1422/H

Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73(C)
16 June 2006
(1422/H – 1400/H)

IN THE APPEALS CHAMBER

Before : Judge Mohamed Shahabuddeen, Presiding Judge
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar : Mr. Adama Dieng

Date of filing : 16 June 2006

ICTR Appeals Chamber
Date: 16 June 2006
Action: R.J.
Copied To: Judges

Prosecutor

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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DATE: 16 June 2006

Case No. ICTR-98-44-AR73(C)

Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice

Office of the Prosecutor	Counsel for the Accused
Mr. Hassan Bubacar Jallow	Ms. Dior Diagne and Mr. Moussa Félix Sow for Édouard Karemera
Mr. James Stewart	Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse
Mr. Don Webster	
Mr. Gregory Lombardi	Mr. Peter Robinson for Joseph Nzirorera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed 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 ("Appeals Chamber" and "Tribunal", respectively), is seized of the "Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (Rule 73(C))", filed by the Prosecution on 12 December 2005 ("Prosecution's Interlocutory Appeal").

I. Procedural History and Filings of the Parties

2. On 30 June 2005, the Prosecution filed before Trial Chamber III its "Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts" ("Prosecution's Motion"). In the Motion, the Prosecution requested, pursuant to Rule 94 of the Tribunal's Rules of Procedure and Evidence ("Rules"), that the Trial Chamber take judicial notice of six purported "facts of common knowledge", as well as a further 153 purported "adjudicated facts" extracted from the Judgements in the *Akayesu, Kayishema and Ruzindana, Rutaganda, Kajelijeli, Musema, Nahimana et al., Ndindabahizi, Niyitegeka, Ntakirutimana* and *Semanza* cases.

3. In its "Decision on Prosecution Motion for Judicial Notice" ("Impugned Decision"), filed on 9 November 2005, the Trial Chamber took judicial notice of two of the six "facts of common knowledge, took judicial notice of another "fact of common knowledge" in modified form, and denied the remainder of the Prosecution's Motion. The Prosecution sought certification to appeal the Decision in accordance with Rule 73(C) of the Rules. The Trial Chamber granted certification in its "Certification of Appeal concerning Judicial Notice", filed on 2 December 2005 ("Certification"). The Prosecution's Interlocutory Appeal was filed accordingly on 12 December.[1]

4. One of the Accused, Joseph Nzirorera, filed "Joseph's Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted" on 13 December 2005 ("Nzirorera's Motion"), seeking to confine the scope of the interlocutory appeal to the single issue on which, Mr. Nzirorera argued, the Trial Chamber had granted certification to appeal. The Prosecution filed a response to this motion on 15 December 2005,[2] and Mr. Nzirorera filed a reply to this response on 16 December 2005.[3] In addition, on 16 December 2005, Mr. Nzirorera filed his

[1] Rule 73(C) requires a party to file its interlocutory appeal within seven days of the filing of a decision certifying the appeal. Because Friday, 9 December 2005 was an official holiday at the Tribunal in Arusha, where the appeal was filed, the deadline was the following Monday, 12 December 2005.
[2] Prosecutor's Reply to Nzirorera's Response, 13 December 2005 ("Response to Nzirorera's Motion").
[3] Reply Brief: Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted, 16 December 2005 ("Reply Supporting Nzirorera's Motion").

"Respondent's Brief" ("Nzirorera's Response") responding to the interlocutory appeal on its merits. The Prosecution filed its reply to this response on 20 December 2005.[4]

5. In both its Response to Nzirorera's Motion and its Reply to Nzirorera's Response, the Prosecution argues that it was improper for Mr. Nzirorera to file both a motion to dismiss the interlocutory appeal and a separate response to that interlocutory appeal. It contends that a respondent to an interlocutory appeal is entitled to only one response, into which should be incorporated any arguments for the dismissal of the appeal. The Prosecution asks the Appeals Chamber to treat Nzirorera's Motion, being the first filed, as his response, and thus to disregard Nzirorera's Response.[5] Mr. Nzirorera has given no answer to these arguments.

6. The Appeals Chamber agrees with the Prosecution that Mr. Nzirorera was only entitled to file a single response. According to paragraph 2 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the Tribunal,[6] the response to an interlocutory appeal filed as of right shall both "state whether or not the appeal is opposed and the grounds therefore" and "set out any objection to the applicability of the provision of the Rules relied upon by the Appellant as the basis for the appeal". That is, the response should both address the merits of the appeal and include any procedural arguments for its dismissal. Nzirorera's Motion set forth an objection to the applicability of Rule 73(B) of the Rules as a basis for the appeal, by contending that the appeal exceeds the scope of the certification granted under that Rule. It should have been included as part of the response.

7. However, the Appeals Chamber nonetheless finds that it is in the interests of justice in the exceptional circumstances of this case to consider the arguments raised in both Nzirorera's Motion and Nzirorera's Response. This is for two reasons. First, there may arguably have been a good faith basis for Mr. Nzirorera's counsel to believe (albeit wrongly) that the above-cited provision of the Practice Direction did not apply to interlocutory appeals certified by a Trial Chamber, an issue the Appeals Chamber had not previously decided.[7] In light of that fact, to set aside Nzirorera's

[4] Prosecutor's Reply to "Respondent's Brief of Joseph Nzirorera" Dated 16 December 2005, 20 December 2005 ("Reply to Nzirorera's Response").
[5] *See* Response to Nzirorera's Motion, paras 1-2; Prosecution's Reply to Nzirorera's Reponse, paras 2-3.
[6] 16 September 2002 ("Practice Direction on Written Submissions").
[7] The Practice Direction on Written Submissions distinguishes between appeals that lie "as of right" and those that lie "only with the leave of a bench of three judges of the Appeals Chamber". Appeals that have been certified by a Trial Chamber—pursuant to a procedure established by amendment to the Rules after the Practice Direction's issuance—are not specifically mentioned, but the Appeals Chamber considers that, after the required certification has been issued, they lie "as of right", in that they are authorized by Rule 73(B) of the Rules and the appellant need not apply to the Appeals Chamber for further leave to file them. In any event, the provisions of the Practice Direction governing the content of a response are the same for all categories of interlocutory appeal. *See ibid.* paras 2, 5.

Response entirely—and thus consider the merits of the issues raised on appeal without any argument from Mr. Nzirorera—would be a disproportionate remedy for the violation of the Rules.

8. Second, the Prosecution's own appeal filing has violated the Practice Direction on the Length of Briefs and Motions on Appeal,[8] which provides in paragraph I(C)(2)(a)(i) that the "motion of a party wishing to appeal where appeal lies as of right will not exceed 15 pages or 4500 words, whichever is greater." In submitting a 28-page filing (plus appendices), the Prosecution relies instead on paragraph I(C)(2)(d).[9] But that paragraph applies to cases in which the Appeals Chamber has either ordered or expressly permitted the parties to file "briefs" on the merits of an interlocutory appeal—that is to say, where the Appeals Chamber has determined that the issues are sufficiently complex to justify submissions longer than those allowed by the ordinary provisions of subparagraphs (a) and (c). No such order or leave has been granted in this case. None of the Accused has objected to the Prosecution's appeal on this basis, which means that the Appeals Chamber is not obligated to grant relief.[10] In light of the fact that the Accused have now all responded to the Prosecution's appeal, the important issues raised by the appeal, and the fact that—like Mr. Nzirorera—the Prosecution might conceivably have been confused by the applicability of the various provisions of the practice direction, the Appeals Chamber determines that the fairest approach is to accept the Prosecution's Interlocutory Appeal as validly filed. Doing so provides another reason that, in fairness to Mr. Nzirorera, the arguments in Nzirorera's Response should not be disregarded.

9. For the foregoing reasons, the Appeals Chamber permits Mr. Nzirorera to separate the response authorized by paragraph 2 of the Practice Direction on Written Submissions into two separate filings (Nzirorera's Motion and Nzirorera's Response), and will thus consider the arguments included in both filings. The Prosecution's replies to these two separate filings are thus also permissible as they are, in essence, a two-part version of the reply authorized by paragraph 3 of that Practice Direction. The Appeals Chamber will not, however, consider the submissions contained in Mr. Nzirorera's Reply Supporting Nzirorera's Motion. There is no provision in the Practice Direction for further submissions by an appellee in response to the appellant's reply, and the above-discussed reasons do not provide a basis for permitting Mr. Nzirorera to file one.

10. The Appeals Chamber delayed its consideration of this appeal because it was awaiting the responses of the other Accused, Édouard Karemera and Mathieu Ngirumpatse, both of which were

[8] 16 September 2002.
[9] Prosecution's Interlocutory Appeal, footnote 1.
[10] *See* Rule 5 of the Rules.

filed on 22 May 2006.[11] These filings were made several months after the above-described filings were completed because of lengthy delays in the completion and transmission of several translations ordered by the Appeals Chamber.[12] Both of the Responses complied with the deadline set by the Appeals Chamber's Decision on Extension of Time (ten days after the transmission of the translations in question), and thus were timely. The Prosecution filed a "Consolidated Reply" to these responses on 25 May 2006.

II. Scope of grounds for which certification of appeal has been granted

11. The Prosecution's Interlocutory Appeal alleges that the Trial Chamber erred in law when it refused to take judicial notice, as facts of common knowledge under Rule 94(A) of the Rules, of four facts, namely, facts 1, 2, 5 and 6 appearing in Annex A to the Prosecution's Interlocutory Appeal. The Prosecution further alleges that the Trial Chamber erred in law and in fact in its refusal to take judicial notice, as adjudicated facts under Rule 94(B), of 147 facts appearing in Annex B to the Prosecution's Interlocutory Appeal.[13] The Prosecution does not challenge the Trial Chamber's refusal to take judicial notice of six other facts.[14]

12. The Accused Joseph Nzirorera claims that this Appeal exceeds the scope of the Certification. He contends that certification for interlocutory appeal was granted only on the legal question whether judicial notice can be taken of adjudicated facts that go directly or indirectly to the guilt of the accused.[15]

13. Under Rule 73(B) of the Rules, a Trial Chamber may certify a decision on a motion for interlocutory appeal if, in its view, the decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" such that "immediate resolution by the Appeals Chamber may materially advance the proceedings". The certification

[11] *Réponse à l'appel interlocutoire interjeté par le Procureur de la Décision relative au constat judiciaire*, 20 May 2006 ("Karemera Response") ; *Mémoire de M. Ngirumpatse en réponse au mémoire d'appel du Procureur contre la « Décision rélative à la Requête du Procureur intitulée Motion for judicial notice of facts of common knowledge and adjudicated facts »*, 22 May 2006 ("Ngirumpatse Response").

[12] *See* Decision on Request for Extension of Time, 27 January 2006 ("Decision on Extension of Time), para. 8 (setting a deadline for the responses of 10 days after the "last of . . . four translated documents is transmitted to the Accused as well as his co-accused Mr. Karemera"). French translations of the four documents in question—the Certification, the Decision on Extension of Time, the Prosecution's Interlocutory Appeal, and the Impugned Decision—were filed on 24 January, 7 February, 6 March, and 10 April 2006, respectively. However, the Registry has confirmed that the Impugned Decision was not communicated to counsel for Mr. Karemera and Mr. Ngirumpatse until 11 May 2006; pursuant to the Decision on Extension of Time and Rule 7 *ter* (B), therefore, the deadline for the responses was 22 May 2006, and they were timely filed.

[13] Prosecution's Interlocutory Appeal, para. 3.

[14] Prosecution's Interlocutory Appeal, para. 5. The relevant facts appear under numbers 31-32 and 75-78 in Annex B to the Prosecution's Interlocutory Appeal.

[15] Nzirorera's Motion, para. 5.

decision is discretionary: Rule 73 makes no provision for interlocutory appeal as of right.[16] The Appeals Chamber has recognized that, as a corollary of the Trial Chamber's discretion concerning whether to certify an interlocutory appeal in the first place, it also has the discretion to limit the scope of the interlocutory appeal to particular issues.[17] The Trial Chamber's Certification thus dictates the possible scope of the Appeals Chamber's decision. The Appeals Chamber is, therefore, called upon to interpret the scope of the Certification.

14. The text of the Certification is unfortunately less than crystalline on this point. In paragraph 3 the Certification acknowledges that the Prosecution advanced "a number of issues . . . , all of which, it submits satisfy both criteria to invoke an exercise of the Chamber's discretion under Rule 73(B)". It proceeds:

> 4. One of the issues raised by the impugned Decision which the Prosecution submits satisfies the criteria to invoke an exercise of the Chamber's discretion is the Chamber's refusal to take judicial notice of a number of facts, as adjudicated facts, on the basis that they might go directly or indirectly to the guilt of the Accused, notably in relation to the pleading of their participation in a joint criminal enterprise. It submits that, if interpreted widely, no fact could be judicially noticed as, presumably, most facts introduced by the Prosecution will go towards proving, either directly or indirectly, the guilt of the accused.
>
> 5. The Chamber is of the view that this issue satisfies both criteria for certification. ...
>
> FOR THOSE REASONS THE CHAMBER GRANTS certification of an interlocutory appeal under Rule 73(B) from the Chamber's "Decision on the Prosecutor's Motion for Judicial Notice", dated 9 November 2005.[18]

No further reference is made to the other issues regarding which certification of appeal was requested. Thus, on the one hand, the rationale of the Trial Chamber for certifying an interlocutory appeal relies on only one issue; however, on the other hand, the disposition does not purport to limit the certification to that issue.

15. In the Appeals Chamber's view, although it is plausible to read to the Certification as limited only to one issue, it is more likely that the Trial Chamber intended no such limit. First, the Trial Chamber explicitly referred in paragraph 3 of its decision to the "number of issues" on which the Prosecution sought certification. It would be strange for it then to proceed to discuss one of those issues in detail, and then simply to ignore all of the other issues entirely—unless, that is, the

[16] This is in contrast to Rule 72(B)(i), which provides for a right to interlocutory appeal of decisions on preliminary motions concerning jurisdiction.
[17] *See Nyiramasuhuko v. Prosecutor*, Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004, para. 7.
[18] Certification, paras. 4-5.

Trial Chamber considered that its resolution of the one issue made it unnecessary to resolve the others because the one issue alone was enough to justify certification of the entire appeal sought. Moreover, as the Prosecution observes,[19] the reasoning given by the Trial Chamber for certification concerned, as a general matter, the potential usefulness of judicial notice in making the trial proceedings more expedient; this reasoning applied equally well to the other issues presented by the Prosecution.[20] In these circumstances, had the Trial Chamber intended simply to deny certification on the other issues, for it to do so simply by omitting discussion of those issues, without a word of explanation, might have run afoul of the requirement that it provide a reasoned basis for its decision.[21]

16. It is not illogical or impermissible for a Trial Chamber to grant certification to appeal an entire decision on the basis of one issue which, in its view, satisfies the Rule 73(B) criteria. To the contrary, such an approach is consistent with the text of that Rule, which requires only that the Trial Chamber identify "an issue" satisfying certain criteria in order to certify interlocutory review of a decision, but does not state that the review must be limited to the identified issue. Thus, although the Appeals Chamber has found that the Trial Chamber *can* limit review to the issue(s) that it has found to specifically satisfy the Rule 73(B) criteria, it is not obligated to do so.

17. This approach is consistent with Rule 73's objective of advancing the fair and expeditious conduct of the proceedings. Interlocutory appeals under Rule 73 interrupt the continuity of trial proceedings and so should only be allowed when there is a significant advantage to doing so—that is, when, in the Trial Chamber's judgement, there is an important issue meriting immediate resolution by the Appeals Chamber. But once one such issue is identified and an interlocutory appeal is certified, allowing the Appeals Chamber to resolve related issues at the same time may cause little additional interruption and may ultimately serve the goals of fairness and expeditiousness.

18. Mr. Nzirorera argues that in a previous interlocutory appeal that he brought in this case, the Appeals Chamber confined the scope of the certification to the issue expressly identified by the Trial Chamber.[22] That situation, however, was different from the one presented here. As here, the Trial Chamber had not specified whether the certification it granted to appeal a decision extended

[19] Reply to Nzirorera's Motion, para. 7.
[20] *See* Certification, para. 5.
[21] The Statute of the International Tribunal applies this requirement to judgements on the merits, *see* Article 22(2), but the Appeals Chamber has also applied it to decisions on motions. *See, e.g.*, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying His Provisional Release, 9 March 2006, para. 10.
[22] Nzirorera's Motion, paras 9-13, citing Decision of Interlocutory Appeals Regarding Participation of Ad Litem Judges, 11 June 2004.

only to the issue it discussed (the competence of *ad litem* judges to confirm indictments) or also to an unmentioned issue (the sanctions it had imposed against Mr. Nzirorera's counsel for bringing the underlying motion).[23] So, as here, the Appeals Chamber was left to infer the Trial Chamber's intent from its context and reasoning. But there, it was clear from context that the Trial Chamber had not meant to certify the issue of sanctions—for just a minute or two later, in the same oral hearing, the Trial Chamber rejected Mr. Nzirorera's attempt to appeal another sanction that had been issued against counsel. It held that "an appeal against financial sanctions is not grounds for an interlocutory appeal, in the sense that the decision to impose financial sanctions does not involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and the resolution by the Appeals Chamber will not materially advance the proceedings."[24] In light of that statement, it was clear that the Trial Chamber did not intend to permit interlocutory appeals of financial sanctions. Moreover, the reasoning that the Trial Chamber gave for permitting interlocutory appeal on the *ad litem* judges issue had no relation to the sanctions issue. This is unlike the position in the present case; here, as noted above, the Trial Chamber's rationale for allowing the Appeals Chamber to resolve the proper scope of judicial notice on an interlocutory basis applied equally to all the parts of the Prosecution's appeal.

19. Nor do the other decisions Mr. Nzirorera cites support his position. In *Nyiramasuhuko v. Prosecutor*,[25] the Trial Chamber had been seized of two separate requests for certification of appeal. It granted both certifications in separate decisions. Erroneously, the Appellant later filed an appeal only with regard to one of the certifications, assuming that the Appeals Chamber would also rule on the related issues certified in the other Trial Chamber decision. The Appeals Chamber, however, held that because no appeal had been filed concerning the second certification, it was not seized of the second issue and could not rule on it. In *Prosecutor v. Bizimungu et al.*,[26] the Prosecutor had submitted several requests for reconsideration of defence witness protection measures with regard to each of the four accused. Three of these requests had been denied by the Trial Chamber and certification for appeal been granted. The fourth request was yet to be decided by the Trial Chamber. The Appeals Chamber, in deciding the Prosecution's interlocutory appeal with regard to the three requests already decided, unsurprisingly held that it would be premature at that stage to decide the issues raised in the fourth request.

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[23] T. 7 April 2004, p. 55.
[24] *Ibid.* p. 56.
[25] Case No. ICTR-98-42-AR73, Decision on Pauline Nyiramasuhuko's Request for Reconsideration, 27 September 2004.
[26] Case No. ICTR-99-50-AR73, Decision on Prosecution Appeal of Witness Protection Measures, 16 November 2005 ("*Bizimungu* Appeal Decision on Witness Protection Measures").

20. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber intended to grant certification to appeal the Impugned Decision with respect to all of the issues raised by the Prosecution's Interlocutory Appeal. Mr. Nzirorera's Motion is therefore denied.

21. Notwithstanding this determination, the Appeals Chamber will not, in considering an interlocutory appeal that extends beyond the issues that the Trial Chamber found to specifically satisfy the Rule 73(B) standard, address matters in which its consideration will not, in fact, materially advance the proceedings. The Appeals Chamber notes the related argument of Mr. Karemera that the Prosecution has as a general matter failed to demonstrate errors invalidating the Trial Chamber's decision or occasioning a miscarriage of justice within the meaning of Article 24(1) of the Statute.[27] Although the Article 24(1) standard applies specifically to post-trial appeals from final Trial Chamber decisions, it is likewise true that in interlocutory appeals, even where certification under Rule 73(B) has been granted, it is not the Appeals Chamber's practice to pass on purported errors that are inconsequential.[28] The Appeals Chamber will keep this standard in mind in addressing the individual allegations of error raised by the Prosecution.

III. Judicial Notice of Facts of Common Knowledge

22. Rule 94(A) states: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." As the Trial Chamber correctly noted,[29] this standard is not discretionary—if a Trial Chamber determines that a fact is "of common knowledge", it must take judicial notice of it. As the Appeals Chamber stated in the *Semanza* Appeal Judgement:

> As the ICTY Appeals Chamber explained in *Prosecution v. Milošević*, Rule 94(A) "commands the taking of judicial notice" of material that is "notorious." The term "common knowledge" encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute.[30]

23. Whether a fact qualifies as a "fact of common knowledge" is a legal question. By definition, it cannot turn on the evidence introduced in a particular case, and so the deferential standard of review ordinarily applied by the Appeals Chamber to the Trial Chamber's assessment of and inferences from such evidence has no application. Mr. Nzirorera suggests that the Appeals Chamber should defer to the Trial Chamber's discretion as to "admissibility of evidence" and "the

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[27] Karemera Response, p. 2.
[28] *See Prosecutor v. Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 9 & fn. 25.
[29] Impugned Decision, para. 5.
[30] *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 194 (footnotes omitted) ("*Semanza* Appeal Judgement").

manner in which facts are to be proven at trial".[31] But the general rule that the Trial Chamber has discretion in those areas is superseded by the specific, mandatory language of Rule 94(A); as noted above, the Trial Chamber has no discretion to determine that a fact, although "of common knowledge", must nonetheless be proven through evidence at trial. For these reasons, a Trial Chamber's decision whether to take judicial notice of a relevant[32] fact under Rule 94(A) is subject to *de novo* review on appeal.

24. The Prosecution sought judicial notice under Rule 94(A) with respect to six purported facts of common knowledge. Its request was granted with respect to Facts 3 and 4 (Rwanda's status as a party to various treaties), but denied with respect to the other facts, although the Trial Chamber did take judicial notice of Fact 1 in modified form. The Prosecution's contentions on appeal as to facts 1, 2, 5, and 6 are considered here in turn.

Fact 1—Status of Hutu, Tutsi and Twa as Ethnic Groups

25. The Prosecution sought judicial notice of the following fact: "Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa."[33] The Trial Chamber instead took judicial notice of "the existence of the *Twa, Tutsi* and *Hutu* as protected groups falling under the Genocide Convention", noting that such a classification was consistent with the Tribunal's jurisprudence and that the groups were "stable and permanent".[34] The Prosecution argues that the Trial Chamber should have used the designation "ethnic" in order to comport with the Appeal Judgement in *Semanza*. Although the Prosecution correctly states that the *Semanza* Appeal Judgement recognized that the Tutsi were an "ethnic" group, it has not attempted to show that the formulation that was instead chosen by the Trial Chamber has any potential to prejudice the Prosecution or render the proceedings less fair and expeditious. The Appeals Chamber can see no potential for such consequences, as the Trial Chamber's formulation equally (or perhaps even more clearly) relieves the Prosecution's burden to introduce evidence proving protected-group status under the Genocide Convention. The Appeals Chamber thus need not consider whether the Trial Chamber erred in

[31] Nzirorera's Response, para. 41-42.

[32] As Mr. Nzirorera suggests, *see* Nzirorera's Response, para. 41, a Trial Chamber is not obligated to take judicial notice of facts that are not relevant to the case, even if they are "facts of common knowledge". Of course, it remains the case that the Trial Chamber "shall not require proof" of such facts, *see* Rule 94(A), since evidence proving an irrelevant fact would in any event be inadmissible under Rule 89(C) of the Rules. *Cf. Prosecutor v. Hadzihasanović and Kubura*, Case No. IT-01-47-T, Final Decision on Judicial Notice of Adjudicated Facts, 20 April 2004 (holding that "before taking judicial notice of these four Definitively Proposed Facts the Chamber is obliged to verify their relevance, pursuant to Rule 89(C) of the Rules"). Relevance determinations are circumscribed by various standards of law, but within the appropriate legal framework the Trial Chamber enjoys a margin of discretion.

[33] *See* Prosecution's Interlocutory Appeal, Annex A, para.1.

[34] Impugned Decision, para. 8.

choosing not to adopt the Prosecution's formulation; nor, given that the Accused have not appealed, need it consider whether it erred in concluding that protected-group status was a fact of common knowledge. The Prosecution's Interlocutory Appeal as to this point is dismissed.

Facts 2 and 5—The Existence of Widespread or Systematic Attacks

26. As Fact 2, the Prosecution sought judicial notice of the following:

> The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.[35]

The Trial Chamber declined the Prosecution's request, stating that the notice sought concerned "a legal finding . . . which constitutes an element of a crime against humanity. The Prosecutor has an obligation to prove the existence of such an attack whenever he alleges that a crime against humanity occurred. . . . The Chamber considers that judicial notice therefore cannot be taken of it."[36] For essentially the same reasons, the Trial Chamber also refused to take judicial notice of Fact 5, namely: "Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character."[37]

27. The Prosecution argues on appeal that the Trial Chamber should have followed the *Semanza* Appeal Judgement in recognizing these facts as being "of common knowledge". In response, Mr. Nzirorera argues that these facts were reasonably disputable and should be proved with evidence, citing various pre-*Semanza* Trial Chamber decisions declining to take judicial notice of them.[38] He notes that in *Semanza*, unlike in this case, the "widespread or systematic" nature of the attacks had not been disputed by the accused.[39] Mr. Ngirumpatse advances similar arguments and adds that it is disputable whether the attacks were committed solely against Tutsis and on the basis of ethnicity[40] and whether the conflict was in fact non-international.[41] Mr. Nzirorera and Mr. Karemera both argue that the "widespread and systematic" and "non-international" characterizations are legal rather than factual in nature and are thus not subject to judicial notice.[42]

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[35] Prosecution's Interlocutory Appeal, Annex A, para. 2.
[36] Impugned Decision, para. 9.
[37] Prosecution's Interlocutory Appeal, Annex A, para. 5; *see* Impugned Decision, para. 11.
[38] *See* Nzirorera Response paras 58, 61, 62.
[39] Nzirorera Response, paras 66-68.
[40] Ngirumpatse Response, para. 7.
[41] Ngirumpatse Reponse, para. 8.
[42] Karemera Reponse, p. 4; Nzirorera Response paras 50, 52-53.

28. The Appeals Chamber in *Semanza* stated:

> As these passages suggest, the Trial Chamber struck an appropriate balance between the Appellant's rights under Article 20(3) and the doctrine of judicial notice by ensuring that the facts judicially noticed were not the basis for proving the Appellant's criminal responsibility. Instead, the Chamber took notice only of general notorious facts not subject to reasonable dispute, including, *inter alia*: 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 during that time; that there was an armed conflict not of an international character in Rwanda between 1 January 1994 and 17 July 1994; that Rwanda became a state party to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) on 16 April 1975; and that, at the time at issue, Rwanda was a state party to the Geneva Conventions of 12 August 1949 and their additional Additional Protocol II of 8 June 1977. The Appeals Chamber finds that these judicially noted facts did not relieve the Prosecution of its burden of proof; they went only to the manner in which the Prosecution could discharge that burden in respect of the production of certain evidence which did not concern the acts done by the Appellant. When determining the Appellant's personal responsibility, the Trial Chamber relied on the facts it found on the basis of the evidence adduced at trial.[43]

29. Thus, the Appeals Chamber has already held that the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification, as well as the existence of a non-international armed conflict, are notorious facts not subject to reasonable dispute. Therefore, the Trial Chamber was obliged to take judicial notice of them, since judicial notice under Rule 94(A) is not discretionary. Moreover, the reasons it gave for not doing so were unfounded. It is true that "widespread and systematic attack against a civilian population" and "armed conflict not of an international character" are phrases with legal meanings, but they nonetheless describe factual situations and thus can constitute "facts of common knowledge". The question is not whether a proposition is put in legal or layman's terms (so long as the terms are sufficiently well defined such that the accuracy of their application to the described situation is not reasonably in doubt).[44] The question is whether the proposition can reasonably be disputed. Neither the Trial Chamber nor any of the Accused has demonstrated any reasonable basis for disputing the facts in question.

30. 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.[45] There is no exception to Rule 94(A) for elements of offences. Of course the Rule 94(A) mechanism sometimes will alleviate the Prosecution's burden to introduce evidence proving certain aspects of its case. As the

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[43] *Semanza* Appeal Judgement, para. 192.

[44] For instance, it is routine for courts to take judicial notice of the existence of a state of war, despite the fact that such a description has a legal meaning. *See, e.g., Mead v. United States*, 257 F. 639, 642 (U.S. 9th Cir. Ct. App. 1919); *see also infra* note 46 (listing other examples of judicial notice incorporating legal concepts).

[45] Impugned Decision, paras 9, 11.

Appeals Chamber explained in *Semanza*, however, it does not change the burden of proof, but simply provides another way for that burden to be met. The Appeals Chamber notes that the practice of taking judicial notice of facts of common knowledge is well established in international criminal law[46] and in domestic jurisdictions.[47] Such facts include notorious historical events and phenomena, such as, for instance, the Nazi Holocaust, the South African system of apartheid, wars, and the rise of terrorism.[48]

31. The Appeals Chamber further considers that there is no reasonable basis for disputing the remainder of Fact 2: during the 1994 attacks, "some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity." These facts are not only consistent with every judgement so far issued by the Appeals and Trial Chambers of this Tribunal, but also with the essentially universal consensus of historical accounts included in sources such as encyclopaedias and history books.[49] They are facts of common knowledge.

32. For these reasons, the Trial Chamber erred in failing to take judicial notice of Facts 2 and 5 under Rule 94(A).

Fact 6—Genocide

33. The Prosecution sought judicial notice of the following fact: "Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group."[50] The Trial Chamber rejected this request. It explained that in order to obtain a genocide conviction, the Prosecution must establish the Accused's individual involvement and mental state, and reasoned:

> As a result, it does not matter whether genocide occurred in Rwanda or not, the Prosecutor must still prove the criminal 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,

[46] *See* Charter of the International Military Tribunal for Germany, art. 21; Rome Statute of the International Criminal Court, art. 69(6); Rules of Procedure and Evidence of the ICTY, Rule 94(A).
[47] *See, e.g.*, German Criminal Procedural Code (Strafprozessordnung stop) sec. 244(3); *R. v. Potts*, 26 C.R. (3d) 252, para. 15 (stating that in Canada, a "court has a duty to take judicial notice of facts which are known to intelligent persons generally"); *Mullen v. Hackney* L.B.C. (U.K. 1997) 1 W.L.R. 1103, CA (Civ. Div.), Archbold 2004, 10-71; *Woods v. Multi-Sport Holdings* (2002), High Court of Australia, 186 ALR 145, para 64; Fed. R. Evid. Rule 201 (U.S.).
[48] *See, e.g., R. v. Zundel* (Can. 1990) 53 C.C.C. (3d) 161, (sub nom. *R. v. Zundel* (No. 2)) 37 O.A.C. 354, para 21 (Holocaust); *Minister of Land Affairs et al v. Stamdien et al*, 4 BCLR 413 (S.Af. LCC 1999), p. 31 (apartheid); *Dorman Long & Co., Ltd. v. Carroll and Others*, 2 All ER 567 (Kings Bench 1945) (state of war); *Case of Klass and Others v. Germany*, Judgement (Merits), E.C.H.R. 6 Sept. 1978, para. 48 (terrorism). *See generally* James G. Stewart, *Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent*, 3 Int'l Crim. L. Rev. 245, 265-66 (2003).
[49] Dinah L. Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (Thomson Gale, 2005); William A. Schabas, *Genocide in International Law* (Cambridge 2000); Jonathan Glover, *Humanity: A Moral History of the 20th Century* (Yale University Press, 1999). *See also infra* notes 55-62 (listing further sources).
[50] Prosecution Interlocutory Appeal, Annex A, para. 6.

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.[51]

34. On appeal, the Prosecution argues that the occurrence of genocide in Rwanda in 1994 is a universally known fact—as evidenced by, *inter alia*, United Nations and government reports, books, news accounts, and the Tribunal's jurisprudence—and, although not itself sufficient to support a genocide conviction, is certainly relevant to the context in which individual crimes are charged.[52] It further argues that taking judicial notice of this fact would not be unfair to the Accused or inconsistent with the Prosecution's burden of proof.[53] In response, Mr. Ngirumpatse argues that to take judicial notice of genocide would prejudge the accusations against the Accused and violate their right to confront their accusers.[54] Mr. Karemera argues that the existence of genocide is a legal determination inappropriate for judicial notice, and that to take judicial notice of it would violate the presumption of innocence.[55] Mr. Nzirorera contends that the Trial Chamber correctly found that the existence of genocide was not relevant to the matters to be proven at trial; that it requires a legal conclusion; and that the practice of the Tribunal has established that it is a matter to be proven with evidence.[56]

35. The Appeals Chamber agrees with the Prosecution: the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber as a fact of common knowledge. Genocide consists of certain acts, including killing, undertaken with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[57] There is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population, which (as judicially noticed by the Trial Chamber) was a protected group. That campaign was, to a terrible degree, successful; although exact numbers may never be known, the great majority of Tutsis were murdered, and many others were raped or otherwise harmed.[58] These basic facts were broadly known even at the time of the Tribunal's establishment; indeed, reports indicating that genocide occurred in Rwanda were a key impetus for its establishment, as reflected in the Security Council

[51] Impugned Decision, para. 7.
[52] Prosecution's Interlocutory Appeal, paras 14-15, 22-31.
[53] *Ibid.*, paras. 32-36.
[54] Ngirumpatse Response, paras 5-6.
[55] Karemera Response, p. 3.
[56] Nzirorera Response, paras 45-49, 50-54, and 56-60, respectively.
[57] Statute of the International Tribunal, art. 4(2).
[58] *See, e.g.*, Human Rights Watch, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch Report March 1, 1999, Introduction, available at http://www.hrw.org/reports/1999/rwanda/Geno1-3-04.htm htm#P95_39230; *see also infra* notes 58-64 and sources cited therein.

resolution establishing it and even the name of the Tribunal.[59] During its early history, it was valuable for the purpose of the historical record for Trial Chambers to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence. Trial and Appeal Judgements thereby produced (while varying as to the responsibility of particular accused) have unanimously and decisively confirmed the occurrence of genocide in Rwanda,[60] which has also been documented by countless books,[61] scholarly articles,[62] media reports,[63] U.N. reports and resolutions,[64] national court decisions,[65] and government and NGO reports.[66] At this stage, the Tribunal need not demand further documentation. The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a "fact of common knowledge".

36. Notably, the Trial Chamber's decision does not contest any of this; indeed, even the Accused have not claimed that genocide might *not* have occurred in Rwanda in 1994. Instead the Trial Chamber provides two other, oddly contradictory reasons not to take judicial notice: first, that whether genocide occurred is not relevant to the case that the Prosecution must prove; and second, that recognizing it would improperly lighten the Prosecution's burden of proof.[67] The first can be readily dismissed. Whether genocide occurred in Rwanda is of obvious relevance to the Prosecution's case; it is a necessary, although not sufficient, part of that case. Plainly, in order to

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[59] *See* S/RES/155 (8 November 1994).

[60] *See, e.g., Akayesu* Trial Judgement, para 126; *Kayishema & Ruzindana* Trial Judgement, para 291; *Muzema* Trial Judgement, para 316; *Kayishema & Ruzindana* Appeal Judgement, para 143; *Semanza* Trial Judgement, para 424.

[61] *See, e.g.*, Gérard Prunier, *The Rwanda Crisis1959-1994: History of a Genocide* (Hurst & Company 1995); Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (New York: Verso, 2004); Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002), Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (New York University Press, 1995); Alan J. Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda* (Brookings Institution Press, 2001); Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Carroll & Graf, 2004); Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families* (Picador, 1999).

[62] *See, e.g.*, Peter Uvin, *Prejudice, Crisis, and Genocide in Rwanda*, African Studies Review Vol. 40, No. 2 (Sep., 1997); Helen M. Hintjens, Explaining the 1994 Genocide in Rwanda, The Journal of Modern African Studies (1999), 37; Rene Lemarchand, *Genocide in the Great Lakes: Which Genocide? Whose Genocide?*, African Studies Review, Vol. 41, No. 1 (Apr., 1998); Paul J. Magnarella, *The Background and Causes of the Genocide in Rwanda*, 3 J. Int'l Crim. Just. 801 (Special Issue: Genocide in Rwanda: 10 Years On), and numerous others.

[63] *See, e.g.*, William D. Rubinstein, *Genocide and Historical Debate*, History Today, April 2004, Vol. 54 Issue 4, pp. 36-38; Gabriel Packard, *Rwanda: Census Finds 937,000 Died in Genocide*, New York Amsterdam News, 4/8/2004, Vol. 95 Issue 15, p. 2-2; BBC News, *Rwanda: How the Genocide Happened*, Thursday, 1 April 2004, *available at* http://news.bbc.co.uk/2/hi/africa/1288230.stm.

[64] Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda. A/52/522, paras 3, 10; General Assembly Resolution on the Situation of Human Rights In Rwanda, A/RES/49/206; General Assembly Resolution on the Situation of Human Rights In Rwanda, A/RES/54/188.

[65] *See, e.g., Mugasera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 S.C.R. 100; *R v. Mihani* [2005] NSWCCA 226; *Government of Rwanda v. Johnson*, 366 U.S. App. D.C. 98; *Mukamusoni v. Ashcroft*, 390 F.3d 110; *Ntakirutimana v. Reno*, 184 F.3d 419.

[66] *See, e.g.*, United Kingdom Foreign and Commonwealth Office, Country Profiles: Rwanda, available at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1020338066458; France Ministère des Affaires Étrangères, Présentation du Rwanda, available at http://www.diplomatie.gouv.fr/fr/pays-zones-geo_833/rwanda_374/presentation-du-rwanda_1270/politique-interieure_5519.html; Human Rights Watch, *Leave None to Tell the Story*, *supra* note 58.

convict an individual of genocide a Trial Chamber must collect evidence of that individual's acts and intent. But the fact of the nationwide campaign is relevant; it provides the context for understanding the individual's actions. And, indeed, the existence of the genocide may also provide relevant context for other charges against the Accused, such as crimes against humanity. It bears noting that if the overall existence of genocide were not relevant to the charges against individuals, then Trial Chambers would not be permitted under Rule 89 to admit evidence pertaining to it either. Yet, as Mr. Nzirorera documents in his Response, they have consistently done so, and the Appeals Chamber has held that this is proper.[68]

37. The second part of the Trial Chamber's reasoning has been addressed already in the context of Facts 2 and 5 above. 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. The Prosecution must, of course, still introduce evidence demonstrating that the specific events alleged in the Indictment constituted genocide and that the conduct and mental state of the Accused specifically make them culpable for genocide. The reasoning under Facts 2 and 5 also dispenses with the objection of the Accused that the genocide characterization is legal in nature; Rule 94(A) does not provide the Trial Chamber with discretion to refuse judicial notice on this basis. In this respect the term "genocide" is not distinct from other legal terms used to characterize factual situations, such as "widespread or systematic" or "not of an international nature", which the Appeals Chamber in *Semanza* already held to be subject to judicial notice under Rule 94(A).

38. For these reasons, the Trial Chamber erred in refusing to take judicial notice of Fact 6.

III. Judicial Notice of Adjudicated Facts

39. Rule 94(B) of the Rules provides:

> "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."

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[67] Impugned Decision, para. 7.
[68] *See, e.g.*, *Akayesu* Appeal Judgement, para. 262.

Taking judicial notice of adjudicated facts under Rule 94(B) is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial.[69]

40. Although governed by some of the same principles, judicial notice under Rule 94(B) is different in nature from judicial notice under Rule 94(A). Adjudicated facts are different from facts of common knowledge (although there is some overlap in the categories). There is no requirement that adjudicated facts be beyond reasonable dispute. They are facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding chose to introduce, in the particular context of that proceeding. For this reason, they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had the chance to contest them.

41. Thus, there are two crucial differences between the two provisions. One is built into the Rule: whereas judicial notice under Rule 94(A) is mandatory, judicial notice under Rule 94(B) is discretionary, allowing the Trial Chamber to determine which adjudicated facts to recognize on the basis of a careful consideration of the accused's right to a fair and expeditious trial. The principles guiding and limiting the exercise of that discretion have been developed through jurisprudence and are discussed below.

42. The second difference is established by the Tribunal's jurisprudence, and concerns the consequences of judicial notice: whereas facts noticed under Rule 94(A) are established conclusively, those established under Rule 94(B) are merely presumptions that may be rebutted by the defence with evidence at trial.[70] The Appeals Chamber reiterates that judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. In the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and

[69] *See Prosecutor v. Željko Mejakić*, Case Nor. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004 ("*Mejakić* Judicial Notice Decision"), p. 5; *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Third and Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 24 March 2005 ("*Krajišnik* Judicial Notice Decision of 24 March 2005"), para. 12; *Prosecutor v. Ntakirutimana et al.*, Case No. ICTR-96-10-T & ICTR-96-17-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 September 2001 ("*Ntakirutimana* Judicial Notice Decision"), para. 28; *Prosecutor v. Duško Sikirica et al.*, Case No. IT-95-8-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000, p. 4.

[70] *See Prosecutor v. Slobodan Milošević*, Case No. 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 ("*Milošević* Appeal Decision on Judicial Notice"), pp. 3-4; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005, paras 10-11; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice and Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule *92bis*, 28 February 2003 ("*Krajišnik* Decision"), para. 16.

credible evidence to the contrary. This approach is consistent with practice in national jurisdictions: whereas judicial notice of facts of common knowledge may be treated as conclusive,[71] the final adjudication of facts in judicial proceedings is treated as conclusively binding only, at most, on the parties to those proceedings (*res judicata*).[72]

43. The Prosecution sought judicial notice under Rule 94(B) of 153 adjudicated facts. The Trial Chamber rejected this request in full, and the Prosecution appeals with respect to 147 of the facts. The Prosecution, the Accused, and the Trial Chamber have not proceeded in their analysis one by one through these facts, and the Appeals Chamber will not do so either. It will instead address the two major reasons given by the Trial Chamber for refusing to take judicial notice and consider whether each constitutes a legitimate reason to so refuse under Rule 94(B). In doing so, the Appeals Chamber bears in mind that "a Trial Chamber's exercise of discretion will only be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion".[73] The piecemeal analysis of each proposed adjudicated fact is a matter best left to the Trial Chamber on remand.[74]

44. The Appeals Chamber will thus consider the Trial Chamber's conclusions that (a) certain facts implicate the guilt of the accused and therefore were not subject to judicial notice; and (b) certain others were improperly taken out of context or combined to produce facts not actually adjudicated. The other reasons given by the Trial Chamber for declining to take judicial notice of other adjudicated facts need not be considered here, either because they have not been appealed by the Prosecution[75] or because, in the case of Fact 153, the issue is rendered moot by the Appeals Chamber's disposition concerning the sixth "fact of common knowledge" above.[76]

A. Facts Implicating the Guilt of the Accused

45. The Trial Chamber declined to take judicial notice of some facts because they "may go directly or indirectly to the guilt of the Accused, notably in relation with the pleading of their participation in a joint criminal enterprise".[77] The Prosecution claims that the Trial Chamber's

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[71] *See R. v. Zundel*, *supra*, para 166; Phipson on Evidence, 16th edition, 3-03; Fed. R. Evid. R. 201(g).
[72] *See, e.g.*, *Kajelijeli* Appeal Judgement, para. 202.
[73] *Milošević* Appeal Decision on Assignment of Counsel, para. 11; *Bizimungu* Appeal Decision on Witness Protection Measures, para. 3.
[74] *See Milošević* Appeal Decision on Judicial Notice, p. 3.
[75] *See* Prosecution Interlocutory Appeal, para. 5, declining to appeal the Trial Chamber's determination that facts 31-32 could not be judicially noticed because evidence had already been introduced on them, and that facts 75-78 could not be judicially noticed because they were extracted from cases currently on appeal. *See* Impugned Decision para. 15.
[76] Fact 153 under "Adjudicated Facts" was proposed as an alternative to Fact 6 (existence of genocide in Rwanda) under "Facts of Common Knowledge". Prosecution's Interlocutory Appeal, para. 4.
[77] Impugned Decision, para. 15 (citing facts 1-30, 33-74, 79-85, and 111-152).

refusal to take judicial notice on this basis amounts to an "over-broad interpretation of principle that is at odds with the object and purpose" of Rule 94(B).[78] It explains that that purpose is precisely to enable the adjudication of an accused's criminal responsibility in a more expeditious way, and that to categorically exclude all findings relating to that responsibility severely impairs the attainment of that objective; every fact relevant to a trial will bear "directly or indirectly" on the accused's responsibility.[79]

46. Mr. Nzirorera argues in response that the Trial Chamber's reasoning was consistent with that of other ICTR and ICTY Trial Chambers, which have consistently declined to take judicial notice of facts bearing on criminal responsibility.[80] He and Mr. Ngirumpatse each further argue that, in the context of joint criminal enterprise allegations, facts relating to the existence of a joint criminal enterprise or the conduct of its members are directly related to the criminal responsibility of the accused and thus are not subject to judicial notice.[81] Mr. Karemera argues that to adopt the Prosecution's position would undermine the presumption of innocence by allowing criminal responsibility to be established without evidence.[82]

47. As Mr. Nzirorera notes, in *Semanza* the Appeals Chamber made reference to the need to ensure "that the facts judicially noticed were not the basis for proving the Appellant's criminal responsibility". This reference was made in the context of a discussion of Rule 94(A), and the Appeals Chamber did not discuss the implications for Rule 94(B). In both contexts, however, it remains the case 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, including his right to confront his accusers. Thus, it 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.

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[78] Prosecution's Interlocutory Appeal, para. 48.
[79] Prosecution's Interlocutory Appeal, para. 62. The Appeals Chamber notes that the Prosecution's Interlocutory Appeal is confusing on this point, as in paras 53 and 63 it appears to accept the *Blagojević* formulation. However, the Appeals Chamber understands the Prosecution to be arguing for a narrow interpretation of the *Blagojević* formulation—essentially, excluding only facts that are *sufficient* to establish the accused's criminal responsibility. *See ibid.* para. 63 ("Here, however, proof, either by evidence or judicial notice, of the existence of a joint criminal enterprise is not proof of the criminal responsibility of the Accused, who must still be shown to have participated in it.").
[80] Nzirorera Response, paras 13-24, citing *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89, and 94 (11 April 2003), paras 61-62; *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004, para. 21; *Prosecutor v. Blagojević et al.*, Case No. IT-02-60-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, paras 16, 23 ("*Blagojević* Decision"); *Krajišnik* Decision.
[81] Nzirorera Response, paras 25-29; Ngirumpatse Reponse paras 10-12.
[82] Karemera Response, p. 5.

48. The Appeals Chamber, however, has never gone so far as to suggest that judicial notice under Rule 94(B) cannot extend to facts that "go directly or indirectly" to the criminal responsibility of the accused (or that "bear" or "touch" thereupon). With due respect to the Trial Chambers that have so concluded,[83] the Appeals Chamber cannot agree with this proposition, as its logic, if consistently applied, would render Rule 94(B) a dead letter. The purpose of a criminal trial is to adjudicate the criminal responsibility of the accused. Facts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial, and, as noted above, thus may neither be established by evidence nor through judicial notice.[84] So judicial notice under Rule 94(B) is in fact available *only* for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused.[85]

49. How can this observation be reconciled with the presumption of innocence? First, as noted above, judicial notice under Rule 94(B) does not shift the ultimate burden of persuasion, but only the initial burden of production (the burden to produce credible and reliable evidence sufficient to bring the matter into dispute). Analogously, in the context of alibi evidence, for instance, the accused bears the burden of production with respect to a matter centrally related to the guilt of the accused; yet this shift does not violate the presumption of innocence because, as the Appeals Chamber has repeatedly recognized, the prosecution retains the burden of proof of guilt beyond a reasonable doubt.[86]

50. Notwithstanding this point, there is nonetheless reason for caution in allowing judicial notice under Rule 94(B) of facts that are central to the criminal responsibility of the accused—for ordinarily in criminal cases the burdens of production *and* persuasion are on the prosecution. Although the latter always remains on the prosecution, even shifting the former has significant implications for the accused's procedural rights, in particular his right to hear and confront the witnesses against him.[87] The Appeals Chamber considers that as a result an exclusion from judicial notice under Rule 94(B) is appropriate, but one narrower than that adopted by the Trial Chamber: judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused.

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[83] *See supra* note 77 (cases cited by Nzirorera Response).
[84] *See supra* note 29.
[85] In theory, there is one exception to this statement: facts bearing on the Tribunal's jurisdiction but not (directly or indirectly) on the accused's criminal responsibility under international law, such as the location of the territorial boundaries of Rwanda, or the Rwandan citizenship of a person accused of committing a serious violation of international humanitarian law in a neighbouring State. This category is quite limited, however, and it has never been suggested that the scope of Rule 94(B) should be limited to such facts.
[86] *See, e.g.*, *Kajelijeli* Appeal Judgement, paras 40-41; *Niyitegeka* Appeal Judgement, paras 60-61.
[87] Statute of the International Tribunal, art. 20(c). For similar reasons, Article 20(d), referring to the right of the accused to be tried in his or her presence, is also implicated by the practice of resolving facts fundamental to the guilt of the accused in other trials where the accused is not present.

51. There are two reasons that this category of facts warrants complete exclusion, while other facts bearing less directly on the accused's criminal responsibility are left to the Trial Chamber's discretion. First, this interpretation of Rule 94(B) strikes a balance between the procedural rights of the Accused and the interest of expediency that is consistent with the one expressly struck in Rule 92 *bis*, which governs the proof of facts other than by oral evidence—another procedural mechanism adopted largely for the same purpose as was Rule 94.[88] Second, there is also a reliability concern—namely, there is reason to be particularly skeptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental state of an individual not on trial in those cases. As a general matter, the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another.

52. As to all other adjudicated facts relating to the criminal responsibility of the accused, it is for the Trial Chambers, in the careful exercise of their discretion, to assess each particular fact in order to determine whether taking judicial notice of it—and thus shifting the burden of producing evidence rebutting it to the accused—is consistent with the accused's rights under the circumstances of the case. This includes facts related to the existence of a joint criminal enterprise and the conduct of its members other than the accused—and, more generally, facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability. Contrary to the contentions of Mr. Nzirorera and Mr. Ngirumpatse, there is a distinction between such facts and those related to the acts and conduct of the accused themselves. In the *Galić* case, in the context of Rule 92 *bis*, the ICTY Appeals Chamber considered and rejected an argument similar to that raised by the Accused here:

> The appellant emphasises that Rule 92 *bis* excludes from the procedure laid down any written statement which goes to proof of the acts and conduct of the accused as charged in the indictment. He says that, as the indictment charges the appellant with individual criminal responsibility -
>
> (i) as having aided and abetted others to commit the crimes charged, and
>
> (ii) as the superior of his subordinates who committed those crimes,
>
> the acts and conduct of those others and of his subordinates "represent his own acts". The appellant describes those "others" as "co-perpetrators", and he says that the "acts and conduct of the accused as charged in the indictment" encompasses the acts and conduct of the accused's co-perpetrators and/or subordinates. This argument was rejected by the Trial Chamber.

[88] Rule 92 *bis* (in paragraphs (A) and (D) limits admission of witness statements and transcripts from other proceedings to matters "other than the acts and conduct of the accused as charged in the indictment". The Appeals Chamber has interpreted this phrase as extending to the mental state of the accused. *See* Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis* (C), 7 June 2002, paras 10-11 ("*Galić* Decision").

> The appellant's interpretation of Rule 92 *bis* would effectively denude it of any real utility. That interpretation is inconsistent with both the purpose and the terms of the Rule. It confuses the present clear distinction drawn in the jurisprudence of the Tribunal between (a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others. It is only a written statement which goes to proof of the latter acts and conduct which Rule 92 *bis*(A) excludes from the procedure laid down in that Rule.[89]

The Appeals Chamber considers this analysis equally applicable in the Rule 94(B) context.

53. Thus, the Trial Chamber erred to the extent that it found that, under Rule 94(B), it is categorically impermissible to take judicial notice of facts relating directly or indirectly to the defendant's guilt, including facts related to the existence and activity of a joint criminal enterprise.[90] It should instead assess the particular facts of which the Prosecution seeks judicial notice to determine (a) whether they are related to the acts, conduct, or mental state of the Accused; and (b) if not, whether under the circumstances of the case admitting them will advance Rule 94(B)'s objective of expediency without compromising the rights of the Accused.

B. Facts Taken Out of Context or Improperly Combined

54. The Trial Chamber declined to take judicial notice of adjudicated facts 86 through 110 because they were "taken out of context and put together to build new facts which have not been adjudicated."[91] The Prosecution contends that this was an error in fact and in law, because the facts have been adjudicated and because there is no legal requirement that facts be placed "in context".[92] It observes, stating five examples, that the adjudicated facts as set out in its request for judicial notice were drawn essentially verbatim from other Trial Judgements.[93] Mr. Ngirumpatse responds that the Trial Chamber's approach was correct because the "facts" at issue are not true facts but instead subjective assertions not subject to judicial notice.[94] Mr. Nzirorera and Mr. Karemera do not respond specifically to these arguments.[95]

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[89] *Galić* Decision, paras 8-9.
[90] The Trial Chamber's statements on this point are in fact somewhat vague; it is not entirely clear whether it intended to embrace such a categorical rule or simply to exercise its discretion as to the particular facts at issue. *See* Impugned Decision, paras 14-15. However, given the lack of any discussion of the particular facts in the Impugned Decision, the Appeals Chamber understands it to have, in essence, taken the former approach.
[91] Impugned Decision, para. 15.
[92] Prosecution's Interlocutory Appeal, paras 64-65.
[93] Prosecution's Interlocutory Appeal, paras 66-67.
[94] Ngirumpatse Response, para. 13.
[95] *See* Nzirorera Response, para. 76 (deeming it unnecessary to respond as the facts in question also related directly or indirectly to the guilt of the accused); Karemera Response, pp. 4-5.

55. As to the legal error asserted by the Prosecution, the Appeals Chamber finds no error. A Trial Chamber can and indeed must decline to take judicial notice of facts if it considers that the way they are formulated—abstracted from the context in the judgement from whence they came—is misleading or inconsistent with the facts actually adjudicated in the cases in question. A fact taken out of context in this way would not actually be an "adjudicated fact" and thus is not subject to judicial notice under Rule 94(B). This is the principle that the Appeals Chamber infers that the Trial Chamber meant to follow in its refusal to take judicial notice of facts "taken out of context".

56. However, because of the lack of further explanation for its conclusion in the Trial Chamber's opinion—and given the examples to the contrary provided in paragraph 67 of the Prosecution's Interlocutory Appeal, which need not be reproduced here—the Appeals Chamber is not persuaded that all of the facts in question were taken out of context, or improperly combined, in a way that made them inconsistent with the judgements from which they were drawn. The Trial Chamber should reconsider the matter on remand and provide an explanation for its conclusions.

DISPOSITION

57. For the foregoing reasons, the Appeals Chamber

UPHOLDS the Prosecution's Interlocutory Appeal in part, except as to Fact 1 listed under its Annex A;

DENIES Nzirorera's Motion;

DIRECTS the Trial Chamber to take judicial notice under Rule 94(A) of the Rules of Facts 2, 5, and 6 listed under Annex A of the Prosecution's Interlocutory Appeal; and

REMANDS this matter to the Trial Chamber for further consideration of Facts 1-30, 33-74, and 79-152 listed under Annex B of the Prosecution's Interlocutory Appeal, in a manner consistent with this Decision.

Done this 16th day of June 2006
At The Hague
The Netherlands

Mohamed Shahabuddeen,
Presiding Judge

[Seal of the Tribunal]

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		Case No / *no. de l'affaire*: ***ICTR-98-44-AR73(C)***	

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DEFENSE
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