
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIMES PROSECUTION PROJECT
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR

ISSUE: CAN GENOCIDE BE JUDICIALLY NOTICED

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2 credits

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"Thus for the time being I have sent to the East only my 'Death's Head Units' with the orders to kill without pity or mercy all men, women, and children of Polish race or language...Who still talks nowadays about the Armenians?"¹

Introduction and Summary of Conclusions

A. Issues

This memorandum addresses the issue of whether judicial notice of genocide can be taken by the judges of the International Criminal Tribunal for Rwanda. Aspects considered include the historical precedent of the taking of judicial notice by the International Military Tribunals following World War II, the recognition of genocide via judicial notice in various domestic courts, policy arguments for judicial notice of genocide, and whether any procedures for the further use of judicial notice proposed by the Secretary-Generals appointed 'Expert Group', should be adopted.

In addition, this memorandum reviews the use of judicial notice in several common law countries and discusses how Rule 94 has been utilized by several Chambers of the ICTR.

B. Summary of Conclusions

Genocide can be recognized by Judicial Notice Pursuant to Rule 94 of the ICTR.

Rule 94, concerning judicial notice, is not burdened by detail in terms of placing limitations on the use of judicial notice. The task is for the Tribunal is to implement the rules of

¹ Adolph Hitler to his Army commanders, August 22, 1939, referring to the Armenian genocide in Turkey 1915-1918 resulting in 1,500,000 deaths.

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 This goal can be achieved by adopting a liberal interpretation of Rule 94. By recognizing genocide via Rule 94 the court will help better facilitate critical judicial resources, and in addition help promote expediency in the judicial process. Historical precedent and further policy considerations also warrants the recognition of genocide by judicial notice.

Genocide Defined

Genocide is distinguishable from all other crimes by the motivation and intent behind it.³ It is a crime on a different scale from other crimes against humanity and implies an intention to completely exterminate a chosen group.⁴ Genocide is therefore viewed as both the gravest and greatest of the crimes against humanity.⁵ The term Genocide was created in 1943⁶ by a Jewish-

² Marea Beeman, *Judicial Notice* < <http://www.nesl.edu/center/wcmemos/2001/notice.pdf> > (accessed Apr. 3, 2002) (quoting 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 accompanying notebook at Tab 1].

³ Matthew Lippman, *The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide*, 3 *B.U. Int'l L. Rev.* 1 (1985), at 3 (quoting Alain Destexhe, *Rwanda and Genocide in the 20th Century* (New York University Press, New York 1995)). [Reproduced in accompanying notebook at Tab 2]

⁴ *Id.* [Reproduced in accompanying notebook at Tab 2]

⁵ *Id.* [Reproduced in accompanying notebook at Tab 2]

⁶ The impetus to recognize genocide as a distinct crime emerged as a reaction to the systematic mass murder of Jews and Gypsies, and the selective decimation of Poles and Slavic civilians in Nazi-controlled Europe during World War II. The mass murders of Jews and Gypsies were acts against intentionally discriminated and aggregated victims - acts not related to the goals of war as legitimated in international law and already criminalized by the Fourth Hague Convention of 1907 (quoting Helen Fein, *Discriminating Genocide From War Crimes: Vietnam And Afghanistan Reexamined*, 22 *Denv. J. Int'l L. & Pol'y* 29 (1993)) [Reproduced in accompanying notebook at Tab 3].

Polish lawyer named Raphael Lemkin who combined the Greek word "genos" (race or tribe) with the Latin word "cide" (to kill)⁷, thereby “corresponding it in its formulation to such words as tryannicide, homicide and infanticide”.⁸ Lemkin described genocide as:

“A coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion and economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against individuals, not in their individual capacity, but as members of the national group.”⁹

After witnessing the horrors of the Holocaust personally, Dr Lemkin campaigned to have genocide recognized as a crime under international law.¹⁰ In 1946, Lemkin urged the newly-formed United Nations to declare genocide an international crime.¹¹ He explained:

“Cultural considerations speak for international protection of national, religious and racial groups. Our whole cultural heritage is a product of the contributions of all nations. We can best understand this when we realize how impoverished our

⁷ BBC News: *Defining genocide*, < http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1701000/1701562.stm > (Dec. 10, 2001) [Reproduced in accompanying notebook at Tab 4].

⁸ See generally Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 Iowa L. Rev. 324 (1967) [Reproduced in accompanying notebook at Tab 5] (quoting R. Lemkin, *Axis Rule In Occupied Europe* 79 (1944)).

⁹ See *Id.* at 79. [Reproduced in accompanying notebook at Tab 5].

¹⁰ BBC, *supra* n. 7. [Reproduced in accompanying notebook at Tab 4] See generally Lippman, [Reproduced in accompanying notebook at Tab 2].

¹¹ Lippman, *supra* n. 3 at [Reproduced in accompanying notebook at Tab 2].

In 1946, the General Assembly of the United Nations proclaimed that the crime of genocide is "a denial of the right to existence of entire human groups" and noted that such denial "shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and the spirit and aims of the United Nations." (quoting G.A. Res. 96(I), U.N. GAOR, 1st Sess., Part II (Resolutions), U.N. Doc. A/64/Add.1 (1947)) [Reproduced in accompanying notebook at Tab 6].

culture would be if the peoples doomed by Germany, such as Jews, had not be permitted to create the bible, or give birth to an Einstein, a Spinoza; if the poles had not had the opportunity to give the world a Copernicus, a Chopin, a Curie; the Czechs, a Huss, a Dvorak; the Greeks, a Plato and a Socrates; the Russians, a Tolstoy and a Shostakovich.”¹²

Lemkin’s efforts led to the adoption of the UN Convention on Genocide in December 1948¹³, which came into effect in January 1951.¹⁴ Genocide, as defined by the Convention, means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, including: (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 and, (e) forcibly transferring children of the group to another group¹⁵. The convention also imposes a duty on states that are parties to "prevent and to punish" genocide.¹⁶

Unfortunately, the act of genocide is not new, however new its moniker may be.¹⁷

Historian William Haviland cites the example of the Pequot Indians, who were exterminated in 1637 by the Colonists when they burned their village in Mystic, Connecticut, and then shot all of

¹² Id. at . See also, R. Lemkin, *Genocide as a Crime under International Law*, 41 Am. J. Int’l L. 145 (1947)) [Reproduced in accompanying notebook at Tab 7].

¹³ *Convention on the Prevention and Punishment of the Crime of Genocide*, 3 U.N. GOAR, G.A. Res. 260A(III) (1948) (replicated at < http://www.unhchr.ch/html/menu3/b/p_genoci.htm > (visited on 14/04/02)). [Reproduced in accompanying notebook at Tab 8].

¹⁴ 77 U.N.T.S 277 (1951) [Reproduced in accompanying notebook at Tab 9].

¹⁵ Lippman, supra n. 3 at . [Reproduced in accompanying notebook at Tab 2].

¹⁶ Id. at . [Reproduced in accompanying notebook at Tab 2].

¹⁷ William A Haviland, *Cultural Anthropology*. 5th edition. (New York: Holt, Reinhart and Winston, Inc., 1987), 421-423 [Reproduced in accompanying notebook at Tab].

the people, including women and children ,who tried to escape.¹⁸ There are numerous other instances of genocide, especially in the nineteenth and twentieth centuries, including the of the extermination of the aboriginal inhabitants of Tasmania, or the massacre of American Indians at Wounded Knee.¹⁹ In the twentieth century, one should note the deliberate and rather systematic murder of over one million Armenians in 1921, and, the genocidal policies and actions of the Khmer Rouge in Cambodia in the late 1970s and 80s.²⁰

It however, the Nazi Genocide of the Jewish people of Europe between 1933-45, that remains for many the most memorable act of genocide in recorded history.²¹ On the basis of its systematic, bureaucratic, and technological nature, it is regarded as unique because it was planned, organized and carried out by a modern nation-state in a willful, legal manner, with the knowledge and collaboration of the vast state bureaucratic apparatus, industry, the state operated train system (the Jews were actually given tickets for their journey on the Reichsbahn to Auschwitz), and the technological expertise of it's scientists.²² In its modernity and bureaucratic, systematic, and scientific nature, the Nazi Genocide of the Jewish People was certainly unique, although it can and must be seen within the context of systematic mass murder in the twentieth century.²³ The seriousness of the problem of genocide is reflected by the scholars Glaser and

¹⁸ Id. [Reproduced in accompanying notebook at Tab].

¹⁹ Robert S. Leventhal, *Genocide* < <http://www.iath.virginia.edu/holocaust/genocide.html#two> > (accessed on Apr. 2, 2002) [Reproduced in accompanying notebook at Tab 10].

²⁰ *Id.* Other experts give a long list of what they consider cases of genocide, including the Soviet man-made famine of Ukraine (1932-33), the Indonesian invasion of East Timor (1975). [Reproduced in accompanying notebook at Tab 10].

²¹ Id. [Reproduced in accompanying notebook at Tab 10].

²² Id. [Reproduced in accompanying notebook at Tab 10].

²³ Id. [Reproduced in accompanying notebook at Tab 10].

Possony's estimate that between 1900 and 1970 one out of every thirty inhabitants of the earth was killed through government criminality such as killings in camps, executions, massacres, forced labor, and famine.²⁴

Judicial Notice Defined

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.²⁵ The rationale for the doctrine of judicial notice is to promote expedience in trial proceedings and to prevent flagrant error.²⁶ "Judicial notice acts as a timesaving device by eliminating the need for the introduction of evidence to prove noticed facts."²⁷ Black's Dictionary defines judicial notice as:

²⁴ Lippman, supra n. 3 at 61 (quoting K.Glaser and S. Possony, *Victims of Politics: The State of Human Rights* 44 (1979)) [Reproduced in accompanying notebook at Tab 2]. While the 20th century was noted for its absolute and bloody wars, (both World Wars I and II cost twenty-four million battle deaths) non-warfare related killings were staggering. As an example, from 1918 to 1953, the Soviet government executed, slaughtered, starved, beat or tortured to death, or otherwise killed 39,500,000 of its own people (among figures ranging from a minimum of twenty million killed by Stalin to a total over the whole communist period of eighty-three million). For China under Mao Tse-tung, the communist government eliminated, as an average figure between estimates, 45,000,000 Chinese. The number killed for just these two nations is about 84,500,000 human beings, or a lethality of 252 percent more than both World Wars together. (quoting R.J. Rummel, *War Isn't This Century's Biggest Killer*, The Wall Street Journal (July 7, 1986) (replicated at < <http://www.hawaii.edu/powerkills/WSJ.ART.HTM> > (accessed Apr. 3, 2002)). [Reproduced in accompanying notebook at Tab 11].

²⁵ Beeman, supra n. 2 at 3 [Reproduced in accompanying notebook at Tab 1].

²⁶ *Id.* [Reproduced in accompanying notebook at Tab 1]. (quoting Carla A. Neeley, Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. Fla. L. Rev. 723, 724 (1976)) [Reproduced In Accompanying Notebook At Tab 12].

²⁷ *Id.* [Reproduced in accompanying notebook at Tab 1]]. (quoting Carla A. Neeley, Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. Fla. L. Rev. 723, 724 (1976)) [Reproduced In Accompanying Notebook At Tab 12].

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>.²⁸

Although countries take slightly differing approaches to it, the doctrine of judicial notice is widely recognized in both civil and common law systems.²⁹ It is difficult to imagine a viable legal system whose courts do not take some facts for granted as being generally known.³⁰

In the issue of the Rwandan tribunal, judicial notice is extremely critical for all of the aforementioned reasons, as well as, other issues which will be discussed in further depth below. Since the tribunal draws from the rules of procedure and evidence (pursuant to Article 14 of the Statute of the Tribunal), from various legal structures of differing nations, it is prudent to observe how judicial notice is utilized in a cross section of nations, and how it can be applied to the issue of genocide.

Judicial Notice in Four Common Law Nations

1. Judicial Notice In the United States

In the United States federal courts, the admission of evidence is governed by the Federal Rules of Evidence (F.R.E.).³¹ Congress adopted the Federal Rules of Evidence in 1975.³² Prior to

²⁸ *Id.* [Reproduced in accompanying notebook at Tab 1] (quoting Black's Law Dictionary 851 (7th ed. 1999) [Reproduced in accompanying notebook at Tab 13].

²⁹ *Id.* [Reproduced in accompanying notebook at Tab 1].

³⁰ *Id.* at 3-4 [Reproduced in accompanying notebook at Tab 1]. (quoting Richard Fentman, *Foreign Law In English Courts Pleading, Proof And Choice of Law* 248 (1998)).

their adoption, evidence law in the United States federal courts system was developed through the common law tradition.³³ 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.³⁴ The federal rules have been influential among the states; by 1995 over half (35) had adopted codes based on the F.R.E.³⁵ Rule 201 of the F.R.E. governs the taking of judicial notice.³⁶ In the United States, judges can take judicial notice of four different types of facts:³⁷

- 1) adjudicative
- 2) legislative
- 3) evaluative
- 4) law³⁸

Of the four types, both “evaluative” and “adjudicative” are most relevant to the present issue.

Evaluative facts are matters of common knowledge that judges and jurors bring to their deliberations.³⁹ Evaluative facts amount to background information that enable the fact-finders to

³¹ *Id.* at 8-9 [Reproduced in accompanying notebook at Tab 1].

³² *Id.* at 9 [Reproduced in accompanying notebook at Tab 1]. (quoting Christopher B. Mueller And Laird C. Kirkpatrick, *Evidence Under The Rules*, Third Edition, xxix (1996).

³³ *Id.* [Reproduced in accompanying notebook at Tab 1].

³⁴ *Id.* [Reproduced in accompanying notebook at Tab 1].

³⁵ *Id.* [Reproduced in accompanying notebook at Tab 1].

³⁶ *Id.* [Reproduced in accompanying notebook at Tab 1].

³⁷ *Id.* at 9-10 (quoting Christopher B. Mueller And Laird C. Kirkpatrick, *Evidence Under The Rules*, Third Edition, xxix (1996).

³⁸ *Id.* at 10 [Reproduced in accompanying notebook at Tab 1].

³⁹ *Id.* [Reproduced in accompanying notebook at Tab 1].

understand the testimony and other evidence in the case, such as the usual meaning of words, slang expressions, or idioms.⁴⁰ 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.⁴¹ 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.⁴² Adjudicative facts are “are simply the facts of the particular case.”⁴³ They concern the immediate parties in a case: “who did what, where, when, how and with what motive or intent.”⁴⁴ In finding facts concerning the immediate parties, the court performs an adjudicative function, hence the term adjudicative facts.⁴⁵ Adjudicative facts are the facts that normally go to a jury in a jury trial.⁴⁶ 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.⁴⁷ 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 to persons in the

⁴⁰ Id. [Reproduced in accompanying notebook at Tab 1]. For example, 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 (quoting Christopher B. Mueller And Laird C. Kirkpatrick, *Evidence Under The Rules*, Third Edition, xxix (1996).

⁴¹ Id., at 11 [Reproduced in accompanying notebook at Tab 1].

⁴² Id. [Reproduced in accompanying notebook at Tab 1] (quoting Christopher B. Mueller And Laird C. Kirkpatrick, *Evidence Under The Rules*, Third Edition, xxix (1996).

⁴³ Id., at 5 [Reproduced in accompanying notebook at Tab 1]. (quoting Fed. R. Evid. 201 advisory committee’s note).

⁴⁴ Id. [Reproduced in accompanying notebook at Tab 1]. (quoting Kenneth Culp Davis, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955)) [Reproduced in accompanying notebook at Tab 14].

⁴⁵ Id., [Reproduced in accompanying notebook at Tab 1].

⁴⁶ Id., [Reproduced in accompanying notebook at Tab 1].

⁴⁷ Id., [Reproduced in accompanying notebook at Tab 1].

[situation] of members of the court.”⁴⁸ 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.⁴⁹ Examples include reference to calendars to confirm days and dates, or to maps to determine distance and location.⁵⁰

Generally, judges may take judicial notice of adjudicative facts only if the facts are clearly indisputable, or considered common knowledge.⁵¹ 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.⁵² F.R.E. 201 only permits judicial notice of adjudicative facts that are indisputable.⁵³ In the United States, the usual method of establishing adjudicative facts is through the introduction of evidence, typically consisting of the testimony of witnesses.⁵⁴ Judicial notice dispenses with the requirement that a party establish formal proof of facts.⁵⁵ The doctrine of judicial notice conflicts somewhat with the adversarial

⁴⁸ Id., at 6 [Reproduced in accompanying notebook at Tab 1] (quoting David M. Paciocco, *Judicial Notice in Criminal Cases: Potential and Pitfalls*, 40 Criminal Law Quarterly 35, 46 (1997) [Reproduced in accompanying notebook at Tab 15] (quoting Edmund Morgan, *Judicial Notice*, 57 Harv. L.Rev. 269, 273-4 (1944)) [Reproduced in accompanying notebook at Tab 16].

⁴⁹ Id., at 6 [Reproduced in accompanying notebook at Tab 1].

⁵⁰ Id. [Reproduced in accompanying notebook at Tab 1].

⁵¹ Id., at 7 [Reproduced in accompanying notebook at Tab 1].

⁵² Id. [Reproduced in accompanying notebook at Tab 1]. As one Canadian jurist has observed: “[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”. (quoting the Hon. Claire L’Heureux-Dube, *Re-Examining The Doctrine Of Judicial Notice In The Family Law Context*, 26 Ottawa L. Rev. 551, 555 (1994). [Reproduced in accompanying notebook at Tab 17] (quoted in David M. Paciocco, *Judicial Notice in Criminal Cases: Potential and Pitfalls*, 40 Criminal Law Quarterly 35, 48 (1997)) [Reproduced in accompanying notebook at Tab 15].

⁵³ Id., at 12 [Reproduced in accompanying notebook at Tab 1].

⁵⁴ Id. [Reproduced in accompanying notebook at Tab 1].

⁵⁵ Id. [Reproduced in accompanying notebook at Tab 1].

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.⁵⁶ 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 reserves debatable issues for the jury.⁵⁷

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.⁵⁸

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.⁵⁹ 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.⁶⁰ The foundations of judicial notice in England include the common law, statute, common knowledge and acquired knowledge.⁶¹ Judges take notice of the contents of enactments, and no

⁵⁶ Id. [Reproduced in accompanying notebook at Tab 1].

⁵⁷ Id. [Reproduced in accompanying notebook at Tab 1] (quoting Carla A. Neeley, Note, *Judicial Notice: Rule 201 of the Federal Rules of Evidence*, 28 U. Fla. L. Rev. 723, 724 (1976)) [Reproduced In Accompanying Notebook At Tab 12].

⁵⁸ Id., at 13 [Reproduced in accompanying notebook at Tab 1].

⁵⁹ Id. [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 The Law Quarterly Review 59, 61 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁶⁰ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 The Law Quarterly Review at 61 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁶¹ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 The Law Quarterly Review at 63 (1958)) [Reproduced in accompanying notebook at Tab 18].

pleading or evidence of the public Act is required.⁶² 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 of the matters noticed as “notorious,” owe their notoriety in part to their establishment or regulation by statute.⁶³

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.⁶⁴ 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.⁶⁵ 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.⁶⁶ 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.⁶⁷ In that situation, it is up to the judge to determine whether a fact is notorious.⁶⁸ There are numerous reported cases in England in which

⁶² Id. [Reproduced in accompanying notebook at Tab 1].

⁶³ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at 65-66 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁶⁴ Id., at 15 [Reproduced in accompanying notebook at Tab 1].

⁶⁵ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at 66 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁶⁶ Id., at 15 [Reproduced in accompanying notebook at Tab 1].

⁶⁷ Id. [Reproduced in accompanying notebook at Tab 1].

⁶⁸ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at 66 (1958)) [Reproduced in accompanying notebook at Tab 18].

judges have or have not taken notice of particular facts. Three considerations appear to affect the decision.⁶⁹

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.⁷⁰ 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.⁷¹ 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 may take steps to acquire the necessary knowledge.”⁷²

Acquired Knowledge: A primary concern in the law of judicial notice is the *sources* from which knowledge may be acquired.⁷³ 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.⁷⁴ And in general, a court should not act on evidence that it has heard in a previous case.⁷⁵ There

⁶⁹ Id. [Reproduced in accompanying notebook at Tab 1].

⁷⁰ Id., at 15 [Reproduced in accompanying notebook at Tab 1].

⁷¹ Id. [Reproduced in accompanying notebook at Tab 1].

⁷² Id., at 16 [Reproduced in accompanying notebook at Tab 1].

⁷³ Id. [Reproduced in accompanying notebook at Tab 1].

⁷⁴ Id. [Reproduced in accompanying notebook at Tab 1].

⁷⁵ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* 67 (1958)) [Reproduced in accompanying notebook at Tab 18].

are, however, exceptions to this general rule.⁷⁶ 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.⁷⁷ 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.⁷⁸ A judge may base judicial notice on written or oral statements in at least two types of cases.⁷⁹ 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.⁸⁰ 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 of the report of an earlier case.”⁸¹ 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.⁸² 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

⁷⁶ Id., at 16 [Reproduced in accompanying notebook at Tab 1].

⁷⁷ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* 67-68 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁷⁸ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at 68 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁷⁹ Id., at 16 [Reproduced in accompanying notebook at Tab 1].

⁸⁰ Id. [Reproduced in accompanying notebook at Tab 1].

⁸¹ Id., [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at (1958)) [Reproduced in accompanying notebook at Tab 18] (citing *Blacquiére v. Hawkins* (1780) 1 *Doug.* 378; *Bruin v. Knott* (1843) 12 *Sim.* 436, on appeal, 1 *Ph.* 572)).

⁸² Id., at 17 [Reproduced in accompanying notebook at Tab 1].

the area of the Monarch's jurisdiction.⁸³ 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.⁸⁴ There is some debate whether judicially noticed facts are conclusive or merely prima facie evidence, which may be rebutted by actual evidence or otherwise.⁸⁵

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.⁸⁶ The provision governing judicial notice of matters of common knowledge states:

- (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

⁸³ Id, [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at 69 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁸⁴ Id, at 17 [Reproduced in accompanying notebook at Tab 1].

⁸⁵ Id, [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 *The Law Quarterly Review* at 70 (1958)) [Reproduced in accompanying notebook at Tab 18].

⁸⁶ Division 1, Judicial Notice s. 120 and 121, Evidence Bill 1987 (Austl.). [Reproduced in accompanying notebook at Tab 19].

that kind as is necessary to ensure that the party is not unfairly prejudiced.⁸⁷

4. Judicial Notice in Canada

The approach to judicial notice in Canada is similar to that of the United States, England and Australia.⁸⁸ 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.⁸⁹ Under the category of adjudicative facts, judicial notice is used to take of facts which are indisputable and notorious in the community.⁹⁰ 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.⁹¹ Finally, Canadian judges may not rely on personal

⁸⁷ Id. [Reproduced in accompanying notebook at Tab 1].

⁸⁸ Id, at 18 [Reproduced in accompanying notebook at Tab 1].

⁸⁹ Id. [Reproduced in accompanying notebook at Tab 1] (quoting David M. Paciocco, *Judicial Notice in Criminal Cases: Potential and Pitfalls*, 40 Criminal Law Quarterly 35, 46 (1997) [Reproduced in accompanying notebook at Tab 15] (quoting Morgan, *Judicial Notice*, 57 Harv. L.Rev. 269, 273-4 (1944)) [Reproduced in accompanying notebook at Tab 20].

⁹⁰ Id, at 18 [Reproduced in accompanying notebook at Tab 1]. This entails “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” (citations omitted).

⁹¹ Id, [Reproduced in accompanying notebook at Tab 1]. (quoting G. D. Nokes, *The Limits of Judicial Notice*, 74 The Law Quarterly Review at 70 (1958)) [Reproduced in accompanying notebook at Tab 18] (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 accompanying notebook at Tab 21].

knowledge when resolving adjudicative facts if the fact is not notorious and there is no evidence presented about the fact.⁹²

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* (unique) institutions which have their own rules of procedure that are not imported from any single national system.⁹³ The ICTY was established in 1993 by United Nations Security Council Resolution 827.⁹⁴ It is mandated to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.⁹⁵ The ICTR, established late in 1994 by Security Council Resolution 955, is mandated to prosecute those responsible for the genocidal activities that took place within Rwandan territory.⁹⁶

⁹² Id. [Reproduced in accompanying notebook at Tab 1] (quoting David M. Paciocco, *Judicial Notice in Criminal Cases: Potential and Pitfalls*, 40 Criminal Law Quarterly 35, 46 (1997) [Reproduced in accompanying notebook at Tab 15].

⁹³ Id. [Reproduced in accompanying notebook at Tab 15] (quoting 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) [Reproduced in accompanying notebook at Tab 22] (quoting *Prosecutor v. Blaskic*, Jan. 21, 1998) [Reproduced in accompanying notebook at Tab 23]

⁹⁴ Mark A. Drumbl and Kenneth S. Gallant, *Appeals In The Ad Hoc International Criminal Tribunals: Structure, Procedure, And Recent Cases*, 3 J. App. Prac. & Process 589 (2001) [Reproduced in accompanying notebook at Tab 24].

⁹⁵ Id. [Reproduced in accompanying notebook at Tab 24].

⁹⁶ Id., at 604 [Reproduced in accompanying notebook at Tab 24].

The Tribunals have taken what can be described as a hybrid civil/common law approach toward admission of evidence.⁹⁷ By statute, the ICTR uses the same rules of evidence as does the ICTY.⁹⁸ In contrast to 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*.⁹⁹ These rules have been described as “simple,” “skeletal” and “unelaborate.”¹⁰⁰

This is best exemplified by the simplistic nature and language of Rule 94, concerning judicial notice.

Rule 94 of the ICTR: Judicial Notice

Rule 94 of the ICTR; the rule concerning 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* (of his own accord), a Trial Chamber, after hearing the parties, may decide to take judicial notice of

⁹⁷ Beeman, *supra* n. 2 at 22 [Reproduced in accompanying notebook at Tab 1].

⁹⁸ *Id.* [Reproduced in accompanying notebook at Tab 1]. (quoting Article 14 of the Statute of the International Tribunal for Rwanda which 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 accompanying notebook at Tab 25].

⁹⁹ *Id.*, [Reproduced in accompanying notebook at Tab 1]. (quoting The Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda [Reproduced in accompanying notebook at Tab 26]. (www.ictor.org, visited April 4, 2002).

¹⁰⁰ *Id.*, [Reproduced in accompanying notebook at Tab 1]. (quoting 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 (1997) at 82-84). [Reproduced in accompanying notebook at Tab 27].

adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.¹⁰¹

Thus, following Rule 94, a Trial Chamber is permitted to take judicial notice of facts if such facts are "of common knowledge."¹⁰² Rule 94, however, provides no guidance as to what manner of facts constitutes "common knowledge."¹⁰³ The Chamber may also take notice of those facts generally well-known in the area where the trial is taking place.¹⁰⁴ The ICTY judges have actively modified the rules since they were first adopted in February 1994.¹⁰⁵ Rule 94 was amended in July 1998, with the addition of Section (B).¹⁰⁶

¹⁰¹ The Rules of Procedure and Evidence, International Criminal Tribunal for Yugoslavia (www.icty.org, visited April 4, 2002) [Reproduced in accompanying notebook at Tab 61].

¹⁰² *Prosecutor v. Laurent Semanza* (ICTR-97-20-I) (Decision On The Prosecutor's Motion For Judicial Notice And Presumptions Of Facts Pursuant To Rules 94 And 54) (3 November 2000) [Reproduced in accompanying notebook at Tab 27].

¹⁰³ The term "common knowledge" is generally accepted as encompassing ". . . those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature." M. Cherif Bassiouni & P. Manikas *The Law of the International Tribunal for the Former Yugoslavia*, (United States of America, 1996) p. 952. See also; Phipson on Evidence, 14th ed., §2-06-2-16 (England, 1990); *Sakar's Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon*, 15th ed. (India, 1999) p. 1015; Hon. Roger E. Salhany *Criminal Trial Handbook*, (Canada, 1994), § 9.5. A common example of a fact of common knowledge are the days of the week. In addition, and perhaps more importantly for the present purposes, "common knowledge" also encompasses those facts that are generally known within a tribunal's territorial jurisdiction. *The Law of the International Tribunal for the Former Yugoslavia*, at p. 952 (quoting *Prosecutor v. Laurent Semanza* (ICTR-97-20-I) (Decision On The Prosecutor's Motion For Judicial Notice And Presumptions Of Facts Pursuant To Rules 94 And 54) (3 November 2000)) [Reproduced in accompanying notebook at Tab 27].

¹⁰⁴ *Id.*, supra note 101. Once a Trial Chamber deems a fact to be of "common knowledge" under Rule 94, it must determine also that the matter is reasonably indisputable. A fact is said to be indisputable 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. See, *General Principles of Law as Applied by International Tribunals*, pp. 303-304; 29 *American Jurisprudence* §33 (United States of America, 1994) 952 (quoting *Prosecutor v. Laurent Semanza* (ICTR-97-20-I) (Decision On The Prosecutor's Motion For Judicial Notice And Presumptions Of Facts Pursuant To Rules 94 And 54) (3 November 2000)) [Reproduced in accompanying notebook at Tab 27].

¹⁰⁵ Beeman, supra n. 2 at 23. [Reproduced in accompanying notebook at Tab 1].

¹⁰⁶ Sub-Rule (B) was added at the eighteenth plenary session on 9-10 July, 1998. 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 (quoting Beeman, supra n. 2 at n.83) [Reproduced in accompanying notebook at Tab 1] (See *ICTY Judges Successfully Conclude Review of Judicial*

With the promulgation of the Rules of Procedure and Evidence, and their subsequent modifications, the judges of the Tribunals have shown via their actions that the Rules are not static, but flexible in nature to accommodate a host of unforeseen issues at the time of their adoption. Rule 94 concerning judicial notice is no exception, as evidenced by its 1998 amendment. Given the complexity of the tribunals, a flexible interpretation of Rule 94 is both warranted and justified.

Judicial Notice in the Post World War II War Crimes Trials

While distinctive, the tribunals for Yugoslavia and Rwanda are not the first *sui generis* institutions to formulate their own rules of evidence and procedure. Following the devastation of the Second World War, military tribunals were established by the victorious Allied nations of France, Great Britain, the United States, and the Soviet Union to try the defeated Axis Powers.¹⁰⁷ The three main tribunals are addressed below.

I. Nuremberg

In August 1945, the British, French, Americans and Soviets, meeting in London, signed the agreement that created the Nuremberg court, officially the International Military Tribunal

Procedures www.un.org/icty/pressreal/p333-e.htm (16 July 1998) (visited Apr. 15, 2002) [Reproduced in the accompanying notebook at Tab 28].

¹⁰⁷ The Axis powers consisted of: Albania, Bulgaria, Finland, Germany, Hungary, Italy, Japan, Romania, and Thailand. However, for the purposes of the military tribunals, Germany and Japan were the driving force behind the Axis Alliance (quoting < <http://www.ucc.uconn.edu/~ww2oh/Powers.htm> >).

(IMT), and set ground rules for the trials to follow.¹⁰⁸ The London Charter set down the rules of trial procedure and defined the crimes to be tried.¹⁰⁹ The general historical consensus accepts the thesis that the Nuremberg Charter, its resulting rules of procedure and evidence, and those of the courts which followed in its wake, were the result of a compromise "blending and balancing ... elements from the Continental European inquisitorial system and the Anglo-American adversarial system."¹¹⁰ The London Charter enunciated a simple evidentiary rule repeatedly propounded by the United States:

"The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure and shall admit any evidence which it deems to have probative value."¹¹¹

The Tribunal could also:

"require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof, and it was not to "require proof of facts of common knowledge... official government documents and reports of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of the United Nations."¹¹²

¹⁰⁸ CourtTV.com *Creation of the International Military Tribunal*, <
<http://www.courtTV.com/casefiles/nuremberg/law.html> > (visited on Apr. 4, 2002) [Reproduced in the accompanying notebook at Tab 29.]

¹⁰⁹ Id. [Reproduced in the accompanying notebook at Tab 29.]

¹¹⁰ Evan J. Wallach, "The Procedural and Evidentiary Rules of the Post World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?," 37 Colum. J. Transnat'l L. 854 (1999) [Reproduced in the accompanying notebook at Tab 30.] (quoting Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (New York, Transnational Publishers, 1995) Vol. 1 at pp. 7-8. [Reproduced in the accompanying notebook at Tab 31.]

¹¹¹ Id., at 860 [Reproduced in the accompanying notebook at Tab 30].

¹¹² Id. [Reproduced in the accompanying notebook at Tab 30].

The Charter also permitted the Tribunal to draw up its own Rules of Procedure that were not inconsistent with the intent of the Charter itself.¹¹³ There were numerous variations in the rules of the post World War II tribunals, but all in some fashion were the progeny of the London Charter.¹¹⁴ The Nuremberg Charter was, in itself, facially applicable only in Germany, but it proved to be a model for the far east tribunals that followed.¹¹⁵

There is a general consensus among international lawyers that "The proceedings [at Nuremberg] were ... generally viewed as providing the defendants with the essentials of due process and a fair trial."¹¹⁶

II. Control Council Law No. 10 and Ordinance No. 7

Following the Nuremberg cases, the United States undertook the prosecution of an array of lower-echelon Nazi leaders, military officers, and major industrialists in twelve separate prosecutions commonly referred to as the Control Council Law No. 10 tribunals.¹¹⁷ These

¹¹³ Id., at 861 [Reproduced in the accompanying notebook at Tab 30.]

¹¹⁴ Id., at 860 [Reproduced in the accompanying notebook at Tab 30.]

¹¹⁵ Id. [Reproduced in the accompanying notebook at Tab 30.]

¹¹⁶ Id., [Reproduced in the accompanying notebook at Tab 30.] (quoting Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (New York, Transnational Publishers, 1995) Vol. 1 at pp. 9-10) [Reproduced in the accompanying notebook at Tab 31.] However, Wallach argues that while the main trial was fair, and even had several acquittals, many of the other trials had procedures that did not safeguard the defendants' fundamental guarantees of rights given by the laws of war. Explicitly bound by "non-technical rules of evidence," these trials admitted hearsay, rumor, documents of dubious authenticity, as well as coerced testimony and confession. Defendants were deprived of their right not to incriminate themselves, and the attorney-client privilege was suborned.

¹¹⁷ Matthew Lippman, *The Other Nuremberg: American Prosecutions Of Nazi War Criminals In Occupied Germany*, 3 Ind. Int'l & Comp. L. Rev. 1 (1992) at 1 [Reproduced in the accompanying notebook at Tab 32].

twelve decisions¹¹⁸ applied and extended the Nuremberg principles and made a substantial contribution to the development of the corpus of international criminal law.¹¹⁹ The Allied Control Council of Germany issued Control Council Law No. 10¹²⁰ which was intended to "establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal .¹²¹ The tribunals were set up by the Military Governor of the American Zone of Occupation¹²², pursuant to Military Government Ordinance No.7, and promulgated on 25 October 1946.¹²³

Article II of Council Law No. 10 recognized the Nuremberg offenses of Crimes Against Peace, War Crimes, Crimes Against Humanity and membership in groups or organizations which

¹¹⁸ The Council decisions are beyond the scope of this article. For more information please see < http://www.ess.uwe.ac.uk/genocide/cntrl10_trials.htm > (visited on 19/04/02).

¹¹⁹ Lippman, supra note 117 at 10 .

¹²⁰ Id. (quoting Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, (December 20, 1945), 3 Official Gazette Control Council for Germany 50-55 (1946)). [citation omitted.] (replicated at < <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> >)). [Reproduced in the accompanying notebook at Tab 33.] On December 20, 1945, the Allied Control Council of Germany, comprising the same nations which were signatory to the London Agreement, issued Control Law No. 10, designed "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders".

¹²¹ Lippman, supra note 117 at 10 (quoting *Punishment Of Persons Guilty Of War Crimes, Crimes Against Peace And Against Humanity, Control Council Law No. 10* (December 20, 1945), Reprinted In VI Trials Of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No. 10 XVII (1952) (citation omitted)). [Reproduced in the accompanying notebook at Tab 33].

¹²² On May 9th 1945, Germany surrendered unconditionally to Soviet forces and ceased to exist as a state. The allies had previously agreed on partitioning Germany in three zones of occupation - a large Soviet zone in the east, a British zone in the Northwest and an American zone in the Southwest. A 4th zone of occupation was established by the recognition of France as a victorious power; this zone was located in the southwest. Berlin was treated separately, partitioned in 4 sectors (quoting, *Germany Occupied, 1945-1948 : Soviet Zone* < <http://www.stabi.hs-bremerhaven.de/gbs2/whkmla/region/germany/ger4548east.html> > (visited on 19/04/02).

¹²³ William Allen Zeck, *Nuremberg: Proceedings Subsequent to Goering ET AL*, 26 N.C L. Rev. 350 (1947-48). [Reproduced in the accompanying notebook at Tab 35.] Article I states " The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of: other courts established or which may be established for the trial of any such offenses. "

had been declared criminal by the International Military Tribunal.¹²⁴ Individuals involved in these acts were liable as principals or accessories or for ordering, abetting, or consenting to such a crime.¹²⁵ The Law also imposed sweeping liability on those connected with plans or enterprises involved in the commission of Nuremberg crimes and on those who were members of any organization or group connected with the commission of any such crime.¹²⁶ Criminal culpability for Crimes Against Peace also was explicitly extended to individuals holding high political, civil or military positions in Germany or in one of its allies, or those who held high positions in the financial, industrial or economic life of any such country.¹²⁷ Those found guilty under Control Council Law No. 10 might be punished with death, life imprisonment, hard labor, fine, forfeiture of property, restitution or deprivation of civil rights.¹²⁸

With respect to the authority of the Tribunals, Control Council Law No. 10 was the basic jurisdictional enactment, while Military Government Ordinance No.7 was the procedural Ordinance.¹²⁹ Under Ordinance No.7, Articles VI, VII, IX and X have the most relevance to the current discussion. Articles VI¹³⁰ and VII¹³¹ give the tribunals affirmative authority to conduct

¹²⁴ Lippman supra note 117 at. Article II(d) states "Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal" [Reproduced in the accompanying notebook at Tab 32.] (quoting *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, (replicated at < <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> >) [Reproduced in the accompanying notebook at Tab 33.]

¹²⁵ Id. [Reproduced in the accompanying notebook at Tab 32].

¹²⁶ Id. [Reproduced in the accompanying notebook at Tab 32].

¹²⁷ Id. [Reproduced in the accompanying notebook at Tab 32].

¹²⁸ Id. [Reproduced in the accompanying notebook at Tab 32].

¹²⁹ Id., at 361 [Reproduced in the accompanying notebook at Tab 32.]

¹³⁰ Article VI states: "The tribunals shall:

a) confine the trial strictly to an expeditious hearing of the issues raised by of the charge, b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any

the trials in such a manner as to obtain an expeditious hearing of issues and to avoid unreasonable delay.¹³² To this end, the tribunals were not bound by technical rules of evidence, and they were obligated to admit any evidence which they deemed to have probative value.¹³³

Article IX¹³⁴ related to judicial notice, covering facts of common, governmental documents and reports to the United Nations and the record of the IMT and "records of any cases previously tried before any tribunal established under this Ordinance, to the extent that such records are called to the attention of the tribunals by either the prosecution or defense counsel."¹³⁵

Article X¹³⁶ bound the tribunals with respect to the findings of fact and legal conclusions of the IMT.¹³⁷ Thus, the IMT's findings of the existence of a legal conspiracy to wage aggressive

defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges."(quoting *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, (replicated at < <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> >) [Reproduced in the accompanying notebook at Tab 33].

¹³¹ Article VII states: "The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof . . ." (quoting *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, (replicated at < <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> >) [Reproduced in the accompanying notebook at Tab 33].

¹³² Lippman, supra n. 117 at 363 [Reproduced in the accompanying notebook at Tab 32].

¹³³ Id. [Reproduced in the accompanying notebook at Tab 32].

¹³⁴ Article XI states: "The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations." (quoting *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, (replicated at < <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> >)) [Reproduced in the accompanying notebook at Tab 33].

¹³⁵ Lippman supra n. 117 at 363. [Reproduced in the accompanying notebook at Tab 32].

¹³⁶ Article X states: "The determinations of the International Military Tribunal in the judgments In Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary." (quoting *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against*

war, and the commission of crimes against peace in Germany, through acts of aggression against each of the occupied countries, had all been established as fact and did not need to be proven again.¹³⁸

III. The Tokyo/ Far East Tribunals

The Tokyo Charter, to try alleged Japanese war criminals was created on January 19, 1946, by order of General Douglas MacArthur, Supreme Allied Commander of the Southwest Pacific theater.¹³⁹ MacArthur had the opportunity to utilize rules issued similar to the U.S. Articles of War, those governing military commission in the United States, or an exact copy of the Nuremberg Charter but declined.¹⁴⁰ The Tribunal was entitled to draft and amend rules of procedure, and its had coercive powers similar to the Nuremberg Tribunal.¹⁴¹ The Tribunal's evidentiary powers were a synthesis of those contained in the Nuremberg Charter and Rules and those found in the Royal Warrant issued for trial of war criminals by the United Kingdom.¹⁴²

Peace and Against Humanity, (replicated at < <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> >)) [Reproduced in the accompanying notebook at Tab 33].

¹³⁷ Lippman, supra n. 117 at 364. [Reproduced in the accompanying notebook at Tab 32].

¹³⁸ Id. [Reproduced in the accompanying notebook at Tab 32].

¹³⁹ Wallach, supra n. 110 [Reproduced in the accompanying notebook at Tab 30].

¹⁴⁰ Id. [Reproduced in the accompanying notebook at Tab 30]. The Potsdam ultimatum issued by the Allies on July 26, 1945, provided that "... stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." (quoting the Potsdam Declaration Article 10.) In the exchange of notes ending with the surrender of Japan and its acceptance of the Declaration, the United States informed Japan that "For the purposes of receiving [the] surrender and carrying it into effect, General of the Army Douglas MacArthur has been designated as the Supreme Commander for the Allied Powers..."(quoting Department of State Bulletin, Vol XII, No. 318 July 29, 1945).

¹⁴¹ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁴² Id. [Reproduced in the accompanying notebook at Tab 30].

Two key relevant provisions in the Tokyo tribunal were:

Admissibility. “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions and statements of the accused are admissible”¹⁴³ and,

Judicial Notice. “The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.”¹⁴⁴

It was clearly the tribunals intention that as much evidence as possible would be admitted against the Defendants.¹⁴⁵ At the policy-making level there were repeated expressions of an intention to provide war crimes defendants with a "fair trial."¹⁴⁶ Many of those who sat on the tribunals, and of those who prosecuted have pointed to the fact that there were acquittals, both of German, and Japanese defendants to prove that point.¹⁴⁷ Indeed, one of the participants in the Yokohama proceedings expressed a view common among prosecutors and judges when he said they "furnished an eloquent example of the conscientious manner in which civilized democratic people jealously protect the rights of fellow human beings to fair trials no matter how black their offenses may have been."¹⁴⁸ In relation to judicial notice, these sentiments were addressed by the

¹⁴³ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁴⁴ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁴⁵ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁴⁶ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁴⁷ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁴⁸ Id. [Reproduced in the accompanying notebook at Tab 30]. (quoting Spurlock, *The Yokohama War Crimes Trials: The Truth About A Misunderstood Subject*, 36 ABA Journal 387, 389 (1950)) [Reproduced in the accompanying notebook at Tab 36].

Judge advocate in regards to the *Yamashita*¹⁴⁹ case, who commented upon the obligations and discretionary powers of the members of the tribunal:

They may draw upon their knowledge of human nature and the common experiences of men in battle, and they may take judicial notice of matters within their general military knowledge and also the laws and usages of war, but insofar as the particular allegations of fact set forth in the charges are concerned, they must disregard . . . any considerations which might affect [their] judgment which is not relevant to this trial. The accused is not to be prejudiced because he is a member of an enemy force ...¹⁵⁰

The problems most apparent from the World War Two trials were simply the sheer mass of defendants and, to a lesser degree, the differences between the legal systems of the United States and the United Kingdom (common law), France (civil law), and the Soviet Union (socialist law). The trials clearly illustrated that the problems facing international tribunals rise geometrically with the number of participants, defendants and incidents¹⁵¹ Additionally, differing legal traditions tend to exacerbate an already difficult situation.¹⁵² While the flexible language of

¹⁴⁹ *Yamashita v. Styer*, 327 US 1 (1946). [Reproduced in the accompanying notebook at Tab 37].

¹⁵⁰ Leslie C. Green, *War Crimes, Crimes against Humanity, and Command Responsibility*, <<http://www.nwc.navy.mil/press/Review/1997/spring/art2sp97.htm>> (visited on 29/04/02) [Reproduced in the accompanying notebook at Tab 38].

¹⁵¹ Wallach, *supra* n. 110 [Reproduced in the accompanying notebook at Tab 30].

¹⁵² *Id.* [Reproduced in the accompanying notebook at Tab 30]. In a statement which might fairly be described as disingenuous, Justice Jackson implied that the United States reluctantly acceded to the abandonment of common law rules of evidence: “The rules of evidence which should govern the Tribunal might have caused serious disagreement if we had insisted on our own. Continental lawyers regard our common-law rules of evidence with abhorrence. Since they were evolved in response to the particularities of trial by jury, we saw no reason to urge their use in an international tribunal before professional judges. They have not generally been followed by international tribunals. We settled, therefore, upon one simple rule: that the Tribunal “shall admit any evidence that it deems to have probative value” (quoting Wallach, *supra* n. 110).

the tribunals lent itself to a host of evidentiary difficulties, including judicial notice¹⁵³, given the volume of defendants, a liberal interpretation of Article 21 in the tribunals was warranted for both judicial efficiency and a need to bring closure to a particularly dark chapter in history. These concerns are currently be revisited in both the Yugoslav and Rwandan tribunals. While the IMT tribunals are rapidly receding into the annals of history, the lessons learned cannot be dismissed. Given their legal and historical significance they have set a compelling precedent for which all present and future tribunals must follow.

Judicial Notice and the “Expert Group” Recommendations

Since the establishment of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, both Tribunals have grown tremendously in terms of resources.¹⁵⁴ Despite this growth, the International Tribunals have rendered judgments in only a limited number of cases and conducted inordinately long trials, a fault for which, perhaps more than any other, they can be justly criticized.¹⁵⁵ In 1998, acting on the basis of recommendations by the Fifth Committee and the chairman of the Advisory Committee on

¹⁵³ The Soviets argued that the judicial notice provision of Article 21 required that binding weight should be given to their report blaming the Germans for a massacre of Polish officers in the Katyn Forest, and which considerable evidence indicated had been carried out by the Russians themselves. (quoting Wallach supra n. 110).

¹⁵⁴ Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 A.J.I.L. 759 (2000) [Reproduced in the accompanying notebook at Tab 39]. The ICTY's 1999 budget was \$ 94,103,800, including 848 staff members, and the ICTR budget was \$ 68,531,900, including 820 personnel (quoting Mundis at 772).

¹⁵⁵ Id. [Reproduced in the accompanying notebook at Tab 39]. For example, After seven years and costs in excess of \$550,000,000 US dollars, in the Rwandan tribunal, there have only been those eight convictions, of which three were guilty pleas (quoting Mark Turner, *Giggling Judges Undermine Case For International Courts: Rwanda's Genocide Tribunal Epitomises The Problems In Applying The Law To Man's Inhumanity* The Financial Times (February 14, 2002)) [Reproduced in the accompanying notebook at Tab 40].

Administrative and Budgetary Questions, the General Assembly asked the Secretary-General to conduct a review of the operation and functioning of the International Tribunals.¹⁵⁶ Pursuant to this authorization, the Secretary-General appointed the five-member expert group.¹⁵⁷ After soliciting input from states and interested nongovernmental organizations (NGOs) and reviewing extensive materials provided by both International Tribunals, the group interviewed the judges, registrar, prosecutor, and senior staff members of the two tribunals, as well as several defense counsel in The Hague, Arusha, and Kigali.¹⁵⁸

Their report was completed and submitted to the Secretary-General on November 22, 1999.¹⁵⁹ The expert group did not make findings as such but, rather, reached certain conclusions that were reduced to forty-six recommendations for improving the operation and functioning of the International Tribunals.¹⁶⁰ Although they stressed that the judges must firmly apply the existing rules, the experts also noted that new rules might be warranted to further clarify the judges' role with respect to trial management.¹⁶¹ This is especially important as trial practice before the International Tribunals combines aspects of both the civil-and the common-law

¹⁵⁶ Id. at 760. [Reproduced in the accompanying notebook at Tab 39].

¹⁵⁷ Id. [Reproduced in the accompanying notebook at Tab 39]. The expert group consisted of Jerome Ackerman, former president of the UN Administrative Tribunal (U.S.); Pedro R. David, judge of the Camara Nacional de Casacion Penal (Argentina); Hassan B. Jallow, justice of the Supreme Court (Gambia); K. Jayachandra Reddy, former public prosecutor and judge of the Supreme Court (India); and Patricio Ruedas, former UN under-secretary-general for administration and management (Spain) (quoting Mundis at 772).

¹⁵⁸ Id., at 759 [Reproduced in the accompanying notebook at Tab 39].

¹⁵⁹ Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634 (1999) [Reproduced in the accompanying notebook at Tab 41].

¹⁶⁰ Mundis, supra n. 154 at 764 [Reproduced in the accompanying notebook at Tab 39].

¹⁶¹ Id. [Reproduced in the accompanying notebook at Tab 39].

approach.¹⁶² The presentation of evidence before the International Tribunals, like any complex criminal prosecution, is a time-consuming process.¹⁶³ The experts recognized that certain evidentiary matters contribute to lengthy trials and in this respect they offered several suggestions.¹⁶⁴ The experts noted that stipulations concerning factual matters that are not in dispute could save considerable amounts of time and eliminate the need for the introduction of potentially massive amounts of evidence, particularly by the prosecutor.¹⁶⁵ More importantly, the experts proposed greater use of the provisions governing judicial notice, in a manner that protects the rights of the accused and "at the same time reduces or eliminates the need for identical repetitive testimony and exhibits in successive cases."¹⁶⁶

In making this recommendation, the experts noted that the Chambers have adopted a conservative approach regarding judicial notice for two primary reasons: (1) to preserve the independence and different viewpoints of the trial Chambers, and (2) to protect the rights of the accused to contest evidence derived from a different case.¹⁶⁷ As regards the first point, there is currently no clear guidance from the Statute, rules, or jurisprudence regarding the binding effect

¹⁶² Id., a 765 [Reproduced in the accompanying notebook at Tab 39].

¹⁶³ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁶⁴ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁶⁵ Id. [Reproduced in the accompanying notebook at Tab 30].

¹⁶⁶ Id. [Reproduced in the accompanying notebook at Tab 30] The ICTY observed that a Chamber may "reserve its legal findings of the adjudicated historical, geographical, administrative and military context until the end of the trial." The prosecutor, however, disagreed: "It is relatively futile to leave the determination of what is within judicial notice until after the witnesses have been brought to the court or the evidence has been led." Rather, the prosecutor argued that, if the Chambers are prepared to take judicial notice of certain matters, it should be taken before the trial (quoting *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN Doc. A/54/634 (1999)). [Reproduced in the accompanying notebook at Tab 41].

¹⁶⁷ Id. [Reproduced in the accompanying notebook at Tab 39].

on one trial Chamber, if any, of rulings and decisions by other trial Chambers.¹⁶⁸ As for protecting the defendants rights, it is very difficult for the trial Chamber to balance the rights of the accused when confronted with a request to take judicial notice, especially when such a request is made by the prosecution and concerns an element of the offense.¹⁶⁹

The prosecutor has identified lengthy trials as one of the most pressing issues facing the International Tribunals, asking, "How can trials of such potentially endless complexity be reduced to manageable proportions for a criminal court? No issue taxes the Tribunals as this one does."¹⁷⁰ Moreover, some of the proposals in the Experts' Report, in helping to reduce the length of trials, would contribute to fulfilling the defendants statutory right to a fair and expeditious trial.¹⁷¹

Judicial Notice of Genocidal Activity in National Courts

The Holocaust, the systemic, planned annihilation of European Jews and other groups by Nazi Germany, was a watershed event in the history of humanity.¹⁷² There can be no doubt that the atrocities committed by the Nazi regime during World War II towards the Jewish population constituted genocide. Yet the Holocaust has not gone unchallenged.¹⁷³ Most notably,

¹⁶⁸ Id. [Reproduced in the accompanying notebook at Tab 41].

¹⁶⁹ Id. [Reproduced in the accompanying notebook at Tab 41].

¹⁷⁰ Id., at 773 (quoting *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, UN Doc. A/54/634 (1999)). [Reproduced in the accompanying notebook at Tab 41].

¹⁷¹ Id. [Reproduced in the accompanying notebook at Tab 41].

¹⁷² Geri J. Yonover, *The Lessons Of History: Holocaust Education In The United States Public Schools*, 26 Vt. L. Rev. 133, 136 (2001). [Reproduced in the accompanying notebook at Tab 42].

¹⁷³ Id. [Reproduced in the accompanying notebook at Tab 42].

some have attacked Holocaust education as a perversion of history.¹⁷⁴ Judicial notice of the Nazi genocide has stemmed in large part from attempts by various groups to disprove or deny that the genocide was in fact perpetrated.

I. The Mermelstein Case

In 1980, the Institute for Historical Review offered a \$50,000 reward for proof that Jews were gassed at Auschwitz.¹⁷⁵ A Holocaust survivor named Mel Mermelstein claimed the reward, submitting as proof declarations by other survivors who witnessed friends and relatives being taken away to their deaths by the Nazis.¹⁷⁶ His own testimony described how he watched his mother and sister led to gas Chambers.¹⁷⁷ When the Institute told him the offer had been withdrawn because there had been no takers, Mermelstein sued in the Superior Court of the State of California.¹⁷⁸ The case never went to trial, but a summary judgment motion was recognized by the court, in favor of Mermelstein.¹⁷⁹ The honorable Thomas T. Johnson, on October 9, 1981, took judicial notice as follows:

¹⁷⁴ Id. [Reproduced in the accompanying notebook at Tab 42].

¹⁷⁵ Kenneth Lasson, *Holocaust Denial And The First Amendment: The Quest For Truth In A Free Society*, 6 Geo. Mason L. Rev. 35(1997) [Reproduced in the accompanying notebook at Tab 43].

¹⁷⁶ Id. [Reproduced in the accompanying notebook at Tab 43].

¹⁷⁷ Id. [Reproduced in the accompanying notebook at Tab 43].

¹⁷⁸ Id. [Reproduced in the accompanying notebook at Tab 43]. (*Mermelstein v. IHR*, Cal. Sup. Ct., October 9, 1981 unpublished opinion).

¹⁷⁹ Ben S. Austin, *Denial is not Revision*, < <http://www.mtsu.edu/~baustin/revision.htm> > (visited on 04/04/02). [Reproduced in the accompanying notebook at Tab 44].

“Under Evidence Code Section 452(h)¹⁸⁰, this court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944” and “it simply is a fact that falls within the definition of Evidence Code Section 452(h). It is not reasonably subject to dispute. And it is capable of immediate and determination by resort to sources of reasonably indisputable accuracy. It is simply a fact”¹⁸¹.

A Canadian court, like their California brethren, did not hesitate in reaching a similar conclusion in a Holocaust denying case of their own.

¹⁸⁰ “Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (quoting California Evidence Code § 452(h)) < http://www.law.harvard.edu/publications/evidenceiii/rules/ca_div4.htm > (visited on 14/04/02) [Reproduced in the accompanying notebook at Tab 45].

¹⁸¹ Austin, supra n. 179 (quoting Superior Court Judge Thomas T. Johnson). The Statement of Record states:

"WHEREAS, the Legion for Survival of Freedom, and the Institute for Historical Review, sent by letter dated November 20, 1980, directly to Mel Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald, an exclusive reward offer in a letter marked "personal" dated November 20, 1980, offering Mr. Mermelstein a \$50,000 exclusive reward for "proof that Jews were gassed in gas Chambers at Auschwitz" "and further stating that if Mr. Mermelstein did not respond to the reward offer "very soon", "the Institute for Historical Review would 'publicize that fact to the mass media' ..."

"WHEREAS, Mr. Mermelstein formally applied for said \$50,000 reward on December 18, 1980; and
"WHEREAS, Mr. Mermelstein now contends that the Institute for Historical Review knew, or should have known, from Mr. Mermelstein's letter to the editor of the Jerusalem Post dated August 17, 1980, that Mr. Mermelstein contended he was a survivor of Auschwitz-Birkenau and Buchenwald; knew, or should have known, that Mr. Mermelstein contended that his mother and two sisters were gassed to death at Auschwitz; and knew, or should have known, of his contention that at dawn on May 22, 1944, he observed his mother and two sisters, among other women and children, being lured and driven into the gas Chambers at Auschwitz-Birkenau, which he later discovered to be Gas Chamber No. 5; and

"WHEREAS, on October 9, 1981, the parties in dispute in the litigation filed cross-motions for summary judgment resulting in the court, per the Honorable Thomas T. Johnson, taking judicial notice as follows: "Under Evidence Code Section 452(h), this court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944" and "It just simply is a fact that falls within the definition of Evidence Code Section 452(h). It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact."

"WHEREAS, Mr. Mermelstein and other survivors of Auschwitz contend that they suffered severe emotional distress resulting from said reward offer and subsequent conduct of the Institute of Historical Review; and

"WHEREAS, the Institute for Historical Review and Legion for Survival of Freedom now contend that in offering such reward there was no intent to offend, embarrass or cause emotional strain to anyone, including Mr. Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald Concentration Camps of World War II, and a person who lost his father, mother and two sisters who also were inmates of Auschwitz;

"WHEREAS, the Institute for Historical Review and Legion for Survival of Freedom should have been aware that the reward offer would cause Mr. Mermelstein and other survivors of Auschwitz to suffer severe emotional distress which the Institute for Historical Review and Legion for Survival of Freedom, now recognize is regrettable and abusive to survivors of Auschwitz.

II. The Zundel Case

Ernst Zundel, one of the most active purveyors of anti-Semitic Holocaust denial in the world, was charged in 1983 under Section 181 (known as the false news section) of the Canadian Criminal Code on the basis of a private complaint concerning the distribution of his pamphlet, "Did Six Million Really Die?"¹⁸² Zundel was convicted twice by a jury, but the Supreme Court of Canada (in a 4-3 decision) ruled in 1992 that the false news section was unconstitutional, in that free speech was too restricted.¹⁸³ During his first trial in 1985 trial judge Huck Locke worried that judicial notice would mean that the prosecutor no longer would have to prove a key element of the case and decided against taking judicial notice of the Holocaust.¹⁸⁴ Prior to the commencement of the Zundel's second trial, Crown Attorney John Pearson requested presiding Judge Ron Thomas to take judicial notice of the historical fact that during the Second World War, the National Socialist regime of Adolph Hitler pursued a policy which had as its goal the extermination of the Jews of Europe.¹⁸⁵ Thomas granted the application in the following terms:

¹⁸² Karen R. Mock, Countering Anti-Semitism and Hate in Canada Today: Legal/Legislative Remedies and Current Realities Racism, Anti-Semitism and Hate in Canada, < <http://www.nizkor.org/hweb/people/m/mock-karen/countering-hate.html> > (visited on 05/04/02) [Reproduced in the accompanying notebook at Tab 46].

¹⁸³ Id. [Reproduced in the accompanying notebook at Tab 46] (citing] *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 accompanying notebook at Tab 21].

¹⁸⁴ Marouf A. Hasian Jr., *Canadian civil liberties, Holocaust denial, and the Zundel trials*, 21Comm. and the Law 43 (1999) [Reproduced in accompanying notebook at Tab 47].

¹⁸⁵ Institute for Historical Review, *The 'False News' Trial of Ernst Zündel – 1988*, < <http://www.ihr.org/books/kulaszka/06thomas.html> > (visited on 05/04/02) [Reproduced in accompanying notebook at Tab 48].

“It is my respectful view that the court should take judicial notice of the Holocaust having regard to all of the circumstances. The mass murder and extermination of Jews of Europe by the Nazi regime during the Second World War is so notorious as not to be the subject of dispute among reasonable persons. Furthermore, it is my view that the Holocaust is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy. But I emphasize the ground upon which I hold that the court should take judicial notice of the Holocaust is that it is so notorious as to be not the subject of dispute among reasonable persons ... The Holocaust is the mass murder and extermination of Jews by the Nazi regime during the Second World War, and the jury will be told to take judicial notice of that.”¹⁸⁶

As a result, the jury in the Zindel trial was directed that it was required to accept as a fact that the Holocaust, as defined by Thomas, actually occurred.¹⁸⁷ As stated previously, Zindel’s convictions were eventually overturned by the Canadian Supreme Court.

The precedents set in both the Mermelstein and Zindel cases cannot be overlooked. Given the notorious nature of the Holocaust, coupled with the abundance of readily available source material on it, justices Johnson and Thomas correctly applied the use of judicial notice to the respective cases at bar. The Genocidal activities perpetrated in 1994 in Rwanda fall into this same category.

Judicial Notice in the ICTY/ICTR Tribunals

I. The Akayesu Case

In the Trial Chamber’s groundbreaking 1998 judgment in the case of Jean Paul Akayesu,¹⁸⁸ the Chamber took judicial notice of voluminous documentary evidence¹⁸⁹ that

¹⁸⁶ Id. (quoting District Court Judge Ron Thomas) [Reproduced in accompanying notebook at Tab 48].

¹⁸⁷ Id. [Reproduced in accompanying notebook at Tab 48].

¹⁸⁸ *Prosecutor v. Jean-Paul Akayesu*, (ICTR-96-4-T), (Sept. 2, 1998) <www.un.org/ictt/english/judgement/akayesu.html> [Reproduced in accompanying notebook at Tab 49].

extensively chronicled the massacres which took place in Rwanda in 1994. These documents illuminated that the Rwandan violence by the Hutus was organized, planned, ethnically motivated, and undertaken with the intent to wipe out the Tutsis (as discussed earlier, this latter element being required to constitute genocide under the definitions provided by the Genocide Convention).¹⁹⁰ This judgment, directed at the bourgmestre of the Taba commune in the Prefecture of Gitarama in Rwanda, was the first international conviction of an individual for genocide.¹⁹¹ Its crucial finding, that the killings of between one half and one million people within Rwanda during mid 1994 was clearly aimed at exterminating the Tutsis and, given the undeniable scale and ferocity with which it was accomplished, these actions undoubtedly constituted genocide within the traditional definition of that term as reflected in both the Genocide Convention and the ICTR's statute.¹⁹²

Significantly, by judicially noting numerous United Nations reports which documented the horrific scale of butchery, the judges demonstrated that Rule 94 could and would be used in the manner in which it was created. By utilizing judicial notice, and its fellow evidentiary rules of the ICTR, in a way that responded to the difficulties presented by these cases from the

¹⁸⁹ For example, the Chamber took judicial notice of the following documents: *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994) [Reproduced in accompanying notebook at Tab 50].; *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993*, U.N. Doc. E/CN.4/1994/7/Add.1 (1993) [Reproduced in accompanying notebook at Tab 51].; *Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda*, S/1994/470, (20 April 1994) [Reproduced in accompanying notebook at Tab 52].; *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994*, U.N. Doc. E/CN.4/S-3/3 (1994) [Reproduced in accompanying notebook at Tab 53]. See also, generally, the collection of United Nations documents in *The United Nations and Rwanda, 1993-1996*, The United Nations Blue Books Series, Volume X, Department of Public Information, United Nations, New York (quoting *Prosecutor v. Jean-Paul Akayesu* para 165).

¹⁹⁰ Drumbl, Gallant, *supra* n. 94 [Reproduced in accompanying notebook at Tab 24].

¹⁹¹ Jose E. Alvarez, *Lessons From The Akayesu Judgment*, 5 ILSA J. Int'l & Comp. L. 359 (1999) [Reproduced in accompanying notebook at Tab 54].

¹⁹² *Id.* [Reproduced in accompanying notebook at Tab 54].

perspective of the prosecution, the judges reaffirmed their own ability to "freely assess the probative value of all relevant evidence" even when such evidence was presented via documentary evidence.¹⁹³ That the use of Rule 94 was crucial in helping secure the first conviction for genocide in history can only help lend weight to its worth as an invaluable evidentiary tool, one which must be used on a more frequent basis.

II. The Semanza Case

Laurent Semanza, former mayor of Bicumbi (Kigali prefecture in central Rwanda) was charged with 14 counts of genocide, conspiracy to commit genocide and crimes against humanity (including rape and persecution) in the Bicumbi and Gikoro communes.¹⁹⁴ On November 3, 2000 in a precedent-setting motion, Trial Chamber III ruled in favour of the Prosecutor's Notice of Motion for Judicial Notice and Presumptions of Facts Pursuant to Rule 94 and 54 of the Rules of Procedure and Evidence, filed on January 19, 1999.¹⁹⁵ The Prosecutor requested that the Chamber take judicial notice of a host of factual information.¹⁹⁶ Citing Rule 94, the Prosecution

¹⁹³ See Id. [Reproduced in accompanying notebook at Tab 21].

¹⁹⁴ Foundation Hirondelle, *Laurent Semanza, former mayor of Bicumbi* < <http://www.hirondelle.org/> > (February 28th, 2002) (visited on 13/02/04) [Reproduced in accompanying notebook at Tab 55].

¹⁹⁵ Prosecutor v. Laurent Semanza, supra n. 102 [Reproduced in accompanying notebook at Tab 27].

¹⁹⁶ In Appendix A to the Motion, the Prosecutor prayed that the Chamber take judicial notice of a panoply of facts, which collectively would be characterized as socio-political historical background facts relating to the existence of "genocide" "armed conflict" and "widespread systematic attacks" against the Tutsi civilian population in Rwanda during the months of April through July, 1994. By submitting Appendix B to the Motion, the Prosecutor argued for the admission into evidence, via judicial notice, certain documents that comprise legislative and administrative regulations and governmental investigative reports of the genocide in Rwanda, including among others, United Nations reports (quoting *Prosecutor v. Laurent Semanza* (ICTR-97-20-I) (Decision On The Prosecutor's Motion For Judicial Notice And Presumptions Of Facts Pursuant To Rules 94 And 54) (3 November 2000) [Reproduced in accompanying notebook at Tab 27].

contended that the factual matters delineated in Appendix A belonged to the category of facts of "common knowledge around the world, facts which are not subject to reasonable dispute, matters which are within the knowledge of the Tribunal, or matters which are self-evident in the circumstances."¹⁹⁷ In answering the Prosecutions prayers, the Chamber cited prior cases dealing with judicial notice¹⁹⁸, policy reasons for taking judicial notice, as well as, other procedural aspects for the taking of judicial notice.

However, the Chamber did not take judicial notice of genocide.¹⁹⁹ It denied the Prosecutor's requests made in to create evidentiary presumptions on the basis of the facts refused to take judicial notice of inferences that could have be drawn from the judicially noticed facts.²⁰⁰ In reaching its conclusion it stated:

“A fundamental question in this case is whether "genocide" took place in Rwanda. Notwithstanding the over-abundance of official reports, including United Nations reports confirming the occurrence of genocide, this Chamber

¹⁹⁷ *Prosecutor v. Laurent Semanza*, supra n. 102 [Reproduced in accompanying notebook at Tab 27].

¹⁹⁸ These include: *Prosecutor v. Tadic*, (IT-94-1-AR72), (Transcript of Hearing on Interlocutory Appeal on Jurisdictional Challenge) (ICTY Appeals Chamber, 2 October 1995) (finding that that Tribunal must in the interest of fairness take judicial notice of notorious facts) [Reproduced in accompanying notebook at Tab 56]., *Prosecutor v. Kanyabashi*, (ICTR-96-15-T), (Decision on Jurisdiction) (18 June 1997). (Rendering a decision on a defense pre-trial motion challenging the jurisdiction of the Tribunal, by, among other things, taking judicial notice of the fact that the Special Rapporteur for Rwanda, the Commission of Experts on Rwanda and the Security Council had all concluded that the conflict in Rwanda as well as the stream of refugees had created a highly volatile situation in the neighboring states) [Reproduced in accompanying notebook at Tab 57]., *Prosecutor v. Akayesu*, (ICTR-96-4-T), (Judgment) (2 September 1998) (taking judicial notice of United Nations reports) [Reproduced in accompanying notebook at Tab 49]., *Prosecutor v. Kayishema*, (ICTR-95-1-T), (Judgment) (21 May 1999) (finding that Article 2 of the Statute which defines genocide is not aimed at determining individual responsibility or guilt, rather a finding that genocide occurred merely provided a context in which the crimes alleged in the indictment may have been perpetrated) [Reproduced in accompanying notebook at Tab 58].

¹⁹⁹ However, the Chamber did state : “...the fact that during the period from 6 April 1994 to 17 July 1994 there existed throughout Rwanda "widespread and systematic attacks" against the civilian population based on certain invidious classifications including Tutsi ethnic identity, *is a notorious historical fact of which this Chamber may take judicial notice.*” (emphasis added) (quoting *Prosecutor v. Laurent Semanza* Ictr-97-20-I (Decision On The Prosecutor's Motion For Judicial Notice And Presumptions Of Facts Pursuant To Rules 94 And 54) (Trial Chamber Decision November 3, 2000)) [Reproduced in accompanying notebook at Tab 27].

²⁰⁰ *Prosecutor v. Laurent Semanza*, supra n. 102 [Reproduced in accompanying notebook at Tab 27].

believes that the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime.”²⁰¹

Significantly, the Chamber

“did take judicial notice of the existence of the *enumerated acts* comprising the crime of genocide between 1 January 1994 and 17 July 1994 in Rwanda, and that there was an armed conflict not of an international character, including killing or causing serious bodily harm to members of a group.”²⁰²

While not recognizing genocide in Rwanda as a whole, nevertheless it is a step in the right direction, and heralds a new direction in the Tribunals approach to Rule 94.

A key element pertaining to each of the Chambers holdings, and relevant to the adequate application of Rule 94, is the fact that in each of the various Chambers the taking of judicial notice of ‘the ultimate facts at issue in this case’ was not permitted. Judicial notice notwithstanding, The Chambers actions assured that the burden of adducing formal proofs of the facts supporting the alleged guilt of the Accused will always remain with the Prosecution, thereby assuring from both substantial and objective viewpoint that a fair trial is not compromised. This very issue was addressed by the *Akayesu* Chamber which stated:

“[T]he Chamber holds that the fact that the [enumerated crimes constituting] genocide [were] indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence its decision in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the prosecutor... In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.”²⁰³

²⁰¹ Id., (citing *Prosecutor v Clément Kayishema*, (ICTR-95-1)(Judgment)(21 May 1999) (referring to "genocide," and holding "the question is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on the issue"))[Reproduced in accompanying notebook at Tab 58].

²⁰² Id. [Reproduced in accompanying notebook at Tab 27].

²⁰³ Alvarez, supra n. 191 at [Reproduced in accompanying notebook at Tab 54].

Further Policy Reasons for the Judicial Notice of Genocide

While the issues of expediency, cost management, and historical precedent are prime reasons for a more liberal interpretation and use of Rule 94, other relevant issues cannot be overlooked. Public perception and confidence in the judicial integrity of the process are increasingly important factors to consider when looking to the overall performance of the respective Tribunals. As mentioned above, with ballooning costs and limited results, criticism of the process is starting to grow.²⁰⁴ Coupled with a number of embarrassing incidents,²⁰⁵ a growing impatience with the process,²⁰⁶ and the birth of the long anticipated International

²⁰⁴ The United States for example is unhappy with the creation of ad hoc international tribunals. It objects to the loss of sovereignty from the internationalization of justice and fears Americans involved in military action abroad could end up in front of international courts, and believes that national law is preferable to unwieldy international tribunals. As a major contributor to the United Nations, and the lone national Superpower, criticism from it cannot be ignored. (see Mark Turner, *Giggling judges undermine case for international courts: Rwanda's genocide tribunal epitomises the problems in applying the law to man's inhumanity*, The Financial Times (February 14, 2002). [Reproduced in accompanying notebook at Tab 40].

²⁰⁵ For example during the testimony of an alleged rape victim in the 'Butare trial', "laughter exploded from the bench and the court video switched to show three of the international tribunal's judges, William Sekule, Winston Maqutu and Arlette Ramaroson, sniggering like children... the judges... saw no reason to apologise". The image of giggling judges, which emerged late last year, has for many come to epitomise the problems facing the International Criminal Tribunal for Rwanda and, by extension, the development of international justice itself. In addition, allegations of defence investigators turning out to be genocide suspects themselves, and accusations that defence lawyers splitting their fees with their clients have also tarnished the image of the Tribunal. (quoting Mark Turner, *Giggling judges undermine case for international courts: Rwanda's genocide tribunal epitomises the problems in applying the law to man's inhumanity*, The Financial Times (February 14, 2002)) [Reproduced in accompanying notebook at Tab 40].

²⁰⁶ According to Mary Kimani from Internews, an organisation that travels around Rwanda teaching people about the court, few Rwandans believe the ICTR is giving them justice. "There is a lot of resentment from both communities ...with many survivors feeling betrayed." (quoting Mark Turner, *Giggling judges undermine case for international courts: Rwanda's genocide tribunal epitomises the problems in applying the law to man's inhumanity*, The Financial Times (February 14, 2002)) [Reproduced in accompanying notebook at Tab 40]. See also the aforementioned "Media trial", one of the tribunal's high profile cases, which has been going on since October 2000, and plagued, as other tribunal cases have, by management problems. Its prosecutors have changed several times and it may still be months from completion. Some 40 witnesses have already been heard (quoting Marlise Simons, *Trial Centers on Role of Press During Rwanda Massacre*, The New York Times (March 3, 2002) [Reproduced in accompanying notebook at Tab 59].

Criminal Court²⁰⁷, the time has come to look towards methods which can help formulate an effective 'end-strategy' for the Tribunal. Of course, this must be accomplished without sacrificing the Tribunals integrity, or due process protections to defendants. and duty of justice.

Another, albeit unorthodox, facet that lends itself to the judicial notice of genocide, is the staggering amount of information documenting this great tragedy. Since 1994, there have been well over 20,000 articles²⁰⁸ written about the genocide, and over 1500 videotaped and filmed segments²⁰⁹ chronicling the massacres. Given the amount of information, coupled with the *proprio motu* allowances of amended Rule 94(b), the argument for judicial notice of genocide is only strengthened.

With the Tribunal already in excess of seven years²¹⁰, and no end in sight, hard choices must be made. A step in the right direction would be the recognition of genocide via the judicial notice provisions of Rule 94.

Genocide Can And Should Be Judicially Noticed Pursuant To Rule 94

Due to its peculiar blend of inquisitorial and adversarial procedure, the ICTR has the freedom to pick and choose evidentiary practices that mirror the intent of the Statute of the

²⁰⁷ The Rome Statute of the International Criminal Court will enter into force on 1 July 2002. For more information please visit < <http://www.un.org/law/icc/> > (visited on 02/05/02).

²⁰⁸ For example there have been over 800 articles alone in the influential Washington Post, and over 700 in the New York Times. The number of 20,000 was reached by performing a comprehensive search using the Westlaw and Lexis-Nexis news databases.

²⁰⁹ Source: Associated Press Television News (APTN).

²¹⁰ In contrast, the Nuremberg trials total duration was 11 months (quoting *War Crimes Tribunals: An In-Depth Analysis* < <http://www.facts.com/icof/nurem.htm> > (visited on 29/04/02) [Reproduced in accompanying notebook at Tab 60].

International Tribunal for Rwanda.²¹¹ The Statute, like the Tribunal's Rules of Evidence, combine inquisitorial and adversarial system elements.²¹² Under Rule 94 the Tribunal clearly is authorized, and arguably mandated, to take judicial notice of facts that are common knowledge.²¹³ With the recent amendment to Rule 94, the Tribunals have empowered judges of their respective courts to take a more "pro-active" approach in how they conduct their trials. It is in this "pro-active" manner which will allow judges to take judicial notice of the commonly known, notorious genocide which occurred within the country of Rwanda during 1994.

- The justices have a host of historical and legal precedent by which to base their conclusions. The Nuremberg Tribunal, following WWII, set a precedent for a liberal interpretation of judicial notice when dealing with the genocidal activities of the Nazi regime. This interpretation was subsequently adopted by its companion, the Control Council 10 Tribunal, as well as, Gen. MacArthur's Far East tribunals. The Yugoslav and Rwandan Tribunals are direct descendents of the WWII tribunals, and as such, should evoke their spirit of justice and judicial expediency.
- Genocide has been judicial noticed on two previous occasions in Canada and the United States respectively. The judges correctly observed that the Holocaust, due to its common

²¹¹ *Statute of the International Tribunal for Rwanda*, < <http://www.ictj.org/> > [Reproduced in accompanying notebook at Tab 61].

²¹² *Id.* [Reproduced in accompanying notebook at Tab 60].

²¹³ *Id.* [Reproduced in accompanying notebook at Tab 60].

knowledge and notorious nature, was a well-known and indisputable fact, and was within the court's power to accept such a fact.

- An Expert Group appointed by the Secretary-General recommended an expanded use of the provisions governing judicial notice to help with judicial efficiency and reduce the need for repetitive testimony.
- In the precedent setting *Akayesu* and *Semanza* cases the Trial Chambers saw the need and purpose for the better use of Rule 94, and as such, evoked judicial notice while recognizing and protecting the due process rights of the defendants.
- For policy reasons and for the well-being of the tribunal itself, a liberal interpretation and use of Rule 94 is warranted.

It is for these foregoing reasons that the Prosecution should strongly advocate the use of Rule 94 to recognize the Genocide in Rwanda. Given the overwhelming nature of the evidence is only a matter of time before such a motion is granted.

Finally the Tribunals must look to their unique roles in history; one that will be scrutinized for generations. It has the responsibility of not only administering justice in a fair and equitable manner, but also the responsibility of educating whomever has the unenviable task of addressing some, unforeseen future horror. This responsibility was so eloquently addressed by Sir Hartley Shawcross Chief Prosecutor for the United Kingdom during the Nuremberg Trial:

“Human memory is very short...so that the true facts, never authoritatively recorded, become obscured and forgotten. One has only to recall the circumstances...to see the dangers to which, in the absence of any authoritative judicial pronouncement a tolerant or a credulous people is exposed. With the passage of time the former tend to discount, perhaps because of their very horror, the stories of aggression and atrocity that may be handed down; and the latter, the credulous, misled by perhaps fanatical and perhaps dishonest propagandists, come to believe that it was not they but their opponents who were guilty of that which they would themselves condemn. And so we believe that this Tribunal, acting, as we know it will act ...with complete and judicial objectivity, will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning. From this record shall future generations know not only what our generation suffered, but also that our suffering was the result of crimes, crimes against the laws of peoples which the peoples of the world upheld and will continue in the future to uphold to uphold by international co-operation... firmly grounded, in the rule of law.”²¹⁴

²¹⁴ Sir Hartley Shawcross, "Twelfth Day, Tuesday, 12/4/1945, Part 01", in Trial of the Major War Criminals before the International Military Tribunal. Volume III. Proceedings: 12/1/1945-12/14/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 91-94. < <http://www.courttv.com/casefiles/nuremberg/shawcross.html> > [Reproduced in accompanying notebook at Tab 62].