity of *bourgmestre* to help certain persons in difficulty to flee the country, most of them Tutsis, in particular by providing them with false papers, and that he had in all probability saved a certain number of lives in so doing. They also found that the accused had not done all that one could expect him to do in his capacity of *bourgmestre* to prevent or limit the massacres, but that these omissions had to be compared with the accused's acts of commission and his general behaviour, and did not constitute crimes additional to those of which he was found guilty. As the Prosecutor did not appeal from the first instance judgment, these aspects of the verdict will not be called into question (**see** Chapter 2, "Legal questions").

[**N.B.**: In its (unpublished) decision, the Divisional Chamber acquitted N. of breach of the duties of a *bourgmestre*. It found that those omissions were absorbed by the acts of commission of which the accused was convicted and that they were not punishable under any applicable instrument.]

Legal questions

III. LEGAL QUESTIONS

CHAPTER 1 – THE RATIONE MATERIAE AND RATIONE PERSONAE JURISDICTION OF SWISS COURTS-MARTIAL [...]

B. *Ratione materiae* jurisdiction [...]

The Appeals Chamber finds that Art. 109 MPC contains a clause prohibiting not only breaches of the international conventions signed and ratified by Switzerland, but also breaches of the customary laws recognized by the international community (see the message from the Swiss Federal Council regarding partial revision of the Military Penal Code, 6 March 1967, [...]). The Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (hereinafter referred to as "the Convention on Genocide"), which has not yet been ratified by Switzerland, contains elements of customary law (see the message of the Federal Council concerning the Convention on the Prevention and Punishment of the Crime of Genocide and the corresponding revision of criminal law, [...]) which fall under Art. 109 MPC. This convention could hence be applicable as customary law. However, Art. 109 MPC must be interpreted in relation to Art. 108 MPC which, as its marginal note indicates, specifies the field of application of Chapter 6 of the Military Penal Code. That provision stipulates that in the case of war or international armed conflict, (para. 1), Art. 109 MPC applies without reservation. In the case, for instance, of the war in the former Yugoslavia, which had an international dimension, the Swiss courts-martial have jurisdiction on the basis of customary

law to try persons accused of breaches of the Geneva Conventions and of the crime of genocide.

However, non-international armed conflicts are covered in particular by para. 2, which restricts international agreements to the wider field of application. In the case of such conflicts Art. 109 MPC does not apply automatically, but requires the existence of an international convention ratified by Switzerland. In the absence of such a convention, it is not possible to apply the customary law provided for under Art. 109 MPC to an internal armed conflict. In the case of the Rwandan conflict, which was non-international (see Chapter 3C, “Legal questions”), Swiss courts-martial do not have jurisdiction to try the case on the basis of the prohibition of genocide established by customary law, as Switzerland has not ratified the Convention on Genocide. However, they do have jurisdiction in the case from the point of view of Article 3 common to the Geneva Conventions and Protocol II, which apply to non-international armed conflicts, and which fall under the reservation made in Art. 108 (2) MPC [...].

The Appeals Chamber will therefore consider the breach of Art. 109 MPC exclusively as regards the Geneva Conventions and Protocol II.

C. *Ratione personae* jurisdiction

Article 218 (1) MPC provides that all persons to whom military law applies are liable to be tried by courts-martial, subject to the reservations of Art. 13 (2), and Art. 14. This rule also applies when the offence has been committed outside Switzerland (para. 2). The criminal law applicable is determined by Articles 1 to 9 MPC, contained in Chapter 1 of the Military Penal Code. Under Art. 2 (9) MPC, civilians who commit breaches of the law of nations during an armed conflict (Articles 108 to 114 MPC) are subject to military law.

Switzerland enacted Art. 2 (9) MPC to meet its international obligations and to allow international law to be applied. In this specific context, even if not at war or threatened by imminent danger of war, Switzerland has undertaken to prosecute anyone, irrespective of nationality, who may have committed grave breaches of the Geneva Conventions outside Switzerland [...].

Contrary to the findings of the trial judges, the clause in Art. 109 (1) (3) MPC (“sauf si des dispositions plus sévères sont applicables” [unless more severe provisions apply]) is not a cross reference but a reservation. Its effect is not to make civilians generally subject to military law. It concerns persons who would normally be subject to military law, and its effect is to prevent such persons from claiming that they may be punished exclusively in accordance with the Geneva Conventions, thereby avoiding the risk of any more severe penalty that military law might apply. It is worth pointing out at this point that the maximum penalty for breaches of the laws of war under Art. 109 MPC is 20 years’ imprisonment (Art. 28 MPC), whereas the Military Penal Code does provide for life imprisonment for certain offences (in particular under Art. 116, Art. 139 (2), Art. 140 (2) and Art. 151c, para. 4). The interpretation of the Appeals Chamber is further supported by Art. 6 MPC, in conjunction with Art. 220 MPC. Under those provisions, a civilian committing an ordinary

crime (Articles 115 to 179 MPC) remains subject to civilian criminal law and civilian courts, even if he participates in crimes with military personnel.

The Appeals Chamber finds it contrary to the system of military law to make a person who is not a Swiss national and has committed offences outside Switzerland and against foreigners subject to that law, when Switzerland is neither at war nor facing imminent danger of war. The Appeals Chamber therefore does not have jurisdiction to try N. under Articles 115 to 179 MPC, even if he remains subject to Rwandan civilian or military jurisdiction for ordinary crimes (such as murder) or the crime of genocide. [...] On this point, the impugned judgment is erroneous and the appeal well founded. [...]

CHAPTER 3 – APPLICABILITY OF COMMON ARTICLE 3 AND OF PROTOCOL II [...]

B. *Ratione loci*

While common Article 3 and Protocol II, Art. 4(2) of Protocol II do prohibit the acts they describe "in any place," that prohibition is clearly limited to the territory of a High Contracting Party (common Article 3 and Protocol II, Art. 1(2) of Protocol II). This territory extends beyond the front or the immediate area in which hostilities are occurring, to include the whole territory of the State in which hostilities are taking place [...].

In accordance with these principles, the provisions in question apply to the whole of Rwanda. [...]

C. *Ratione materiae*

Common Article 3 applies to any "armed conflict not of an international character." This notion, which common Article 3 does not define in detail, implies a situation in which hostilities are occurring between armed forces or organized armed groups within a single State [...].

The notion of "armed forces" in Art. 1 (1) of Protocol II, must be seen in its widest sense, to include all armed forces described in domestic legislation (**see** the *Musema* judgment, para. 256, and the references cited). "Responsible command" implies some degree of organization within the armed groups or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable of, on the one hand, planning and carrying out sustained and concerted military operations – operations that are kept up continuously and that are done in agreement according to a plan – and on the other, of imposing discipline [...].

This condition implies the concept of duration: international humanitarian law applies from the start of armed conflict and extends beyond the cessation of hostilities [...], in the case of internal conflicts, until a peaceful solution has been achieved [...].

D. *Ratione personae*

1. The victims

Common Article 3 protects persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat. This provision, which is very broad in scope, covers members of armed forces and persons taking no part in hostilities, but applies above all to civilians, i.e. persons who do not bear arms [...].

Art. 2 (2) of Protocol II applies to all persons affected by armed conflict within the meaning of Art. 1. By this one must understand in particular persons who do not, or no longer take part in hostilities and enjoy the rules of protection laid down by the Protocol for their benefit and all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons (see [...] Sandoz[/Swinarski]/Zimmermann. (Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, 1986, nos 4485 and 4489 [**available at** http://www.icrc.org/ihl]). Article 4(1) of the Protocol concerns all persons not participating directly in hostilities, or who are no longer participating. In view of their similarity, the formulations of common Article 3 and Art. 4 of Protocol II must be considered synonymous (**See** *Akayesu* judgment, para. 629.).

ICTR jurisprudence uses a negative definition of "civilian," taking the victim as its basis. A civilian is anyone who falls outside the category of "perpetrators," namely 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 (**See** *Musema* judgment, para. 280).

In the instant case, victim D., the wife of the uncle of Witness 3, Witness 32 and his brother F. are all civilians who possess the characteristics of victim within the meaning of common Article 3 and Protocol II, Art. 2(2) and Art. 4.

2. The perpetrators

A perpetrator must belong to a "Party to the conflict" (common Article 3) or to the "armed forces", be they governmental or dissident (Protocol II, Art. 1). However, neither text specifies or defines the category of persons capable of committing war crimes. Given the primary purpose of these international instruments, which is to protect civilians against the atrocities of war, and given their humanitarian aim, the Appeals Chamber finds that the term "perpetrator" needs to be defined broadly. What has been said with regard to defining the category of victim applies also to that of potential perpetrator. Any person, military or civilian, who harms a person protected by the Geneva Conventions as defined above, has contravened these conventions and falls under Art. 109 MPC. The Appeals Chamber therefore diverges from the judgments of the ICTR, which require a proximate connection between the offence and the armed conflict, and restrict the application of the Geneva Conventions to persons holding positions in the armed forces or the civilian

government (Cf. *Musema*, para. 259 and the references to the *Akayesu* judgment, paragraphs 642 and 643, where the ICTR found that this nexus did not exist, despite evidence of very substantial support for the war effort on the part of the accused. On that question in particular the Prosecutor of the ICTR lodged an appeal).

Nevertheless, the Appeals Chamber finds that under all of these circumstances there must be a nexus between the offence and the armed conflict. If, during a civil war in which the civilians on both sides are protected by the Geneva Conventions, one protected person commits an offence against another, it is necessary to establish a link between that act and the armed conflict. If such a link does not exist, the action constitutes not a war crime but an ordinary crime.

In this instance, N. was the *bourgmestre* of Mushubati, a commune of some 80,000 people. He was part of the Rwandan civilian administration, from which he had not resigned. On the contrary, when he returned to Rwanda on 19 May 1994 he once again took up the post he had delegated to his deputy during his absence in Europe, and the government of the day did not perceive him as a member of the opposition. At the time of the acts of which the appellant is accused, a war was in progress between the FAR and the FPR, a conflict that it would be very hard to dissociate from the massacres of Tutsis and of moderate Hutus. While the war had somewhat reduced the powers of *bourgmestre* N., there is considerable evidence that he still exercised effective *de jure* and *de facto* power over the citizens of his commune and over the military personnel and militias present therein. A number of points emphasize his links with the FAR, which was a party to the armed conflict: he had received a recommendation from a senior officer, Colonel K.; during his two visits to Kabgayi he was accompanied by soldiers, and three soldiers provided an escort when his family and his sisters left the bishop's residence in Kabgayi. At Mont Mushubati he was also accompanied by soldiers. He was able to move around freely, not only in his own commune but as far as Gitarama. He moved freely through road-blocks and his wife had even been recognized as the wife of the *bourgmestre*, assuring her of favourable treatment by the militias. He was able to obtain petrol in Gitarama on a number of occasions and had no difficulty obtaining an exit visa for his family and his sisters.

It was in his capacity as a public servant that N. summoned the men of his commune to Mont Mushubati for the purpose of inciting them to hate and eliminate Tutsis, to commit killings and murder and to attack the property of moderate Hutus and the Tutsi minority. [...] N.'s status as perpetrator and the existence of a link between his actions and the armed conflict are therefore proven.

As all the conditions for applying common Art. 3 and Protocol II are satisfied, the facts proven will be assessed in the light of those provisions.

CHAPTER 4 – LEGAL CLASSIFICATION OF THE OFFENCES AND DETERMINATION OF PENALTY

A. Legal classification of the offences

Article 109 of the MPC is an independent provision [...] to which the general concepts of action, conspiracy, complicity and instigation apply. [...]

In his capacity as *bourgmestre*, N. summoned the people of his commune to Mont Mushubati for the purpose of inciting them to hate and eliminate Tutsis, to commit killings and murder, to attack the property of moderate Hutus and the Tutsi minority and to kill Hutu women pregnant by Tutsi men. This behaviour would of itself constitute attempted incitement to murder or homicide, and would be punishable without any need to find or identify victims. The Appeals Chamber notes in this connection that N.'s words led to the deaths of an unknown number of persons, including D. and the wife of the uncle of Witness 3.

The appellant is therefore guilty of incitement to breaches of the laws of war (Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 3, 146 and 147, and Art. 4 of Protocol II), as provided for under Art. 109 MPC. The offences led to intentional homicides and constitute grave breaches within the meaning of Art. 109 (1) (3) MPC.

Again in his capacity as *bourgmestre*, the appellant went to Kabgayi on at least two occasions, accompanied by soldiers, to encourage the refugees from his commune to return to Mushubati, with the sole aim of having them massacred. He also ordered the soldiers accompanying him to kill Witness 32 and his brother F., only the former having survived.

The appellant is therefore guilty of grave breaches of the laws of war (Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, Articles 3, 146 and 147, and Art. 4 of Protocol II), as provided for under Art. 109 MPC.

B. Determination of penalty

In the case of grave breaches, the penalty is between one and twenty years' imprisonment, as provided for under Art. 109 (1) (3) MPC, in conjunction with Art. 28 MPC. Within that legal framework, the sentence is to be determined in accordance with Art. 44 MPC and the criteria derived from jurisprudence [...].

The acts described above constitute intentional violence to life, life being the supreme right protected by criminal law. These acts constitute war crimes and are intrinsically very serious. They led to the deaths of at least three persons. These persons were not only literally executed, under horrific circumstances (e.g. using a rifle butt and bayonet); they were subsequently denied even a decent grave, being thrown into the gutter (in the case of the brother of Witness 32) or a latrine (in the case of D.). Considerable emotional detachment is required to incite others to murder and to have human beings killed in such a sordid manner. Hatred is also required. The appellant harboured genuine hatred of Tutsis and moderate Hutus, as evinced by his words on Mont Mushubati and in the telephone call of 14 August 1996. Furthermore, the Appeals Chamber has observed no feelings of pity, nor any sign of remorse or repentance with respect to the victims or in connection with the tragic events that ravaged Rwanda.

Because he was outside Rwanda from 12 March 1994 to 19 May 1994, N. did not participate in the meeting of 18 April 1994, and did not play an active role at the height of the massacres, which occurred during the second half of April 1994. Without being one of the originators, he participated in the massacre process following his return from Europe for a period of not more than three weeks. Certainly, his professional position and his capacity of *bourgmestre* obliged him to ensure the safety of all residents of his commune, whether Tutsi or Hutu moderate or, at least, to abstain from harming them. The Appeals Chamber does find that this constitutes aggravation. Nevertheless, the Chamber is mindful that on his return to Mushubati, the appellant was confronted with a chaotic situation, which left him with only limited freedom of decision and action. These circumstances reduce the criminal intent attributed to N. [...]

Under these circumstances, the Appeals Chamber considers fourteen years' imprisonment sufficient punishment. In accordance with Art. 50 MPC, the time spent in pre-trial detention (1,367 days) shall be deducted from the sentence. [...]

FOR THESE REASONS [...]

in accordance with Articles 3, 146 and 147 of the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War and with Article 4 of Protocol II additional to the said Convention, [...]:

VERDICT

I. The appeal is allowed in part.

II. N. is found guilty of breaches of the laws of war (Art. 109 MPC)

He is therefore sentenced to fourteen years' imprisonment [...].

Discussion

1. a. Was Rwanda in a state of armed conflict during the period in question? Was the conflict international or non-international? (GC I-IV, Arts 2 and 3; P II, Art. 1)
   b. Does Protocol II apply "until a peaceful settlement of a conflict is achieved"? (P II, Art. 2(2))
   c. Does Art. 2 define the field of application *ratione personae* of Protocol II?
2. a. Who is protected by Art. 3 common to the Geneva Conventions and by Art. 4 of Protocol II?
   b. Does the IHL of non-international armed conflicts protect, in their capacity as persons not taking part in hostilities, only those who are not perpetrators? (GC I-IV, Art. 3; P II, Art. 4)
3. a. Does the material field of application of the provisions of the Swiss Military Penal Code that concern offences against IHL meet the requirements of the provisions of IHL on grave breaches? Is it more restricted or does it go further? (GC I-IV, Arts 49/50/129/146 respectively) [**See** Switzerland, Military Penal Code]

b. Does Switzerland have the right to make violations of international agreements punishable even if the agreements themselves do not provide for criminal responsibility? Even concerning acts committed in foreign countries by foreigners against foreigners?
c. Does Art. 109 of the Swiss Military Penal Code [**See** Switzerland, Military Penal Code] make all violations of the Geneva Conventions punishable? Only grave breaches? Also violations of customary IHL?
d. Is the wording of Art. 109 of the Swiss Military Penal Code sufficiently precise for a provision of criminal law?

4. a. Why could Mr Niyonteze not be prosecuted for genocide? Because genocide is not an offence in Switzerland? Or because the genocide was committed abroad and Switzerland therefore did not have jurisdiction?
b. Is Switzerland bound by the prohibition of genocide? Is genocide punishable in Switzerland? Is the prohibition of genocide included in the "international treaties on the conduct of hostilities" or the "laws and customs of war"? Is genocide prohibited in the event of armed conflict? Only in the event of armed conflict?
c. If a genocide is committed during an armed conflict, does it fall within the scope of Art. 109 of the Swiss Military Penal Code? Only if the armed conflict is international?
d. Why can Swiss courts apply customary international law in the event of an international armed conflict but not of a non-international armed conflict? Is customary international law not part of domestic law in a monist legal system such as Switzerland's?

5. Can a violation of the customary IHL applicable to non-international armed conflicts be punished by Switzerland? Should a violation of Art. 3 common to the Geneva Conventions or of Protocol II be punished in Switzerland, according to these instruments? According to customary IHL as interpreted by the ICTY in the *Tadic* case on jurisdiction? [**See in particular** para. 134 of that decision, **See** ICTY, The Prosecutor v. Tadic [Part A]]

6. a. Why is a Swiss military court competent to prosecute a Rwandan who committed violations of IHL against Rwandans in Rwanda? Is this prescribed by IHL? Would it be prescribed by IHL if the conflict in Rwanda had been classified as international? (GC I-IV, Arts 49/50/129/146 respectively)
b. Is a Swiss military court competent to prosecute a Rwandan who committed ordinary crimes against Rwandans in Rwanda? Why not?
c. In your country, in what circumstances can violations of IHL also be prosecuted as common crimes?

7. Were Art. 3 common to the Geneva Conventions and Protocol II applicable throughout the territory of Rwanda? Or only where there was fighting between the government and the Rwandan Patriotic Front?

8. a. Who are the addressees of IHL of non-international armed conflicts? Who can be said to have violated Art. 3 common to the Geneva Conventions? Protocol II? Anyone committing a prohibited act in a territory where a non-international armed conflict is under way? Does there need to be a link between the armed conflict and the prohibited act? Does the perpetrator have to belong to a party to the conflict? To the armed forces of a party? Does he have to be serving in the civilian administration or in the armed forces?
b. On the question of determining for whom the prohibitions of the IHL of non-international armed conflicts are intended, are you inclined to agree with the Military Appeals Court, the ICTR Trial Chamber, the Swiss Military Court of Cassation or the ICTR Appeals Chamber? [**See** ICTR, The

Prosecutor v. Jean-Paul Akayesu [Part B.]] Does the Swiss Military Court have the right to deviate from ICTR case-law? Does the ICTR not, by virtue of Art. 8(2) of its Statute (adopted by the Security Council under Chapter VII of the United Nations Charter), have "primacy over the national courts of all States"?

c. According to the ICTR Trial Chamber's interpretation, could a doctor in a civilian hospital violate the obligation to care for the wounded laid down in Art. 3(2) common to the Geneva Conventions and in Art. 7 of Protocol II? Could a judge violate the judicial guarantees laid down in Art. 3(1)(d) common to the Geneva Conventions and in Art. 6 of Protocol II? Could a prison guard violate Art. 5 of Protocol II ? Would the ICTR Trial Chamber's interpretation render these provisions meaningless?

9. a. Did Mr Niyonteze violate Arts 3, 146 and 147 of Convention IV and Art. 4 of Protocol II or only some of these provisions?

b. Under the laws of your country, does a prosecution for war crimes involve the need to specify the identity or the number of the victims? In what cases?

c. Do Arts 146 and 147 of Convention IV contain rules that could be directly applied in a monist constitutional system such as Switzerland's? Are these articles applicable to non-international armed conflicts?

10. a. Why was Mr Niyonteze acquitted of violating his duties as *bourgmestre*? Were his omissions with respect to the lives of thousands of inhabitants of his community considered to be part of the actions taken that led to charges against him? Were they not punishable under an applicable law? Does a non-military leader not bear penal responsibility owing to his position of authority? (P I, Arts 86(2) and 87)

b. Is the fact that Mr Niyonteze was a *bourgmestre* an aggravating factor or a mitigating circumstance? Could he have prevented his community from taking part in the genocide even though doing so was badly thought of by those in power? If he had neither called the people to Mount Mushubati nor visited the Kabgayi camp, would he nevertheless have committed a wrongful act by the mere fact of having allowed the genocide to take place in his community?

11. What were the costs and the practical and intercultural problems for Switzerland arising from the prosecution of Mr Niyonteze? Were they worth it? Could Switzerland have handed the case over to the ICTR [**See** ICTR Statute, Arts 8, 17 and 28, UN, Statute of the ICTR]? What in your view are the advantages and disadvantages of Mr Niyonteze being tried by a Rwandan, international or Swiss court?