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## Comments

# Taking Judicial Notice of the Genocide in Rwanda: The Right Choice

Rebecca Faulkner\*

### I. INTRODUCTION

At the Roman Catholic Church compound in Shangi, Rwanda, bloody handprints remain on the walls as a gruesome reminder of the Hutu massacre of Tutsis that occurred on April 18, 1994.<sup>1</sup> In one room, handprints stretch from floor to ceiling, showing how Tutsis stood on one another's shoulders in desperate efforts to reach ceiling crawl spaces and the roof in order to hide from Hutu militiamen.<sup>2</sup> Other rooms are bullet-pocked or partially blown apart by hand grenades.<sup>3</sup> Although no one knows for sure, it is estimated that as many as 4,000 Tutsis—adults and children alike—were hacked, shot, or beaten to death at the Shangi

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\* Juris Doctor, The Dickinson School of Law of the Pennsylvania State University, 2009; Bachelor of Arts, Wheaton College, Norton, Massachusetts, 2006. Special thanks to my family and friends who supported and encouraged me during the writing process. Thank you also to the PILSR members who took the time to read this Comment and provide thoughtful critique.

1. See Jonathan C. Randal, *A Mosaic of Bloody Handprints Recalls 4,000 Tutsis' Last Day of Life*, WASH. POST, June 29, 1994, at A17.

2. See *id.*

3. See *id.*

church that day.<sup>4</sup> As horrifying as the events at Shangi are, they mark just a fraction of the Tutsis massacred throughout Rwanda in the span of just four months in the summer of 1994.<sup>5</sup>

Following the atrocities committed against Rwandan Tutsis, the United Nations formed the International Criminal Tribunal for Rwanda (“ICTR” or “Tribunal”) to prosecute those accused of these heinous acts.<sup>6</sup> The ICTR has since tried dozens of cases and uncovered evidence of genocide on a large scale.<sup>7</sup> Yet, until recently, the Tribunal addressed the issue of genocide in Rwanda as an issue of fact for the prosecutor to prove in each case.<sup>8</sup> However, on June 16, 2006, in *Prosecutor v. Karemera, et al.*, the Appeals Chamber for the ICTR issued a decision upholding the Prosecutor’s interlocutory appeal and taking judicial notice of the fact that “[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group” as a fact of common knowledge.<sup>9</sup> Taking judicial notice of genocide in Rwanda means that the prosecutor in this and future cases need no longer offer evidence to prove that genocide occurred; the fact of genocide in Rwanda is now beyond argument.<sup>10</sup> With the evidence compiled in ICTR cases, like the bloody handprints left at Shangi, the Tribunal’s decision is difficult to dispute.

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4. *See id.*

5. *See* Gabriel Packard, *Rwanda: Census Finds 937,000 Died in Genocide*, N.Y. AMSTERDAM NEWS, Apr. 8, 2004, at 2-2.

6. *See* International Criminal Tribunal for Rwanda, [www.ictr.org](http://www.ictr.org) (follow “About the Tribunal” hyperlink; then follow “General Information” hyperlink) (last visited Jan. 11, 2009).

7. *See* International Criminal Tribunal for Rwanda, *supra* note 6 (follow “Cases” hyperlink; then follow “Status of Cases” hyperlink).

8. *See, e.g.*, *Prosecutor v. Nyiramasuhuko*, Case No. ICTR 97-21-T, ¶ 127-28 (May 15, 2002) (declining to take judicial notice of genocide, “prefer[ing] in the circumstances of the present case to hear evidence and arguments on this issue, rather than to take judicial notice of those legal conclusions”); *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Decision on the Prosecutor’s Motion for Judicial Notice Pursuant to Rule 94 of the Rules, ¶ 19 (Apr. 16, 2002) (declining to take judicial notice of genocide in Rwanda); *Prosecutor v. Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, ¶ 36 (Nov. 3, 2000) (declining to take judicial notice of genocide because “the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional element crime”); *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 273 (May 21, 1999) (holding that the question of genocide is so fundamental to the case against the accused that the Trial Chamber feels obligated to make a finding of fact on the issue).

9. *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, ¶ 33-35 (June 16, 2006).

10. *See Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, ¶ 17.

Yet the Appeals Chamber's ruling in *Karemera* took many observers by surprise, for prosecutors had asked the Tribunal to take judicial notice of the genocide in Rwanda in past cases without success.<sup>11</sup> Aside from the novelty of this decision, commentators question the prudence of the Appeals Chamber's decision, arguing that it is unwise and illogical,<sup>12</sup> as well as conceptually flawed.<sup>13</sup> This Comment examines the issue of judicially noticing genocide in Rwanda and argues that it is a positive step in the right direction. In responding to arguments against judicially noticing the genocide in Rwanda, this Comment is divided into three principle sections. The first section discusses the historical context of violence in Rwanda and the procedural context of *Prosecutor v. Karemera*. The second section provides a more detailed discussion of judicial notice and the ways in which that term has been defined. Finally, the third section addresses the ICTR's decision to take judicial notice of the genocide in Rwanda in *Prosecutor v. Karemera*. Discussion of *Karemera* is further divided into four subsections: an explanation of the Appeals Chamber's reasons for noticing genocide; an examination of the arguments against noticing genocide; a response to the arguments against noticing genocide; and an argument in support of noticing genocide.

## II. HISTORICAL AND PROCEDURAL CONTEXT

### A. *A Brief History of Violence in Rwanda*

Rwanda has long been a country of conflict. From its earliest days, discord between its two major ethnic groups, the Hutus and the Tutsis, has divided the country.<sup>14</sup> In 1916, Rwanda became a Belgian colony.<sup>15</sup>

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11. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-R94, Decision on Prosecution Motion for Judicial Notice, ¶ 6 (Nov. 9, 2005) (citing *Prosecutor v. Niyitegeka*, Case No. 96-14-T, Decision on the Prosecutor's Motion for Judicial Notice of Facts (Sept. 4, 2002); *Nyiramasuhuko*, Case No. ICTR 97-21-T; *Kajelijeli*, Case No. ICTR 98-44A-T, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules; *Prosecutor v. Ntakirutimana*, Case No. 96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts (Nov. 22, 2001); *Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54).

12. See Ralph Mamiya, *Taking Judicial Notice of Genocide? The Problematic Law and Policy of the Karemera Decision*, 25 WIS. INT'L L.J. 1, 1 (2007).

13. See Brittan Heller, *Noticing Genocide*, 116 YALE L.J. POCKET PART 101, 101 (2006).

14. See *Rwanda: How the Genocide Happened*, BBC NEWS, Apr. 1, 2004, <http://news.bbc.co.uk/2/hi/africa/1288230.stm>.

15. See United Kingdom Foreign and Commonwealth Office, Country Profiles: Rwanda, <http://www.fco.gov.uk> (follow "Country profiles" hyperlink; then follow "Sub Saharan Africa" hyperlink) (last visited Jan. 11, 2009).

Believing the Tutsis to be superior to the Hutus,<sup>16</sup> the Belgians gave the Tutsis almost all of the political power,<sup>17</sup> further fueling the animosity between the two ethnic groups. Over time, tensions mounted, and violent clashes occurred sporadically.<sup>18</sup> On April 6, 1994, however, Rwanda exploded into chaos with the assassination of its president, Juvenal Habyarimana.<sup>19</sup> Violence erupted between the Hutu majority and the Tutsi minority, with the Hutu-led interim government advocating and inciting violence against Tutsis and moderate Hutus.<sup>20</sup> During the one hundred days that followed President Habyarimana's assassination, from early April to mid July, the atrocities committed by the Hutu government led to the slaughter of approximately one million Tutsis and moderate Hutus,<sup>21</sup> and the displacement of many more.<sup>22</sup> It was this wholesale violence against the Tutsis that led the United Nations to form 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; or more simply, the International Criminal Tribunal for Rwanda.<sup>23</sup>

#### B. Prosecutor v. Karemera and Judicially Noticing Genocide

*Prosecutor v. Karemera*<sup>24</sup> is one of the cases currently before the ICTR.<sup>25</sup> The three defendants in this case, Edouard Karemera, Mathieu Ndirumpatse, and Joseph Nzirorera, are charged with committing heinous crimes in 1994.<sup>26</sup> During this time, the defendants were all high-level officials in the Mouvement Révolutionnaire Nationale pour le Développement, or National Revolutionary Movement for Development

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16. See *Rwanda: How the Genocide Happened*, *supra* note 14.

17. See United Kingdom Foreign and Commonwealth Office, *supra* note 15.

18. For example, in a series of riots beginning in 1959, more than 20,000 Tutsis were killed, see *Rwanda: How the Genocide Happened*, *supra* note 14, and approximately 150,000 fled into neighboring countries, see CIA, *The World Fact Book: Rwanda*, <https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html> (last visited Jan. 11, 2009).

19. See *Rwanda: How the Genocide Happened*, *supra* note 14.

20. See United Kingdom Foreign and Commonwealth Office, *supra* note 15.

21. See Packard, *supra* note 5.

22. See CIA, *supra* note 18.

23. See International Criminal Tribunal for Rwanda, *supra* note 6 (follow "About the Tribunal" hyperlink; then follow "General Information" hyperlink).

24. Case No. ICTR 98-44.

25. See International Criminal Tribunal for Rwanda, *supra* note 6 (follow "Cases" hyperlink; then follow "Status of Cases" hyperlink).

26. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-I, Amended Indictment, (Aug. 24, 2005).

("MRND"), the political party that controlled Rwanda's 1994 interim government.<sup>27</sup> All three were members of the MRND's Steering Committee.<sup>28</sup> Additionally, Karemera served as Minister of the Interior for the interim government and as the MRND's First Vice-President,<sup>29</sup> Ngirumpatse served as the MRND's President,<sup>30</sup> and Nzirorera served as the MRND's National Secretary.<sup>31</sup> Each was charged with using the power of his position to plan, instigate, order, commit, or otherwise aid and abet in the planning, preparation, or commission of the crimes charged in the indictment.<sup>32</sup>

The Amended Indictment of August 24, 2005 charges each of the defendants with seven counts.<sup>33</sup> The first four counts are pursuant to Article 2 of the Statute of the Tribunal, and charge the defendants with: "(i) conspiracy to commit genocide, (ii) direct and public incitement to genocide, *and* (iii) genocide, *or alternatively* (iv) complicity in genocide."<sup>34</sup> The next two counts are pursuant to Article 3 of the Statute of the Tribunal, and charge the defendants with: "(v) rape, *and* (vi) extermination *as crimes against humanity*."<sup>35</sup> The final count is pursuant to Article 4 of the Statute of the Tribunal, and charges the defendants with "(vii) murder and causing violence to health and physical or mental well-being *as serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II*."<sup>36</sup> The most egregious, and arguably the most serious, of these crimes is genocide.<sup>37</sup>

27. *See id.* ¶ 1-3.

28. *Id.*

29. *See id.* ¶ 1.

30. *See id.* ¶ 2.

31. *See Karemera*, Case No. ICTR 98-44-I, ¶ 3.

32. *See id.* ¶ 4.

33. *See* Prosecutor v. Karemera et al., Case No. ICTR 98-44-I, Amended Indictment, (Aug. 24, 2005).

34. *Id.* (emphasis in the original).

35. *Id.* (emphasis in the original).

36. *Id.* (emphasis in the original).

37. Article 2, section 2 of the Statute for the International Criminal Tribunal for Rwanda defines genocide as:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Statute of the International Tribunal for Rwanda, 1994, art. 2(2).

In its motion filed on June 30, 2005,<sup>38</sup> the Prosecutor asked the Trial Chamber to take judicial notice of the fact that genocide occurred in Rwanda in 1994 as a fact of common knowledge.<sup>39</sup> The Trial Chamber held, somewhat contradictorily, that: (1) it does not matter whether genocide occurred in Rwanda for purposes of the Prosecutor's case against the accused, for that is not a fact to be proved, and (2) taking judicial notice of the fact that genocide occurred in Rwanda would lessen the Prosecutor's obligation to prove his case.<sup>40</sup> On November 9, 2005, the Trial Chamber therefore denied the Prosecutor's motion as it related to judicial notice of genocide.<sup>41</sup>

Unhappy with this decision, the Prosecutor filed a motion for certification to appeal the Trial Chamber's decision in an interlocutory appeal and on December 2, 2005, the Trial Chamber granted this motion.<sup>42</sup> After carefully reviewing the issue *de novo*, the Appeals Chamber agreed with the Prosecutor and held that "the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber as a fact of common knowledge."<sup>43</sup> The Appeals Chamber then remanded the matter to the Trial Chamber for further consideration consistent with the Appeals Chamber's decision.<sup>44</sup> The case is currently back before the Trial Chamber.<sup>45</sup>

### III. JUDICIAL NOTICE

Before determining whether the Appeals Chamber's ruling in *Prosecutor v. Karemera* was a prudent decision, it is important to discuss the concept of judicial notice itself. Judicial notice is an important and powerful tool for courts. By taking judicial notice of a fact, the court relieves the prosecutor of his formal burden of producing evidence of

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38. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-R94, Decision on Prosecution Motion for Judicial Notice (Nov. 9, 2005).

39. Additionally, the Prosecutor asked the Trial Chamber to take judicial notice of five other facts of common knowledge and 153 facts that had been previously adjudicated in other ICTR cases. For purposes of this Comment, however, these additional facts are unimportant. See *id.* ¶ 7.

40. *Id.*

41. See *id.* ¶ 6.

42. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, Certification of Appeal Concerning Judicial Notice (Dec. 2, 2005).

43. *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 35 (June 16, 2006).

44. See *id.* ¶ 57.

45. See *id.* (remanding the matter to the Trial Chamber for further consideration in a manner consistent with the Appeals Chamber's Decision).

that fact at trial.<sup>46</sup> Thus, judicial notice expedites the trial process<sup>47</sup> by reducing the necessary amount of evidence and witnesses, and promotes the efficiency of the court.<sup>48</sup> It also fosters judicial economy<sup>49</sup> and ensures the consistency and uniformity of decisions.<sup>50</sup> Yet, as important as these traits are to the judicial process, they must be balanced against the court's equally important "mandate to ensure a fair and equitable trial for the Accused."<sup>51</sup>

#### A. *The ICTR's Definition of Judicial Notice*

Rule 94 of the ICTR's Rules of Procedure and Evidence states that:

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

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.<sup>52</sup>

In addition to dealing with different types of facts—those of common knowledge and those that have been previously adjudicated—the two subsections have one major difference: Rule 94(A) is mandatory while Rule 94(B) is discretionary.<sup>53</sup> Thus, the applicable subsection may make a great deal of difference to the ultimate outcome. While both subsections are important and useful tools when dealing with judicial notice, the remainder of this Comment discusses Rule 94(A) exclusively, for in *Karemera*, the Appeals Chamber took judicial notice of genocide only as a fact of common knowledge.<sup>54</sup> Regardless of the subsection

46. See *Prosecutor v. Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, ¶ 17 (Nov. 3, 2000).

47. See *id.* ¶ 20.

48. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, Decision on the Prosecutor's Motion for Judicial Notice, ¶ 2 (Apr. 30, 2004).

49. *Id.*

50. See *Semanza*, Case No. ICTR 97-20-I, ¶ 20.

51. *Id.* ¶ 18.

52. Rules of Procedure and Evidence, 2006 ICTR Acts & Docs. Rule 94.

53. See *id.* (Rule 94(A) uses the language "shall" while Rule 94(B) uses the language "may" when discussing judicial notice.).

54. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 38 (June 16, 2006)(taking judicial notice of genocide in Rwanda as a fact of common knowledge). Although there may be strong arguments for taking judicial notice of the genocide in Rwanda under Rule 94(B), for the sake of brevity and simplicity I will leave that discussion for another comment.



used, however, Rule 94 provides no guidance as to what constitutes a fact of “common knowledge” or an “adjudicated fact.”<sup>55</sup> The Tribunal has therefore had to provide definitions for these phrases through its jurisprudence.

In *Prosecutor v. Semanza*,<sup>56</sup> the Trial Chamber closely examined the issue of judicial notice, focusing primarily on prominent legal treatises in order to formulate a definition for facts of common knowledge.<sup>57</sup> It determined that a fact of common knowledge is one that is not subject to reasonable dispute.<sup>58</sup> The Trial Chamber went on to state that a fact is not subject to reasonable dispute if “it is either generally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question.”<sup>59</sup> The Trial Chamber listed the days of the week, general historical facts, geographical facts, and the laws of nature as examples of facts that meet this test for facts of common knowledge.<sup>60</sup> The Tribunal also considered judicial notice in *Prosecutor v. Bizimungu*.<sup>61</sup> In its December 2, 2003 decision, the Trial Chamber determined that facts of common knowledge are those facts that are “of such notoriety, so well known and acknowledged that no reasonable individual with relevant concern can possibly dispute them.”<sup>62</sup>

Based on the Trial Chamber’s decisions in *Semanza* and *Bizimungu*, the Tribunal has developed a more precise definition of facts that constitute “common knowledge” than that provided by Rule 94(A) alone.<sup>63</sup> It is this definition that the Trial Chamber should have applied in *Karemera* when determining whether to take judicial notice of genocide in Rwanda. And it is this definition that this Comment will use to argue that the Appeals Chamber made the right decision when it granted the Prosecutor’s motion for judicial notice.

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55. See Rules of Procedure and Evidence, 2006 ICTR Acts & Docs. Rule 94.

56. Case No. ICTR 97-20.

57. See *Prosecutor v. Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, ¶ 22 (Nov. 3, 2000).

58. See *id.* ¶ 23.

59. *Id.* ¶ 24.

60. See *id.* ¶ 23.

61. See *Prosecutor v. Bizimungu et al.*, Case No. ICTR 99-50-I, Decision On Prosecution’s Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, (Dec. 2, 2003).

62. *Id.* ¶ 23.

63. See generally *Bizimungu*, Case No. ICTR 99-50-I (explaining that facts of common knowledge are facts that are notorious and so well known and acknowledged that they cannot reasonably be disputed by an individual with relevant concern); see also *Semanza*, Case No. ICTR 97-20-I (explaining that facts of common knowledge are facts that are not subject to reasonable dispute because they are either generally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned).

## B. *The ICTY's Definition of Judicial Notice*

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) is a tribunal very similar to the ICTR. The ICTY was established in 1993, in response to violations of international humanitarian law that occurred in the territory of the former Yugoslavia in 1991.<sup>64</sup> Looking at the ICTY’s interpretation of judicial notice is relevant to the ICTR for a number of reasons. First, the ICTY served as a model for the establishment of the ICTR, and the ICTR drew in whole or in substantial part on many of the ICTY’s basic legal texts, including the Rules of Procedure and Evidence.<sup>65</sup> Important for purposes of this Comment, the ICTR’s rule of evidence on judicial notice, Rule 94, is the same as the ICTY’s rule, also Rule 94.<sup>66</sup> Second, and even more important for purposes of this Comment, the two tribunals share one Chamber of Appeals.<sup>67</sup> For these reasons, much of what the two tribunals do is closely linked, so understanding the ICTY’s interpretation of judicial notice is helpful to understanding the ICTR’s view.

Unlike the ICTR, the ICTY has not been asked to take judicial notice of genocide. It has been asked, however, to take judicial notice of facts under Rule 94(A) in a number of cases,<sup>68</sup> and so like the ICTR, it has interpreted the language of Rule 94(A) to make it more useful.<sup>69</sup> For

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64. See International Criminal Tribunal for the Former Yugoslavia, [www.icty.org](http://www.icty.org) (follow “Welcome to the New ICTY Website” hyperlink; then follow “The About section” hyperlink) (last visited Jan. 11, 2009).

65. Compare Rules of Procedure and Evidence, 2007 ICTY Acts & Docs. and Rules of Procedure and Evidence, 2006 ICTR Acts & Docs.

66. In fact, the two rules are nearly identical. The ICTR adopted Rule 94(A) verbatim, and changed Rule 94(B) only slightly: the ICTY’s rule states that the Tribunal may take judicial notice of facts “relating to matters at issue,” Rules of Procedure and Evidence, 2007 ICTY Acts & Docs. Rule 94(A), while the ICTR’s version states that the Tribunal may take judicial notice of facts “relating to the matter at issue,” Rules of Procedure and Evidence, 2006 ICTR Acts & Docs. Rule 94(A).

67. International Criminal Tribunal for the Former Yugoslavia, *supra* note 64 (follow “Welcome to the New Website” hyperlink; then follow “Chambers” hyperlink).

68. See, e.g., *Prosecutor v. Marijadic*, Case No. IT 95-14-R77.2, Decision on Prosecution Motion for Judicial Notice and Admission of Evidence (Jan. 13, 2006) (Prosecution request asking the Trial Chamber to take judicial notice of documents falling into one of three categories: newspaper articles; court documents of the International Tribunal; and selected Croatian laws); *Prosecutor v. Simic*, Case No. IT 95-9, Decision on Defense Request for Trial Chamber to Take Judicial Notice (July 7, 2000) (Defense request asking the Trial Chamber to take judicial notice of the Prosecution’s position, as reflected in the Weekly Press Briefing issued by the International Tribunal on June 14, 2000).

69. See, e.g., *Nikolic v. Prosecutor*, Case No. IT 02-60/1-A, Decision on Appellant’s Motion for Judicial Notice (Apr. 1, 2005); *Prosecutor v. Milosevic*, 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 (Oct. 28, 2003).

example, in *Prosecutor v. Milosevic*,<sup>70</sup> the Appeals Chamber, recognizing that “Rule 94(A) [does not] explain what ‘facts of common knowledge’ are,” defined these facts as material that is notorious.<sup>71</sup> In *Nikolic v. Prosecutor*,<sup>72</sup> the Appeals Chamber went on to state that facts of common knowledge are facts that are “common or universally known facts,” and must be facts that are “not the subject of reasonable dispute.”<sup>73</sup> Thus, taking judicial notice of facts of common knowledge implies that those facts cannot be challenged at trial.<sup>74</sup>

Decisions by both the ICTY and the ICTR interpreting judicial notice pursuant to Rule 94(A) thus provide a fuller understanding of what constitutes facts of common knowledge. Facts of common knowledge are those facts that are notorious, universally known or at least generally known in the territorial jurisdiction of the court, capable of accurate and ready determination, and not subject to reasonable dispute.<sup>75</sup> With these definitions, we now have the framework for concluding that the genocide in Rwanda is a fact of common knowledge, and that the Appeals Chamber acted properly in *Karempera* when it took judicial notice of that fact pursuant to Rule 94(A).

#### IV. NOTICING GENOCIDE IN *KAREMERA*

##### A. *The Appeals Chamber’s Reasons for Noticing Genocide*

In *Karempera*, the Appeals Chamber provided a number of reasons supporting its decision to take judicial notice of genocide in Rwanda as a fact of common knowledge pursuant to Rule 94(A).<sup>76</sup> The first reason was simply that the genocide in Rwanda fits within the definition of a fact of common knowledge.<sup>77</sup> Using the language of *Semanza*, the Appeals Chamber stated that “[t]here is no reasonable basis for anyone to

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70. *Milosevic*, Case No. IT 02-54.

71. *See Milosevic*, Case 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 (Oct. 28, 2003).

72. *Nikolic*, Case No. IT 02-60.

73. *Nikolic*, Case No. IT 02-60/1-A, ¶ 10.

74. *See id.*

75. *See Nikolic* Case No. IT 02-60/1-A; *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-I, Decision On Prosecution’s Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, (Dec. 2, 2003); *Milosevic*, Case 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 (Oct. 28, 2003); *Prosecutor v. Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54 (Nov. 3, 2000).

76. *See Prosecutor v. Karempera et al.*, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (June 16, 2006).

77. *Id.* ¶ 35.

dispute that, during 1994, there was a campaign of mass killings to destroy, in whole or at least in very large part, Rwanda's Tutsi population."<sup>78</sup> To substantiate this claim, the Appeals Chamber pointed to United Nations' reports detailing the genocide in Rwanda, which were a key impetus for the Tribunal's establishment, and the very name of the Tribunal itself—the International Criminal Tribunal for the Prosecution of Persons *Responsible for Genocide*.<sup>79</sup>

The Appeals Chamber's second reason supporting its decision to take judicial notice of genocide in Rwanda was the fact that it is no longer necessary for the Tribunal to build the historical record.<sup>80</sup> The Appeals Chamber found that while this role was important during the early part of the Tribunal's history, "at this stage, the Tribunal need not demand further documentation."<sup>81</sup> The historical record of the genocide in Rwanda has been thoroughly documented through the Tribunal's previous judgments,<sup>82</sup> "books, scholarly articles, media reports, U.N. reports and resolutions, national court decisions, and government and NGO reports."<sup>83</sup> That genocide occurred in Rwanda is a fact that no longer necessitates proof; it is "a classic instance of a 'fact of common knowledge.'"<sup>84</sup> It is therefore an appropriate fact for Rule 94(A) judicial notice.

A third reason the Appeals Chamber offered in support of its decision was that, unlike the Trial Chamber, the Appeals Chamber believed that the issue of judicially noticing genocide is "of obvious relevance to the Prosecution's case."<sup>85</sup> Although insufficient in itself to prove the case against the accused, it is a necessary factor.<sup>86</sup> Showing a nationwide campaign of genocide is also relevant because it provides the context within which to understand individual defendants' actions.<sup>87</sup>

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78. *Id.*

79. *See id.*

80. *See id.*

81. *Karemera*, Case No. ICTR 98-44-AR73(C), ¶ 35.

82. *See, e.g.*, *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 291 (May 21, 1999); *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment and Sentence, ¶ 273-472 (May 15, 2003) (providing a lengthy discussion, replete with details, of specific instances of the genocide that took place in Rwanda); *Prosecutor v. Musema*, Case No. ICTR 96-13-A, Judgment and Sentence, ¶ 316 (Jan. 27, 2000) (setting out factual findings of massacres that took place in the Bisero Region of Rwanda); *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 112-126 (Sept. 2, 1998) (containing a lengthy findings of fact detailing genocide in Rwanda).

83. *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶35 (June 16, 2006) (footnotes omitted).

84. *Id.*

85. *Id.* ¶ 36.

86. *See id.*

87. *See id.*

Thus, the Appeals Chamber explicitly rejected the Trial Chamber's first reason for declining to take judicial notice of the genocide in Rwanda.

Linked with this argument is the Appeals Chamber's response to the Trial Chamber's second contention, that judicially noticing genocide will lessen the Prosecutor's burden in convicting the individual accused.<sup>88</sup> The Appeals Chamber similarly rejected this argument, stating that even if the Tribunal takes judicial notice of genocide, the Prosecutor must still offer evidence demonstrating the individual guilt of each of the accused.<sup>89</sup> Specifically, in order to prove its case against the defendants in *Karemera*, the Prosecutor must show that particular actions by the accused constitute genocidal conduct, and that each of the accused acted with the requisite mental state.<sup>90</sup> Even with judicial notice of genocide, without such proof the Prosecutor cannot prove his case against the defendants. The Appeals Chamber further noted that these proof requirements serve to protect the procedural rights of the accused.<sup>91</sup>

Based on the foregoing reasons, the Appeals Chamber rejected arguments put forward by the Trial Chamber and the defendants that genocide in Rwanda is not an appropriate fact for judicial notice.<sup>92</sup> The Appeals Chamber found that noticing this fact would not truncate the historical record, lessen the Prosecutor's burden in convicting the accused, or infringe upon the defendant's procedural rights.<sup>93</sup> It further found that the fact is relevant to the Prosecutor's case.<sup>94</sup> Based on the evidentiary record and the facts known to the Tribunal, the Appeals Chamber concluded that "[t]here is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killings intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population."<sup>95</sup> Therefore, the Appeals Chamber found that noticing genocide is appropriate pursuant to Rule 94(A).<sup>96</sup>

### *B. Arguments Against Noticing Genocide*

While the Appeals Chamber found ample support for its decision that taking judicial notice of genocide in Rwanda is appropriate, there are others who disagree.<sup>97</sup> Their reasons for rejecting the decision are many,

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88. See *Karemera*, Case No. ICTR 98-44-AR73(C), ¶ 37.

89. See *id.*

90. See *id.*

91. See *id.*

92. See *id.* ¶ 38.

93. See *Karemera*, Case No. ICTR 98-44-AR73(C), ¶ 35-37.

94. See *id.* ¶ 36.

95. *Id.* ¶ 35.

96. See *id.* ¶ 38.

97. Since the Appeals Chamber's decision, two comments have been published criticizing its decision to take judicial notice of genocide: Mamiya, *supra* note 12 and

and at first glance some seem persuasive. Most of these arguments aim to show the imprudence of noticing genocide, and can be placed into two categories, which I will call “efficiency arguments” and “procedural arguments” for purposes of this Comment. However, one commentator, Ralph Mamiya, disagrees with the Appeals Chamber’s decision entirely, and questions whether genocide in Rwanda fulfills the criteria for a fact of common knowledge at all.<sup>98</sup>

In his comment, *Taking Judicial Notice of Genocide? The Problematic Law and Policy of the Karemera Decision*,<sup>99</sup> Mamiya argues that the genocide in Rwanda is not a fact of common knowledge.<sup>100</sup> He concedes that the Rwandan genocide “is, after all, one of the best-known humanitarian tragedies in history,”<sup>101</sup> but argues that the intent aspect of the definition of genocide precludes this from being an appropriate fact for judicial notice.<sup>102</sup> He contends that, while it is possible for the world at large to know of the conduct that constitutes genocide, it is not possible for the general public to know of the specific intent of the individual perpetrators.<sup>103</sup> The types of evidence needed to prove specific intent—“official memoranda; the testimony of experts; victims and informants; a comprehensive investigation”<sup>104</sup>—are not available to the world at large.<sup>105</sup> He maintains that without such evidence, people make assumptions based on rumor and published account. While these assumptions may be generally correct, they are not an appropriate basis for judicial notice.<sup>106</sup> Mamiya thus argues that based on its intent aspect, genocide is not an appropriate fact for judicial notice.<sup>107</sup>

Even setting aside this argument and assuming that genocide may be an appropriate fact for judicial notice, Mamiya and other commentators advance a number of additional arguments in an effort to show that the decision to take judicial notice of genocide in Rwanda was unwise.<sup>108</sup> The first category of arguments contains what I will refer to as “efficiency arguments.” These include arguments that noticing genocide will truncate the judicial record, impede reconciliation, and

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Heller, *supra* note 13. These commentators argue that the Appeals Chamber’s decision was unwise, illogical, and conceptually flawed.

98. See Mamiya, *supra* note 12, at 14.

99. *Id.*

100. See *id.* at 14-17.

101. *Id.* at 14.

102. See *id.* at 16.

103. See Mamiya, *supra* note 12, at 16.

104. See *id.*

105. See *id.*

106. See *id.*

107. See *id.*

108. See, e.g., Mamiya, *supra* note 12; Heller, *supra* note 13.

prove time consuming for future cases.<sup>109</sup> For example, in her comment *Noticing Genocide*,<sup>110</sup> Brittan Heller argues that taking judicial notice of genocide will truncate the judicial record by foreclosing future discussion about whether genocide occurred, and preventing further presentation of evidence and testimony.<sup>111</sup> Mamiya concurs, arguing that “[o]ne of the most fundamental goals of international criminal fora is to establish a history of the events that they examine,”<sup>112</sup> noticing genocide prevents the Tribunal from setting out an “impartial, detailed, and well-publicized record”<sup>113</sup> of those events.<sup>114</sup> Heller also believes that noticing genocide will impede reconciliation, for the accused will no longer be called upon to explain or excuse their actions.<sup>115</sup> Finally, she argues that while judicial notice aims at promoting efficiency, noticing genocide may actually lead to more time and money spent, due to attorneys’ and defendants’ unwillingness to accept the decision and the resulting appeals.<sup>116</sup> In short, these commentators argue that noticing genocide conflicts with many of the ICTR’s most important efficiency goals.<sup>117</sup>

The second category of arguments against taking judicial notice of genocide consists of what I will refer to as “procedural arguments.” These include arguments that noticing genocide violates basic legal principles, as well as the rights of the accused.<sup>118</sup> For example, Heller argues that taking judicial notice of genocide violates basic legal principles by conflating issues of law with issues of fact.<sup>119</sup> She contends that judicial notice is reserved for factual determinations, and argues that a finding that genocide occurred is not a fact; it is a legal conclusion that the elements of a crime have been met.<sup>120</sup> Another procedural argument advanced against noticing genocide is that it violates the rights of the accused.<sup>121</sup> In *Karemera*, for instance, the defendants argued that noticing genocide would prejudice them by removing both the presumption of innocence and the right to confront their accusers.<sup>122</sup>

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109. See Heller, *supra* note 13, at 102-03.

110. *Id.*

111. *See id.* at 102-03; *see also* Mamiya, *supra* note 12, at 17-18.

112. Mamiya, *supra* note 12, at 17.

113. *Id.*

114. *See id.*

115. See Heller, *supra* note 13, at 103.

116. *See id.*

117. *See id.*; Mamiya, *supra* note 13.

118. See Heller, *supra* note 13, at 103.

119. *See id.*

120. *See id.*

121. See Prosecutor v. Karemera et al., Case No. ICTR 98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, ¶ 34 (June 16, 2006).

122. *See id.*

Together, these arguments consist of the notion that judicial notice of genocide is inappropriate, for it violates important procedural aspects of the law.

### C. *Response to Arguments Against Noticing Genocide*

The following section addresses and responds to the arguments set forth above, and argues that the various reasons presented in opposition to noticing genocide are unsound. The arguments against noticing genocide may seem persuasive upon a first reading; however, upon closer inspection they lose much of their appeal. Aside from Mamiya's argument that genocide is not a fact of common knowledge at all,<sup>123</sup> the rest of the arguments share one fatal flaw: they disregard the fact that Rule 94(A) is mandatory rather than discretionary.<sup>124</sup> In what follows, this Comment will first expand upon this assertion, and then move on to rebut Mamiya's argument that genocide is not a fact of common knowledge.<sup>125</sup>

The first and most problematic issue with all of the arguments advanced above—with the exception of the argument that genocide is not a fact of common knowledge at all—is that these arguments disregard the fact that Rule 94(A) is mandatory.<sup>126</sup> The rule states: “[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.”<sup>127</sup> In other words, “the Trial Chamber has no discretion to determine that a fact, although ‘of common knowledge,’ must nonetheless be proven through evidence at trial.”<sup>128</sup> Yet, all of the efficiency and procedural arguments overlook that fact. Instead, the commentators attempt to show that the Appeals Chamber abused its discretion because its decision will make the trial more costly or time consuming, or truncate the judicial record<sup>129</sup>—arguments that are appropriate under Rule 94(B), but not Rule 94(A). If the Tribunal determines that the genocide in Rwanda is a fact of common knowledge, the Tribunal must take judicial notice of that fact pursuant to the mandatory nature of Rule 94(A). There may still be arguments that the decision is inefficient or procedurally unsound, but those are arguments not about whether the Appeals Chamber acted correctly in *Prosecutor v. Karemera*, but about the Tribunal's wisdom in enacting Rule 94(A). For this reason, all of the efficiency and procedural arguments fail.

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123. See Mamiya, *supra* note 12, at 14-17.

124. See Rules of Procedure and Evidence, 2006 ICTR Acts & Docs. Rule 94.

125. See Mamiya, *supra* note 12, at 14-17.

126. See generally *id.*; Heller, *supra* note 13.

127. Rules of Procedure and Evidence, 2006 ICTR Acts & Docs. Rule 94(A).

128. *Karemera*, Case No. ICTR 98-44-AR73(C), ¶ 23.

129. See generally Mamiya, *supra* note 12; Heller, *supra* note 13.



Regardless of our opinions of the prudence or imprudence of taking judicial notice of genocide, our first and only inquiry must be whether the fact that genocide occurred in Rwanda fits the criteria for a fact of common knowledge.

Ralph Mamiya seems to recognize this to some degree. In his comment, Mamiya argues that the genocide in Rwanda does not meet Rule 94(A)'s criteria for a fact of common knowledge because of its intent element.<sup>130</sup> However, this argument also fails. While it is true that in proving genocide the Prosecution has the burden of proving specific intent, or *dolus specialis*, it is also true that in the case of genocide in Rwanda there is ample evidence to support such a burden. We may never have direct evidence of intent, but that should hardly be cause for concern. Proof of intent is often based on circumstantial evidence—which can be every bit as convincing as direct evidence—and in the case of genocide in Rwanda, there is ample circumstantial evidence. Mamiya himself admits that “the use of radio and public speakers to widely disseminate the hate-filled messages of ‘Hutu Power’ made the intent behind the Rwanda genocide clearer than most.”<sup>131</sup> Further, the fact that one ethnic group was targeted and that almost half a million people from that ethnic group were killed within the span of a few months<sup>132</sup> provides strong circumstantial evidence of genocidal intent.

Mamiya's claim that the types of evidence needed to prove specific intent—“official memoranda; the testimony of experts; victims and informants; a comprehensive investigation”<sup>133</sup>—are not available to the world at large<sup>134</sup> is also unpersuasive. The testimony of victims and informants is available through the transcripts of cases that have already been completed, as well as cases that are working their way through trial. Additionally, the inquiry and documentation that went into the preparation of each of the indictments and trials of ICTR defendants constitutes a comprehensive investigation. While not every official memorandum of the interim Hutu government and not every victim may be available to testify as to the genocidal intent in Rwanda, there is sufficient evidence available to the world at large to determine that those in power in Rwanda during the summer of 1994 had a genocidal intent when they slaughtered the Tutsis.

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130. See Mamiya, *supra* note 12, at 16.

131. *Id.*

132. See Packard, *supra* note 5.

133. Mamiya, *supra* note 12, at 16.

134. See *id.*

Furthermore, as the Tribunal noted in the *Semanza* decision, facts for judicial notice need not necessarily be known to the world at large.<sup>135</sup> It is enough that the facts are “generally known within a tribunal’s territorial jurisdiction.”<sup>136</sup> In this case, the Rwandan genocide is common knowledge among people in Rwanda. There are many Rwandans who lived through the ordeal and have first-hand knowledge of the events that occurred. There are also traces of what happened still evident in Rwanda, such as the church compound at Shangi.<sup>137</sup> To claim that genocide is not a fact of common knowledge because of the intent element of genocide is to deny all of this evidence. While the specific intent of each individual defendant may not be common knowledge, it is impossible to overlook all of the relevant evidence that points to the overall genocidal intent of those in power during the summer of 1994. The evidence available to those in Rwanda and to the world at large provides compelling—even if circumstantial—evidence of a genocidal intent.

There is also ample evidence to support the conduct element of genocide for judicial notice. The events that occurred during the summer of 1994 in Rwanda are notorious and capable of accurate and ready determination. They have been documented in books,<sup>138</sup> scholarly articles,<sup>139</sup> United Nations reports,<sup>140</sup> national court decisions,<sup>141</sup> and previous ICTR decisions.<sup>142</sup> There are also numerous media reports that document the events.<sup>143</sup> Even the full name of the Tribunal itself—the

135. See *Prosecutor v. Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, ¶ 23 (Nov. 3, 2000).

136. *Id.*

137. See Randal, *supra* note 1.

138. See, e.g., ROBERT LYONS, *INTIMATE ENEMY: IMAGES AND VOICES OF THE RWANDAN GENOCIDE* (Zone Books 2006); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* (Hurst 1998) (1995).

139. See, e.g., Helen M. Hintjens, *Explaining the 1994 Genocide in Rwanda*, 37 J. MOD. AFR. STUD. 241 (1999); Alex de Waal, *Genocide in Rwanda*, 10 ANTHROPOLOGY TODAY 1 (1994); Peter Uvin, *Reading the Rwandan Genocide*, 3 INT’L STUD. REV. 75 (2001).

140. See, e.g., G.A. Res. 49/206, U.N. Doc. A/RES/49/206 (March 6, 1995); G.A. Res. 54/188, U.N. Doc. A/RES/54/188 (Feb. 9, 2000).

141. See, e.g., *Mukamusi v. Ashcroft*, 390 F.3d 110 (1st Cir. 2004); *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999).

142. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998); *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment (May 21, 1999); *Prosecutor v. Musema*, Case No. ICTR 96-13-A, Judgment and Sentence (Jan. 27, 2000); *Prosecutor v. Semanza*, Case No. ICTR 97-20-T, Judgment and Sentence (May 15, 2003).

143. See, e.g., Donatella Lorch, *Rape Used As Weapon in Rwanda/Future Grim for Genocide Orphans*, Hous. Chron., May 15, 1995, at 1; Randal, *supra* note 1; Sebastian Rotella, *Genocide Findings Cause an Uproar; A French Judge Says the Current Rwanda Leader Plotted the ‘94 Chaos that Left 800,000 Dead*, L.A. TIMES, Feb. 17, 2007, at A1.

International Criminal Tribunal for the Prosecution of Persons *Responsible for Genocide*—accepts the fact of genocide in Rwanda as a fact of common knowledge. In short, that genocide occurred in Rwanda is beyond reasonable dispute, and Mamiya's contention that the genocide is not a fact of common knowledge<sup>144</sup> is unfounded.

*D. Support for the ICTR's Decision to Notice Genocide*

Thus far I have tried to show that genocide is a fact of common knowledge, and that the arguments against taking judicial notice of the genocide in Rwanda fail upon closer inspection. However, there are also many reasons that the decision to take judicial notice was a prudent one in its own right. In the following section, I will discuss these reasons and show that even if Rule 94(A) was discretionary, the Tribunal made the right choice when it took judicial notice of the genocide in Rwanda.

One argument in favor of the Appeals Chamber's decision to notice genocide is that it promotes the ICTR's judicial efficiency.<sup>145</sup> Judicial notice aids the tribunal in using its time and financial resources more efficiently, and thus more effectively.<sup>146</sup> Another argument is that judicial notice helps the Court to maintain a uniform interpretation of commonly reviewed facts.<sup>147</sup> Once the Tribunal takes judicial notice of a certain fact, that fact will be viewed and understood the same for all cases. This uniformity in turn leads to fairness between defendants in different cases, for all defendants will be treated similarly.

Another, and perhaps the strongest argument, is that judicially noticing genocide may play a significant role in the healing process for many Rwandans, while at the same time maintaining the prosecutor's burden of proving individual defendants' guilt. By taking judicial notice of the genocide in Rwanda, the Tribunal publicly acknowledges that the genocide did, in fact, take place and affirms the strength and courage of all those Rwandans who lived through the ordeal. It also provides support against those who would argue that the mass murder of Tutsis never occurred in Rwanda, preventing something similar to the Holocaust denial from occurring. Furthermore, the decision may also provide some measure of closure, for with acceptance the healing process can begin.

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144. See Mamiya, *supra* note 12, at 14.

145. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, Decision on the Prosecutor's Motion for Judicial Notice, ¶ 2, (Apr. 30, 2004).

146. *Id.*

147. See *generally* *Prosecutor v. Semanza*, Case No. ICTR 97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, ¶ 20 (Nov. 3, 2000).

Just as importantly for the Tribunal is the fact that the decision does these things without lessening the prosecutor's burden of proving the guilt of the individual defendants in each case. In order to prove its case against the accused, the prosecutor still has to provide evidence showing that the conduct and intent elements of genocide can be satisfied as to each individual defendant. The prosecutor will still be called on to make his case and carry the burden of proof, while each defendant will still have the opportunity to disprove the prosecutor's assertions or provide any defenses that defendant may have. This also provides a resolution to many of the efficiency arguments made by commentators and discussed above. By carrying the burden of proof as to each individual defendant, the prosecutor will actually build the historical record, rather than truncate it, through the presentation of evidence and testimony about the conduct and intent of each defendant that appears before the Tribunal. Thus, there are many reasons that taking judicial notice of the genocide in Rwanda was a prudent decision by the Appeals Chamber.

## V. CONCLUSION

The events that occurred in Rwanda during the summer of 1994 were horrific. Almost one million people were killed based solely on their ethnicity.<sup>148</sup> Since that time, prosecutors in many of the cases before the International Criminal Tribunal for Rwanda had argued that the fact that genocide occurred in Rwanda should be judicially noticed, but without success.<sup>149</sup> That is, until the Appeals Chamber took judicial notice of the Rwandan genocide on June 16, 2006, in *Prosecutor v. Karemera, et al.*<sup>150</sup> Many commentators have since argued that this was an unwise decision.<sup>151</sup> However, upon closer inspection all of these arguments fail. Rule 94(A) provides that the Tribunal shall take judicial notice of facts of common knowledge,<sup>152</sup> and the genocide in Rwanda fits the definition of a fact of common knowledge. With all of the information available to the world at large, and especially to the Tribunal and its territorial jurisdiction, there is no room left to dispute that the genocide did in fact occur. Because the genocide is a fact of common knowledge, and also because it was a good decision, the Appeals Chamber made the right choice when it took judicial notice of the genocide in Rwanda.

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148. See Randal, *supra* note 1.

149. See *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-R94, Decision on Prosecution Motion for Judicial Notice (Nov. 9, 2005).

150. *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ¶ 38 (June 16, 2006).

151. See, e.g., Mamiya, *supra* note 12; Heller, *supra* note 13.

152. See Rules of Procedure and Evidence, 2006 ICTR Acts & Docs. Rule 94.

