
**NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROJECT
RWANDA GENOCIDE PROSECUTION**

**MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR**

ISSUE: JUDICIAL NOTICE

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26. JOHN R.W.D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA* (1998).

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27. Rod Dixon, *Symposium: Prosecuting International Crimes: An Inside View: Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunal*, 7 *TRANSNAT'L L.*

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28. Carla A. Neeley, Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. FLA. L. REV. 723 (1976).
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I. Introduction and Summary of Conclusions

A. Issues

This memorandum addresses the practice of the taking of judicial notice by the judges of the International Criminal Tribunal for Rwanda. Aspects considered include the appropriate scope of judicial notice by the Tribunal and whether any procedures should be adopted to give parties notice of the Tribunal's intent to take judicial notice, and thereby offer an opportunity for them to rebut such with the presentation of evidence.

In addition, this memorandum reviews the use of judicial notice in several common law countries and discusses some distinctions between civil and common law legal traditions that are relevant to the practice of taking judicial notice.

B. Summary of Conclusions

1. The Tribunal's Rules of Evidence Give Little Guidance on the Taking of Judicial Notice; It is Up to the Tribunal to Develop a System

The taking of judicial notice in the proceedings before the International Criminal Tribunal for Rwanda is governed by the Rules of Procedure and Evidence first developed for the International Tribunal for the Former Yugoslavia.¹ The rules were developed by judges of the Tribunal and are

¹ Article 14 of the Statute of the International Tribunal for Rwanda states:
The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary. [Reproduced in the accompanying notebook at Tab 1.]

considered to be neither predominantly common law nor civil law rules, but rather a hybrid of the two systems. Rule 94, which concerns judicial notice, is unadorned by detail restricting or placing limits on the use of judicial notice. The task is for the Tribunal -- chiefly the judges but also the Office of the Prosecutor and defense counsel -- to implement the rules of evidence in a way that provides for “simple, speedy and fair trials . . . [while] balanc[ing] the interests of the international community against the rights of the accused and efficiency in dealing with criminal matters against the requirements of due process.”²

2. Proposed System of Taking Judicial Notice in the ICTR

Reference should be made to the approaches adopted by various states to the taking of judicial notice so that over time suitable approaches are developed to the taking of different types of judicial notice, e.g., notice of adjudicative or legislative facts, in the Tribunal. A premium should be placed on transparency in order to instill confidence in the Tribunal’s use of the doctrine. For example, the Tribunal should notify opposing counsel before it formally takes judicial notice of notorious, indisputable facts (facts of common knowledge) in order to give opposing counsel the opportunity to attempt to convince the court not to take judicial notice. In addition, it is important that the Tribunal distinguish whether it is taking judicial notice of an adjudicative fact or a legislative fact. The distinction is critical, particularly when courts rely on the decision in later cases as precedent. A previous decision taking judicial notice of a matter as a legislative fact should generally not be authority for notice of the same

² Rod Dixon, *Symposium: Prosecuting International Crimes: An Inside View: Developing International Rules of Evidence for the Yugoslav and Rwanda Tribunal*, 7 *TRANSNAT’L L. & CONTEMP. PROBS.* 81, 102 (1997). [Reproduced in the accompanying notebook at Tab 27.]

matter as an adjudicative fact. (These different types of judicial notice are discussed in Part III. A. *infra*.)

II. Factual Background

A. Definitions

Judicial notice is a mechanism whereby trial judges can recognize the truth of certain facts having a bearing on the controversy at bar while dispensing with the usual methods of introducing evidence. The rationale for the doctrine of judicial notice is to promote expedience in trial proceedings and to prevent flagrant error.³ “Judicial notice acts as a timesaving device by eliminating the need for introduction of evidence to prove noticed facts.”⁴ Black’s Dictionary defines judicial notice as:

A court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact; the court’s power to accept such a fact <the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit>.⁵

Although countries take slightly differing approaches to it, the doctrine of judicial notice is widely recognized in both civil and common law systems.⁶ It is difficult to imagine a viable legal system

³ See Carla A. Neeley, Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. FLA. L. REV. 723, 724 (1976). [Reproduced in the accompanying notebook at Tab 28.]

⁴ See *id.* at 724. [Reproduced in the accompanying notebook at Tab 28.]

⁵ BLACK’S LAW DICTIONARY 851 (7th ed. 1999). [Reproduced in the accompanying notebook at Tab 36.]

⁶ “The ancient rule permitting judicial notice, without proof, of notorious facts is recognized [in Italy].” In Italy, the rule is commonly expressed in the maxim, “notoria non egent probatione” and for civil cases is codified in Codice di procedure civile art. 115, para. 2. MAURO CAPPELLETTI, JOHN HENRY MERRYMAN AND JOSEPH PERILLO, *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* 131 (1967). [Reproduced in the accompanying notebook at Tab 15.] In England and Australia, “the Courts will take judicial notice of facts which are notorious, and there is a wide discretion which may be

whose courts do not take some facts for granted as being generally known.⁷

With each judicial decision, the founding ICTY and ICTR carve out important case law, precedent and customary international law which have great importance not just for the parties appearing before the tribunals, but also for other international tribunals, including the permanent international criminal court, when it comes into force.⁸ The ICTR and ICTY are proscribed from using the evidence law of a single state.⁹ It is crucial that the Tribunals develop an approach to the use of

exercised on this.” ROSEMARY PATTENDEN, *THE JUDGE, DISCRETION AND THE CRIMINAL TRIAL* 9 (1982) (quoting Angas Parons, J., *Allchurch v. Healey* [1927] S.A.S.R. 370, 372.) [Reproduced in the accompanying notebook at Tab 16.] *See also* RICHARD FENTMAN, *FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW* 248 n.169 (1998) (citing *Commonwealth Shipping Representative v. P & O Branch Service* [1923] AC 191, 212 (HL)) [reproduced in the accompanying notebook at Tab 17] and for Australia, Division 1, Judicial Notice s. 120 and 121, Evidence Bill 1987 [reproduced in the accompanying notebook at Tab 8]. In Germany, section 291 of the German Civil Procedural Code provides that, “facts which are evident to the court need not be proved.” JULIANE KOKOTT, *THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW* 32 (1998). [Reproduced in the accompanying notebook at Tab 18.]

⁷ *See* RICHARD FENTMAN, *FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW* 248 (1998). [Reproduced in the accompanying notebook at Tab 17.]

⁸ The Legal Officer with the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia writes that the evidentiary systems developed by the ICTY and the ICTR will “almost certainly” be carried forward into a permanent international criminal court, if such a court is established. *See* Dixon, *supra* note 2, at 82. [Reproduced in the accompanying notebook at Tab 27.] As of 12 February 2001, 139 countries had signed the Rome Statute of the International Criminal Court and 29 countries had ratified it. The Statute will come into force when 60 countries have ratified it. *See* <http://www.un.org/law/icc/statute/status.htm> (visited April 9, 2001). [Reproduced in the accompanying notebook at Tab 3.]

⁹ Rule 89 of the ICTR’s Rules of Procedure and Evidence, which is considered to be the cornerstone for the Tribunal’s evidentiary procedure, states that, “The Chambers shall not be bound by national rules of evidence.” International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence, Part Six, Section 3, Rule 89. [Reproduced in the accompanying notebook at Tab 2.] The ICTY operates under the same rule.

judicial notice that balances the need to use court resources efficiently, while carefully affording due process protections to defendants. To aid in this task, the approaches in several common law countries are discussed below. In addition, several distinctions between civil and common law legal traditions that are relevant to the practice of taking judicial notice in criminal cases are discussed.

III. Legal Discussion

A. Different Types of Judicial Notice

Courts take judicial notice of facts that fall into several broad categories. The two primary categories are 1) adjudicative facts and 2) legislative facts. *Adjudicative facts* “are simply the facts of the particular case.”¹⁰ They concern the immediate parties in a case: “who did what, where, when, how and with what motive or intent.”¹¹ In finding facts concerning the immediate parties, the court performs an adjudicative function, hence the term adjudicative facts. Adjudicative facts are the facts that normally go to a jury in a jury case. They are those facts to which the law is applied in the process of adjudication. They relate to the parties, their activities, their properties and their businesses.¹²

Another type of adjudicative fact as to which courts may take judicial notice is one “capable of immediate and accurate demonstration by resort to sources of indisputable accuracy easily accessible

¹⁰ FED. R. EVID. 201 advisory committee’s note. [Reproduced in the accompanying notebook at Tab 6.]

¹¹ Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955). [Reproduced in the accompanying notebook at Tab 29.]

¹² *See id.* [Reproduced in the accompanying notebook at Tab 29.]

to persons in the [situation] of members of the court.”¹³ Such facts may not be generally known, but their accuracy is easily verified by going to sources that ordinary, reasonable people would consult to find authoritative answers. Examples include reference to calendars to confirm days and dates, or to maps to determine distance and location.¹⁴

On the other hand, when a court develops law or policy, it acts legislatively.¹⁵ The facts which inform the court’s legislative judgment are called *legislative facts*. “Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily [of] general [application] and do not concern the immediate parties.”¹⁶

Legislative facts often relate to the social, economic and cultural context in which the law operates. As such, legislative facts are not easily provable; they generally transcend the interests of the immediate parties. The law could not be developed or applied without judges taking cognizance of the milieu in which it functions. It would be counter-productive to require evidentiary hearings every time a question arose as to what our society is like. The doctrine of judicial notice of legislative facts allows courts developing and interpreting law to take judicial notice of the society within which the law

¹³ David M. Paciocco, *Judicial Notice in Criminal Cases: Potential and Pitfalls*, 40 CRIMINAL LAW QUARTERLY 35, 46 (1997) (quoting Morgan, *Judicial Notice*, 57 HARV. L.REV. 269, 273-4 (1944)). [Reproduced in the accompanying notebook at Tab 30.]

¹⁴ *See id.* at 46. [Reproduced in the accompanying notebook at Tab 30.]

¹⁵ *See* Davis, *supra* note 11, at 952. “[T]he courts have created the common law through judicial legislation.” *Id.* [Reproduced in the accompanying notebook at Tab 29.]

¹⁶ *Id.* [Reproduced in the accompanying notebook at Tab 29.]

operates.¹⁷

Generally, judges may take judicial notice of adjudicative facts only if the facts are clearly indisputable, or considered common knowledge. There are far fewer restrictions placed on courts constraining the types of materials that judges can consult when taking judicial notice of legislative facts than when taking notice of adjudicative facts. One Canadian jurist points out:

[W]hile clear rules exist on the use, admissibility and judicial notice of adjudicative facts, the use, admissibility and judicial notice of legislative facts are almost completely unfettered. In fact, American deference to judicial notice of legislative facts is virtually as broad as a judge's power to independently determine the domestic law.¹⁸

The Advisory Committee Note that accompanies the Federal Rule of Evidence governing judicial notice in the United States explains the rationale for permitting virtually unfettered judicial notice of legislative facts, and draws heavily from the writings of the man who coined the terms distinguishing legislative and adjudicative facts. The Advisory Committee quotes Professor Kenneth Davis:

My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly. . . within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.¹⁹

¹⁷ See Paciocco, *supra* note 13, at 47. [Reproduced in the accompanying notebook at Tab 30.]

¹⁸ Hon. Claire L'Heureux-Dube, *RE-EXAMINING THE DOCTRINE OF JUDICIAL NOTICE IN THE FAMILY LAW CONTEXT*, 26 OTTAWA L. REV. 551, 555 (quoted in David M. Paciocco, *Judicial Notice in Criminal Cases: Potential and Pitfalls*, 40 CRIMINAL LAW QUARTERLY 35, 48 (1997). [Reproduced in the accompanying notebook at Tab 30.]

¹⁹ Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 82 (1964), as quoted in FED. R. EVID. 201 advisory committee's note. [Reproduced in the accompanying notebook at Tab 6.]

Another type of fact that courts may take judicial notice of is the *social framework*, or general social context, in which the law is operating. This type of judicial notice often involves reference to social and behavioral science material. An example in the criminal context is when at sentencing courts consider the prevalence and social costs of the particular crime at issue when rendering their decisions. While their conclusion will affect the particular accused, the fact to be noted is not particular to the accused.²⁰ As with legislative facts, there are very few restrictions placed on the taking of judicial notice of social framework facts.

It is not always clear whether certain facts are adjudicative or legislative. Some facts can be properly classified as adjudicative or legislative.²¹ Further, courts do not always announce when they are taking judicial notice of certain facts.

B. Judicial Notice in Four Common Law Countries

1. Judicial Notice In the United States

In the United States federal courts, the admission of evidence is governed by the Federal Rules

²⁰ See Paciocco, *supra* note 13, at 49. [Reproduced in the accompanying notebook at Tab 30.]

²¹ See Neeley, *supra* note 3, at 751, discussing *Powell v. Texas*, 392 U.S. 514 (1968) where the Supreme Court was called on to determine the constitutionality of punishing chronic alcoholics for intoxication in public places. The Court considered extra-record facts to determine the current view of the medical profession as to whether alcoholism is a disease. The facts noticed were adjudicative in that they were used to determine whether the alcoholic defendant was afflicted with a disease. The same facts were used in a legislative sense to determine whether “as a matter of medical science alcoholism was so clearly a disease that a constitutional principle should be developed to prohibit punishment for alcoholism.” *Id.* [Reproduced in the accompanying notebook at Tab 28.]

of Evidence (F.R.E.). Congress adopted the Federal Rules of Evidence in 1975.²² Prior to their adoption, evidence law in the United States federal courts system was developed through the common law tradition.²³ The rules apply in both civil and criminal cases in the federal system, although there are slightly different rules for jury instructions in criminal and civil cases. The federal rules have been influential among the states; by 1995 over half (35) had adopted codes based on the F.R.E.²⁴

The Federal Rules of Evidence were proposed by an Advisory Committee appointed by the United States Supreme Court and comprised of distinguished practitioners, judges, and law professors.²⁵ After eight years of work and two published drafts, the Supreme Court accepted a final draft, which it transmitted to Congress pursuant to the Enabling Act (28 U.S.C. §2072).²⁶ Congress held public hearings and scrutinized the Rules intensely. After making substantial changes, Congress enacted the revised version in statutory form.²⁷ Rule 201 governs the taking of judicial notice.

In the United States, judges can take judicial notice of four different types of facts:²⁸

²² See CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES, Third Edition, xxix (1996). [Reproduced in the accompanying notebook at Tab 19.]

²³ See *id.* at 3. [Reproduced in the accompanying notebook at Tab 19.]

²⁴ See *id.* [Reproduced in the accompanying notebook at Tab 19.]

²⁵ See *id.* at 4. [Reproduced in the accompanying notebook at Tab 19.]

²⁶ See *id.* [Reproduced in the accompanying notebook at Tab 19.]

²⁷ See MUELLER AND KIRKPATRICK, *supra* note 22, at 4. [Reproduced in the accompanying notebook at Tab 19.]

²⁸ See *id.* at 837. [Reproduced in the accompanying notebook at Tab 19.]

- 1) adjudicative
- 2) legislative
- 3) evaluative
- 4) law.

Definitions for adjudicative and legislative facts are provided above in III-A.²⁹ Evaluative facts are matters of common knowledge that judges and jurors bring to their deliberations. Evaluative facts amount to background information that enable the fact-finders to understand the testimony and other evidence in the case, such as the usual meaning of words, slang expressions, or idioms.

When a witness says “fire engine,” it is assumed that the jury understands what is meant without a dictionary or other definitional evidence being offered. When a witness testifies that the defendant nodded after being asked whether he was the person driving the car, again it is assumed that the jury understands the usual meaning of nod.³⁰

Other evaluative facts help the trier assess the formal evidence in the case. For example, when a witness is impeached by a showing that he has a close romantic, economic or familial relationship with

²⁹ For examples of judicial notice of facts viewed by the court as adjudicative, *see Sinatra v. Heckler*, 566 F. Supp. 1354 (E.D.N.Y. 1983) (a significant number of federal employees take vacations during the year-end holiday period when there is a high volume of mail, resulting in a general slowdown of office operations and mail delivery) [reproduced in the accompanying notebook at Tab 9] and *Allen v. Allen*, 518 F. Supp. 1234, 1235 n.2 (E.D. Pa. 1981) (in 1979, Father’s Day occurred on June 17) [reproduced in the accompanying notebook at Tab 10]. For an example of a court taking judicial notice of a legislative fact, *see Population Services Intl. v. Wilson*, 398 F. Supp. 321, 332-33 (S.D.N.Y. 1975) (challenging the constitutionality of a New York statute prohibiting distribution of contraceptives to persons under the age of sixteen; the court stated that, “[I]t is not beyond the power of this Court to note that some young persons under the age of sixteen . . . do engage in sexual intercourse and that the consequence of such activity is often venereal disease, unwanted pregnancy, or both.”). [Reproduced in the accompanying notebook at Tab 11.]

³⁰ MUELLER AND KIRKPATRICK, *supra* note 22, at 838. [Reproduced in the accompanying notebook at Tab 19.]

one of the parties, it is assumed that the jury is aware that, due to basic human nature, such a relationship could affect the witness' credibility.³¹

There is no need to instruct a jury to take notice of evaluative facts because an evaluative fact is normally a matter of general knowledge. However, sometimes a general instruction is given regarding evaluative facts telling jurors that they may use their experience in the affairs of life, their general knowledge of the natural tendencies and inclinations of human beings, and their common sense in reviewing the evidence in the case.³²

Judicial notice of the law refers to the process by which the court determines the controlling law in the case. If judicial notice of law is not taken, responsibility for proving the applicable law rests with the parties. The parties are relieved of this burden if the court takes judicial notice of the applicable law.³³ In the federal system, common law tradition requires judges to take judicial notice of all domestic statutory and case law, both state and federal.³⁴ Many states have provisions in their evidence codes regulating judicial notice of law.³⁵

³¹ *See id.* at 838. [Reproduced in the accompanying notebook at Tab 19.]

³² *See id.* [Reproduced in the accompanying notebook at Tab 19.]

³³ *See id.* at 839. [Reproduced in the accompanying notebook at Tab 19.]

³⁴ *See id.* at 856 [reproduced in the accompanying notebook at Tab 19] (citing *Schultz v. Tecumseh Prods.*, 310 F. 2d 426, 433 (6th Cir. 1962)) [reproduced in the accompanying notebook at Tab 12].

³⁵ *See, e.g.*, HAWAII RULES OF EVIDENCE 202. [Reproduced in the accompanying notebook at Tab 7.]

The Federal Rules of Evidence Rule 201 only regulates judicial notice of *adjudicative facts*,³⁶ leaving judges unfettered discretion with respect to notice of legislative facts, evaluative facts and law.

F.R.E. 201 only permits judicial notice of adjudicative facts that are indisputable. In the United States, the usual method of establishing adjudicative facts is through the introduction of evidence, typically consisting of the testimony of witnesses.³⁷ Judicial notice dispenses with the requirement that a party establish formal proof of facts. The doctrine of judicial notice conflicts somewhat with the adversarial American justice system, whereby it is the judge's role to determine questions of law and it is the jury's role to determine questions of fact. However, the restriction of F.R.E. 201 that courts may only enjoy the time-saving function of judicial notice in admitting truly indisputable adjudicative facts

³⁶ FED. R. EVID. 201 is as follows:

- (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it either is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) When discretionary. A court may take judicial notice, whether requested or not.
- (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
- (g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. [Reproduced in the accompanying notebook at Tab 6.]

³⁷ See FED. R. EVID. 201 advisory committee's note. [Reproduced in the accompanying notebook at Tab 6.]

reserves debatable issues for the jury.³⁸ Further, in criminal cases, 201(g) requires that the court instruct the jury that it may, but is not required to, accept as conclusive any adjudicative fact judicially noticed.

In contrast, there is no restriction that judicially noticed legislative facts be clearly indisputable, as “facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.”³⁹

2. Judicial Notice In England

In England, courts have a long history of taking judicial notice of the law of the forum (*lex fori*) and matters of fact.⁴⁰ After the practice of using written pleadings was established, either omission from them or averments in them could require judicial notice of some matter of fact.⁴¹ The foundations of judicial notice in England include the common law, statute, common knowledge and acquired

³⁸ See Neeley, *supra* note 3, at 731. [Reproduced in the accompanying notebook at Tab 28.]

³⁹ FED. R. EVID. 201 advisory committee’s note (quoting Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 82 (1964)). [Reproduced in the accompanying notebook at Tab 6.]

⁴⁰ In 1958, one author wrote that “judicial notice of facts has been familiar to English lawyers for over 650 years.” G. D. Nokes, *The Limits of Judicial Notice*, 74 THE LAW QUARTERLY REVIEW 59, 61 (1958). [Reproduced in the accompanying notebook at Tab 31.]

⁴¹ See *id.* at 61. In 1661, when a plaintiff sued in respect of the words, “As sure as God governs the World, and King James this Kingdom, so sure hath J.S. committed treason,” it was held that the plaintiff could maintain his action without averring the existence of the divine and temporal governments, for to a Jacobean court these were “choses apparent.” See *id.* at 61-62 (quoting *Anon.* (n.d.) cited in *Dacy v. Clinch* (1661) 1 Sid. 52 at 53, *per* Twisden J.). [Reproduced in the accompanying notebook at Tab 31.]

knowledge.⁴²

Statute: Several Acts of Parliament contain mandatory directions to the courts to take judicial notice and one of these relates explicitly to statutes themselves.⁴³ Section 9 of the Interpretation Act of 1889 provides that every Act passed after 1850 shall be a public Act and shall be judicially noticed as such, unless the Act in question expresses the contrary.⁴⁴ Judges take notice of the contents of enactments, and no pleading or evidence of the public Act is required.⁴⁵

By statute, all judges are to take notice of the signature on official documents of any of the equity or common law judges of the superior courts at Westminster.⁴⁶ Also by statute, courts-martial must take judicial notice of all matters of notoriety and of all other matters of which judicial notice would be taken in a civil court in England.⁴⁷ When Acts of Parliament refer to a state of war to which England is a party, the courts have held themselves obligated to notice the state of war. Further, many

⁴² See *id.* at 63. In 1958, Nokes wrote that there is “modern authority” describing the practice of taking judicial notice of *lex fori* for common law (citing *Brandao v. Barnett* (1846) 12 Cl. & F. 787, at pp. 806, 810, H.L.), statute law (citing the *Interpretation Act*, 1889, s. 9) and some statutory rules (citing the *Bankruptcy Act*, 1914, s. 132, with reference to the Bankruptcy Rules, 1952, as amended). See *id.* at 61. [Reproduced in the accompanying notebook at Tab 31.]

⁴³ See *id.* at 63. [Reproduced in the accompanying notebook at Tab 31.]

⁴⁴ See *id.* at 64. [Reproduced in the accompanying notebook at Tab 31.]

⁴⁵ See *id.* at 63. [Reproduced in the accompanying notebook at Tab 31.]

⁴⁶ See Nokes, *supra* note 40, at 65 (citing Evidence Act, 1845, s.2). [Reproduced in the accompanying notebook at Tab 31.]

⁴⁷ See *id.* (citing Army Act, 1955, s. 99 (3); Air Force Act, 1955, s. 99 (3)). [Reproduced in the accompanying notebook at Tab 31.]

of the matters noticed as “notorious,” such as coinage or weights and measures, owe their notoriety in part to their establishment or regulation by statute.⁴⁸

Common knowledge: Judicial notice of non-statutory elements of the law is generally founded on the judge’s knowledge and memory, which can be refreshed if necessary by reference to records, law reports and books of authority. The foundation for judicial notice of matters of fact requires no training in the law; it is based on knowledge and experience common to judge and jurors.⁴⁹ For example, if the fact is relevant, everyone in court will assume rain falls, the sun sets in the west, etc. Facts falling into this category are often called “notorious” facts. However, when a fact is not so obviously common knowledge of humankind, it may be necessary for counsel to request the court to take judicial notice. In that situation, it is up to the judge to determine whether a fact is notorious.⁵⁰

There are numerous reported cases in England in which judges have or have not taken notice of particular facts. Three considerations appear to affect the decision.⁵¹

First, common knowledge differs with time and place; so a fact which was notorious a century ago may no longer be the appropriate subject of notice, and a fact commonly known in one locality may be unknown in another. Secondly, a fact may be common knowledge only among a class of the community, such as those interested in a particular sport; and the judge who provokes lay ribaldry by inquiring “Who is So-and-so?” may be merely indicting that the nature of the name of a popular footballer is not the proper subject of notice. Thirdly, though a judge may consider a fact to be the appropriate subject of notice, he may not himself remember or profess to know it, and therefore he

⁴⁸ *See id.* at 65-66. [Reproduced in the accompanying notebook at Tab 31.]

⁴⁹ *See id.* at 66. [Reproduced in the accompanying notebook at Tab 31.]

⁵⁰ *See id.* [Reproduced in the accompanying notebook at Tab 31.]

⁵¹ *See id.* [Reproduced in the accompanying notebook at Tab 31.]

may take steps to acquire the necessary knowledge.”⁵²

Acquired Knowledge: A primary concern in the law of judicial notice is the *sources* from which knowledge may be acquired. Private or personal knowledge that is not shared by a large percentage of the community at large should not be used as a foundation for notice by a court. And in general, a court should not act on evidence that it has heard in a previous case.⁵³ There are, however, exceptions to this general rule. One exception is when counsel requests that judicial notice of a fact be taken, and he provides appropriate sources of information, such as repeated proof of a matter in earlier cases, written and oral statements to the court and works of reference.⁵⁴ Adequate proof from prior cases before the same or another court has been regarded as a ground for taking judicial notice of custom, usage or practice in English courts.⁵⁵

A judge may base judicial notice on written or oral statements in at least two types of cases. First, as an alternative to repeated offers of proof in recognizing a custom, the courts have acted on the certificates of responsible officials, such as the Recorder of London. Once notice of a custom has been taken, it should be taken again, and “may apparently be founded not on the certification but on the law

⁵² Nokes, *supra* note 40, at 66-67. [Reproduced in the accompanying notebook at Tab 31.]

⁵³ *See id.* at 67 (citing *Van Beda v. Silberbauer* (1869) L.R. 3 P.C. 84, 99; *Robinson v. Robinson* (1877) 2 P.D. 75; *Owen v. Nicholl* [1948] 1 All E.R. 707, C.A.; and *Roper v. Taylor’s Central Garages (Exeter) Ltd.* [1951] 2 T.L.R. 284, D.C.). [Reproduced in the accompanying notebook at Tab 31.]

⁵⁴ *See id.* at 67-68. [Reproduced in the accompanying notebook at Tab 31.]

⁵⁵ *See id.* at 68, n.65 (citing cases demonstrating a custom proved in a lower court may be noticed in an appellate court: *Bruce v. Wait* (1840) 1 Man. & G. 1 at p. 25; *George v. Davies* [1911] 2 K.B. 445, D.C.). [Reproduced in the accompanying notebook at Tab 31.]

of the report of an earlier case.”⁵⁶ Second, if there is doubt regarding matters within the sphere of the executive government that must be noticed, a judge can obtain information from an appropriate person, usually a Minister, and the information is often furnished in writing. Such matters noticed this way include the recognition of foreign rulers, their ambassadorial staff, the continuance of a state of war to which the country is a party, and the area of the Monarch’s jurisdiction.⁵⁷

Whether a court establishes notice of fact or law, it does so without evidence, and it therefore acts as a substitute for evidence in cases where evidence would normally be appropriate. There is some debate whether judicially noticed facts are conclusive or merely prima facie evidence, which may be rebutted by actual evidence or otherwise.⁵⁸ Under F.R.E. 201 in the United States, both parties are permitted to argue the propriety of taking judicial notice before the judge but are prohibited from offering evidence concerning the noticed fact at trial.⁵⁹

3. Judicial Notice in Australia

Statute governs the taking of several types of judicial notice in Australia: matters of law, matters of common knowledge, and certain Crown certificates.⁶⁰ The provision governing judicial notice of matters of common knowledge states:

⁵⁶ *Id.* at 69, n.75 (citing *Blacquiere v. Hawkins* (1780) 1 Doug. 378; *Bruin v. Knott* (1843) 12 Sim. 436, on appeal, 1 Ph. 572). [Reproduced in the accompanying notebook at Tab 31.]

⁵⁷ *See id.* at 69. [Reproduced in the accompanying notebook at Tab 31.]

⁵⁸ *See Nokes, supra* note 40, at 70. [Reproduced in the accompanying notebook at Tab 31.]

⁵⁹ *See* FED. R. EVID. 201(e). [Reproduced in the accompanying notebook at Tab 6.]

⁶⁰ *See* Division 1, Judicial Notice s. 120 and 121, Evidence Bill 1987 (Austl.). [Reproduced in the accompanying notebook at Tab 8.]

- (1) Proof shall not be required about knowledge that is not reasonably open to question and is -
- (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The Judge may acquire knowledge of that kind in any manner that the Judge thinks fit.
- (3) The court (if there is a jury, including the jury) shall take knowledge of that kind into account.
- (4) The Judge shall give a party such opportunity to make submissions, and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.⁶¹

4. Judicial Notice in Canada

The approach to judicial notice in Canada is similar to that of the United States, England and Australia. Three types of judicial notice are recognized: judicial notice of adjudicative facts, judicial notice of legislative facts and judicial notice of the “social framework” or the general social context in which the law as interpreted is operating.⁶² Within the category of adjudicative facts, judicial notice is taken of facts which are indisputable and notorious in the community, such as “the location and configuration of major roads in the area where the case is being tried, the ethnic composition of a nearby community, the location and number of drinking establishments in a nearby community, that “Mitchell” is a common surname in a nearby community, that highway tractors can be worth in the range of \$100,000, that head injuries can produce symptoms of impairment, that DNA is the essential building block of the human cell, and that cigarettes are more expensive in Manitoba than Ontario”

⁶¹ Division 1, Judicial Notice s.121, Evidence Bill 1987 (Austl.) [Reproduced in the accompanying notebook at Tab 8.]

⁶² See Paciocco, *supra* note 13, at 36. [Reproduced in the accompanying notebook at Tab 30.]

(citations omitted).⁶³

The Ontario Court of Appeal has acknowledged judges' discretion to refuse to take judicial notice of an adjudicative fact. In *R. v. Zundel*, the Court held that the trial court was correct to refuse to take judicial notice of the holocaust, specifically, "that millions of Jews were annihilated in Europe during the years 1933 to 1945 because of a premeditated policy of the hierarchy of Nazi Germany, and that means of annihilation included mass shootings of Jews and their deliberate starvation, privation and death by gassing."⁶⁴ The truth of that proposition was an ultimate issue in the case and if the court had taken judicial notice of it, the accused would have been prevented from presenting his defense. Further, the judge would have been required to direct the jury to accept the proposition fact as true, thereby prejudicing the defense of the accused that he honestly did not believe it.⁶⁵

Interestingly, while the court adopted the view that there is discretion to take judicial notice, it also accepted the notion that before a court can take judicial notice, the facts must be so notorious as to be indisputable, and that once a judge decides to take judicial notice, counter proof, being pointless, is not admissible.⁶⁶ One writer suggests that a problem with this approach is that a court will take judicial

⁶³ *Id.* at 38-39. Although uncommon, Canadian courts may also take judicial notice of facts that are not indisputable under the approach espoused by J.B. Thayer in his classic work, *A Preliminary Treatise on Evidence at the Common Law*, first published in 1898. In this approach, judges have discretion to take notice of a fact when there is strong enough basis in human experience to believe that a fact is true. *See id.* at 39. [Reproduced in the accompanying notebook at Tab 30.]

⁶⁴ *See id.* at 40 (quoting *R. v. Zundel*, (1987), 31 C.C.C. (3d) 97, 56 C.R. (3d) 1 at p. 54 O.R. (2d) 129 (C.A.), leave to appeal to S.C.C. refused 56 C.R. (3d) xviii, 61 O.R. (2d) 588n.). [Reproduced in the accompanying notebook at Tab 30.]

⁶⁵ *See id.* at 40. [Reproduced in the accompanying notebook at Tab 30.]

⁶⁶ *See id.* [Reproduced in the accompanying notebook at Tab 30.]

notice of a fact “that stands in the face of that which is notorious and indisputable,” thereby undermining confidence in the administration of justice.⁶⁷ A better approach, it is suggested, is that trial judges not have the discretion to refrain from taking judicial notice of notorious, indisputable facts. Instead, before they take judicial notice, they should notify opposing counsel of their intention to do so, allowing opposing counsel the chance to attempt to persuade the court not to take judicial notice.⁶⁸

Finally, Canadian judges may not rely on personal knowledge when resolving adjudicative facts if the fact is not notorious and there is no evidence presented about the fact.⁶⁹

Difficulty can arise when judges rely on social framework facts derived from specialized literature or published, expert papers when they are deciding adjudicative facts.⁷⁰ For example, a report (the *Badgely Report*) was cited by the Supreme Court on a number of occasions to provide an understanding of the social framework within which the law operates in order to resolve factual

⁶⁷ *Id.* at 40. [Reproduced in the accompanying notebook at Tab 30.]

⁶⁸ *See Paciocco, supra* note 13, at 40. [Reproduced in the accompanying notebook at Tab 30.]

⁶⁹ Thus, in *R. v. W.S.*, the trial judge erred when he found that the native complainant’s evidence was not rendered less credible because of difficulties that occurred when she was recounting the allegation in her testimony. The trial judge considered these difficulties to rise from the “compelling cultural disinclination to relive past events of an unpleasant nature” related to her aboriginal ethnicity. Even if the judge had received cultural training or based his conclusion on judicial experience, no evidence was presented about the cultural disinclination, and the fact was non-notorious, thus it was not proper to take judicial notice of it. *See id.* at 41. [Reproduced in the accompanying notebook at Tab 30.]

⁷⁰ *See id.* at 50. [Reproduced in the accompanying notebook at Tab 30.]

questions of law.⁷¹ However, in another case, perhaps mistakenly misled by the previous Supreme Court references to the report, a trial judge relied upon the report to adjudicate *factual* issues between the parties.⁷² The fact used against the defendant on a *factual issue* that was *particular to him* was not a notorious and indisputable one. As a result, the defendant's rights under the accusatory system were compromised, as he was not allowed to question the basis of the evidence or to dispute it.⁷³

One writer suggests that to avoid such a situation, if a judge is to consult materials from which to take judicial notice of social framework evidence, he or she should confine notice to materials submitted by the parties. This approach avoids the problem that can arise when the judge conducts her own research into social framework facts, leaving the parties with little or no opportunity to respond.⁷⁴

C. Judicial Notice in the ICTR/ICTY

The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) are *sui generis* institutions which have their own rules of procedure

⁷¹ See *id.* (citing *R. v. L. (W.K.)* (1991) 64 C.C.C. (3d) 312, 6 C.R. (4th) 1 at p. 10 [1991] 1 S.C.R. 1091 (study was used to confirm common delay in reporting sexual offenses) and *R. v. B. (G.)* (1990) 56 C.C.C. (3d) 161 at pp. 169-70, 77 C.R. (3d) 327, [1990] 2 S.C.R. 3. (court cited the report for its general criticism of the corroboration rule relating to unsworn evidence of children)). [Reproduced in the accompanying notebook at Tab 30.]

⁷² See *id.* at 51 (citing *R. v. Desaulniers*, (1994) 93 C.C.C. (3d) 371, 65 Q.A.C. 81 (C.A.), leave to appeal to S.C. refused 93 C.C.C. (3d) vi, 68 Q.A.C. 298*n.*, 185 N.R. 159*n.*) [Reproduced in the accompanying notebook at Tab 30.]

⁷³ See *id.* [Reproduced in the accompanying notebook at Tab 30.]

⁷⁴ See *id.* [Reproduced in the accompanying notebook at Tab 30.]

that are not imported from any single national system.⁷⁵ The Tribunals have taken a hybrid civil/common law approach toward admission of evidence. By statute, the ICTR uses the same rules of evidence as does the ICTY.⁷⁶ In contrast with the United States Federal Rules of Evidence, which number several dozen rules, the ICTR has only 13 evidentiary rules to follow, Rules 89-98 *bis*.⁷⁷ The rules have been described as “simple,” “skeletal” and “unelaborate.”⁷⁸ Rule 94, the rule on judicial notice, reads:

(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

⁷⁵ See Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 80 (1999) (quoting *Prosecutor v. Blaskic*, Jan. 21, 1998). [Reproduced in the accompanying notebook at Tab 32.]

⁷⁶ Article 14 of the Statute of the International Tribunal for Rwanda states: The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary. [Reproduced in the accompanying notebook at Tab 1.]

⁷⁷ See Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, Part 6 (www.icttr.org, visited March 19, 2001). Several other rules cover production of evidence before the commencement of trial proceedings (Rules 66-70) and the presentation of evidence during proceedings before the Chambers (e.g., Rule 85). Rule 71 governs the taking of depositions. [Reproduced in the accompanying notebook at Tab 2.]

⁷⁸ See Dixon, *supra* note 2, at 82-84. [Reproduced in the accompanying notebook at Tab 27.]

current proceedings.

The rule thus requires that judges take notice of facts that are common knowledge, rather than requiring parties to submit evidence to prove such a fact. There is no attempt to categorize judicially noticed facts as adjudicative, legislative or otherwise; merely as those that are “common knowledge.” Rule 94 is intended to avoid wasting time by requiring the parties to establish obvious facts, such as the number of hours in a day.⁷⁹ Under the Nuremberg Charter, which governed the trials of Nazi war criminals in Nuremberg, the tribunal was required to take judicial notice of official government documents and United Nations reports, including those relating to the investigation of war crimes.⁸⁰

Under Article 15 of the ICTY Statute, which is essentially identical to Article 14 of the ICTR Statute, the Tribunal’s judges as a group are responsible for adopting rules of evidence.⁸¹ The ICTY judges have actively modified the rules since they were first adopted in February 1994. By July 1995 - just over a year following their initial adoption -- 56 amendments had been made and two new rules had been adopted. As of July 1998, 13 sessions had been held to revise the rules.⁸² Rule 94 was one

⁷⁹ See 1 MICHAEL P. SCHARF AND VIRGINIA MORRIS, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 571 (1998). [Reproduced in the accompanying notebook at Tab 20.]

⁸⁰ *Id.* [Reproduced in the accompanying notebook at Tab 20.]

⁸¹ “The judges of the International Tribunal shall adopt rules and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.” Article 15, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. <http://www.un.org/icty/basic/statut/statute.htm> (visited March 4, 2001). [Reproduced in the accompanying notebook at Tab 4.]

⁸² See Scott T. Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT’L. LEGAL PERSP. 111, 172

of those amended in July 1998, with the addition of Section (B).⁸³ By December 2001, there had been 18 separate sessions in which the Judges made amendments to the Rules of Procedure and Evidence.⁸⁴

Judges in the ICTY trial chambers have indicated they are charting a course somewhere between the common law tradition of controlling the admission of evidence and the civil law tradition (which does not involve potentially prejudicing a jury) of allowing virtually any information to be presented.⁸⁵ The court has said that the conduct of a trial is not similar to an adversarial trial, but is

(1998). [Reproduced in the accompanying notebook at Tab 33.]

⁸³ Under Rule 6, Amendment of the Rules, proposals for amendment of the Rules may be made by a judge, the prosecutor or the registrar and shall be adopted if agreed to by at least nine judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges. Alternately, an amendment to the Rules may be adopted if it is unanimously approved by the judges.

There is no public record of the judges' deliberations regarding making amendments to existing rules and promulgating new rules. However, a July 1998 press release for the ICTY announcing the judges' adoption of six new rules and amendments to 25 other rules states that the judges' deliberations for these changes were informed by two International Criminal Trial Management Workshops held at the Tribunal, a proposal prepared by the Office of the Prosecutor, and papers submitted by defense counsel who have experience with the Tribunal. Judge Gabrielle Kirk McDonald, President of the ICTY, stated that the objective of the judges in making the amendments was to be more expeditious, . . . "to utilize procedures from both the common law and civil law to make our trials more efficient This requires more efficiently disposing of pre-trial matters. And we must avoid unnecessary delays. But although we are looking to make our trials more expeditious, they must be fair. We should not force ourselves into a grand prix race. Our goal is not to try cases with lightening speed, but to conduct trials making efficient use of court time." *ICTY Judges Successfully Conclude Review of Judicial Procedures* www.un.org/icty/pressreal/p333-e.htm (16 July 1998) (visited Feb. 15, 2001). [Reproduced in the accompanying notebook at Tab 37.]

⁸⁴ See Amendments to The Rules of Procedure And Evidence, <http://www.un.org/icty/basic/rpe/IT183e.htm> (visited March 4, 2001). [Reproduced in the accompanying notebook at Tab 5.]

⁸⁵ See Murphy, *supra* note 75, at 80. [Reproduced in the accompanying notebook at Tab 32.]

moving toward a more hybrid system of adversarial and inquisitorial traditions.⁸⁶ Despite stating they are taking a middle course, the trial chambers have generally not excluded relevant evidence, including hearsay evidence. Thus, the basic rule of evidence applied by the trial chambers is to “‘admit any relevant evidence which it deems to have probative value’ (ICTY Rule 89(c)), unless there is a specific reason to question its reliability (ICTY Rule 95).”⁸⁷

Increasingly, the ICTY is allowing the introduction of expert evidence by expedited means. In the initial ICTY trials of *Tadic* and *Blaskic*, experts made extensive testimony from the stand on the history of the conflict in Yugoslavia, past and present, as well as on the civilian and military command structure of the various warring factions during the 1990s.⁸⁸ Now that they have established a certain base of knowledge of these factors, the ICTY judges are “‘more interested in taking account of such information through either judicial notice (ICTY Rule 94) or agreement of the parties, in which case written testimony alone is introduced (ICTY Rule 94 bis).”⁸⁹ In the ICTR case of *Prosecutor v. Akayesu*, the Rwandan Tribunal took judicial notice that notions of ethnicity can be constructed.⁹⁰

⁸⁶ See *id.* (citing *Prosecutor v. Blaskic* (Jan. 21, 1998) and *Prosecutor v. Tadic* (August 5, 1996)). [Reproduced in the accompanying notebook at Tab 32.]

⁸⁷ *Id.* [Reproduced in the accompanying notebook at Tab 32.]

⁸⁸ See *id.* at 81. [Reproduced in the accompanying notebook at Tab 32.]

⁸⁹ *Id.* [Reproduced in the accompanying notebook at Tab 32.]

⁹⁰ See ICTR-96-4-T, at 81-83 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998). www.un.org/ictt/english/judgements/akayesu.html. [Not included in accompanying notebook.]

III. Differences Between Civil and Common Law That are Pertinent to the Taking of Judicial Notice

A. Introduction

There are two major legal traditions throughout the world: civil law and common law.⁹¹ A legal tradition is “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.”⁹² A “legal tradition” differs from a “legal system.” A legal system is “an operating set of legal institutions, procedures and rules. In this sense there are one federal and fifty state legal systems in the United States, separate legal systems in each of the other nations, and still other distinct legal systems in such organizations as the European Economic Community and the United Nations.”⁹³ Likewise, there are distinct legal systems among nations that can be grouped into categories of civil law or common law

⁹¹ As recently as 1989, it was common to identify a third major legal tradition: socialist law. With the decline of Soviet socialism, socialist law is no longer considered a major legal tradition, but some version of it still persists in China, North Korea, Vietnam and Cuba. It is expected that former states in the Soviet empire will return to the civil law tradition, which was in place prior to the Soviet expansion. *See* JOHN HENRY MERRYMAN, DAVID S. CLARK AND JOHN O. HALEY, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 10 (1994). [Reproduced in the accompanying notebook at Tab 21.]

⁹² *See* JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 2 (1969). [Reproduced in the accompanying notebook at Tab 22.]

⁹³ *See id.* at 1. [Reproduced in the accompanying notebook at Tab 22.]

traditions.

The civil law tradition is older, more widespread, and more influential than the common law tradition.⁹⁴ It is the dominant legal tradition in most of Western Europe, all of Central and South America, many parts of Asia and Africa and even a few enclaves of the common law world, such as Louisiana, Quebec and Puerto Rico.⁹⁵ The civil law was the tradition familiar to the Western European scholar-politicians who pioneered the development of international law.⁹⁶ “It is difficult to overstate the influence of the civil law tradition on the law of specific nations, the law of international organizations, and international law.”⁹⁷

Although it is a much younger tradition, the common law tradition spread to different parts of the world during the age of colonialism as the British Empire expanded. It is the legal tradition in force in Great Britain, Ireland, the United States, Canada, Australia and New Zealand, and has been influential on the law of many nations in Asia and Africa.⁹⁸

The civil and common law traditions are not the only ones in force throughout the world; they are merely the predominant legal traditions. For example, many countries in North Africa, the Middle

⁹⁴ *See id.* at 3. The date of origin of the civil law tradition is considered to be 450 B.C., the supposed date of publication of the XII Tables in Rome. In contrast, the date of origin of the common law tradition is viewed as 1066 A.D., when the Normans defeated the defending natives at Hastings and conquered England. *See id.* [Reproduced in the accompanying notebook at Tab 22.]

⁹⁵ *See id.* [Reproduced in the accompanying notebook at Tab 22.]

⁹⁶ *See id.* [Reproduced in the accompanying notebook at Tab 22.]

⁹⁷ *Id.* [Reproduced in the accompanying notebook at Tab 22.]

⁹⁸ *See MERRYMAN, supra* note 92, at 4. [Reproduced in the accompanying notebook at Tab 22.]

East and Asia follow a Moslem legal tradition. India follows a tradition that combines Hindu law, other native legal influences and the common law of England. And in Japan, a legal tradition that is in no way related to the civil or common law has influences of civil and common law traditions that came into force due to events pre- and post-World War II.⁹⁹

B. Source of Law

One of the fundamental differences between the civil and common law traditions is the source of law. In the civil law tradition, law is contained primarily in statutory codes, and, to a lesser extent, in regulations and custom.¹⁰⁰ Courts are not in the business of making law; they apply it. In the common law tradition, law is embodied in judicial opinions. The common law doctrine of *stare decisis* -- which says similar cases should be decided similarly -- is inconsistent with the civil law tradition, which adheres to the strict separation of powers whereby legislatures make, interpret and modify laws, while judges apply it.¹⁰¹

C. The Role of The Judge

The role and reputation of the judge are markedly different in common law and civil law countries. In the common law world, where the legal tradition was originally created and has grown and developed in the hands of judges, the judge is somewhat of a culture hero. People know the names

⁹⁹ *See id.* at 5-6. [Reproduced in the accompanying notebook at Tab 22.]

¹⁰⁰ *See id.* at 25. Merryman points out that the common observation that civil law systems are codified statutory systems while common law systems are based in large part on judicial decisions oversimplifies and misrepresents the basic differences between the two traditions, but the general distinction is useful to the discussion. *See id.* at 27. [Reproduced in the accompanying notebook at Tab 22.]

¹⁰¹ *See id.* at 24. [Reproduced in the accompanying notebook at Tab 22.]

of great common law judges: Coke, Mansfield, Marshall, Holmes, Brandeis, Cardozo. Common law judges reason from case to case, carefully building a body of law that binds subsequent judges, through the doctrine of *stare decisis*, to decide similar cases similarly.¹⁰² Judges are powerful figures: they can hold legislation invalid if they decide it is unconstitutional. They have broad interpretive powers. In the United States, in particular, the phrase “judicial supremacy” is a fair description of the common law system.¹⁰³

In the common law world, the judge holds a position of prestige and respect, and often ascends to the bench -- either through appointment or election -- on the basis of his or her reputation as an excellent lawyer and sometimes from political influence. In many instances, appointment or election to the bench comes relatively late in life, often as a crowning achievement.¹⁰⁴

In contrast, in the civil law world, a judge is a civil servant, a functionary.¹⁰⁵ In general, a judicial career is one of several possibilities immediately open to a student graduating from law school, or completing practical training. If interested in a judicial career, a recent law school graduate will take a state-administered exam and, if successful, become a junior judge. Lateral entry into the judiciary is rare. The great majority of judicial offices, even at the highest level, are filled from the ranks of the professional judiciary. Judges in the highest courts receive public respect, but it is the type of respect

¹⁰² *See id.* at 35. [Reproduced in the accompanying notebook at Tab 22.]

¹⁰³ *See id.* at 35. [Reproduced in the accompanying notebook at Tab 22.]

¹⁰⁴ *See* MERRYMAN, *supra* note 92, at 35. [Reproduced in the accompanying notebook at Tab 22.]

¹⁰⁵ *See id.* at 36. [Reproduced in the accompanying notebook at Tab 22.]

earned and paid to persons in high positions elsewhere in civil service.¹⁰⁶ The judge is a sort of “expert clerk” who is presented with a fact situation. The judge must find the pertinent legislative provision and apply it to the situation. The image of a judge in the civil law is not one of culture hero, but rather that of a civil servant who performs important but essentially uncreative functions.¹⁰⁷

In civil law states, the doctrine of separation of powers reserves for the legislature the power to make law, which includes interpreting statutes and, when necessary, holding statutes illegal. Unlike common law countries, in civil law countries the power to hold statutes illegal is a legislative, not judicial, power. This denies courts an interpretive function, and instead refers problems of statutory inquiry to the legislature.

D. Differences in Criminal Law Adversarial and Inquisitorial Systems

Criminal proceedings typically afford defendants greater protections than do civil proceedings because of the high stakes at risk: the potential loss of one’s liberty. There are some general but significant differences in the nature of criminal proceedings between civil law and common law systems. Because the ICTR blends approaches from the two systems, it is worth noting some of the more significant differences.

Criminal procedure in the civil law tradition is often called “inquisitorial,” while in the common law world it is called “accusatorial” or “adversarial.”¹⁰⁸ The typical criminal proceeding in a civil law system can be divided into three basic parts: the investigating phase, the examining phase, and the

¹⁰⁶ *See id.* [Reproduced in the accompanying notebook at Tab 22.]

¹⁰⁷ *See id.* at 37-38. [Reproduced in the accompanying notebook at Tab 22.]

¹⁰⁸ *See id.* at 134. [Reproduced in the accompanying notebook at Tab 22.]

trial.¹⁰⁹ A public prosecutor oversees the investigative phase and plays an active role in the examining phase. The examining phase is overseen by an examining judge or magistrate.¹¹⁰ The examining phase is primarily written, not oral. The magistrate controls the nature and scope of this phase. The court is expected to investigate the matter thoroughly. It may, either on its own motion or at the request of one of the parties, question witnesses directly. Cross-examination is a rarity.¹¹¹ There is no rule excluding hearsay and trials in absentia are permitted.¹¹²

The magistrate will prepare a complete written record or dossier so that at the close of the examining phase, all relevant evidence is in the record. If the examining judge concludes a crime was committed and the accused is the perpetrator, the case proceeds to trial.¹¹³ The evidence taken and the record made are provided to the accused and his counsel, as well as to the prosecution. The function of the trial is to present the case to the trial judge and jury, before whom the prosecutor and defense counsel argue their cases.¹¹⁴ The trial is a public event.

Under the adversarial or common law system, in contrast, the indictment contains only a

¹⁰⁹ *See id.* at 137. [Reproduced in the accompanying notebook at Tab 22.]

¹¹⁰ In Germany and Italy, the examining judge has been abolished and most of the examining judge's powers now reside with the prosecutor. *See* RALF ROGOWSKI ed., *CIVIL LAW* xvi (1996). [Reproduced in the accompanying notebook at Tab 23.]

¹¹¹ *See* MICHAEL P. SCHARF, *BALKAN JUSTICE* 6 (1997). [Reproduced in the accompanying notebook at Tab 24.]

¹¹² *See id.* [Reproduced in the accompanying notebook at Tab 24.]

¹¹³ *See* MERRYMAN, *supra* note 92, at 137. [Reproduced in the accompanying notebook at Tab 22.]

¹¹⁴ *See id.* at 138. [Reproduced in the accompanying notebook at Tab 22.]

summary of the facts alleged. Evidence is presented in open court by lawyers who examine and cross-examine witnesses. The accused has the right to confront his accusers, a right that limits the use of hearsay evidence and ex parte affidavits and requires the presence of the accused at the trial.¹¹⁵

Most European, or “continental,” countries follow the civil law tradition, and most split the law of evidence, statutes and doctrine between criminal procedural law and civil procedural law.¹¹⁶ In some European countries, such as the Netherlands and Germany,¹¹⁷ there are no jury trials in criminal cases. Judges in countries with no jury trials, therefore, are responsible not only for deciding questions of law, but are also fact-finders and decision-makers in questions of proof.¹¹⁸ The countries in the continental systems take a different attitude toward evidence than do countries in the common law systems.¹¹⁹ In some European countries, the emphasis in the regulation of evidence is not put on the presentation of evidence in the trial, but on the decision-making process thereafter.¹²⁰ Where the

¹¹⁵ See Scharf, *supra* note 111, at 6-7. [Reproduced in the accompanying notebook at Tab 24.]

¹¹⁶ See J. F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 AM. J. COMP. L. 299, 301 (1993). [Reproduced in the accompanying notebook at Tab 34.]

¹¹⁷ See Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VIRGINIA LAW REVIEW 239 (1970), reprinted in JOHN HENRY MERRYMAN AND DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 706 (1978). [Reproduced in the accompanying notebook at Tab 25.]

¹¹⁸ See Nijboer, *supra* note 116, at 302. [Reproduced in the accompanying notebook at Tab 34.]

¹¹⁹ See *id.* at 305. [Reproduced in the accompanying notebook at Tab 34.]

¹²⁰ See *id.* at 302. [Reproduced in the accompanying notebook at Tab 34.]

emphasis is not on presentation, concepts such as admissibility, relevancy, and materiality are to a certain extent meaningless.¹²¹

The ICTY's Rules of Procedure and Evidence, which are followed by the ICTR, were modeled largely upon a draft submitted by the United States, and therefore reflect more of the American adversarial system rather than the inquisitorial system common to civil law countries.¹²² As noted previously, the doctrine of judicial notice conflicts somewhat with the adversarial American justice system, whereby it is the judge's role to determine questions of law and it is the jury's role to determine questions of fact. However, F.R.E. 201, which regulates judicial notice of adjudicative facts in U.S. federal courts, requires the court in criminal cases to instruct the jury that it may, but is not required to, accept as conclusive any adjudicative fact judicially noticed. In the adversarial system -- which includes safeguards for defendants not found in many civil law systems, such as the right to confront witnesses and restrictions on admission of hearsay -- there seems to always be a possibility to refute the taking of judicial notice of adjudicative facts, whether in preliminary proceedings by the parties themselves or, in criminal cases, by the jury.

IV. Challenge for ICTR: Develop Its Own Approach to the Use of Judicial Notice

The challenge for the ICTR is to adopt an approach to the use of judicial notice that balances

¹²¹ That does not mean that all evidence would be admissible to form the basis of a valid decision; there are decisional exclusionary rules. For example, a defendant cannot be convicted on his own confession without corroboration. *See id.* [Reproduced in the accompanying notebook at Tab 34.]

¹²² Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U.J. INT'L & POL. 167, 171. [Reproduced in the accompanying notebook at Tab 35.]

the need to use court resources efficiently, while carefully affording due process protections to defendants. “The ultimate problem of judicial notice is the highly practical one of accomplishing two purposes that are often difficult to reconcile with each other - facilitating a tribunal’s access to the facts, and assuring that parties are given an appropriate opportunity to apply their testing processes to the facts that influence either the findings or the decision.”¹²³

Due to its peculiar blend of inquisitorial and adversarial procedure, the ICTR has the freedom to pick and choose evidentiary practices that evoke the spirit of the Statute of the International Tribunal for Rwanda. The Statute, like the Tribunal’s Rules of Evidence, combine inquisitorial and adversarial system elements. For example, there are no jury trials, and the Tribunal functions as an examining magistrate in the tradition of the inquisitorial systems, but, as in an adversarial system, the accused has the right to be present at his trial and to cross-examine witnesses against him.¹²⁴

Under Rule 94 the Tribunal clearly is authorized, and arguably mandated, to take judicial notice of facts that are common knowledge. Less clear is the standard to be applied in determining what is common knowledge. Further, to what extent may parties dispute what constitutes common knowledge? Does the Tribunal, as an international organ, have any more or less leeway in taking judicial notice than a domestic court? In the *Tadic* case tried in the ICTY, the Prosecution made a lengthy submission on judicial notice in international law in the hearings before the Appeals Chamber in an interlocutory appeal on jurisdiction (IT-94-1-AR72). The arguments made warrant consideration

¹²³ Davis, *supra* note 11, at 984. [Reproduced in the accompanying notebook at Tab 29.]

¹²⁴ See Article 20, Statute of the International Tribunal for Rwanda. [Reproduced in the accompanying notebook at Tab 1.]

here.

The Prosecutor mentioned that the International Court of Justice is not bound by technical rules of evidence as are found in many domestic systems. For example, rules such as the common law best evidence rule are viewed as not appropriate to litigation between governments.¹²⁵ However, the Prosecutor suggested that it is “necessary for this Tribunal as a criminal tribunal to be perhaps more conservative with regard to judicial notice in a criminal tribunal than the ICJ might be with regard to civil litigation between governments. Governments can look after themselves a lot more easily than accused who appear in criminal courts.”¹²⁶ The Prosecutor suggested that the ICTY take judicial notice of facts it considers notorious in the context in which it is adjudicating, namely, the context of the former Yugoslavia.¹²⁷ The Prosecutor also urged the Tribunal to take judicial notice of United Nations documents, resolutions of the Security Council and statements made by the President of the Security Council regarding the former Yugoslavia at the relevant time of the Tribunal’s jurisdiction.¹²⁸

The main decision in the appeal did not address the issue of judicial notice. A separate opinion

¹²⁵ See Prosecutor, Transcript of Hearing, 7 September 1995, 107-110, reprinted in JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 310 (1998). [Reproduced in the accompanying notebook at Tab 26.]

¹²⁶ *Id.* [Reproduced in the accompanying notebook at Tab 26.] The International Court of Justice does not have jurisdiction to prosecute persons for criminal offenses. It focuses primarily on disputes regarding the States and State-like entities. See Dixon, *supra* note 2, at 84. [Reproduced in the accompanying notebook at Tab 27.]

¹²⁷ See Prosecutor, Transcript of Hearing, 7 September 1995, 107-110, reprinted in JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA 310 (1998). [Reproduced in the accompanying notebook at Tab 26.]

¹²⁸ See *id.* [Reproduced in the accompanying notebook at Tab 26.]

by Judge Sidhwa did not directly address the Prosecutor's substantive suggestions for taking judicial notice, but it chided the Trial Chamber for not following "some modicum of legal procedure grounded in method and logic" in determining the preliminary issue as to whether judicial notice of certain facts should be taken.¹²⁹

The Trial Chamber asked the parties how it should deal with questions of fact pertaining, among other things, to whether there was an international conflict in the Former Yugoslavia. The Chamber solicited input from the parties regarding how it should take judicial notice of certain facts, or if it should defer the whole issue to evidence before the Chamber. Apparently defense counsel failed to submit any reports or documents to the Trial Chamber supporting his position that no international conflict -- merely an internal conflict -- had occurred in Yugoslavia. The Prosecution submitted a mass of documents to support his position that there was an international conflict. In its judgment, the Trial Chamber referred to the voluminous materials but concluded the material did not amount to a basis for taking judicial notice.

Judge Sidhwa felt the whole process was flawed. He recommended that the matter be remanded and set out a process that he felt the Trial Chamber should have followed.

The first thing that the Trial Chamber should have done was to formally enquire from the accused whether he would be leading any evidence, oral or documentary. Had the appellant said "yes", the Trial Chamber should have enquired whether he would be leading oral evidence in particular. If the answer was still in the affirmative, the Trial Chamber should have considered whether it was appropriate for the motion to proceed, considering that the matter was a mixed question of law and fact, which could be dealt with along with the main case. Had he replied in the negative, the Trial

¹²⁹ See *Prosecutor v. Tadic*, IT-94-1 (2 October 1995) paragraph 121. [Reproduced in the accompanying notebook at Tab 13.]

Chamber should have called upon both the contesting parties to submit a statement of facts, with particulars as to how and by which documents they stood proved, and to admit or deny such facts and documents and to get such documents exhibited on which there was no dispute. At this stage it would have become known, after objections were recorded by either side, which facts were admitted and which documents could have been exhibited as proved or retained for presumptive proof and which had to be rejected Only then the motion should have been allowed to proceed. It was not proper for the Trial Chamber to have proceeded with the motion before these preliminaries had been attended to. The Trial Chamber erred in not adopting this minimal procedure which it should have adopted for an orderly and legal disposal of the case. To record that no documents were tendered by the parties in the judgement is not sufficient, till all this was formerly put on the record in the form of questions and answers.¹³⁰

Judge Sidhwa's suggested approach is a sound one. The process invites both parties to provide input into the taking of judicial notice. In a preliminary proceeding, parties are invited to provide materials and to make objections on the record over materials offered by the other side. Then it is up to the Trial Chamber to make the final determination regarding whether judicial notice will be taken and on what basis.

In addition to inviting input from the parties into the process of taking judicial notice, there are compelling reasons for the Tribunal to notify opposing counsel before it formally takes judicial notice of notorious, indisputable facts. Again, such transparency would give opposing counsel the opportunity to attempt to convince the court not to take judicial notice. Certainly it would be a misuse of the tribunal's time to require proof of certain "common knowledge" facts. However, there may be dispute about whether certain facts are indeed common knowledge, or there may be dispute over the veracity of certain legislative facts that are judicially noticed.

¹³⁰ *Id.* [Reproduced in the accompanying notebook at Tab 13.]

With no jury, the judges of the ICTR are finders of fact and they also act in a legislative capacity. There is nothing to forbid the Tribunal from taking judicial notice of legislative facts, nor is there anything to regulate the practice. It is sometimes difficult to tell when a court is taking notice of legislative facts. It might make sense for the ICTR to adopt the policy that it will announce when it is taking judicial notice of legislative facts that affect its decision, and/or announce the sources of the legislative facts it notices. Such transparency could inspire confidence in the judicial process and reduce the potential for abuse -- however inadvertent -- in the use of judicial notice. Given the international context of the Tribunal, with judges from different cultures and different perspectives presiding over the cases, as well as the fact it is a criminal tribunal, which warrants heightened due process protections, this may be particularly appropriate. As with adjudicative facts, or facts of common knowledge, counsel should have the opportunity to be apprised the court is taking judicial notice of legislative facts so that counsel may offer proof that counters those facts.

Compared with adjudicative facts, judges have wide latitude in taking notice of legislative facts. Courts are not restricted to using the evidence submitted to them by the parties when considering legislative facts. Courts are free to base their judgments on as much information as they can obtain, as the establishment of legislative facts has an impact that far transcends the litigant's interests. Davis writes that "[t]he rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case."¹³¹ A potential danger, however, is that because there are no restrictions on the

¹³¹ Kenneth Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942), *quoted in* JULIANE KOKOTT, THE BURDEN OF PROOF IN

practice, judges will rely on “subjective and uncontrolled assumptions” when taking judicial notice of legislative facts.¹³² The ICTR must take pains to avoid such a use of judicial notice.

Finally, it is sometimes difficult to determine whether a court is taking judicial notice of an adjudicative fact or a legislative fact. The distinction, however, is critical, particularly when courts rely on the decision in later cases as precedent. A previous decision taking judicial notice of a matter as a legislative fact is generally not authority for notice of the same matter as an adjudicative fact.

A failure to distinguish between the purposes for which courts take judicial notice of fact creates the danger that someone will assume that once an appellate court has at one time or another taken judicial notice of a fact for one purpose it is a proper subject for notice for a completely different purpose.¹³³

In summary, the judges of the ICTR should utilize the doctrine of judicial notice to expedite

COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW 34 (1998). [Reproduced in the accompanying notebook at Tab 18.]

¹³² JULIANE KOKOTT, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW 35 (1998). [Reproduced in the accompanying notebook at Tab 18.]

¹³³ *Chartrand v. Coos Bay Tavern*, 298 Or. 689, 694, 696 P.2d 513, 517 (1985). The underlying case concerned the liability of a tavern owner for selling alcoholic beverages to a patron who was visibly intoxicated and who, after leaving the tavern, got into a car wreck that injured the plaintiff. The Court found that previous cases where the court took judicial notice of the fact that in current times traveling by car to and from a tavern is commonplace and car accidents resulting from drinking are frequent constituted judicial notice of a "legislative fact." That fact was used to determine whether under the common law of Oregon a tavern owner may be sued on a theory of common law negligence in selling alcoholic liquor to a customer who is visibly intoxicated when it was known or should have been known that the customer would leave the premises and operate a vehicle. However, the fact “that in current times traveling by car to and from a tavern is commonplace and car accidents resulting from drinking are frequent are not the type of indisputable facts that qualify for judicial notice under [the Oregon Rule of Evidence concerning judicial notice of adjudicative facts]. Judicial notice cannot replace the need for proof of an essential element of the tort claim as alleged in this case, *i.e.*, proof that the defendant knew or should have known that the customer would drive a vehicle from the tavern.” *Id.* [Reproduced in the accompanying notebook at Tab 14.]

proceedings, but they must be constantly conscious of potential abuses or mere appearances of misuse of the doctrine in order to ensure fairness in the proceedings. Reference to the approaches adopted by various states to the use of judicial notice should be made so that over time, suitable approaches are developed to the taking of different types of judicial notice in the Tribunal.