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PASSING THE POISONED CHALICE: JUDICIAL NOTICE OF GENOCIDE BY THE ICTR

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Article abstract

Relying on the procedural mechanism of judicial notice, the Appeals Chamber of the United Nations International Criminal Tribunal for Rwanda (ICTR) released a decision in the *Prosecutor v. Karemera* case that relieves the prosecution of the burden of producing evidence proving that the horrific events in Rwanda meet the legal requirements of genocide. This paper traces the origins and development of the doctrine of judicial notice in international criminal law so as to examine the Appeals Chamber's decision and its implications. Traditionally, facts that go to legal conclusions or to the elements of the crime with which the accused is charged have been deemed prohibited subjects for this efficiency-producing mechanism. Because a finding of genocide is a legal conclusion, the author argues that judicial notice of genocide violates the procedural rights of the accused by barring defence submissions on the definition of this legal conclusion. The author continues by arguing that the Appeals Chamber has violated the substantive rights of the accused by pushing the doctrine of judicial notice beyond its proper limits and thereby shrinking the protections afforded by the fundamental rights enshrined in the Tribunal's Statute. While it is imperative that the Tribunal punish the perpetrators of the heinous crimes committed in Rwanda, it is nonetheless essential that the ICTR conduct proceedings in a manner that safeguards the procedural and substantive rights of the accused. To this end, the author suggests other means by which the Tribunal could have promoted efficiency and justice without violating the rights of the accused.

PASSING THE POISONED CHALICE: JUDICIAL NOTICE OF GENOCIDE BY THE ICTR

Par Kirk G. Shannon[*]

En se basant sur le mécanisme procédural du constat judicaire, la Chambre d'Appel du Tribunal Pénal International (TPIR) pour le Rwanda a pris la décision dans *Le Procureur c. Karemera* que la poursuite n'a pas à démontrer que les événements horrifiques qui se sont déroulés au Rwanda remplissent la définition légale de génocide. Cet article retrace les origines et le développement de la doctrine du constat judiciaire dans le droit pénal international afin d'examiner la décision de la Chambre d'Appel et ses implications. Habituellement, les faits qui ont directement trait à des questions de droit ou les éléments du crime dont le défendeur est accusé sont exclus de ce mécanisme procédural. Parce que le génocide est une conclusion juridique, l'auteur propose que le constat judiciaire de génocide va à l'encontre des droits procéduraux de l'accusé en empêchant la défense de contester la définition de cette conclusion juridique. L'auteur ajoute que la Chambre d'Appel a violé les droits substantifs de l'accusé en poussant la doctrine du constat judiciaire au-delà des ses limites appropriées pour en fait restreindre les protections découlant des droits fondamentaux inscrits dans les statuts du Tribunal. Il est bien sûr essentiel que le Tribunal puisse punir les auteurs des crimes horribles commis au Rwanda, mais il est tout aussi essentiel que le TPIR respecte les droits procéduraux et substantifs de l'accusé. L'auteur suggère donc d'autres pistes qui auraient pu être prises afin de promouvoir l'efficacité et la justice sans violer les droits de l'accusé.

Relying on the procedural mechanism of judicial notice, the Appeals Chamber of the United Nations International Criminal Tribunal for Rwanda (ICTR) released a decision in the *Prosecutor v. Karemera* case that relieves the prosecution of the burden of producing evidence proving that the horrific events in Rwanda meet the legal requirements of genocide. This paper traces the origins and development of the doctrine of judicial notice in international criminal law so as to examine the Appeals Chamber's decision and its implications. Traditionally, facts that go to legal conclusions or to the elements of the crime with which the accused is charged have been deemed prohibited subjects for this efficiency-producing mechanism. Because a finding of genocide is a legal conclusion, the author argues that judicial notice of genocide violates the procedural rights of the accused by barring defence submissions on the definition of this legal conclusion. The author continues by arguing that the Appeals Chamber has violated the substantive rights of the accused by pushing the doctrine of judicial notice beyond its proper limits and thereby shrinking the protections afforded by the fundamental rights enshrined in the Tribunal's Statute. While it is imperative that the Tribunal punish the perpetrators of the heinous crimes committed in Rwanda, it is nonetheless essential that the ICTR conduct proceedings in a manner that safeguards the procedural and substantive rights of the accused. To this end, the author suggests other means by which the Tribunal could have promoted efficiency and justice without violating the rights of the accused.

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> We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.
>
> Justice Robert Jackson
> Opening statement at the Nuremberg trials

On 16 June 2006, in the *Prosecutor v. Karemera et al.*,(*Karemera*) the Appeals Chamber of the United Nations International Criminal Tribunal for Rwanda (ICTR) took judicial notice of the fact that between 6 April 1994 and 17 July 1994 there was a genocide in Rwanda against the Tutsi ethnic group.[1] This landmark decision relieved the Office of the Prosecutor (OTP) of the burden of producing evidence that proved that the 1994 events in the East African country met the legal requirements of genocide.[2] In making its decision, the Appeals Chamber relied on Rule 94(A) of the ICTR *Rules of Procedure and Evidence*[3] which requires a Chamber to take judicial notice of notorious facts or facts of common knowledge.

The Appeals Chamber's use of the doctrine of judicial notice as a means of alleviating the prosecution's burden has been a source of intense debate among lawyers at the ICTR.[4] As judicial notice has never been employed in this manner before, this decision signifies a shift in the jurisprudence of the ICTR. Cognizant of the volley of criticisms launched daily in Arusha's direction, ICTR judges have traditionally expended large amounts of time on frivolous matters in order to ensure the rights of the accused to a fair trial. With this one decision, however, the Appeals Chamber has potentially altered the path of the ICTR. By using the doctrine of judicial notice in this novel manner, the Appeals Chamber has sacrificed the rights of the accused in favour of efficiency concerns. In so doing, the legitimacy of the ICTR risks being compromised.

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1 *Prosecutor v. Édouard Karemera. Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (16 June 2006) (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Karemera* Appeals Decision]. See also UNICTR, Press Release, ICTR/INFO-9-2-481.EN, "ICTR Appeals Chamber takes Judicial Notice of Genocide in Rwanda" (20 June 2006), online: <http://69.94.11.53/ENGLISH/PRESSREL/2006/481.htm>.

2 *Ibid*.

3 International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, UN Doc. ITR/3/Rev. 12 (2003), as amended 10 November 2006, Rule 94(A), online: <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf> [*ICTR Rules*].

4 *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme Bicamumpaka & Prosper Mugiraneza*, ICTR-99-50-T, Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A) (19 July 2006) (International Criminal Tribunal for Rwanda); *Prosecutor v. Protais Zigiranyirazo*, ICTR-01-73-I, Response to the Prosecutor's Motion for Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A) (4 July 2006) (International Criminal Tribunal for Rwanda).

This paper traces the origins and development of the doctrine of judicial notice in international criminal law so as to examine the Appeals Chamber's decision and its implications. Traditionally, this paper posits, judicial notice has been used to alleviate the burden of proving facts so notorious that there can be no debate as to their veracity. Facts that go to the elements of the crime with which the accused is charged, to the actions of the accused or to legal conclusions have customarily been deemed prohibited subjects of this efficiency-producing mechanism.[5] Indeed, where such facts are at issue in criminal trials, courts have most often required that proof beyond a reasonable doubt be presented in court in order to safe-guard the rights of the accused.[6] This paper argues that the Appeals Chamber's use of the doctrine of judicial notice in the *Karemera* case was improper, violated the rights of the accused, and calls into question the legitimacy of the international tribunal. Although efficiency concerns must motivate expediency, deference to such concerns should not be given without careful regard to the rights of the accused.

While positing that judicial notice of genocide was improper in the *Karemera* case, this paper does not seek to address or condone "genocide denial" as a means of defence. Furthermore, we do not dispute the factual findings of domestic and international courts with respect to the atrocities perpetrated against the Tutsi population of Rwanda in 1994. Rather, this paper addresses the propriety of the Appeals Chamber's use of the doctrine of judicial notice *per se*. Findings of genocide reached−absent the use of judicial notice−are in no way disputed.

I. What is Judicial Notice?

Judicial notice is an evidentiary mechanism used by judges to officially "recognize the truth of certain facts" that bear on an issue before the court.[7] It allows the party relying on the doctrine to dispense with the standard methods of introducing evidence. *Black's Law Dictionary* defines judicial notice as "A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact."[8]

Although judicial notice can be taken of a variety of facts including, *inter alia*, notorious facts or facts of common knowledge, documentary evidence, legislative facts, adjudicative facts, adjudicated facts, "social" facts, procedure and custom, its primary purpose with respect to the streamlined admission of all such facts remains the same: to significantly expedite trial by eliminating the need for parties to

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5 See e.g. *People v. Taylor,* 74 P.3d 396 at 12 (Colo. App. 2002); *Massey v. People*, 649 P.2d 1070 (Colo. 1982) at 12; *U.S. v. Wagner*, 19 Fed.Appx. 542 (9th Cir. 2001) at 2; *R. v. McAllister* (2003) CarswellOnt 6553 (Ont. Sup. Ct.) (WL) at paras. 10-11 [*McAllister*].

6 *McAllister*, *ibid.*

7 Memorandum from Marea Beeman to the Office of the Prosecutor, "Judicial Notice" (May 2001), at 3, online: New England School of Law International War Crimes Project Rwanda Genocide Prosecution <http://www.nesl.edu/center/wcmemos/>. Note that in the common law tradition this evidentiary mechanism could also be used by juries.

8 *Black's Law Dictionary*, 8th ed., *s.v.* "judicial notice".

adduce evidence on matters that are not subject to reasonable dispute.[9] As stated by Thayer, "the failure to exercise [judicial notice] tends daily to smother trials with technicality, and monstrously lengthens them out."[10] Other considerations may also influence a court's decision to employ this doctrine, including reducing the risk of diversion and confusion which would result from disputes concerning what is really indisputable.[11]

While this practice can be found throughout the jurisprudence of legal systems in both the common and civil law traditions, the *doctrine* of judicial notice was originally a development of the common law.[12] According to commentators in that tradition, the doctrine has been employed by English courts for over 650 years with respect to both the *lex fori* and to matters of fact.[13] Originally, the doctrine was used with respect to written pleadings, where omissions or averments could require judicial notice of matters of fact.[14] Over subsequent centuries, judges have endeavoured to increase the efficiency of the trial process by accepting as proven a wide range of facts considered to be so notorious as to not require proof.[15] The

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9 James G. Stewart, "Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent" (2003) 3 Int'l. Crim. L. Rev. 245 at 245.

10 James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Boston: Little, Brown, and Company, 1898) at 309, cited in *ibid.* at 245.

11 Peter B. Carter, "Judicial Notice: Related and Unrelated Matters" in Enid M. Campbell and Peter L. Waller, eds., *Well and Truly Tried: essays on evidence in honour of Sir Richard Eggleston* (Sydney: The Law Book Company, 1982) at 89.

12 With respect to the civil law see e.g. Mauro Cappelletti, John Henry Merryman & Joseph M. Perillo, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 1967) at 131 ("[t]he ancient rule permitting judicial notice, without proof, of notorious facts is recognized [in Italy]"). According to Beeman, the rule in Italy is commonly expressed not as judicial notice, but rather in the maxim *notoria non egent probatoire* and is codified in the *Codice di procedure civile,* R.D. 28 ottobre 1940, n. 1443, at art. 115(2); *supra* note 7 at 3, fn 6. Similarly, in Germany, s. 244(3) of the German Criminal Procedure Code (*Strafprozeßordnung, StPO*) provides that "an application to take evidence may be rejected […] if the taking of such evidence is superfluous because the matter is common knowledge"; translated by the Federal Ministry of Justice and reproduced online: <http://www.iuscomp.org/gla/statutes/StPO.htm#244>. In the Netherlands, see Dutch Criminal Procedure Code, *Wetboek van Strafvordering,* Sv. (1926), at art. 339(2). An important distinction must be noted between the common law's use of the doctrine of judicial notice and the civil law's use of facts that are *de notoriété publique*. The effect of these concepts in both legal traditions may ultimately be the same, but their implications in the respective criminal evidence systems are very different. That is, while the common law primary controls evidence through admissibility rules, the civil law admits any relevant evidence. Thus, whereas judicial notice is a significant exception to strict common law rules of evidence, it is not considered so exceptional in the civil law. See Catherine Elliott, *French Criminal Law* (Devon: Willan Publishing, 2001) at 48. With respect to the common law tradition, see generally G.D. Nokes, "The Limits of Judicial Notice" (1958) 74 Law Q. Rev. 59.

13 Nokes*, ibid*. at 61, cited in Beeman, *supra* note 7 at 13.

14 Nokes*, ibid*. For an early example see the case of *Dacy v. Clinch* (1661), 1 Sid. 52 at 53, per Twisden J., where a plaintiff sued in respect of the words "[a]s sure as God governs the World, and King James this Kingdom, so sure hath J.S. committed treason", cited in Beeman, *ibid*. The court accepted that the plaintiff would not have the burden of proving the existence of the divine and temporal governments, for to a Jacobean court these things were "choses apparentes".

15 For example, courts have taken judicial notice of the standards of weight and measure (*Hockin v. Cooke,* (1791) 4 T.R. 314), the public coin and currency (*Kearney v. King*, (1789) 2 B. & Ald. 301), the course of the post, the stamps of post offices on letters, and the fact that postcards are unclosed documents whose contents are visible to those dealing with them (*Robinson v. Jones*, [1879] 4 L.R. I.R. 391); *Huth v. Huth* (1915), [1914-1915] All E.R. 242 (C.A.) the number of days in a given month

doctrine primarily developed around simple factual matters such as the one illustrated in *Black's Law Dictionary*: "the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit."[16]

Under the common law, two categories of facts were recognized as appropriate subjects of judicial notice. In his seminal work on the subject, Professor Kenneth Davis coined the terms subsequently used to describe these categories: adjudicative facts and legislative facts.[17] Adjudicative facts are the facts of the particular case which specifically concern the immediate parties to the case: "who did what, where, when, how, and with what motive or intent."[18] As well, adjudicative facts can consist of facts "capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible to men in the situation of members of the court."[19] The latter category of adjudicative facts includes facts of common knowledge.

By contrast, legislative facts are characterized as more general, concerning the "social, economic and cultural context" that influence the law's interpretation.[20] Rather than relating to the particular parties to the case, legislative facts assist the finders of fact to ascertain the content of law and policy.[21] Whereas judicial notice can only be taken of adjudicative facts that are beyond reasonable dispute, far fewer restrictions are placed on courts with respect to legislative facts. L'Heureux-Dubé J., formerly of the Supreme Court of Canada, has stated:

> [w]hile clear rules exist on the use, admissibility and judicial notice of adjudicative facts, the use, admissibility and judicial notice of legislative facts are almost completely unfettered. In fact, American deference to judicial notice of legislative facts is virtually as broad as a judge's power to independently determine the domestic law.[22]

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or that a certain day of the month was a Sunday (*Hanson v. Shackleton*, (1835) 4 Dowl. 48), that the streets of London are crowded and dangerous; (*Dennis v. White* (1916), 2 KB 1 at 6); that cats are ordinarily kept for domestic purposes; (*Nye v. Niblett* (1917), [1916-1917] All E.R. 520 (KB)), and that "[p]eople who go to hotels do not like having their nights disturbed"; (*Andreae v. Selfridge* (1938), Ch 1 (C.A.) (LexisNexis)). See generally Hodge M. Malek *et al*., *Phipson on Evidence,* 16th ed. (London: Sweet & Maxwell, 2005) at 44-45.

16 *Supra* note 8.

17 Kenneth Culp Davis, "A System of Judicial Notice Based on Fairness and Convenience" in Roscoe Pound, Erwin N. Griswold & Arthur E. Sutherland, eds., *Perspectives of Law: Essays for Austin Wakeman Scott* (Boston: Little Brown, 1964) 69 at 82.

18 Kenneth Davis, "Judicial Notice" (1955) 55 Colum. L. Rev. 945 at 952, cited in Beeman, *supra* note 7 at 5. See also *R. v. Spence*, [2005] 3 S.C.R. 458 at para. 58 [*Spence*].

19 E.M. Morgan, "Judicial Notice" (1944) 57 Harv. L. Rev. 269 at 273; Beeman*, supra* note 7 at 5-6. Examples of facts that fall into this category include "reference to calendars to confirm days and dates, or to maps to determine distance and location"; see also David M. Paciocco, "Judicial Notice in Criminal Cases: Potential and Pitfalls" (1997) 40 Crim. L. Q. 35 at 46.

20 Paciocco, *ibid*. at 47, quoting from *Canada Post Corp. v. Smith* (1994), 75 O.A.C. 15 at 24 (Div. Ct.) and *R. v. Bonin* (1989), 47 C.C.C. (3d) at 248.

21 Beeman*, supra* note 7 at 6; *Spence*, *supra* note 18 at para. 58.

22 Claire L'Heureux-Dubé, "Re-Examining the Doctrine of Judicial Notice in the Family Law Context" (1994) 26 Ottawa L. Rev. 551 at 555.

However, the categorization of an issue as either a legislative fact or adjudicative fact does not dictate the degree to which a court must be satisfied of the fact's trustworthiness. As explained by the Supreme Court of Canada in *R. v. Spence*, the intensity of the court's examination of the trustworthiness of a fact will ultimately relate to the centrality of the fact to the case against the accused.[23] Binnie J. opined that in the case of both adjudicative and legislative facts "the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy."[24] Thus, the proper limits of the doctrine of judicial notice are dictated not solely by the categorization of the fact seeking to be recognized, but rather by the extent to which that fact is dispositive of the case.[25]

More recent developments in the common law have added two more categories to the categories of adjudicative and legislative facts: evaluative facts and adjudicated facts. Evaluative facts are those that enable a finder of fact to "understand the testimony and other evidence in the case."[26] Included in this category are the usual meaning of words, slang expressions and idioms.[27] On the other hand, taking judicial notice of adjudicated facts allows the court to consider a fact in dispute as proven by reference to evidence from prior proceedings where the fact was originally corroborated by *vive voce* testimony.[28]

II. Judicial Notice at International Criminal Law

The procedural and evidentiary systems of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR are *sui generis* and are not imported from any single national system or legal tradition.[29] Rather, the systems under which they operate are a hybrid of common law and civil law approaches. Therefore, whereas the common law performs a strict evaluation with regard to the admissibility of evidence and the civil law tradition provides for the admissibility of virtually all relevant evidence, the *ad hoc* tribunals chart a path that reflects their status as courts of mixed tradition.[30] In view of this unique evidentiary path, the most

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23 *Spence*, *supra* note 18 at para. 58.

24 *Ibid*. at para. 65.

25 *Ibid*. at para. 7.

26 Beeman, *supra* note 7 at 10.

27 *Ibid*.

28 Michael P. Scharf & Ahran Kang, "Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL" (2005) 38 Cornell Int'l L.J. 911 at 943. Note that judicial notice of adjudicated facts is provided for in Rule 94(B) of the *ICTR Rules*, *supra* note 3.

29 Sean Murphy, "Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" (1999) 93 Am. J. Int't L. 57 at 80, quoting *Prosecutor v. Tihomir Blaškić*, IT-94-14, Decision (21 January 1998) (International Criminal Tribunal for the Former Yugoslavia); see International Criminal Tribunal for the Former Yugoslavia, Press Release, CC/PIO/286-E, "Blaškić Case: Defence Objection to the Admission of Hearsay is Rejected" (23 January 1998) (WL). See also *Prosecutor v. Zejnil Delalic* et al., IT-96-21-A, Judgement (20 February 2001) at para. 538 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

30 See *Blaškić, ibid.* where, with respect to hearsay evidence, the Chamber wrote: "neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the

appropriate developments in the doctrine of judicial notice emanate from international jurisprudence.

The intractable problems that present themselves when operating in a hybrid system of civil and common law were first confronted at Nuremburg.[31] In similar fashion to the statutes of its successors, the *Charter of the International Military Tribunal* addressed judicial notice at Article 21 where it stated:

> The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall take judicial notice of official government documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.[32]

The provision included in the *Charter for the International Military Tribunal for the Far East* (*IMTFE Charter*) was substantially more liberal than the above iteration. Rather than requiring the Tribunal to take judicial notice of certain facts, the *IMTFE Charter* simply stated that the Tribunal would not require proof of facts of common knowledge.[33] Arguments with respect to the appropriate use of the doctrine *per se* were therefore not required.

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general principle prevailing in civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system", cited in Murphy, *ibid*. See also Stewart*, supra* note 9 at 246-47; Richard May & Marieke Wierda, "Trends in International Criminal Evidence: Nuremburg, Tokyo, the Hague and Arusha" (1998-1999) 37 Colum. J. Transnat'l L. 725 at 727-28.

[31] Telford Taylor, *The Anatomy of the Nuremburg Trials: A Personal Memoir* (New York: Knopf, 1992) at 63 [Taylor]. The Chief Prosecutor was "driven close to distraction" by the "intractable problem[s] […] caused by the differences between Continental and Anglo-American criminal procedures." Similarly, as Chief Prosecutor of the United States trials pursuant to Control Council Law No. X, Brigadier General Taylor stated in *United States v. Carl Krauch (the "I.G. Farben Case")*, U.S. Mil. Tribunal, 1948, Motion for Consideration of a Ruling by the Tribunal (1949), 15 Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No. 10 (1946-1949), at 897 that "[i]t is important to keep in mind that we are applying international penal law and that we should not, and cannot, approach these questions solely from the standpoint of any single judicial system".

[32] *Charter of the International Military Tribunal*, annexed to *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers*, 8 August 1945, 59 Stat. 1544, 82 U.N.T.S. 284, art. 21 [*IMT Charter*].

[33] *Charter of the International Military Tribunal for the Far East*, 19 January 1946, T.I.A.S. No. 1589, 4 Bevans 20 (as amended 26 April 1946, 4 Bevans 27), art. 13(5)(d): "[t]he Tribunal shall neither require proof, of facts of common knowledge, nor of the authenticity or official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations." See also, Ordinance No. 7, Art IX; the Supreme Commander of the Allied Powers, Regulations Governing the Trials of Accused War Criminals (SCAP rules - Regulations Governing the Trials of Accused War Criminals), issued 5 December 1945.

The jurisprudence from the World War II tribunals reveals a narrow use of the doctrine of judicial notice.[34] Nonetheless, judicial notice of facts of common knowledge was explicitly taken in a number of cases including "The Medical Case" where the court used the doctrine to recognize facts such as the existence of "incurably insane people" throughout the world.[35]

Post-World War II international tribunals and courts have similarly incorporated the doctrine of judicial notice into their statutes and rules of procedure and evidence. As stated by Eugene O'Sullivan, "[t]he practice of the International Court of Justice reveals that when faced with […] establishing a factual situation, such as relevant periods, critical dates and subsequent developments relevant to events being litigated," the guiding principle is that extra-legal facts "should be assumed as a matter of convenience."[36] It is equally apparent, however, that this convenience "should always yield to the requirement of procedural fairness" between the parties, who should have the opportunity to rebut all facts that influence the disposition of the case.[37]

Like the World War II tribunals, the modern international criminal tribunals are not bound by the procedural or evidentiary rules of any jurisdiction or legal tradition. Nevertheless, the doctrine of judicial notice is a product of the common law tradition and as such "reflects general principles of law which may form the basis for the interpretation and application of [this rule of Procedure and Evidence]."[38] Based on the doctrine's roots in certain legal regimes, it is appropriate to turn to those systems for interpretive assistance "in determining the definition and scope of judicial notice" at international law.[39] However, the jurisprudence of the *ad hoc* tribunals and the Special Court for Sierra Leone (SCSL) has demonstrated a propensity to chart a *sui generis* course for the doctrine of judicial notice. As will be outlined below, this new course has ignored important restrictions that were cemented throughout the doctrine's development in the common law tradition.

The *ad hoc* tribunals' equivalent of the *Nuremburg Charter*'s Article 21 was adopted in reaction to a report issued by an expert group appointed by the Security

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34 Richard May & Marieke Wierda, *International Criminal Evidence* (New York: Transnational Publishers, 2002) at 135 [May & Wierda]. Indeed, use of the terms "judicial notice" in the transcripts of the international military tribunals most often refers not to the doctrine itself, but rather to a lawyer's request that the judges of the tribunal examine a document. See, for example, *United States v. Karl Brandt et al*. ("The Medical Case"*)*, Transcript. 9 December 1946, NMT01-T025, online: The Mazal Library <http://www.mazal.org/NMT-HOME.htm> at 25.

35 *United States v. Karl Brandt et al.* ("The Medical Case"), Transcript, 9 May 1947, XV NMT, at 572-573 cited in May & Wierda, *ibid.* at 135.

36 Eugene O'Sullivan, "Judicial Notice" in Richard May *et al.*, eds., *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk MacDonald* (The Hague: Kluwer Law International, 2001) at 332 [O'Sullivan] citing Giuliana Ziccardi Capaldo ed., *Répertoire de la Jurisprudence de la Cour Internationale de Justice (1947-1992) = Repertory of Decisions of the International Court of Justice (1947-1992)*, Vol II, (London: Martinus Nijhoff, 1995) at 793, 795, 797.

37 *Ibid*.

38 *Ibid*. at 330.

39 *Ibid*.

Council to review the functioning of the ICTY and the ICTR.[40] This report urged expeditiousness[41] when conducting the tribunals' proceedings and stated that

> [f]urther consideration should be given to greater use of judicial notice in a manner that fairly protects the rights of the accused and at the same time reduces or eliminates the need for identical repetitive testimony and exhibits in successive case.[42]

Expeditiousness, however, is not the doctrine's sole purpose at international law. As is the case in many domestic systems, fostering consistency and uniformity of decisions on factual issues is also an important motivation behind its use.[43] Robertson J. of the SCSL Appeals Chamber has argued that expedition, economy and consistency are secondary goals that may be the *result* of judicial notice – not its purpose. Rather, Robertson J. writes that

> the purpose of the Rule is [to] promote a fair trial for all parties both by relieving them of the burden of proving facts that have been convincingly established elsewhere and by enabling the tribunal to take into account […] the full panoply of relevant facts currently available to the world.[44]

Acceptance of this latter iteration of the doctrine's purpose could fundamentally change the way in which the doctrine is employed.

Irrespective of their purpose, the SCSL and the *ad hoc* tribunals have adopted identical provisions at Rule 94 which state:

A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof;

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40 See Stewart, *supra* note 9 at 248; William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (New York: Cambridge University Press, 2006) at 488.

41 Note that this term is the one employed by the ICTR when referring to the need to proceed quickly and fairly through pending cases. Indeed, the Tribunal specifically chose this term over terms such as "expediency". See *Prosecutor v. Édouard Karemera et al.*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File and Amended Indictment (19 December 2003) at para. 14 (International Criminal Tribunal for Rwanda, Appeals Chamber); *Prosecutor v. Pauline Nyiramasuhuko et al.,* ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings Under Rule 15*bis*(D) (24 September 2003) at para. 24 (International Criminal Tribunal for Rwanda, Appeals Chamber).

42 *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN GAOR, 54th sess., UN Doc A/54/634 (1999) Recommendation 11 at 102.

43 *Prosecutor v. Blagoje Simić* et al., IT-95-9, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina (25 March 1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Simić* Decision].

44 *Prosecutor v. Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, SCSL-2004-14-AR73, Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", Separate Opinion of Judge Robertson (16 May 2005) at para. 15 (Special Court for Sierra Leone, Appeals Chamber) [*Norman* Appeals Decision]. See also, Schabas, *supra* note 40 at 488.

> B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.[45]

The jurisprudence of these tribunals reveals that while the use of Rule 94(B) is discretionary, the judges of the tribunals are *required* under Rule 94(A) to employ the doctrine where a fact is deemed to be beyond reasonable dispute.[46] Thus, regardless of the implications, judicial notice *must* be taken of all notorious facts that are considered beyond reasonable dispute.[47] By contrast, the *Rome Statute of the International Criminal Court* provides that the ICC "shall not require proof of facts of common knowledge but may take judicial notice of them."[48] As can be noted from the text, the chambers of the ICC *may* take judicial notice of notorious facts thereby making use of the doctrine discretionary. Where circumstances render the use of the doctrine inappropriate, a request for judicial notice could be denied.

Accordingly, absent any discretion to employ the doctrine, the use of Rule 94(A) ultimately rests on the definition and interpretation of the phrase "facts of common knowledge". The concept is accepted as encompassing "those facts which are not subject to reasonable dispute, including common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature."[49] However, it must be noted that the ICTR has adopted a more expansive definition of these terms than its domestic counterparts. Rather than limiting the interpretation of "facts of common knowledge" to propositions that are universally accepted, the ICTR has explicitly stated that universal acceptance is not required for the use of the doctrine.[50] Instead, propositions that are generally known within the tribunal's jurisdiction or that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question" are susceptible of judicial notice.[51]

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45 *Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,* UN Doc. IT/32/Rev.6 (1994) as amended 17 July 2003, UN Doc. IT/32/Rev. 28 (2003); *ICTR Rules*, *supra* note 3.

46 *Prosecutor v. Laurent Semanza,* ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, (3 November 2000) at para. 24 (International Criminal Tribunal for Rwanda, Trial Chamber III) [*Semanza* Decision]; *Prosecutor v. Slobodan Milošević*, IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (28 October 2003) at para. 6 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) [*Milošević* Appeals Decision]; *Karemera* Appeals Decision, *supra* note 1 at para. 22.

47 *Karemera* Appeals Decision*, supra* note 1 at para. 30.

48 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force 1 July 2002), art. 69(6).

49 Stewart, *supra* note 9 at 249, citing *Semanza* Decision, *supra* note 46 at para. 25.

50 Stewart, *supra* note 9 at 249; *Semanza* Decision, *ibid.* at para. 31.

51 *Semanza* Decision, *ibid.* at para. 23.

The inconsistent interpretation of what constitutes a fact of common knowledge is apparent throughout the case law of the ICTR. Whereas trial chambers have declined to accept as common knowledge facts such as the existence of the *Interahamwe* militia and the shooting down of the Rwandan President's plane,[52] other judges of the ICTR have taken judicial notice of far more amorphous propositions. In one decision, for instance, Trial Chamber II approved one such vague proposition when it took judicial notice of

> the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries were refugees had settled. The demographic composition of the population in certain neighbouring regions outside the territory of Rwanda, furthermore, showed features which suggest that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.[53]

Inconsistencies are equally apparent among ICTR trial chambers with respect to judicial notice of identical facts,[54] and between the ICTR and the ICTY with respect to similar propositions.[55]

The most important distinction between the uses of judicial notice in domestic jurisdictions and at international law is the complexity of judicially noticed facts, and their centrality to the case against the accused. In domestic jurisdictions, commonly judicially noticed facts include the values of weights and measures, the temperature at which water freezes and the fact that London's streets are crowded.[56] By contrast, the *ad hoc* tribunals have opted to take judicial notice of more intricate

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52 *Prosecutor v. Pauline Nyiramasuhuko et al.,* ICTR-98-42-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence (15 May 2002) at para. 105 (International Criminal Tribunal for Rwanda, Trial Chamber II) [*Nyiramasuhuko* Decision].

53 *Prosecutor v. Joseph Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction (18 June 1997) at para. 21 (International Criminal Tribunal for Rwanda, Trial Chamber II). For discussion regarding this decision see Stewart, *supra* note 9 at 250.

54 Stewart, *ibid*. at 251. Note that while the *Semanza* Decision, *supra* note 46, took judicial notice of widespread or systematic attacks in Rwanda during 1994, subsequent decisions declined to take judicial notice of similar propositions: see *Nyiramasuhuko* Decision, *supra* note 52 at para. 115; *Prosecutor v. Juvénal Kajelijeli*, ICTR-98-44A-T, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of The Rules (16 April 2002) at para. 19 (International Criminal Tribunal for Rwanda, Trial Chamber II) [*Kajelijeli* Decision]; *Prosecutor v. Eliezer Niyitegeka*, ICTR-96-14-T, Decision on Prosecutor's Motion for Judicial Notice of Facts (Rule 94 of the Rules of Procedure and Evidence) (4 September 2002) at para. 6 (International Criminal Tribunal for Rwanda, Trial Chamber I) [*Niyitegeka* Decision].

55 For example, the *Nyiramasuhuko* Decision, *supra* note 52, declined to take judicial notice of Rwanda's ratification of the Geneva Conventions, whereas an earlier ICTY trial chamber decision judicially noticed the fact that "the Socialist Republic of the Former Yugoslavia ratified the Genocide Convention of 1949 on 29 August 1950 and that Bosnia and Herzegovina succeeded to the Geneva Convention of 1949 with an effective date of 6 March 1992." See *Prosecutor v. Milan Kovačević*, IT-97-24-PT, Prosecutor's Request for Judicial Notice (20 April 1998) (International Criminal Tribunal for the Former Yugoslavia) at 2.

56 *Supra* note 15.

and complex facts that have substantially greater impact on the case against the accused.[57] This is especially apparent in the Appeals Chamber's decision in *Karemera*.

III. The *Karemera* Interlocutory Appeal

The prosecution's motion in the *Karemera* case requested the Trial Chamber to take judicial notice of six facts of "common knowledge" and 153 adjudicated facts.[58] Of the alleged facts of common knowledge, fact number six stated that "[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group."[59]

In his written submissions, the prosecutor acknowledged the many occasions on which trial chambers in previous ICTR cases had rejected requests for judicial notice of genocide in Rwanda.[60] Undeterred, the prosecution submitted that the previous decisions were distinguishable. Relying on United Nations reports,[61] reports of other international institutions[62] and governments,[63] books,[64] decisions in national jurisdictions,[65] newspaper accounts,[66] and ICTR judgments,[67] the prosecution argued

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[57] For example, in the May 2005 *Semanza* Decision, the Tribunal took judicial notice of the following facts: that Rwandan citizens were classified by ethnic group between April and July 1994; that widespread or systematic attacks against a civilian population based on Tutsi-ethnic identification occurred at the time; that there was an armed conflict not of an international character in Rwanda between 1 January 1994 and 17 July 1994; *The Prosecutor v. Laurent Semanza*, ICTR-97-20-A, Judgement (20 May 2005) at para. 192 (International Criminal Tribunal for Rwanda, Appeals Chamber).

[58] *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR-98-44-I, Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts (30 June 2005) at para. 1 (International Criminal Tribunal for Rwanda) [Motion].

[59] *Prosecutor v. Karemera, Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR-98-44-I, Prosecution's Motion for Judicial Notice – Annex A (30 June 2005) at para. 6 (International Criminal Tribunal for Rwanda).

[60] Motion, *supra* note 58 at para. 19.

[61] See generally *Final report of the Commission of Experts established pursuant to Security Council resolution 935 (1994)*, annexed to *Letter dated 9 December 1994 from the Secretary-General Addressed to the President of the Security Council*, UN Doc. S/1994/1405 (1994); *Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, UN ESCOR, 51st Sess., Annex, Provisional Agenda Item 12, UN Doc. E/CN.4/1995/70 (1994).

[62] See generally Organization of African Unity, "Rwanda: The Preventable Genocide" (8 July 2000), online: The African Union <http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf>. The Nordic Africa Institute, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience*, (Copenhagen: The Joint Evaluation of Emergency Assistance to Rwanda, 1996).

[63] See e.g. "Enquête sur la tragédie rwandaise (1990-1994)", Tome I, Rapport d'information, Assemblée Nationale (France), 15 December 1998.

[64] Alison des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999) ; Jean-Paul Gouteux, *La nuit rwandaise : l'implication française dans le dernier génocide du siècle* (Paris: Éditions Izuba, 2002); Gérard Prunier, *Rwanda : le génocide* (Paris: Éditions Dagorno, 1997).

[65] *Mugasera v. Canada (Minister of Citizenship and Immigration*, [2005] S.C.R. 100 at para. 8 [*Mugesera*].

that the existence of a genocide in Rwanda in 1994 was a fact of common knowledge of which the Chamber was required to take judicial notice under Rule 94(A).

The Trial Chamber offered little justification for its rejection of the prosecution's motion.[68] In a contradictory decision, while simultaneously concluding that judicial notice of genocide in Rwanda would lessen the prosecution's burden, the Chamber emphatically stated that judicially noticing genocide in Rwanda would have no impact on the case against the accused.[69] The Chamber wrote that

> it does not matter whether a genocide occurred in Rwanda or not, the Prosecutor must still prove the responsibility of the Accused for the counts he has charged in the Indictment. Taking judicial notice of such a fact as common knowledge does not have any impact on the Prosecution's case against the Accused, because that is not a fact to be proved. In the present case, where the prosecutor alleges that the Accused are responsible for crimes occurring in all parts of Rwanda, taking judicial notice of the fact that genocide has occurred in that country would appear to lessen the Prosecutor's obligation to prove his case. This application falls therefore to be dismissed.[70]

In addition to this internal inconsistency, the decision offered no new insight into the definition of the terms "facts of common knowledge" in Rule 94(A), nor whether the Rwandan genocide could be caught within the bounds of these terms.

The prosecution's application for certification to appeal the decision was granted[71] and the prosecution's interlocutory appeal was filed on 12 December 2005.[72] Alleging the central issue to be the Trial Chamber's discretionary power under Rule 94(A), the prosecutor asserted that the Chamber had erred in its dismissal

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66 See e.g. Jeevan Vasagar, "Hutu Rebels Apologise for Rwandan Genocide" *The Guardian UK* (1 April 2005), online: The Guardian: <http://www.guardian.co.uk/rwanda/story/0,14451,1449865,00.html>. The prosecution refers to the 14 judgments that had been released as of 30 June 2005 stating that no appellant had contested a Chamber's decision that genocide had taken place in Rwanda during the relevant period; see Motion, *supra* note 58 at para. 14.

68 *Prosecutor v. Karemera, Mathieu Ngirumpatse & Joseph Nzirorera,* ICTR-98-44-I, Decision on Prosecution Motion for Judicial Notice: Rule 94 of the Rules of Procedure and Evidence (9 November 2005) (International Criminal Tribunal for Rwanda, Trial Chamber III) [*Karemera* Trial Chamber Decision].

69 *Ibid*. at para. 7.

70 *Ibid.*

71 *Prosecution v. Karemera, Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR- 98-44-PT, Certification of Appeal Concerning Judicial Notice: Rule 73(B) of the Rules of Procedure and Evidence (2 December 2005) (International Criminal Tribunal for Rwanda, Trial Chamber) [*Karemera* Certification Decision].

72 *Prosecution v. Karemera, Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR- 98-44-T, Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73(C)) (12 December 2005) (International Criminal Tribunal for Rwanda, Appeals Chamber) [Interlocutory Appeal]. Note that responses were filed by the defence teams for the accused Nzirorera, and both the accused Karemera and Ngirumpatse on 16 December 2006 and 22 May 2006 respectively. The replies thereto were filed by the prosecution on 20 December 2006 and 25 May 2006.

of the prosecution's motion.[73] Specifically, the prosecution called on the Appeals Chamber to recognize that the genocide in Rwanda was "so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of [its] existence is unnecessary."[74]

The landmark decision of the Appeals Chamber relied almost exclusively on the lack of discretion given to a trial chamber under Rule 94(A). Reiterating a common refrain, the Appeals Chamber stated that the Trial Chamber was *required* to take judicial notice of facts deemed to be of "common knowledge."[75] Accordingly, the sole enquiry that was ripe for adjudication was the extent to which the relevant fact was reasonably disputable.[76] For this investigation, the Appeals Chamber deemed the following considerations to be *irrelevant*: 1) whether the fact at issue constitutes an element of the crime charged;[77] 2) whether the terms in which the fact at issue is phrased are considered "legal" in nature;[78] and 3) whether judicial notice of the fact at issue alleviates the burden on one of the parties.[79] Furthermore, in answer to concerns that judicial notice of genocide violated the rights of the accused, the Chamber stated:

> As the *Semanza* Appeal Judgement made clear, allowing judicial notice of a fact of common knowledge – even one that is an element of an offence, such as the existence of a 'widespread or systematic' attack – does not lessen the Prosecution's burden of proof or violate the procedural rights of the Accused. Rather, it provides an alternative way that that burden can be satisfied; obviating the necessity to introduce evidence documenting what is already common knowledge.[80]

IV. Discussion

It is undisputed that the events of 1994 in Rwanda represent some of the worst atrocities in recent human history. The attempted extermination of the Tutsi population by much of the military and civilian Hutu population was carried out in the wake of the assassination of Rwandan President Habyarimana and was largely ignored by the international community.[81] Since the cessation of hostilities in Rwanda, both national and international jurisprudence have unequivocally established that the purpose of the campaign was the complete destruction of the Tutsi ethnic group. The heinous nature of the crimes that were perpetrated against the Tutsi population is well documented and incontestable. Death by machete and rudimentary

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73 *Ibid*. at para. 14.
74 *Ibid*. at para. 19 quoting *Semanza* Decision, *supra* note 46 at para. 25.
75 *Karemera* Appeals Decision, *supra* note 1 at paras. 22-23.
76 *Ibid*. at para. 23.
77 *Ibid*. at para. 30.
78 *Ibid*. at para. 29.
79 *Ibid*. at para. 30.
80 *Ibid*. at para. 37.
81 The primary target of the extermination campaign was the Tutsi group although it is widely accepted that moderate members of the majority group, the Hutu, were also targets. See generally, des Forges, *supra* note 64; Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (London: New Left Books, 2004).

farm implement was the norm, while mass execution of men, women and children by firearm and grenade was equally common. Small babies were butchered and women were repeatedly raped, all in the name of protecting the Rwandan Hutu population and its leaders from subservience to "Tutsi hegemony in the Great Lakes region."[82]

Dr. Degni-Segui, United Nations Special Rapporteur of the Commission on Human Rights, has stated that there is every indication that a plan was devised to carry out this massive and coordinated attack on the Tutsi population.[83] The indicia of such a plan have been examined in every case heard by the ICTR and include 1) execution lists which targeted the Tutsi elite; 2) the spreading of extremist ideology through the Rwandan media which facilitated a campaign of incitement to exterminate the Tutsi population; 3) the use of civil defence forces and the distribution of weapons to the civilian population; and 4) the "screening" carried out at roadblocks created almost immediately after the death of the President.[84]

While it is imperative that the international community accepts the reality of what took place in Rwanda, it is nonetheless essential that the ICTR conducts proceedings in a manner that safeguards the procedural and substantive rights of the accused. Valid criticisms have been levelled against every international criminal tribunal since Nuremburg for imposing a form of "victors' justice" on the defendants.[85] Legitimacy concerns are equally present at the ICTR where inequality of arms between defence and prosecution counsel remains an issue.[86] Should it accept reductions in the protections afforded to the accused in the interests of judicial economy and expediency, the ICTR risks being labelled as another court in the business of dispensing "victors' justice." Procedural fairness as well as consistent and fair use of evidentiary mechanisms are basic safeguards that must not be sacrificed. While every effort must be made to ensure that guilty members of Rwandan society are brought to justice, to do so absent of procedural fairness, and in contravention of the rights of the accused, transforms the proceedings into a farce.

In light of the foregoing, the *Karemera* decision is particularly troubling. Offering only a textual analysis of Rule 94(A) as justification, the Appeals Chamber

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82 References to a Tutsi hegemony were allegedly made by Théoneste Bagosora, a high-ranking official in the Ministry of Defence and allegedly one of the masterminds of the extermination. See Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (New York: Avalon Publishing, 2005) at 293. Bagosora is currently being tried at the ICTR: see *Prosecutor v. Théoneste Bagosora et al.,* ICTR-98-41-T, Transcript (29 September 2004) (International Criminal Tribunal for Rwanda) where a witness attending the Arusha Peace Talks in 1992-1993 testified that Bagosora allegedly left Arusha to "prepare the apocalypse".

83 See *Prosecutor v. Clément Kayishema & Obed Ruzindana*, ICTR-95-1-T, Judgement (21 May 1999) at para. 275 (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kayishema* Judgement]. Note that the existence of such a plan is/has been the central issue before the ICTR trial chambers. See generally, *Prosecutor v. Théoneste Bagosora et al.,* ICTR-96-7-I, Amended Indictment (12 August 1999) (International Criminal Tribunal for Rwanda).

84 *Kayishema* Judgement, *ibid.* at para. 275.

85 See e.g. Antonia Sherman, "Sympathy for the Devil: Examining a Defendant's Right to Confront before the International War Crimes Tribunal" (1996) 10 Emory Int'l L. Rev. 833 at 837.

86 See UNICTR, Press Release, ICTR/INFO-9-3-15.EN, "Registry's Response to the Allegations of Serious and Repeated Violations of Rights of the Defence", Arusha (29 January 2004), online: <http://69.94.11.53/english/pressrel/2004/9-3-15.htm>.

used the doctrine of judicial notice in violation of the procedural and substantive rights of the accused. In so doing, it risks sacrificing the integrity of the ICTR and the international tribunal system as a whole.

Three elements of this decision are particularly susceptible to criticism: (**A**) how the Chamber has expanded the doctrine of judicial notice and thereby violated the procedural rights of the accused; (**B**) how the Chamber has taken judicial notice of an element of a crime with which the accused is charged and thereby violated the substantive rights of the accused; and (**C**) how the consequences proposed by the Appeals Chamber with respect to other ICTR cases are illogical and inconsistent with international jurisprudence. Each issue will be discussed in turn.

A. Violating the Procedural Rights of the Accused

Based on reports of human rights organizations, United Nations bodies, as well as many scholarly articles and books, the events that took place in Rwanda in 1994 can be characterized as a "genocide" in the term's non-legal sense.[87] This fact is not subject to reasonable dispute−Genocide−colloquially understood as the destruction of a group−was the "call to arms" of the Hutu Power movement which took control of Rwanda following the death of the President.[88] However, whereas "genocide" is an apt characterization in the extra-legal context, the use of the term in a legal setting has more grave implications on the liberty of the accused. Rather than a mere descriptor of a factual situation, genocide is a crime under international law and is therefore the subject of a legal conclusion. Thus, whereas the non-legal community can describe the Rwanda atrocities as part of a genocide, in the legal realm a party asserting the existence of such a characterization should have to satisfy the court that the requisite criteria for the crime have been met.

At domestic and international law, there is a well-established limitation imposed on the doctrine of judicial notice: it can only be applied to *facts* of common knowledge and cannot be used in relation to legal characterizations or conclusions.[89] According to international jurisprudence, it is inappropriate to judicially notice legal consequences inferred from facts, as opposed to facts of common knowledge *simpliciter*.[90] Furthermore, as stated by William Schabas, judicial notice provisions

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87 *Supra* note 61; *supra* note 62; *supra* note 64; *supra* note 66.

88 Melvern, *supra* note 81 at 49 ff.

89 See *supra* note 5; *infra* note 90.

90 Schabas, *supra* note 40 at 493; *Norman* Appeals Decision, *supra* note 44 at 28; *Prosecutor v. Théoneste Bagosora et al,* ICTR-98-41-T, Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94 (11 April 2003) (International Criminal Tribunal for Rwanda) [*Bagosora* Decision]; *Prosecutor v. Casimir Bizimungu et al*., ICTR-99-50-T, Decision on Prosecutor's Motion and Notice of Adjudicated Facts (28 June 2004) (International Criminal Tribunal for Rwanda) [*Bizimungu* Decision]; *Prosecutor v. Kvočka et al.,* IT-98-30/1-T, Decision on Judicial Notice (8 June 2000) at 4 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Kvočka* Decision]; *Nyiramasuhuko* Decision, *supra* note 52 at paras. 38-39; *Prosecutor v. Elizaphan Ntakirutimana & Gerard Ntakirutimana*, ICTR-96-10-T and ICTR-96-17-T, Decision on The Prosecutor's Motion for Judicial Notice of Adjudicated Facts (22 November 2001) at para. 30

"should not be used to resolve disputes that are essentially about questions of law."[91] The clearest illustration of this restriction was articulated by the ICTY in the *Simic* case. In a passage that has since been endorsed by the Appeals Chamber of the SCSL, the Trial Chamber stated: "Considering further that Rule 94[(A)] is intended to cover facts and not legal consequences from them, the Trial Chamber can only take judicial notice of factual findings but not of a legal characterization as such."[92] Other trial chamber decisions have upheld this restriction referencing a need to protect the procedural rights of the accused.[93]

Decisions in every ICTR case from *Semanza* to *Bagosora* have clearly acknowledged that genocide, a crime listed in the Tribunal's *Statute*,[94] is a legal characterization and not a "fact" *per se*.[95] The classification of events as meeting the legal definition of genocide requires a finding of mixed law and fact.[96] To reach such a conclusion, a chamber must evaluate evidence adduced in court and determine whether the relevant series of factual events, when considered in unison, meet the legal requirements of the crime of genocide.[97] When generally considering the events that took place in Rwanda, the tribunal must nevertheless carry out an evaluation of whether those committing the crimes did so with "the intent to destroy in whole or in part the Tutsi population."[98] A legal conclusion is then reached that, as will be seen below, has a substantial effect on the case against the particular accused.

The question that must now be asked is: Why is it improper for a legal conclusion to be the subject of judicial notice? Firstly, the rationale behind this limitation can be found in the text of the provision itself: Rule 94(A) refers to "facts". Indeed, in its efforts to distinguish Rule 94(A) from Rule 94(B), the Appeals Chamber emphasized that the former provision is limited to "facts" whereas the latter

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(International Criminal Tribunal for Rwanda, Trial Chamber I) [*Ntakirutimana* Decision]; *Niyitegeka* Decision, *supra* note 54 at para. 6.

91 Schabas, *ibid*. at 491.

92 *Simic* Decision, *supra* note 43 at 5, cited with approval in *Norman* Appeals Decision, *supra* note 44 at para. 35.

93 *Kvočka* Decision, *supra* note 90 at 4; *Nyiramasuhuko* Decision, *supra* note 52 at paras. 38-39; *Ntakirutimana* Decision, *supra* note 90 at para. 30; *Niyitegeka* Decision, *supra* note 54 at para. 6.

94 *International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994,* UN SCOR, 49th sess., Annex, UN Doc. S/RES/955 (1994), art. 2 [*ICTR Statute*].

95 *Bagosora* Decision, *supra* note 90; *Bizimungu* Decision, *supra* note 90; *Kvočka* Decision, *supra* note 90 at 4; *Nyiramasuhuko* Decision, *supra* note 52 at paras. 38-39; *Ntakirutimana* Decision, *supra* note 90 at para. 30; *Niyitegeka* Decision, *supra* note 54 at para. 6; *Semanza* Decision, *supra* note 46 at para. 35.

96 *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement (2 September 1998) at paras. 157-69 (International Criminal Tribunal for Rwanda, Trial Chamber I) [*Akayesu* Judgement].

97 *Ibid.* Note that the Trial Chamber in *Akayesu* carries out an extensive evaluation of the events in Rwanda to reach the legal conclusion that they amounted to genocide.

98 *Ibid*. at para. 169.

addresses "findings of fact."[99] Thus, the decision to judicially notice genocide under Rule 94(A) violates a strict textual reading, a practice so heavily relied upon by the Appeals Chamber throughout the *Karemera* decision.

Secondly, issuing a legal conclusion through the evidentiary vehicle of judicial notice constitutes a violation of the procedural rights of the accused. The adversarial system demands that an accused be provided with the opportunity to present submissions on issues of mixed law and fact.[100] To side-step this requirement by requiring chambers to characterize the events in Rwanda as genocide *proprio motu* is to violate the accused's procedural rights. According to the jurisprudence of the international criminal tribunals, an accused does not have the *right* to be heard on the issue of whether a chamber should take judicial notice of a fact under Rule 94(A).[101] A party's ability to present arguments to the chamber is a privilege, not a right.[102] This fact, combined with the irrebuttable nature of judicial notice under Rule 94(A), means that parties cannot challenge judicially noticed questions of law or mixed law and fact.[103] Thus, definitions of legal characterizations, aspects of which are the subject of considerable disagreement, can no longer be debated once such a characterization has been performed by way of judicial notice.[104] The procedural right to adduce submissions on these important issues of law has essentially been revoked, thereby violating the accused's procedural rights.

In several recent decisions, the ICTR Appeals Chamber has taken judicial notice of a number of legal conclusions despite the impact on the accused's procedural rights.[105] For example, legal conclusions such as the non-international character of the conflict in Rwanda have been judicially noticed under Rule 94(A).[106] In the *Karemera* appeals decision, two rationales are given as the basis for the Chamber's decision to judicially notice legal conclusions.

The first justification is the Appeals Chamber's textual interpretation of Rule 94(A). According to its analysis, Rule 94(A) is not discretionary.[107] Irrespective of all other considerations, Rule 94(A) *requires* judicial notice of reasonably indisputable propositions whether they are "put in legal or layman's terms."[108] By issuing this

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99 *The Prosecution v. Clément Kayishema & Obed Ruzindana*, ICTR-95-1-A, Judgement (Reasons) (1 June 2001) at para. 273 (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Kayishema* Appeals Judgement]. Note that neither provision was said to address findings of mixed law and fact.

100 O'Sullivan, *supra* note 36 at 332.

101 *Milošević* Appeals Decision, *supra* note 46, Separate Opinion of Judge Shahabuddeen at para. 6.

102 *Ibid*.

103 Stewart, *supra* note 9 at 264.

104 *Ibid.*

105 *Karemera* Appeals Decision*, supra* note 1 at para. 29; *The Prosecutor v. Laurent Semanza*, ICTR-97-20-A, Judgement (20 May 2005) at para. 192 (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Semanza* Appeals Judgement].

106 The Appeals Chamber has endorsed taking judicial notice of legal characterizations such as: (1) the fact that there was an armed conflict of a non-international character in Rwanda between January 1, 1994 and July 17, 1994; and (2) that widespread and systematic attacks against a civilian population based on Tutsi ethnic identification occurred during that time; see *Semanza* Appeals Judgement, *ibid.*

107 *Karemera* Appeals Decision, *supra* note 1 at para. 29.

108 *Ibid*.

statement, the Appeals Chamber ignores well-established principles of the doctrine of judicial notice at international law, prior rulings of the trial chambers of the ICTR and ICTY, rulings of the Appeals Chamber of the SCSL, and the procedural rights of the accused.

As a second justification for its decision, the Appeals Chamber relies on alleged precedent from domestic jurisdictions. Specifically, judicial notice has been taken by domestic courts with respect to the Nazi Holocaust, the South African Apartheid, the existence of a state of war, and the rise of terrorism.[109] Unfortunately, however, the Appeals Chamber makes a false analogy on this point. While domestic courts have taken judicial notice of these events, the terms employed to describe them do not constitute actual crimes in jurisdictions cited in the Chamber's decision. Unlike genocide, which is listed at Article 2 of the *Statute of the International Criminal Tribunal for Rwanda,*[110] "Holocaust" is neither a legal characterization nor a crime;[111] one cannot be indicted for "Holocaust". This logic applies equally to the term "Apartheid" within the jurisdiction of the Land Claims Court of South Africa.[112] In the cases referenced, both terms were used not as legal terms of art but as colloquial expressions describing a horrific set of events. Like the events of the Nazi Holocaust and the South African Apartheid, it cannot be contested that a genocide, as it is understood colloquially, occurred in Rwanda. However, when the term is employed as a legal term of art, analogies with non-legal characterizations like Holocaust and Apartheid cannot be sustained.

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109 *Ibid*., at para. 30.

110 *ICTR Statute*, *supra* note 94.

111 In support of its holding, the Appeals Chamber cites the case of the Ontario Court of Appeal in *R. v. Zundel,* (1990) 53 C.C.C. (3d) 161. With respect to the contrary opinion, this analogy falls short. At issue in the *Zundel* case was the truthfulness of several specific claims made by the accused in pamphlets he published in Canada: see 37 O.A.C. 354 at para. 1. The accused was not charged with the crime of "Holocaust" nor were the crimes in issue those that would amount to the perpetration of a Holocaust. No legal characterization of the constituent elements of a Holocaust was made in the decision. Furthermore, as noted by the Court of Appeal for Ontario, the existence of the Holocaust was not in dispute before the trial court. Even the defence in the case accepted the existence of the Holocaust to be mere background information and *not* a point of contention for the finders of fact: see 37 O.A.C. 354 at paras. 20-25.

112 The Appeals Chamber makes reference in the *Karemera* Appeals Decision to the case of *Minister of Land Affairs v. Slamdien et al*. (1999) 4 B.C.L.R. 413 (S. Afr. Land Claims Ct.). While the Chamber was correct in stating that this Land Claims Court decision takes judicial notice of a "policy of previous governments which sought to divide up the country spatially along racial and ethnic lines", it did not take judicial notice of any criminal activity nor characterize events under a legal classification. Indeed, at the time the case was decided, South Africa did not have a "crime of apartheid". Since this decision, however, South Africa has adopted the *Implementation of the Rome Statute of the International Criminal Court Act*, No. 27 of 2002. Under the *Act*, as under the *Rome Statute* itself, Apartheid is *now* a crime. Note that the Appeals Chamber also refers to Stewart, *supra* note 9 at 265-66, where he cites other examples. These include judicial notice of the fact "that flick knives are offensive weapons for the purposes of criminal legislation in the United Kingdom, that cocaine hydrochloride is a controlled substance under the law of the United States, that the reasonable person knows that HIV is a life endangering disease under Australian criminal legislation, and that '[i]n Rwanda in 1994 attacks were suffered by civilians *on the grounds* of their perceived political affiliation or ethnic identification." In each of these examples, the "fact" that is judicially noticed is not a legal characterization or a crime; analogies with the crime of genocide cannot therefore be sustained.

Similarly, it is inappropriate for the Appeals Chamber to rely on previous decisions where the rise in terrorism and the existence of a state of war were admitted via the doctrine of judicial notice. In the cases cited in support of the Bench's discussion on this matter, the accused were not under indictment for "a rise in terrorism" or for "the existence of a state of war."[113] Indeed, these two descriptors, as phrased by the Appeals Chamber and the courts who accepted them as facts of common knowledge, while arguably legal characterizations, are not in and of themselves crimes. Any analogy with the crime of genocide−a crime for which the accused in *Karemera* are under indictment−is therefore inappropriate.[114]

Accordingly, the Appeals Chamber has incorrectly expanded the scope of the doctrine of judicial notice to include crimes generally committed in Rwandan territory. This decision prohibits the accused from submitting arguments on questions of mixed law and fact, and could have the impact of preventing challenges with respect to the legal definition of genocide. As a result, and in opposition to all previous international case law, the decision violates the procedural rights of the accused.

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[113] The Appeals Chamber cites the case of *Klass and Others v. Federal Republic of Germany* (1978), 2 E.H.R.R. 214 at para. 48 as an example of judicial notice of terrorism – see *Karemera* Appeals Decision, *ibid*. at para 30. The *Klass and Others* case dealt with legislation that provided for surveillance of the mail, post and telecommunications in Germany. Specifically, the applicants claimed that provisions providing for surveillance violated the *European Convention on Human Rights*; see *Klass and Others* at para. 39. In the context of this case, judicial notice of "the development of terrorism in Europe in recent years" served as background information explaining the legislative action taken by the German government. Neither party to the case was under indictment for offences related to terrorism, nor was the phrase "the development of terrorism in Europe" a legal characterization. Therefore, an analogy with judicial notice of genocide in a case where an accused is under indictment for genocide cannot stand. Likewise, the Appeals Chamber incorrectly cites *Dorman Long & Co Ltd v. Carroll and Others*, [1945] 2 All E.R. 567 with respect to judicial notice of a state of war. This case, however, was a contracts dispute between workers "employed as fillers at the colliery"; at 567. Judicial notice of the existence of a state of war by the court served to contextualize the employers' aim when increasing the number of hours worked by the respondents. The centrality of this fact to this civil dispute is hardly analogous to an arguably pivotal fact in a criminal proceeding where the accused's liberty is in jeopardy. More pointedly, unlike the accused in *Karemera*, the parties to *Dorman* were not under indictment for "the existence of a state of war".

[114] See also *Mugesera*, *supra* note 65 at para. 8 where the Supreme Court stated "[t]here is no doubt that genocide and crimes against humanity were committed in Rwanda between April 7 and mid-July 1994. Although we do not suggest that there is absolutely no connection between the events, it is important to be mindful that one cannot use the horror of the events of 1994 to establish the inhumanity of the speech of November 22, 1992. The allegations made against Mr. Mugesera must be analysed in their context, at the time of his speech." In the proceedings before the Canadian courts the detainee was not under indictment for events that took place during 1994 in Rwanda. Rather, as clearly expressed in this statement by the Court, the case pertained to speeches made by Mugesera in 1992. In this context, judicial notice of events that took place two years later and for which the detainee was not charged (noting that the Canadian proceedings were in the context of an immigration hearing) is entirely appropriate.

B. Violating the Substantive Rights of the Accused

1. A Finding of Genocide in Rwanda as an Element of the Crime of Genocide

By pleading not guilty to an offence, an accused disputes allegations of a guilty mind laid out in the prosecutor's indictment.[115] These allegations of a guilty mind must therefore be proved beyond a reasonable doubt and cannot be the subject of judicial notice.[116] Robertson J. of the SCSL Appeals Chamber clearly outlined this requirement in the *Norman* appeals decision when he stated:

> The doctrine of judicial notice does not and cannot relieve the Prosecution of proving the elements of the offence. The defendant, by pleading 'not guilty' puts in issue his *mens rea* or guilty mind which cannot in consequence be the subject of judicial notice.[117]

It must be emphasized that judicial notice of the existence of a genocide in Rwanda in 1994 is not, in and of itself, *sufficient* to prove the individual responsibility of the accused with respect to the crime of genocide. The fact that a genocide occurred at the time of the accused's impugned conduct is also not a necessary element of the offence.[118] So long as the *actus reus*, *mens rea* and *dolus specialis* components of the crime are proven at trial, it is theoretically possible that genocide could be committed by a single individual acting alone.[119] It is on this basis that the Appeals Chamber has maintained that judicial notice of genocide does not go to the individual responsibility of the accused. Rather, the tribunal held that judicial notice of genocide provides a context, a backdrop or a "blank canvas" that is useful when examining the accused's actions.[120] However, far from acting as a mere "backdrop", a finding of genocide in Rwanda has been translated by both trial chambers and the Appeals Chamber into a finding of genocidal intent on the part of the individual accused.

It is clear from the plethora of doctrinal and jurisprudential writings on the subject that an added *mens rea*, or *dolus specialis* component, is required for a

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115 *Norman* Appeals Decision, *supra* note 44, Separate Opinion of Justice Robertson at 16.

116 *Ibid*.

117 *Ibid.*

118 John Quigley, *The Genocide Convention: An International Law Analysis* (Burlington: Ashgate, 2006) at 167; *Prosecutor v. Radislav Krstić,* IT-98-33-A, Judgement (19 April 2004) at para. 225 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) which refers to *Prosecutor v. Goran Jelisić,* IT-95-10-A, Judgement (5 July 2001) at para. 48 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), which referred to *Kayishema* Appeals Judgement, *supra* note 99.

119 *Ibid.* See also Joe Verhoeven, "Le crime de génocide: originalité et ambiguité" (1991) 24 Rev. B.D.I. 5 at 18.

120 *Karemera Appeals Decision*, *supra* note 1 at para. 36; *Prosecutor v. Karemera, Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR-98-44-AR73(c), Decision on Motions for Reconsideration (1 December 2006) at para. 16 (International Criminal Tribunal for Rwanda, Appeals Chamber) [*Karemera* Appeals Decision on Reconsideration].

tribunal to find an accused guilty of genocide.[121] Apart from the requisite guilty mind that must be found with respect to the specific acts enumerated in the indictment, the prosecution must demonstrate that the accused committed these acts with the intention to "destroy, in whole or in part, a national, ethnical, racial or religious group."[122]

Furthermore, it is equally clear from both trial and appeals chamber jurisprudence that the additional *dolus specialis* requirement *can* be satisfied by sole reference to the general context in which the alleged acts were committed.[123] That is, chambers have inferred the genocidal intent inherent in a particular act "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."[124] Thus, once a general context of genocide is found, the additional *mens rea* or *dolus specialis* requirement—an element that is a condition *sine qua non* for a finding of guilt at international law—will likely be satisfied.

In the *Karemera* case, the defence argued that judicial notice of genocide went directly to the culpability of the accused and was therefore an inappropriate subject for the doctrine. According to its submissions, elements that are so central to a case against an accused must be proven by legal evidence adduced before a chamber and cannot be taken out of the adversarial system by resort to judicial notice.[125] The Appeals Chamber rejected this argument by stating:

> Likewise, it is not relevant that these facts constitute elements of some of the crimes charged and that such elements must ordinarily be proven by the Prosecution. There is no exception to Rule 94(A) for elements of the offences. Of course, the Rule 94(A) mechanism sometimes will alleviate the Prosecution's burden to introduce evidence proving certain aspects of its case [...] however, it does not change the burden of proof, but simply provides another way for that burden to be met.[126]

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[121] See e.g. Raphael Lemkin, "Genocide – A Modern Crime" *Free World* 4 (April 1945) 39; David L. Nersessian, "The Razor's Edge: Defining and Protecting Human Groups under the Genocide Convention" (2003-2004) 36 Cornell Int'l L.J. 293 at 314; *Akayesu* Judgement, *supra* note 96 at para. 498.

[122] *ICTR Statute*, *supra* note 94 art. 2.

[123] *Ntakirutimana* Decision, *supra* note 90 at para. 44; *Kayishema* Appeals Judgement, *supra* note 99 at para. 159; *Norman* Appeals Deicision, *supra* note 44 at 16.

[124] *Ntakirutimana* Decision, *ibid.*; *Akayesu* Judgement, *supra* note 96 at para. 523; *Prosecutor v. George Rutaganda,* ICTR-96-3-T, Judgement and Sentence (6 December 1999) at para. 61 (International Criminal Tribunal for Rwanda, Trial Chamber); *Prosecutor v. Alfred Musema*, 96-13-T, Judgement (27 January 2000) at para. 166 (International Criminal Tribunal for Rwanda, Trial Chamber); *Kayishema* Judgement, *supra* note 83 at para. 93.

[125] *Prosecutor v. Pauline Nyiramasuhuko et al.,* ICTR-98-42-T, Prosecutor's Supplemental Reply in Support of her Motion for Judicial Notice and Admission of Evidence (3 September 2001) at paras. 92-103; *Krajelijeli* Decision*, supra* note 54 at para. 2; Motion, *supra* note 58 at para. 31.

[126] *Karemera* Appeals Decision, *supra* note 1 at para. 30. This statement is reiterated at para. 37 of the *Karemera* Appeals Decision and in the *Karemera* Appeals Decision on Reconsideration, *supra* note 120 at para. 16. It is therefore plain that the Appeals Chamber is of the opinion that judicial notice of genocide does not affect the burden of proof.

However, while it would be incorrect to state that judicial notice of genocide itself constitutes the *dolus specialis*, given that chambers have used this fact as the *sole* basis from which to infer the *dolus specialis*,[127] a finding of genocide will effectively satisfy the special intent element of the crime.

Consequently, the Appeals Chamber's decision to take judicial notice of the proposition that a genocide occurred in Rwanda effectively satisfies one of three elements necessary for a conviction: the genocidal intent. Therefore, as ICTR trial chambers are now required to take judicial notice of genocide in subsequent cases, the Appeals Chamber has eliminated any need to prove the *dolus specialis*. Henceforth, the prosecution need only prove the *actus reus* and *mens rea* of the underlying crimes, and based on judicial notice of genocide generally, the crime will likely be elevated to genocide in the specific case. No further proof need be adduced in order to draw the required inference.

2. JUDICIAL NOTICE OF AN ELEMENT OF THE CRIME: A VIOLATION OF SUBSTANTIVE RIGHTS

Defence counsel for the accused Nzirorera argued in the *Karemera* case that taking judicial notice of the crime of genocide would have the effect of both violating the presumption of innocence and the right of the accused to provide full answer and defence.[128] Both arguments were rejected by the Appeals Chamber.[129] Against specific claims of individual wrongdoing, the Chamber held that the accused continued to have the opportunity to contradict the prosecution's evidence.[130] His rights therefore remained intact.

As noted, it is true that no violation of rights resulted from a shift in the burden of proof; as held by the Appeals Chamber, no such shift has taken place. It is clearly stated in the decision that defence counsel in the *Karemera* case cannot adduce evidence in an attempt to contradict facts judicially noticed by the Appeals Chamber under Rule 94(A).[131] The issue is considered settled and a trial chamber has no discretion to rule that this fact of common knowledge can be disproved by evidence adduced at trial.[132] As such, once judicial notice is taken, while a burden on the prosecution is alleviated, no burden is correspondingly shifted to the accused.

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127 *Ntakirutimana* Decision, *supra* note 90 at para. 44; *Kayishema* Appeals Judgement, *supra* note 99 at para. 159; *Norman* Appeals Decision, *supra* note 44 at 16.

128 See e.g. *Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR-98-44-PT, Joseph Nzirorera's Partial Response to Motion for Judicial Notice and Request for Extension of Time (4 July 2005) at para. 30. See *ICTR Statute*, *supra* note 94, art. 20, where the rights of the accused are enshrined.

129 *Karemera* Appeals Decision, *supra* note 1 at para. 47. See also *Karemera* Appeals Decision on Reconsideration, *supra* note 120 at para. 25.

130 *Karemera* Appeals Decision, *ibid.* at paras. 30, 37 & 47.

131 *Ibid.* at para. 42.

132 *Karemera* Appeals Decision on Reconsideration, *supra* note 120 at para. 24.

While no rights violation results from a shift in the burden of proof, the Chamber's decision violates the accused's rights by pushing the doctrine of judicial notice beyond its proper limits, thereby shrinking the protections afforded.[133]

Prior to the *Karemera* decision, the content of the rights of the accused included the opportunity to meet, in the appropriate fashion, all facts that substantially influenced the disposition of a case. While this right had to be balanced against efficiency concerns, the defence had the right to be heard on issues that were "fundamental to the case against the accused."[134] One such fundamental issue was the *dolus specialis* or genocidal intent requirement for the crime of genocide. Therefore, judicial notice of such a fact was previously not permitted.[135]

Subsequent to this decision, however, the doctrine of judicial notice has been expanded beyond its proper limits to include any fact that would not be *sufficient* to prove the guilt of the accused.[136] Shahabuddeen J. for the Appeals Chamber writes:

> [I]t would plainly be improper for facts judicially noticed to be the 'basis for proving the Appellant's criminal responsibility' (in the sense of being *sufficient* to establish that responsibility), and it is always necessary for Trial Chambers to take careful consideration of the presumption of innocence and the procedural rights of the accused.[137]

Accordingly, any fact that, *when presented alone*, that would not lead to a criminal conviction is now susceptible of judicial notice. This remains true no matter how fundamental the fact is to the case against the accused. Therefore, whereas a fact demonstrating the *dolus specialis* was once so fundamental as to be prohibited as a

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133 See *Spence*, *supra* note 18 at para. 7.

134 *Kayishema* Judgement, *supra* note 83 at para. 273.

135 *Semanza* Decision, *supra* note 46; *Ntakirutimana* Decision, *supra* note 90; *Krajelijeli* Decision, *supra* note 54; *Nyiramasuhuko* Decision, *supra* note 52; *Niyitegeka* Decision, *supra* note 54; *Bagosora* Decision, *supra* note 90.

136 *Karemera* Appeals Decision, *supra* note 1 at para 47. See also *Spence*, *supra* note 18 at para. 7.

137 *Karemera* Appeals Decision, *ibid*. at para. 47. Even the prosecution has repeatedly argued that facts judicially noticed must not go to proof of the personal responsibility of any accused. See e.g. *Prosecutor v. Pauline Nyiramasuhuko et al.,* ICTR-98-42-T, Prosecutor's Supplemental Reply in Support of her Motion for Judicial Notice and Admission of Evidence (3 September 2001) at paras. 92-103 (International Criminal Tribunal for Rwanda) [*Nyiramasuhuko*, Prosecutor's Supplemental Reply]; *Krajelijeli* Decision*, supra* note 54 at para 2; Motion, *supra* note 58 at para 31. The burden to prove such facts must rest on the prosecution and must be presented in court before the Chamber. Trial Chambers have regularly endorsed this argument in rejecting requests to take judicial notice of genocide. The Appeals Chamber has similarly ruled in both the *Semanza* Appeals Judgement and the *Karemera* Appeals Decision. See *Semanza* Decision, *supra* note 46; *Ntakirutimana* Decision, *supra* note 90; *Krajelijeli* Decision, *supra* note 54; *Nyiramasuhuko* Decision, *supra* note 52; *Niyitegeka* Decision, *supra* note 54; *Bagosora* Decision, *supra* note 90; *Semanza* Appeals Judgement, *supra* note 105 at para. 192; *Karemera* Appeals Decision, *supra* note 1 at 47. As an aside, it should be noted that the *Karemera* Appeals Decision, in a somewhat contradictory manner, *does* provide some discretion to judges under Rule 94(A). Where a trial chamber deems a fact of common knowledge to be "sufficient to establish criminal responsibility", according to this passage it is duty bound not to take judicial notice of that fact despite the lack of discretion found in Rule 94(A). This is an inconsistency that will have to be resolved in future decisions.

subject of judicial notice, it is now susceptible to the doctrine. The reason: the *dolus specialis* is but one element of the crime. Taken alone, it is insufficient to convict the accused.[138] Indeed, the Chamber now allows for judicial notice of any fact that, on its own, would be insufficient to establish individual criminal responsibility.[139]

This expansion of the judicial notice doctrine has meant a correlative reduction in the protections afforded by the rights of the accused. While initially claiming that "the practice of judicial notice must not be allowed to circumvent the presumption of innocence and the defendant's right to a fair trial," the Appeals Chamber in this decision has essentially redefined the point at which the rights of the accused are considered to be violated.[140] A chamber will only allow these rights to prohibit judicial notice in cases where the fact at issue is *sufficient* to secure a criminal conviction. All other facts, including those that alone establish the *mens rea* and (presumably) the *actus reus* components of a case, are permitted as subjects of judicial notice. By thus expanding the doctrine of judicial notice, the rights of the accused and the presumption of innocence are whittled down in violation of the principles of fundamental justice.

While efficiency concerns must necessarily drive the adjudicative process at the ICTR, the convenience afforded by the doctrine of judicial notice should always yield to the requirements of the substantive and procedural rights of the accused.[141] By allowing the application of judicial notice to virtually all facts regardless of their centrality to the case against the accused, the Appeals Chamber has favoured efficiency concerns above all. For sacrificing the rights of the accused to such an extent, the ICTR must be sharply criticized.

C. Inconsistencies Regarding the Implications of the *Karemera* Decision

The Appeals Chamber offered further insight into the implications of its decision when it reconsidered its findings in a ruling dated 1 December 2006.[142] While reaffirming the decision to take judicial notice of genocide in Rwanda, the judges saw fit to clarify the implications of their original decision with respect to other cases before the ICTR.[143] In a motion for reconsideration, the defence claimed a breach in the principle of *inter partes* proceedings. Specifically, counsel argued that the original decision affected "all cases before the Tribunal without affording the parties in those cases the opportunity to present submissions on these matters."[144] The

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138 *Kayishema* Judgement, *supra* note 83 at para. 273; *Nyiramasuhuko*, Prosecutor's Supplemental Reply, *supra* note 137 at paras. 92-103; *Krajelijeli* Decision, *supra* note 54 at para. 2; Motion, *supra* note 58 at para. 31.

139 *Karemera* Appeals Decision, *supra* note 1 at para. 47.

140 *Karemera* Appeals Decision, *supra* note 1 at para. 47; *Semanza* Appeals Judgement, *supra* note 105 at para. 192.

141 O'Sullivan, *supra* note 36 at 332.

142 *Karemera* Appeals Decision on Reconsideration, *supra* note 120.

143 *Ibid.* at para. 27.

144 *Prosecutor v. Édouard Karemera*, *Mathieu Ngirumpatse & Joseph Nzirorera*, ICTR-98-44-A, Demande en réconsideration de la décision de la Chambre d'Appel en date du 16 juin 2006 suite à

Chamber rejected this argument, stating that parties in other cases were not prevented from challenging the implication of the *Karemera* Appeals Decision in their respective proceedings before their respective trial chambers.[145]

This clarification, however, is inconsistent with the decisions of other international tribunals. International jurisprudence and commentators have consistently opined that, subject to a small number of exceptions, facts of common knowledge accepted by way of judicial notice cannot be the subject of subsequent dispute by other parties appearing before the tribunal.[146] Indeed, to allow for contestation by defence counsel in other proceedings would mean shifting the burden of proof to the defence.[147] An accused would then be required to adduce evidence to overcome a presumption in favour of judicial notice of genocide. While it is unclear whether such a method can legitimately be used in the case of adjudicated facts noticed under Rule 94(B), it is clear that there can be no reversal of the burden of proof under Rule 94(A).[148]

Furthermore, although the international criminal law system is not bound by the principle of *stare decisis per se*, it is understood that appeals chambers should be bound by their own decisions unless they conclude that previous decisions were clearly erroneous and cannot stand.[149] Indeed, there has only been one case where an appeals chamber has overridden its own previous decision.[150] Therefore, unless a decision of a trial chamber demonstrates a clear error in the *Karemera* Appeals Decision, it is likely that all subsequent chambers will take judicial notice of genocide

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l'appel interlocutoire de procureur de la décision relative au constat judiciaire (3 August 2006) at 7 (International Criminal Tribunal for Rwanda).

145 *Karemera* Appeals Decision on Reconsideration, *supra* note 120 at para. 27 citing *Prosecutor v. Elizaphan Ntabakuze*, ICTR-98-41-AR73, Decision on Motion for Reconsideration (4 October 2006) at para. 15 (International Criminal Tribunal for Rwanda).

146 *Norman* Appeals Decision, *supra* note 44, Separate Opinion of Justice Robertson at para. 9; *Norman* Appeals Decision, *supra* note 44 at para. 31; *Prosecutor v. Slobodan Milošević*, IT-02-54-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brcko (5 June 2002) at 3 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Milošević* Decision]; *Milošević* Appeals Decision, *supra* note 46, Dissenting Opinion of Hunt J. (not on this point) at para. 9; Claire Harris, "Precedent in the Practice of the ICTY" in Richard May *et al.*, eds., *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk MacDonald* (The Hague: Kluwer Law International, 2001) at 352; Schabas, *supra* note 40 at 493.

147 *Norman* Appeals Decision, *ibid*. at para. 31.

148 *Norman* Appeals Decision, *ibid.* at para. 32; *Norman* Appeals Decision, *ibid.*, Separate Opinion of Justice Robertson at para. 9; *Milošević* Decision, *supra* note 146 at 3; Schabas, *supra* note 40 at 492-93.

149 Harris*, supra* note 146 at 352. See also *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, Judgement (24 March 2000) at paras. 92-94 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber); *Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgement (15 July 1999) at paras. 80, 83 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) when compared with *Prosecutor v. Dusko Tadic,* IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) paras. 79-84 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

150 Harris, *ibid*.; *Prosecutor v. Dusko Tadic*, IT-94-1-A & IT-94-1-Abis, Judgement in Sentencing Appeals (26 January 2000) at para. 69 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber).

or risk having their decisions overturned on appeal. This trend can already been seen in recent jurisprudence.[151]

The clarification made by the Appeals Chamber also creates internal inconsistencies with respect to the logic of Rule 94(A). It must follow that facts of common knowledge judicially noticed are, for all intents and purposes, irrebuttable.[152] Once a fact is considered susceptible of judicial notice−i.e. it is not the subject of reasonable dispute−to hold otherwise in subsequent cases is to defy the original characterization of the fact as indisputable. Such a finding would call into question the veracity of the decision in *Karemera* and would indicate an amorphous definition of what constitutes "a fact of common knowledge." Therefore, evidence tending to rebut a judicially noticed fact under Rule 94(A) must be inadmissible in order to ensure predictability with respect to the definition of what constitutes a "fact of common knowledge."

Finally, the clarification issued on 1 December 2006 is incomplete as it leaves unanswered the question of the specificity of the earlier decision. The Appeals Chamber has not clearly outlined the application of its ruling with respect to genocide in various regions of Rwanda. Is it open to the defence to claim that events in a specific region of the country did not constitute genocide? Finding genocide in the region where the alleged acts of genocide took place is an important factor in securing the conviction of an accused.[153] While this question remains unanswered, it will no doubt be addressed in future decisions.

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In his *Preliminary Treatise on Evidence at the Common Law*, Thayer spoke of judicial notice as "an instrument of great capacity in the hands of a competent judge."[154] Proper use of the doctrine has the potential to reduce the length of a trial while ensuring that consistency is achieved on issues that are clearly accepted as common knowledge. At international law, the use of this evidentiary mechanism is an essential component of the drive to ensure expeditious completion of the tribunals' work. International pressure has mounted on the United Nations to abide by the ICTR Completion Strategy which calls for the conclusion of trials by the end of 2008.[155] As implied by a United Nations Expert Group Report, only through the use of time-saving mechanisms like judicial notice is a 2008 completion date possible.[156]

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[151] *Prosecutor v. Protais Zigiranyirazo*, ICTR-01-73-I, Oral Decision, Transcript (27 November 2006) (International Criminal Tribunal for Rwanda); *Prosecutor v. Ndindiliyimana et al*., Case No. ICTR-00-56-T, Transcript. 28 June 2006.

[152] *Norman* Appeals Decision, *supra* note 44, Separate Opinion of Justice Robertson at para. 9; Schabas, *supra* note 40 at 493.

[153] *Akayesu* Judgement, *supra* note 96 at para. 129.

[154] Thayer, *supra* note 10 at 309.

[155] See UNICTR, Press Release, ICTR/INFO-9-2-499.EN, "ICTR's Annual Report Presented to the General Assembly" (10 October 2006), online: <http://69.94.11.53/default.htm>.

[156] *Supra* note 42 at 102.

While the doctrine of judicial notice is not the proper mechanism to recognize the genocide in Rwanda, other efficiency producing methods were available to the Appeals Chamber. As in the *Kvočka* decision, the Chamber could have judicially noticed many of the facts that underlie a legal finding of genocide but left the ultimate characterization of the events until the judgment stage of the proceedings.[157] Until the final ruling is issued, "the parties to the proceedings [would be left to] determine whether further evidence must be adduced in order to establish the point which is suggested or inferred by the judicially noticed facts."[158] While expediting the trial process, the rights of the accused would have remained intact.

If the international community is to continue to rely on international criminal tribunals as a means of seeking justice for the victims of conflict, the justice rendered by those tribunals must be fair. While official recognition of genocide in Rwanda seems like a logical step and the prosecution cannot be faulted for seeking this ruling, recognition of genocide through the legal mechanism of judicial notice has dire implications for the rights of the accused. It is imperative that international criminal tribunals retain moral authority by fairly and consistently applying international law in a manner that does not impose or appear to impose a form of "victor's justice". Persons guilty of genocide in Rwanda must be punished; however, it is equally important that the process by which their guilt is assessed is fair and transparent.

The improper expansion of the doctrine of judicial notice as seen in *Karemera* violates the rights of the accused and calls into question the ability of the ICTR to fairly adjudicate matters of international criminal law. Failure to ensure proper protection of the procedural and substantive rights of the accused lends credence to common criticisms of international criminal tribunals. While efficiency and expeditiousness are essential, chambers must remain mindful of the rights of the accused and of the requirements of a fair trial. In this endeavour, the Appeals Chamber in the *Karemera* decision has been largely unsuccessful. In the words of Jackson J., the defendants have here been passed a poisoned chalice.[159]

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[157] *Kvocka* Decision, *supra* note 90 at 4. Note that Stewart points out a legitimate problem with this decision. By recognizing the facts underlying a crime while purposefully failing to judicially notice the *mens rea* component of the crime, an issue of relevance can arise. For a discussion on this issue, see Stewart, *supra* note 9 at 262.

[158] O'Sullivan, *supra* note 36 at 338.

[159] Justice Robert Jackson, opening statement to the Nuremburg Trials, reprinted in Taylor, *supra* note 31 at 168.