THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE No. ICTR-98-44-AR73.5

IN THE APPEALS CHAMBER

Before: The Appeals Chamber

Registrar: Mr. Adama Dieng

Date Filed: 16 December 2005

THE PROSECUTOR

v.

EDOUARD KAREMERA,
MATHIEU NGIRUMPATSE,
JOSEPH NZIRORERA

RESPONDENT'S BRIEF OF JOSEPH NZIRORERA

The Office of the Prosecutor:
Mr. Don Webster
Mr. Gregory Lombardi
Mr. Iain Morley
Mr. Gilles Lahaie

Defence Counsel:
Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:
Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. The prosecution has appealed from the *Decision on Prosecution Motion for Judicial Notice* (9 November 2005) (the "Impugned Decision") on a number of grounds, principally that the Trial Chamber erred in declining to take judicial notice that genocide was committed in Rwanda.

2. On 13 December 2005, Mr. Nzirorera filed *Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted*. In that motion, he contended that certification was only granted as to one issue--whether the Trial Chamber was within its discretion to decline to take judicial notice of adjudicated facts on the ground that they related to the guilt of the Accused. That motion has not yet been adjudicated.

3. Mr. Nzirorera therefore responds to the appeal in two parts. The first part is his response to the issue for which certification has been granted. The second part is his response to the issues for which he contends certification has not been granted—to be consulted by the Appeals Chamber in the event Mr. Nzirorera's *Motion to Dismiss* is denied.

Procedural History

4. On 30 June 2005, the prosecution filed a *Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts*. The motion requested that the Trial Chamber take judicial notice of five facts of common knowledge pursuant to Rule 94(A) and 153 adjudicated facts pursuant to Rule 94(B).

5. Mr. Nzirorera opposed the motion in responses filed on 4 July 2005, 13 July 2005, and 7 November 2005.[1[1]] Mr. Ngirumpatse filed an opposition on 18 August 2005. The prosecution filed a consolidated reply on 19 August 2005.

[1[1]] *Joseph Nzirorera's Partial Response to Motion for Judicial Notice and Request for Extension of Time* (4 July 2005), *Joseph Nzirorera's First Supplemental Response to Motion for Judicial Notice* (13 July 2005), and *Joseph Nzirorera's Second Supplemental Response to Motion for Judicial Notice* (7 November 2005).

6. On 9 November 2005, after the first trial session had concluded, the Trial Chamber issued its *Decision on Prosecution Motion for Judicial Notice*. In its decision, the Trial Chamber took judicial notice of two facts of common knowledge. It declined to take judicial notice of the fact that genocide had occurred in Rwanda, that there were widespread and systematic attacks against Tutsi civilians, that the armed conflict in Rwanda was non-international in character, and the status of three ethnic groups in Rwanda.[2[2]]

7. The Trial Chamber also declined to take judicial notice of adjudicated facts, holding that:

> "It appears to the Chamber that while most of those facts 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[3[3]], others are extracted from cases currently on appeal.[4[4]] It also appears for other facts that they are taken out of context and put together to build new facts which have not been adjudicated.[5[5]] One other fact is a legal characterization for which judicial notice cannot be taken.[6[6]] Finally, on some other facts[7[7]], evidence has already been adduced at this trial, and it would be unfair to the Accused for the Chamber to take judicial notice of them when relevant evidence has already been heard."[8[8]]

8. On 15 November 2005, the prosecution filed its *Motion for Certification to Appeal Trial Chamber's Decision on Prosecution Motion for Judicial Notice of Facts of Common*

[2[2]] Impugned Decision at paras. 7-11

[3[3]] Facts 1-30,33-74,79-85, and 111-152

[4[4]] Facts 75-78

[5[5]] Facts 86-110

[6[6]] Fact 153

[7[7]] Facts 31-32

[8[8]] Impugned Decision at para. 15

Knowledge and Adjudicated Facts of 9 November 2005. Mr. Nzirorera and Mr. Ngirumpatse opposed certification.[9][9]

9. On 2 December 2005, the Trial Chamber issued its *Certification of Appeal Concerning Judicial Notice*. The Trial Chamber held that:

> "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.
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> "The Chamber is of the view that this issue satisfies both criteria for certification…" (emphasis added)[10][10]

10. On 9 December 2005, the prosecution filed its *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice*. On 13 December 2005, Mr. Nzirorera moved to dismiss the issues raised in the appeal for which certification was not granted.[11][11]

I. The Trial Chamber Was Within its Discretion to Decline to Take Judicial Notice of Adjudicated Facts

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[9][9] *Joseph Nzirorera's Response to Application for Certification to Appeal Decision on Judicial Notice and Motion for Reconsideration* (18 November 2005) and *Memoire de M. Ngirumpatse sur la Application for Certification to Appeal Decision on Judicial Notice of Facts of Common Knowledge and Adjudicated Facts* (21 November 2005)

[10][10] *Certification* at paras. 4-5

[11][11] *Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification Was Not Granted*

Going to the Guilt of the Accused

11. Rule 94 (B) provides that:

> "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."

12. The Appeals Chamber has held that the taking of judicial notice of an adjudicated fact pursuant to Rule 94(B) creates a "well-founded presumption for the accuracy of this fact."[12][12]

13. Article 20(3) of the ICTR Statute provides that:

> "The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute."

14. In the *Semanza* judgement, the Appeals Chamber recognized that there must be "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."[13][13]

15. The Appeals Chamber has not elaborated on the test to be used to determine when taking judicial notice of an adjudicated fact may impermissibly intrude upon the presumption of innocence. However, the issue has arisen before Trial Chambers of the ICTR and ICTY.

16. In the *Bagosora* case, an ICTR Trial Chamber I, led by President Erik Mose, held that:

> "Because Article 20(3) of the Statute guarantees each accused the right to be presumed innocent until proven guilty, Rule 94(B) must be interpreted as preventing the

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[12][12] *Prosecutor v Milosevic*, No. IT-02-54-AR73.5, *Decision on the Prosecutor'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 page 4

[13][13] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para. 192

> taking of judicial notice of any adjudicated facts or documentary evidence that go to the guilt of any of the accused in the instant trial proceedings."[14][14]

17. The Trial Chamber declined to take judicial notice of adjudicated facts that "may touch upon the guilt or innocence of the accused".[15][15] Under this rubric, the Trial Chamber refused to take judicial notice of the following facts:

> 13. From 1973 to 1994, the government of President Habyarimana used a system of ethnic and regional quotas, which was supposed to provide educational and employment opportunities for all.
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> 14. The quota system was in fact used increasingly to discriminate against both Tutsi and Hutu from regions outside of the north-west of Rwanda.
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> 15. Among the privileged elite, an inner circle of relatives and close associates of President Habyarimana and his wife, Agathe Kanziga, known as the *Akazu*, enjoyed great power.
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> 20. Within days of the 1 October 1990 invasion by the RPF, government began arresting thousands of people.
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> 21. Tutsi and Hutu political opponents were the main targets of the arrests following the RPF invasion of 1 October 1990.
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> 30. Determined to avoid the power sharing prescribed by the Arusha Accords, several prominent civilian and military figures pursued their strategy of ethnic division and incitement to violence.
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> 31. With the intention of ensuring widespread dissemination of the calls to ethnic violence, prominent figures, including some from the President's circle, set up hate media.
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> 32. The most prominent forms of hate media included *Radio Television Libre des Mille Collines* (RTLM) and the newspaper *Kangura*.

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[14][14] *Prosecutor v Bagosora,* No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 61

[15][15] *Prosecutor v Bagosora,* No. ICTR-98-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (11 April 2003) at para. 62

37. From the morning of 7 April 1994, groups of military personnel commenced the systematic assassinations of a large number of individuals…

38. The massacre of the Belgian soldiers prompted the withdrawal of the Belgian troops in the days that followed.

40. Given the political and constitutional void created by the deaths of most national political authorities, a new government, the "Interim Government", composed solely of Hutu, was set up on 9 April 1994.

43. During the week of 14 to 21 April 1994, the President of the Interim Government, the Prime Minister, and some key ministers traveled to Butare and Gikongoro.

44. On 19 April 1994, the President of the Interim Government, Theodore Sindikubabwo, spoke on the radio and called for the killing of "accomplices" in Butare.

45. The visits of the President of the Interim Government, the Prime Minister, and some key ministers to Butare and Gikongoro during the week of 14-21 April 1994 marked the beginning of killings in the region.

46(d) The widespread or systematic attacks were organized and planned by (i) members of the Rwandese Armed Forces of the day (FAR) and (ii) the political forces behind the Hutu power movement.

46(e) The widespread or systematic attacks were carried out mainly by (i) Rwandese state security personnel, (ii) civilians, including the armed militia, and, (iii) ordinary citizens.

47. From late 1990 until July 1994, some Rwandan citizens conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition.

48. The components of this plan consisted of, among other things: (a) recourse to incitement of hatred and ethnic violence; (b) the training of militiamen; (c) the distribution of weapons to militiamen; and (d) the preparation of lists of people to be killed.

49. Between 1 January 1994 and 17 July 1994, soldiers, militiamen, and civilians set up roadblocks. Such roadblocks were set up

under orders.

50. At those roadblocks, the identity cards of those who wished to pass were often checked.

51. Many people identified as Tutsi were killed by people manning those roadblocks.[16][16]

18. This decision was followed by Trial Chamber III of the ICTR in the *Bizimungu* case, where the Trial Chamber declined to take judicial notice of adjudicated facts which "would have a bearing upon the guilt or innocence of the accused."[17][17] The Trial Chamber rejected many of the same facts as those rejected in the *Bagosora* decision.

19. Thus it can be seen that Trial Chambers of the ICTR have taken a very broad view of the nature of facts which bear upon the guilt of the accused and have refused to take judicial notice of adjudicated facts that even inferentially touch upon the culpability of the accused being tried.

20. Trial Chambers of the ICTY have taken the same approach. In the *Blagojevic* case, Trial Chamber I, led by Judge Liu Daquin, held that:

> "In order to ensure that the application of the Rule is in accordance with the rights of the Accused, the Trial Chamber must satisfy itself that the proposed facts meet several criteria before it takes judicial notice of the non-agreed fact. These factors include:
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> …(v) the fact must not attest, either directly or indirectly, to the criminal responsibility of the accused."[18][18]

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[16][16] Annex A to *Prosecution's Motion for Judicial Notice* (23 July 2002)

[17][17] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 21

[18][18] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence* (19 December 2003) at para. 16

21. The Trial Chamber declined to take judicial notice of any non-agreed facts, "preferring to make its own determination of these facts based upon the evidence presented, rather than to adopt as rebuttable presumptions the findings of a previous trial chamber."[19][19]

22. The ICTY Trial Chamber hearing the *Krajisnik* case endorsed the criteria for judicial notice of adjudicated facts set forth in *Blagojevic*, including the requirement that the fact not attest, directly or indirectly, to the criminal responsibility of the accused.[20][20]

23. The prosecutor in Mr. Nzirorera's case complains that "If the applicable test is to be whether or not the facts may go directly or indirectly to the guilt of the accused, then no adjudicated fact could be the subject of judicial notice, under Rule 94 (B), since presumably every fact the Prosecutor seeks to establish has some bearing, directly or indirectly, however remotely, on the guilt of the accused."[21][21] Yet it is noteworthy that, applying this very standard, the Trial Chamber in *Krajisnik*, took judicial notice of more than 600 adjudicated facts.

24. In addition to employment of this standard by the ICTR and ICTY Trial Chambers, the Appeals Chamber of the Special Court for Sierra Leone has adopted the same standard in that Tribunal. In the *Norman* case, the Appeals Chamber held that it was a requirement for judicial notice that "the facts do not attest to the criminal responsibility of the accused."[22][22]

25. That standard was applied by a Trial Chamber of the Special Court in the *Brima* case with respect to joint criminal enterprise where the Trial Chamber refused to take judicial notice

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[19][19] *Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, *Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence* (19 December 2003) at para. 23

[20][20] *Prosecutor v Krajisnik*, No. IT-00-39-T, *Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts* (24 March 2005)

[21][21] *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) at para. 62

[22][22] *Prosecutor v Norman et al*, No. SCSL-2004-14-T, *Fofana—Decision on Appeal Against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence* (16 May 2005) at para. 128

of the existence of a joint criminal enterprise because it offended the requirement that the facts not attest to the criminal responsibility of the accused."[23][23]

26. This is contrary to the argument advanced by the prosecution in Mr. Nzirorera's case that "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."[24][24]

27. There is nothing about the form of liability of joint criminal enterprise that calls for any different application of the test for taking judicial notice of adjudicated facts. Like conspiracy and superior responsibility, joint criminal enterprise is a vehicle for attributing criminal responsibility to an accused for the acts of others. The Trial Chambers in *Bagosora* and *Bizimungu* applied the standard correctly and refused to take judicial notice of acts of those for whose conduct the accused could be liable. Just as judicial notice could never be taken as to facts which establish the existence of a conspiracy, or the existence of a superior-subordinate relationship, it cannot be taken of facts which establish the existence of a joint criminal enterprise.

28. A mere glance at the adjudicated facts which the prosecution sought to have judicially noticed in this case makes this point. For example, facts 19-20 and 33-64 deal with the conduct of Juvenal Kajelijeli. Kajelijeli is listed in the Amended Indictment as a member of the joint criminal enterprise[25][25], a co-conspirator[26][26] and a subordinate of Mr. Nzirorera[27][27] and Mr.

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[23][23] *Prosecutor v Brima et al*, No. SCSL-2004-16-T, *Decision on the Prosecution Motion for Judicial Notice and Admission of Evidence* (25 October 2005) at para. 50

[24][24] *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) at para. 63

[25][25] para. 6 (ii)

[26][26] para. 23

[27][27] para 62.5

Nzirorera is charged with the same acts for which Mr. Kajelijeli has been convicted.[28][28] Ironically, although the prosecution has cherry-picked the facts from the Kajelijeli judgement for which it sought judicial notice, Mr. Kajelijeli was actually acquitted of conspiring with Mr. Nzirorera.[29][29]

29. The prosecution also sought judicial notice of adjudicated facts relating to the conduct of Laurent Semanza[30][30], Clement Kayishema and Obed Ruzindana[31][31], Jean Kambanda[32][32], Eliezer Niyitegeka[33][33], Alfred Musema[34][34], Gerald Ntakirutimana[35][35], Jean Bosco Barayagwiza, Ferdinand Nahimana, Hassan Ngeze, and Felicien Kabuga[36][36], and Georges Rutaganda[37][37]. All of these men are listed in the Amended Indictment as members of the joint criminal enterprise[38][38] and co-conspirators.[39][39]

30. The Trial Chamber's decision in Mr. Nzirorera's case not to take judicial notice of facts that "may go directly or indirectly to the guilt of the Accused, notably in relation with the

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[28][28] para 62.9

[29][29] *Prosecutor v Kajelijeli*, No. IT-98-44-T, *Judgement* (1 December 2003) at paras. 794-98

[30][30] facts 15, 65-68, 144-45

[31][31] facts 74, 82, 95-98, 109, 114, 120-21, 135

[32][32] facts 79-81

[33][33] facts 10-12, 83, 99-103, 105, 107, 120, 124, 127-31, 133-37

[34][34] facts 13-14, 93, 111-13, 120

[35][35] facts 120, 122-23, 132

[36][36] facts 138-41

[37][37] facts 146-48, 150

[38][38] para. 6

[39][39] para. 23

pleading of their participation in a joint criminal enterprise" was in accordance with the *Bagosora, Bizimungu, Blagojevic, Krajisnik, Norman,* and *Brima* decisions. The wisdom of the 18 trial judges who sat on these cases and who balance judicial economy and the rights of the accused on a daily basis ought to convince this Appeals Chamber that an appropriate standard for judicial notice has been developed in the jurisprudence and was followed by the Trial Chamber in this case.

31. It is respectfully submitted that the Trial Chamber neither misdirected itself as to the principle to be applied or the law relevant to the exercise of its discretion; took into account irrelevant considerations; failed to take into account relevant considerations; gave insufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; nor reached a decision that no reasonable Trial Chamber could have reached.[40[40]]

32. The Trial Chamber's decision not to take judicial notice of adjudicated facts which "may go directly or indirectly to the guilt of the Accused" was not an abuse of its wide discretion in the admission of evidence and management of the trial, and should be affirmed.

II. The Trial Chamber Was Within Its Discretion In Refusing to Take Judicial Notice of Facts of Common Knowledge and Adjudicated Facts[41[41]]

The Impugned Decision

(A) Genocide

[40[40]] *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 7; *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 5

[41[41]] To be considered only if the *Motion to Dismiss* is denied

33. The Trial Chamber declined to take judicial notice that "between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group." The Trial Chamber reasoned that "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."[42][42]

34. The Trial Chamber also declined to take judicial notice of genocide on the ground that "it would appear to lessen the prosecution's obligation to prove its case."[43][43]

(B) Ethnicity

35. The Trial Chamber declined to take judicial notice that "Hutu, Tutsi, and Twa are ethnic groups in Rwanda". Instead it took judicial notice that they were "protected groups" within the scope of the Genocide Convention. The Trial Chamber reasoned that "the jurisprudence has not clearly established that those three groups are ethnic groups *per se* and, as a result, no judicial notice can be taken." [44][44]

(C) Crimes Against Humanity

36. The prosecution sought judicial notice that

> "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 persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity."

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[42][42] Impugned Decision at para. 7

[43][43] Impugned Decision at para. 7

[44][44] Impugned Decision at para. 8

37. The Trial Chamber declined on the grounds that this was a legal finding as to an element of crimes against humanity and that "such evidence should be provided in close relation to the facts pleaded."[45][45]

(D) War Crimes

38. The Trial Chamber also declined to take judicial notice of the "non-international" character of the armed conflict in Rwanda on the basis that this was a legal finding to be made on the basis of the evidence in the case.[46][46]

(E) Adjudicated Facts

39. The Trial Chamber exercised its discretion not to take judicial notice of adjudicated facts from other Trial Chambers on the grounds that:

> ""It appears to the Chamber that while most of those facts 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[47][47], others are extracted from cases currently on appeal.[48][48] It also appears for other facts that they are taken out of context and put together to build new facts which have not been adjudicated.[49][49] One other fact is a legal characterization for which judicial notice cannot be taken.[50][50] Finally, on some other facts[51][51], evidence has already been adduced at this trial, and it would be unfair to the Accused for the Chamber to take judicial notice of them when relevant evidence has already been heard."[52][52]

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[45][45] Impugned Decision at para. 9

[46][46] Impugned Decision at para. 10

[47][47] Facts 1-30,33-74,79-85, and 111-152

[48][48] Facts 75-78

[49][49] Facts 86-110

[50][50] Fact 153

[51][51] Facts 31-32

[52][52] Impugned Decision at para. 15

Standard of Review

40. The Appeals Chamber has held that "it is first and foremost the responsibility of the Trial Chambers, as triers of fact, to determine which evidence to admit during the course of the trial; it is not for the Appeals Chamber to assume this responsibility."[53][53] This may well be why the Trial Chamber declined to certify for appeal the issues currently being discussed. In any event, it indicates a wide measure of discretion on the part of the Trial Chamber to decide issues relating to admissibility of evidence and the manner in which facts are to be proven at trial.

41. The Trial Chamber's decision was not primarily based on the legal issue of what constitutes a fact of common knowledge, but on the exercise of its discretion as to the relevance of the facts sought to be judicially noticed (genocide) as well as the manner in which elements of the offences were to be proven at trial (widespread and systematic attack, international character of the conflict). Its decisions on these issues must then be reviewed under a deferential "abuse of discretion" standard.

42. That standard is "whether the Trial Chamber misdirected itself as to the principle to be applied or the law relevant to the exercise of its discretion; took into account irrelevant considerations; failed to take into account relevant considerations; gave insufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that no reasonable Trial Chamber could have reached."[54][54]

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[53][53] *Nyiramasuhuko v Prosecutor*, No. ICTR-98-42-AR73.2, *Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence* (4 October 2004) at para. 5

[54][54] *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 7; *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 5

43. The same standard applies to the Trial Chamber's decision not to take judicial notice of adjudicated facts—a matter that the prosecution recognizes is committed to the sound discretion of the Trial Chamber.[55][55]

Grounds for Declining to Take Judicial Notice of Facts of Common Knowledge

(A) Relevance

44. The Appeals Chamber has held that facts proposed for judicial notice must also meet the test of relevance under Rule 89.[56][56]

45. The Trial Chamber's determination that the general proposition that "there was a genocide in Rwanda" was not relevant to the determination it would have to make in this case was undeniably correct.

46. It recognized that the prosecution must prove that (i) the Accused participated in at least one of the prohibited acts; (ii) the Accused committed such act against a person because of his ethnic, racial, national, or religious group; and (iii) the Accused had the specific intent required for the crime of genocide.[57][57] The Trial Chamber concluded that "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."[58][58]

47. The Trial Chamber was correct in its evaluation of the relationship of the fact sought to be judicially noticed and the matters to be proven at the trial. The fact that someone in Rwanda killed with the intent to destroy the Tutsi as a group does not advance the prosecution of

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[55][55] *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) at para. 13

[56][56] *Semanza* v Prosecutor, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para 189; Nikolic *v. Prosecutor*, IT-002-60/1-A, *Decision on Appellant's Motion for Judicial Notice*, (5 April 2005) at para. 17.

[57][57] Impugned Decision at para. 7

[58][58] Impugned Decision at para. 7

the accused. It is only if the perpetrator was the accused, or a person for whose conduct he is responsible, that makes it relevant to this trial.

48. The prosecution itself recognizes the point when it argues in its brief on appeal that the accused will not be prejudiced by the taking of judicial notice. It quoted with approval the statement of the Trial Chamber in *Akayesu* that "the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor."[59][59]

49. If the fact of genocide in Rwanda is of no influence upon the judgement, the Trial Chamber in our case was well within its discretion to exclude it on relevance grounds.

(B) Legal Conclusions

50. In addition to properly declining to take judicial notice on relevance grounds, the Trial Chamber was correct in declining to take judicial notice of genocide, the widespread and systematic nature of the attacks, and the non-international character of the armed conflict in Rwanda on the grounds that they were not facts, but legal conclusions.

51. The Trial Chambers in *Bizimungu*[60][60] and *Bagosora*[61][61] refused to take judicial notice of genocide in Rwanda on this ground. Similarly, the Trial Chamber in the *Bizimungu*

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[59][59] *Prosecutor v Akayesu*, No. ICTR-96-4-T, *Judgement*, (2 September 1998) at para. 129; cited in *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) at para. 32

[60][60] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Prosecutor's Motion and Notice of Adjudicated Facts* (28 June 2004) at paras. 21,60

[61][61] [61][61] *Prosecutor v Bagosora et al*, No. ICTR-99-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rule 73, 89, and 94* (11 April 2003) at paras. 64,67

case declined to take judicial notice of the widespread and systematic attack on the ground that it was a legal conclusion and not a fact.[62][62]

52. The Trial Chamber in *Bizimungu* refused to take judicial notice of the non-international nature of the conflict, holding it to be a legal conclusion not appropriate for judicial notice.[63][63] In addition, two Trial Chambers of the ICTY have likewise refused to take judicial notice of the international character of a conflict on the grounds that it is a legal conclusion, not a fact.[64][64]

53. Similarly, in *Bagosora*, the Trial Chamber also rejected the prosecution's request that it take judicial notice of the nature of the conflict.[65][65] The prosecution itself had classified these matters as "legal conclusions" and the Trial Chamber held that legal conclusions could not be judicially noticed under Rule 94(A).[66][66]

54. The prosecution in its brief on appeal has put a slightly different "spin" on the matter. Now, genocide in Rwanda is not a legal conclusion, but a "cluster of underlying factual conclusions" including inferences about the state of mind of unidentified individuals.[67][67] Rule

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[62][62] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Prosecutor's Motion and Notice of Adjudicated Facts* (28 June 2004) at para. 39

[63][63] *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Prosecutor's Motion and Notice of Adjudicated Facts* (28 June 2004) at paras. 21,63

[64][64] *Prosecutor v Simic et al*, No. IT-95-9-PT, *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); *Prosecutor v Sikirica et al*, No. IT-95-8-PT, *Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts* (27 September 2000)

[65][65] *Prosecutor v Bagosora et al*, No. ICTR-99-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rule 73, 89, and 94* (11 April 2003) at para. 19

[66][66] *Prosecutor v Bagosora et al*, No. ICTR-99-41-T, *Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rule 73,89, and 94* (11 April 2003) at paras. 64,67

[67][67] *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) at para. 35

94(A) applies to "facts" of common knowledge, not clusters, inferences, or conclusions. In fact, the Appeals Chamber in *Semanza* praised the Trial Chamber for "being careful to note that it could take judicial notice of facts of common knowledge under Rule 94 of the Rules, but that it could not "take judicial notice of inferences to be drawn from the judicially noticed facts."[68][68]

55. Therefore, the Trial Chamber correctly determined that the matters sought to be judicially noticed were not facts at all, but legal conclusions.

(C) Form of Proof

56. Judicial notice is one of several ways a party has of establishing a fact. The Trial Chamber in this case properly exercised its discretion in requiring that the important facts sought to be established by judicial notice be the subject of evidence at the trial.

57. In *Semanza*, the Trial Chamber held that:

> "A fundamental question in this case is whether "genocide" took place in Rwanda. Notwithstanding the over-abundance of official reports, including United Nations reports confirming the occurrence of genocide, this Chamber believes that the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime."[69][69]

58. Trial Chambers in *Kayishema*,[70][70] *Ntakirutimana*[71][71], and *Nyiramasuhuko*[72][72] also

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[68][68] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para 192

[69][69] *Prosecutor v Semanza*, No. ICTR-97-20-I, *Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54* (3 November 2000) at para. 36

[70][70] *Prosecutor v Kayishema & Ruzindana*, No. ICTR-95-1-T, *Judgement* (21 May 1999) at para. 273

[71][71] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts* (22 November 2001) at paras. 40-46,51

declined to take judicial notice of genocide, exercising its discretion to hear testimony on issue.[73][73] Similarly, with respect to the widespread and systematic nature of the attacks, the *Ntakirutimana* Trial Chamber declined to take judicial notice, stating that it "prefers in the circumstances of the present case to hear evidence and arguments on the issue, rather than to take judicial notice."[74][74] And on the issue of the non-international character of the conflict, the Trial Chamber in *Nyiramasuhuko,* refused to take judicial notice of the nature of the conflict indicating it "prefers in the circumstances of the present case to hear evidence and arguments on the issue, rather than to take judicial notice of those legal conclusions."[75][75]

59. The prosecution in its brief on appeal claims that "it is inconsistent for the Trial Chamber not to conclude that a genocide was committed in Rwanda in 1994 against the Tutsi as a group, when every other Trial Chamber called upon to make a factual finding on this issue, on the basis of the evidence, has concluded that a genocide was committed."[76][76] But those Trial Chambers came to their conclusions after refusing to judicially notice genocide and hearing **evidence**. What would really have been inconsistent is if the Trial Chamber had turned the tables on Mr. Nzirorera and granted the prosecution's request for judicial notice, relieving it of the burden of producing evidence.

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[72][72] *Prosecutor v Nyiramasuhuko et al*, No. ICTR-99-42-T, *Decision on Prosecutor's Motion for Judicial Notice and Admission of Evidence* (15 May 2002) at paras 121(Request #75a) and 127

[73][73] The prosecution incorrectly claims that these decisions dealt with a request to find there was a plan of genocide. In *Semanza, Nyiramasuhuko, Bagosora, and Bizimungu* the rejected requests were virtually identical to the one offered in this case.

[74][74] *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts* (22 November 2001) at paras. 33,35;

[75][75] *Prosecutor v Nyiramasuhuko et al*, No. ICTR-99-42-T, *Decision on Prosecutor's Motion for Judicial Notice and Admission of Evidence* (15 May 2002) at para. 127; see also *Prosecutor v Ntakirutimana*, No. ICTR-96-10-T, *Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts* (22 November 2001) at para. 51

[76][76] *Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (9 December 2005) at para. 60

60. Therefore, the Trial Chamber was well within its discretion to require evidence on these issues, rather than taking judicial notice.

(D) Reasonably Disputable

61. The facts for which judicial notice were sought have also been held to be reasonably disputable and therefore not the proper subject of judicial notice pursuant to Rule 94(A). In the *Nyiramasuhuko* case, the Trial Chamber refused to take judicial notice of the widespread and systematic nature of the attacks, holding that they were not facts of common knowledge and that they were reasonably disputed by the defence.[77][77]

Likewise, in the *Kajelijeli* case, the Trial Chamber also refused to take judicial notice of the widespread or systematic nature of the attacks in Rwanda, finding that such a proposition was "reasonably disputable".[78][78]

62. The *Kajelijeli* Trial Chamber also refused to take judicial notice of the non-international character of the armed conflict, finding that "the proposition is reasonably disputable."[79][79]

63. It is true that the Appeals Chamber in *Semanza* affirmed the Trial Chamber's taking of judicial notice of the widespread and systematic attacks and non-international character of the conflict, but it did so on the basis of deference to the Trial Chamber and the facts that were before it, not on the basis of its own independent findings of fact.

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[77][77] *Prosecutor v Nyiramasuhuko et al*, No. ICTR-99-42-T, *Decision on Prosecutor's Motion for Judicial Notice and Admission of Evidence* (15 May 2002) at para. 115

[78][78] *Prosecutor v Kajelijeli*, No. 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

[79][79] *Prosecutor v Kajelijeli*, No. 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. 17

64. When the Appeals Chamber in *Semanza* upheld the Trial Chamber's decision to take judicial notice of the non-international character of the armed conflict it did so "having regard to the arguments submitted by the Appellant before the Trial Chamber to challenge the nature of the facts adduced by the Prosecution and to the facts themselves."[80][80]

65. Looking to the arguments submitted by Semanza before the Trial Chamber, most were procedural in nature. His request for additional time to respond more substantively was denied.[81][81] Further, the Trial Chamber noted that:

> "In the instant case, some of the matters the Prosecutor seeks judicial notice of do not appear to be disputed by the Defence. Rather, the Defence disputes Semanza's personal involvement in the offences cited within the facts."[82][82]

66. Similarly, with respect to the widespread and systematic nature of the attacks, the Trial Chamber in *Semanza* did take judicial notice of the request, but, as noted by the Trial Chamber:

> "Palpably absent from the Defence submissions, is any argument or authority negating the existence of either the "widespread or systematic attacks"[83][83]

67. When affirming the decision of the Trial Chamber, the Appeals Chamber noted that "the Appellant failed either to raise some of his present objections or to substantiate them before the Trial Chamber."[84][84]

68. In the instant case, Mr. Nzirorera did dispute before the Trial Chamber the existence of widespread or systematic attacks[85][85] and the non-international character of the conflict.[86][86]

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[80][80] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para 194

[81][81] *Prosecutor v Semanza*, No. ICTR-97-20-I, *Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54* (3 November 2000) at paras. 8-16

[82][82] *Prosecutor v Semanza*, No. ICTR-97-20-I, *Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54* (3 November 2000) at para. 32

[83][83] *Prosecutor v Semanza*, No. ICTR-97-20-I, *Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54* (3 November 2000) at para. 32

[84][84] *Semanza v Prosecutor*, No. ICTR-97-20-A, *Judgement* (20 May 2005) at para 193

Therefore, the decision in *Semanza* is distinguishable from the instant case. The Appeals Chamber judgement in *Semanza* is not a finding that the matters judicially noticed are facts of common knowledge, but is a holding that the Trial Chamber did not err in taking judicial notice considering the matters which were before it.

69. Given the number of Trial Chambers which have found the widespread and systematic attacks and non-international character of the conflict to in fact be reasonably disputable, it can hardly be said that the Trial Chamber in our case erred when declining to take judicial notice of these matters.

70. The Trial Chamber likewise did not err when concluding that it was reasonably disputable whether Hutu, Tutsi, and Twa were ethnic groups.[87][87]

71. In the *Rutaganda* case, the Trial Chamber concluded in its judgement that:

> "The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context."[88][88]

72. The Trial Chamber in Rutaganda went on to find that the Tutsi was a protected group under the Genocide Convention without attempting to classify them among the types of groups enumerated in that Convention.

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[85][85] *Joseph Nzirorera's Partial Response to Motion for Judicial Notice and Request for Extension of Time* (4 July 2005) at para. 13

[86][86] *Joseph Nzirorera's Partial Response to Motion for Judicial Notice and Request for Extension of Time* (4 July 2005) at para. 25 and Annex "A" thereto.

[87][87] Impugned Decision at para. 8

[88][88] *Prosecutor v Rutaganda*, No. ICTR-96-3-T, *Judgement* (6 December 1999) at para. 56; See also *Prosecutor v Musema*, No. ICTR-96-13-T, *Judgement* (27 January 2000) at para. 161

73. The Trial Chamber in Mr. Nzirorera's case did the same thing. Mr. Nzirorera does not see how it could have erred or how the prosecution is prejudiced if it did.

74. Therefore the Trial Chamber did not err in refusing to take judicial notice of facts which were reasonably disputable.

Grounds for Declining to Take Judicial Notice of Adjudicated Facts

75. There were two issues concerning adjudicated facts for which certification was not granted.

76. The first issue is the prosecution's contention that the Trial Chamber erred when it concluded that facts 86-110 "are taken out of context and put together to build new facts which have not been adjudicated." However, since these facts involve findings concerning the participation of members of the joint criminal enterprise and coconspirators of the accused, they are not facts which can be judicially noticed in any event.[89][89]

77. The second issue concerns the prosecution's alternative argument that genocide in Rwanda, even if not a fact of common knowledge, should be judicially noticed as an adjudicated fact. The prosecution did not even ask for certification on this issue.[90][90] Should the Appeals Chamber nevertheless decide to consider it, the prosecution's argument fails for the same reasons outlined at paragraphs 44-60 of this response. It is not relevant, it is not a "fact" but a legal conclusion, and the Trial Chamber was within its discretion to determine the form of proof it would receive on the issue.

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[89][89] See paras. 28-29

[90][90] See *Joseph Nzirorera's Motion to Dismiss Issues of Interlocutory Appeal for Which Certification was not Granted* (13 December 2005) at para. 6; *Motion for Certification to Appeal Trial Chamber's Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts dated 9 November 2005* (15 November 2005)

78**.** Former ICTY Judge Patricia Wald has noted that taking of judicial notice "raises serious questions about fairness to the second set of defendants who were not before the Court in the first trial."[91][91] Judge Hunt, in his dissenting opinion in *Milosevic*, said that:

> "The ability of the particular accused person in the later trial to obtain evidence in relation to some of the adjudicated facts from an earlier trial will often be very much greater than the accused person in that earlier trial. This is particularly so as the accused now being tried are increasingly more senior in position than those being tried in previous years. An easy example would be the findings of fact made by the Trial Chamber in 1997 in the *Tadić* case in relation to the international character of the armed conflict. The accused there was a café proprietor and a minor local politician. There are now Chiefs of General Staffs, Vice-Presidents and even a President being tried where many of the same facts are in issue. Their access to relevant evidence is very much greater than those accused who were tried earlier."[92][92]

79. This is precisely the case here where the prosecution is attempting to exploit findings made in the case of, for example, Laurent Semanza, a former bourgmestre of an isolated commune in Kigali-Rural prefecture, and have them accepted in the case of Mr. Nzirorera, National Secretary-General of the ruling MRND party and President of the Rwanda National Assembly.

80. The Trial Chamber was well within its discretion to decline to take judicial notice of adjudicated facts.

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[91][91] Wald, *The International Criminal Tribunal for the former Yugoslavia Comes of Age: Some Observations on Day-to Day Dilemmas of an International Court*, 5 Journal of Law & Policy 87, 111(2002)

[92][92] *Prosecutor v Milosevic*, 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), Dissenting Opinion of Judge David Hunt at para. 10

Conclusion

81. The Trial Chamber's denial of judicial notice was not an abuse of its discretion. It is respectfully requested that the decision of the Trial Chamber be affirmed.

Respectfully submitted,

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