International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Navanethem Pillay
Judge Andrésia Vaz

Decision of: 22 November 2001

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GERARD NTAKIRUTIMANA

Case No. ICTR-96-10-T
and
Case No. ICTR-96-17-T

DECISION ON THE PROSECUTOR'S MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS

Rule 94(B) of the Rules of Procedure and Evidence

For the Prosecutor:

Mr. Charles Adeogun-Phillips
Mr. Wallace Kapaya
Ms. Boi-Tia Stevens

For the Defence:

Mr. Ramsey Clark
Mr. Edward M. Medvene

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Navanethem Pillay, and Judge Andrésia Vaz ("the Chamber");

BEING SEIZED OF the Prosecution's motion of 26 July 2001 for judicial notice of adjudicated facts ("the motion") pursuant to Rule 94(B) of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

CONSIDERING a submission by the Defence dated 19 August 2001 in opposition to the Prosecution's motion ("the response");

TAKING ACCOUNT of the oral hearing on 10 October 2001;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 27 April 2001 the Defence responded to the Prosecution's "Request to Admit" form, which had requested admission of forty-three alleged facts. The Defence also submitted a document entitled "Explanations and Additions to Responses to Requests for Admissions".[1]

2. At the Status Conference on 27 August 2001, following receipt of the Prosecution's motion for judicial notice under Rule 94(B), the Chamber requested the parties to make a further attempt to reach agreement on the facts in question.[2] On 10 September 2001 the Defence filed a document concerning "Additional Areas of Factual Agreement".[3]

3. The common ground that emerged through this admissions' process was, in the Prosecution's view, insufficient. At the Pre-trial Conference on 17 September 2001, the Prosecution therefore stood by its original motion.[4] However, as will become evident below, some of the facts that the Prosecution seeks to have judicially noticed have already been admitted through the admissions' process.

SUBMISSIONS OF THE PARTIES

Prosecution

4. In its motion, the Prosecution requested the Trial Chamber to take judicial notice of purported adjudicated facts set out in the Annexure thereto. The Annexure contains

[1] Hereinafter referred to as the Defence's First Set of Admissions.
[2] Transcripts of 27 August 2001 pp. 25-26.
[3] Hereinafter referred to as the Defence's Second Set of Admissions.
[4] Transcripts of 17 September 2001 p. 100.

five items, which are reproduced in full below. The Prosecution submitted that these items, "having been upheld on appeal by the Appeals Chamber in the *Kambanda*, *Serushago*, *Akayesu* and *Kayishema/Ruzindana* cases", may be considered adjudicated facts within the meaning of Rule 94(B).

5. The Prosecution submitted that its motion seeks "to ensure judicial economy and uniformity of judgements on general facts regarding the events in Rwanda".[5] It also submitted that Rule 94(B) empowers the Chamber to take judicial notice of legal conclusions reached in other proceedings, provided that those conclusions do not tend to prove the guilt of an accused person. According to the Prosecution, the Defence in this case would suffer no prejudice should the motion be granted.

6. The alleged adjudicated facts appear in the Annexure as follows:

    1) Between 6 April and 17 July 1994, citizens native to Rwanda were identified according to the following ethnic classifications: Tutsi, Hutu and Twa.

    2) On 6 April 1994, the President of the Republic of Rwanda, Juvénal Habyarimana, was killed when his plane was shot down on its approach to Kigali airport.

    3) The following state of affairs prevailed in Rwanda between 1 January 1994 and 17 July 1994:

        a) there were throughout Rwanda widespread or systematic attacks against human beings.
        b) the widespread or systematic attacks were directed against a civilian population.
        c) the widespread or systematic attacks were directed against a civilian population on the grounds of political persuasion, Tutsi ethnic identification or Tutsi racial origin.

    4) Between 1 January 1994 and 17 July 1994, a total of between 500,000 and 1,000,000 people died in Rwanda as a result of the widespread violence.

    5) The following state of affairs, among others, prevailed in Rwanda between 6 April 1994 and 17 July 1994:

        a) There was in existence in Rwanda between 6 April-17 July 1994 a genocidal plan to exterminate the Tutsi ethnic group in Rwanda.

        b) The modus operandi of the genocidal plan to exterminate the Tutsi ethnic group in Rwanda consisted of the following:

            i) The preparation and execution of lists, targeting Tutsi elite, government officials, intellectuals, and other moderate Hutu sympathetic to the Arusha peace accords.
            ii) The dissemination of an extremist ideology through the media designed to facilitate a campaign of incitement to exterminate the Tutsi population.
            iii) The use of local government official[s] in the administration of a civil defence programme involving the wide distribution of weapons to the civilian population.

[5] Motion para. 5. See also transcripts of 10 October 2001 p. 2.

iv) The screening of identification cards carried out at roadblocks erected throughout the country following the death of the President.
v) The use of a meticulously planned programme of gathering Tutsi civilians in historically 'safe havens' or community centres such as churches, stadiums, commune offices assuring them that their safety was guaranteed and thereafter confining them to such locations following which attacks were launched upon them therein.

c) A plan of genocide was planned and executed in Rwanda between April-June 1994, in the course of which, the following acts were done with the intent to destroy wholly or partially in Rwanda the ethnic group identified as Tutsi:

i) persons perceived to be Tutsi were killed.
ii) serious bodily or mental harm was inflicted upon persons perceived to be Tutsi.
iii) conditions of life calculated to bring about the whole or partial physical destruction of Tutsi in Rwanda were deliberately inflicted upon them.

d) A plan of genocide was planned and executed in the Prefecture of Kibuye, Republic of Rwanda, between April and June 1994, in the course of which, the following acts were done with the intent to destroy wholly or partially in Rwanda the ethnic group identified as Tutsi:

i) persons perceived to be Tutsi were killed.
ii) serious bodily or mental harm was inflicted upon persons perceived to be Tutsi.
iii) conditions of life calculated to bring about the whole or partial physical destruction of Tutsi in Rwanda were deliberately inflicted upon them.

e) Some Rwandan citizens committed murder as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.

f) Some Rwandan citizens committed extermination of human beings as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.

g) Some Rwandan citizens committed inhumane acts as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.

h) Many of the victims of the above-mentioned crimes were protected persons, within the meaning of Article 3 common to the Geneva Conventions and Additional Protocol II.

i) The Tutsi ethnic group constitutes a group protected by the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) and hence, by Article 2 of the Statute.

j) Between 1 January 1994 and 17 July 1994, the following state of affairs existed in Rwanda:

i) an armed conflict between the Rwandan Armed Forces (FAR) and the Rwandan Patriotic Front (RPF).

ii) the armed conflict was non-international in character.

k) Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) – having acceded to it on 12 February 1975.

l) Between 1 January 1994 and 17 July 1994, Rwanda was a Contracting Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977 – having acceded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and acceded to Protocols additional thereto of 8 June 1977 on 19 November 1984.

Defence

7. In response to the Prosecution's claim that the judicial notice sought by it assists judicial economy, the Defence argued that "familiarity acquired in prior cases is a dangerous source of judicial economy if the Trial Chamber remains influenced by them".[6] It submitted that the Prosecution's motion seeks to have "virtually every fact essential to conviction, except individual participation, established by judicial notice", and argued that legal conclusions that are essential elements of the Prosecution's criminal charges are not within the ambit of matters that can be judicially noticed.[7]

8. According to the Defence, the matters allegedly adjudicated include generalisations and other allegations that are factually incorrect or questionable, or so imprecise and vague that they cannot be assessed. Some of them are only part of the subject matter and therefore misleading, or are legal conclusions involving questions of law or mixed questions of law and fact.

9. The Defence's position is that the application of Rule 94(B) as sought by the Prosecution would violate fundamental rights of the Accused, namely the presumption of innocence and the right to present a full defence in the course of a fair trial. Accordingly, the Defence requested the dismissal of the motion.

DELIBERATIONS OF THE CHAMBER

1. Facts Agreed upon through the Admissions' Process

10. By way of introduction, the Chamber notes that through the admissions' process the parties have agreed on several matters. The Defence is in agreement with the Prosecution on items 1 to 7 as set out in the "Request to Admit" form, which also cover items 1 and 2 of the Annexure to the Prosecution's motion, with some qualifications (below). Agreement has also been reached in relation to parts of item 5 of the Annexure.

[6] Response p. 14.
[7] Response pp. 3 and 14, respectively.

Annexure Item 1 - Ethnicity

11. The Prosecution submitted that "[b]etween 6 April and 17 July 1994, citizens native to Rwanda were identified according to the following ethnic classifications: Tutsi, Hutu and Twa".

12. The Defence made a "partial" admission on this point, namely that "some people identified Tutsi, Hutu and Twa as ethnic groups before, during and after 1994".[8]

13. The Chamber finds that the parties agree that between 6 April and 17 July 1994 in Rwanda, people were identified as Tutsi, Hutu or Twa.

14. The Chamber considers that item 1 of the Annexure adequately expresses the common ground between the parties and sees no need to take judicial notice.[9]

Annexure Item 2 - Shooting Down of Airplane

15. The Prosecution's request for judicial notice included the fact that President Habyarimana was killed when his airplane was shot down on its approach to Kigali airport. The Defence accepted this formulation.[10] The fact is therefore regarded as admitted and no judicial notice is required.

Annexure Items 5 (k) and 5(l) - International Conventions binding Rwanda

16. The Defence, through the admissions' process, has already expressed its agreement with items 5(k) and 5(l) of the Annexure to the motion, concerning the Genocide Convention and the Geneva Conventions and Protocols.[11] Since there is no dispute the Chamber is not required to take judicial notice of these issues.[12]

Matters Not Covered by the Annexure

17. The admissions' process has also clarified that the parties agree on certain matters that are not covered by the Prosecution's request for judicial notice. The Chamber finds it useful to recall these matters in the present decision.

[8] Defence's First Set of Admissions, comment on item 6.
[9] In *The Prosecutor v. Laurent Semanza*, Decision of 3 November 2000 on the Prosecutor's motion for judicial notice and presumptions of facts pursuant to Rules 94 and 54 (Case No. ICTR-97-20-I), Trial Chamber III took judicial notice of facts of common knowledge under then Rule 94, now Rule 94 (A). One fact of common knowledge was that "[b]etween 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa" (Annex A item 1). This decision is hereinafter referred to as the First *Semanza* Decision.
[10] Defence's Second Set of Admissions, para. 2.
[11] Ibid., para. 6.
[12] Rwanda's adherence to these conventions was considered common knowledge in the First *Semanza* Decision; see Annex A items 4 and 5.

(i) Rwandan Administrative Structures. Bisesero

18. The parties agree on aspects of the Rwandan administrative structure, such as the eleven prefectures and the subdivision of prefectures into communes, secteurs and cellules. They also agree that Ngoma secteur formed part of Gishyita commune, which together with Gisovu were two communes of Kibuye prefecture.[13] However, whereas the Prosecution stated that the area known as Bisesero "spanned" the communes of Gishyita and Gisovu in Kibuye prefecture, the Defence asserted that Bisesero lies "partially in both communes, but is a minor part of each".[14]

19. The Chamber observes that the parties agree that the Bisesero area comprises a part of Gishyita and a part of Gisovu communes. It is noted that there is also agreement on the physical situation of the Mugonero complex.[15]

(ii) Personal History of the Two Accused

20. With respect to further items that are not covered by the Prosecution's motion, the Chamber notes that the Defence and the Prosecution also agree on the following items in the "Request to Admit" form: items 19 (date of birth of Elizaphan Ntakirutimana), 23 (date of birth of Gérard Ntakirutimana), and 24 (occupation of Gérard Ntakirutimana).

21. There is also at least partial agreement between the parties in respect of items 20 (occupation of Elizaphan Ntakirutimana), and 21 (presidency of Elizaphan Ntakirutimana). Whether there is any real disagreement on these points will be clarified during the trial.

2. Contested items

22. There being no other admitted common ground between the parties, it remains for the Chamber to decide whether it should take judicial notice of items 3, 4, and 5(a) to 5(j) of the Annexure to the Prosecution's motion.

General Observations on Rule 94(B)

23. The Prosecution's motion for judicial notice was made pursuant to paragraph (B) of Rule 94 of the Rules. The Rule in full states:

> **Judicial Notice**
> (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
> (B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

[13] Request to Admit, items 1 to 4.
[14] Defence's Second Set of Admissions, para. 1.
[15] Request to Admit, item 5.

24. Rule 94(B) was added to the ICTR's Rules at the Ninth Plenary Session on 3 November 2000. The wording is the same as Rule 94(B) of the ICTY Rules. Until now there has been only one decision by a Trial Chamber of the ICTR pursuant to Rule 94(B).[16] ICTY case law under the equivalent provision is dealt with below.

25. According to Rule 94(B) a Chamber may take judicial notice of "adjudicated facts" and of "documentary evidence from other proceedings of the Tribunal". In the present case the Prosecution's request refers only to the former. Under Rule 94(A) judicial notice shall be taken of "facts of common knowledge". It is the Chamber's view that "facts of common knowledge" and "adjudicated facts" constitute different, albeit possibly overlapping, categories: a fact of common knowledge is not necessarily an adjudicated fact, and vice versa.

26. It follows from Rule 94(B) that the facts proposed for notice must have been "adjudicated" in other proceedings of this Tribunal. The Chamber is of the view that this reference to previous findings of the ICTR does not include judgements based on guilty pleas, or admissions voluntarily made by an accused during the proceedings. Such instances, which do not call for the same scrutiny of facts by a Chamber as in a trial situation where the Prosecutor has the usual burden of proof, are not proper sources of judicial notice.[17] Consequently, the Chamber will not take account of facts allegedly adjudicated in the *Kambanda* and the *Serushago* judgements, as urged by the Prosecution. As for the *Musema* judgement, the Chamber will not take judicial notice of admissions by the accused during the trial. Moreover, it notes that in a decision in the *Kupreskic* case, the Appeals Chamber observed that only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed "adjudicated facts" within the meaning of Rule 94(B).[18]

27. Rule 94 (B) also requires that the proposed adjudicated facts must "relate" to matters at issue in the current proceedings. This means that matters which have only an indirect or remote bearing on the present case should not be the subject of judicial notice. That would not serve the main purpose of such notice, which is to ensure judicial economy (see para. 28).

28. If the above-mentioned conditions are fulfilled, the Chamber "may" take judicial notice. Unlike Rule 94(A), litra (B) therefore is discretionary. It is for the Chamber to decide whether justice is best served by its taking judicial notice of adjudicated facts. In this connection, the Chamber recalls that the doctrine of judicial notice serves two purposes, judicial economy and consistency of case law. These aims must be balanced against the fundamental right of an accused to a fair trial. Reference is made to Article 20 of the Statute. The Chamber agrees with the *Simic*

[16] *The Prosecutor v. Laurent Semanza*, Decision of 15 March 2001 on the Prosecutor's further motion for judicial notice pursuant to Rules 94 and 54, hereinafter referred to as the Second *Semanza* Decision. The Chamber denied the motion. Paras. 33-40 of the First *Semanza* Decision contain references to previous case law on judicial notice under Rule 94, now 94 (A).
[17] See, similarly, First *Semanza* Decision para. 34, in relation to present Rule 94 (A).
[18] *Prosecutor v. Zoran Kupreskic*, decision of 8 May 2001 para. 6. In relation to judgements of the ICTR it should be noted that the Appeals Chamber rendered its decision in the *Musema* case on 16 November 2001.

decision, in which an ICTY Trial Chamber, in relation to a motion pursuant to Rules 94(A) and (B), stated that "a balance should be struck between judicial economy and the right of the accused to a fair trial".[19] Similar statements have been made by ICTR and ICTY Chambers under Rule 94 (A). The Chamber endorses previous case law of the ICTR which has emphasised that the discretion to take judicial notice must not be exercised in a way that may result in prejudice to the accused.[20]

29. In striking this balance, the Chamber will avoid taking judicial notice of facts that are the subject of reasonable dispute.[21] Such matters should not be settled by judicial notice, but should be determined on the merits after the parties have had the opportunity to submit evidence and arguments.

30. Moreover, the Chamber is not inclined to take judicial notice of legal characterisations or legal conclusions based on interpretation of facts. This is consistent with the position adopted by other Trial Chambers in decisions on judicial notice, such as the *Simic* and the *Sikirica* decisions.[22] The Chamber's apprehension in relation to judicial notice of such matters would be alleviated in the event of clear guidance from the Appeals Chamber.

31. In its assessment the Chamber will also consider whether taking judicial notice would significantly assist judicial economy. The Chamber observes that in the present case, the Prosecution's case rested after 27 trial days. The witnesses for the Defence will be heard in the period from 14 January to 15 February 2002. Consequently, at this stage of the proceedings, the Chamber is not inclined to view judicial notice as significantly influencing judicial economy.

Annexure Item 3 - Widespread or Systematic Attacks

32. The Prosecutor has requested the Chamber to take judicial notice of a state of affairs prevailing in Rwanda between 1 January 1994 and 17 July 1994, namely widespread or systematic attacks directed against a civilian population on the grounds of political persuasion, Tutsi ethnic identification or Tutsi racial origin.

33. The Chamber accepts that judgements of this Tribunal have established that from April 1994, in Rwanda, attacks were suffered by civilians on the grounds of their perceived political affiliation or ethnic identification. However, the Prosecution's

[19] See, *Prosecutor v. Simic et al.*, Decision of 25 March 1999 on the Pre-trial motion by the Prosecution requesting the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia-Herzegovina.
[20] See, for instance, Second *Semanza* Decision para. 10.
[21] In support of this position, see *Prosecutor v. Sikirica et al.*, Decision of 27 September 2000 on the Prosecution motion for judicial notice of adjudicated facts: "Considering that the Trial Chamber can only take judicial notice of facts which are not the subject of reasonable dispute and … that it is appropriate for the Trial Chamber to take judicial notice of facts which are agreed between the parties …".
[22] See *Simic* (above, n. 19): "Considering … that Rule 94 is intended to cover facts and not legal consequences inferred from them, [and] that the Trial Chamber can only take judicial notice of factual findings but not of a legal characterisation as such …"; and *Sikirica* (above, n. 21): "Considering that … facts involving interpretation or legal characterisation of facts are not capable of admission under Rule 94 …". See also First *Semanza* Decision para. 35, in relation to present Rule 94(A): "… the Chamber cannot take judicial notice of matters, which are unadorned legal conclusions".

request is far-reaching and relates to the situation "throughout Rwanda". The Tribunal's findings so far do not relate to all prefectures of the country, but only certain regions. It is true that some judgements contain statements about the general situation in Rwanda, but they are formulated in a different way than the Prosecution's present request. For instance, in the *Akayesu* judgement the Trial Chamber stated that "… no one can reasonably refute the fact that *widespread killings* were perpetrated throughout Rwanda in 1994" (para. 114; italics added).[23]

34. More relevant is the Prosecution's reference to the Trial Chamber's conclusion in the *Akayesu* judgement that "a widespread and systematic attack began in April 1994 in Rwanda, targeting the civilian Tutsi population" (para. 173). However, the Prosecution's present request alleges that the attacks commenced on 1 January 1994 and not in April of that year.

35. Even if previous case law gives some support to the view that the there was a "widespread or systematic attack" against a "civilian population", the Chamber prefers in the circumstances of the present case to hear evidence and arguments on the issue, rather than to take judicial notice.

36. Consequently, the Chamber does not take judicial notice of item 3 of the Annexure, as formulated by the Prosecution.

Annexure Item 4 - Total Number of Persons Killed

37. The Prosecution is seeking judicial notice for the alleged adjudicated fact that "[b]etween 1 January 1994 and 17 July 1994, a total of between 500,000 and 1,000,000 people died in Rwanda as a result of widespread violence". The main problem with this formulation is that the numbers are mere estimates. Paragraph 111 of the *Akayesu* judgement, relied on by the Prosecution, concludes a brief introductory chapter on the "Historical Context" of the alleged events. It states that "[t]he estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more". No source is given for this estimate. The formulation even indicates that the number may be higher than one million. Factual findings are made in later chapters of the *Akayesu* judgement. Clearly, the cited paragraph does not state an adjudicated fact.

38. The Prosecutor's other reference is paragraph 291 of the *Kayishema and Ruzindana* judgement, of which the first sentence reads: "Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million …". The Chamber notes that the estimate in the lowest part of the range is different from that in the *Akayesu* judgement. Again, this cannot be regarded as stating an adjudicated fact.[24]

[23] Other references to the *Akayesu* judgement (TC) provided by the Prosecution also deal with different aspects (paras. 118-121, 126 and 128). The same applies to the *Kayishema and Ruzindana* judgement (TC, paras. 54, 275, 289 and 291). Paras. 358 and 360 of the *Musema* judgement (TC) were based on admissions by the accused.

[24] Para. 291 in the *Kayishema and Ruzindana* judgement referred to Prosecution Exhibit 331B, i.e. the report of 17 January 1995 of the Special Rapporteur of the Commission of Human Rights. The

39. For these reasons the Chamber will not take judicial notice of item 4.

Annexure Items 5(a)-5(d) - Existence and Execution of a Genocidal Plan

40. These items represent as adjudicated fact that there was, in Rwanda, during the relevant time, a "genocidal plan" to exterminate Tutsi; that among other methods used, the plan was executed by assembling Tutsi in "safe havens", such as community centres or churches, and killing them there; and that, in consequence, a genocide occurred in Rwanda and, in particular, in Kibuye Prefecture.

41. The Prosecution has referred the Chamber to the *Kambanda* sentencing judgement. As mentioned above, this proceeded from a guilty plea and not from findings of fact proven beyond reasonable doubt at trial. Consequently, it cannot be considered a source of adjudicated facts (see para. 26, above). It should be noted, nonetheless, that Kambanda did not admit to a "genocidal plan", and that there is no explicit finding by the Trial Chamber in that case that he participated in a planned genocide.[25] The Chamber sees no need to address the Prosecution's reference to *Serushago*, another guilty plea. As for the Prosecution's reference to the *Musema* case, Alfred Musema admitted that there had been a genocide, so the Trial Chamber made no finding on this point.[26]

42. Turning to other judgements, the Chamber notes that the paragraphs of the *Rutaganda* judgement cited by the Prosecution do not contain any findings by the Trial Chamber of a planned genocide.[27] In any case, that judgement is still subject to appeal and therefore not *res judicata*. Pertinent statements are to be found only in the *Akayesu* judgement and in the *Kayishema and Ruzindana* judgement. In the former it was found that "genocide was indeed committed in Rwanda in 1994 and more particularly in Taba" (in Gitarama Prefecture).[28] In *Kayishema and Ruzindana* the Chamber found that "a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994";[29] and that "in Kibuye Prefecture, the plan of genocide was implemented by the public officials".[30]

43. In the Chamber's opinion, the cited conclusions are inferences from adjudicated facts, that is inferences from findings relating to charges of genocide brought against the three accused, in those two cases, as individuals. In its request, the Prosecution is, by contrast, inviting the Chamber to take notice of a "genocidal plan", its modus operandi and execution. The Chamber's view is that the case law of the Tribunal is still limited in relation to these matters.

formulation in that report is also an estimate ("… the loss of human life has been extremely heavy, possibly reaching 1 million"; see p. 5 para. 8 of that report).
[25] See *Kambanda* judgement paras. 39 and 44.
[26] See *Musema* judgement (TC) para. 360.
[27] *Rutaganda* judgment (TC) paras. 359-361 and 369-372.
[28] *Akayesu* judgement (TC) para. 129.
[29] *Kayishema and Ruzindana* judgement (TC) para. 291.
[30] Ibid. para. 312.

44. Second, and of greatest concern to the Chamber, is the possibility that judicial notice of the alleged facts at 5(a) to 5(d) of the Annexure may compromise the Accused's defence. Counsel for the Accused have indicated that they dispute the Prosecution's theory about a genocide, or about a single genocide, having occurred.[31] The Chamber is mindful of the risk that a prior finding as to the context of the alleged crimes poses to the Accused's right to a fair trial, who will then inevitably have their actions examined against that context. The Chamber recalls the following statements from *Akayesu*, which were repeated in *Rutaganda* and in *Musema*:

> … in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged *from the general context of the perpetration of other culpable acts systematically directed against that same group*, whether these acts were committed by the same offender or by others.[32]

45. Without necessarily adopting this statement, it is evident to the Chamber that to accede to the Prosecution's request may be seen as detrimental to the Defence. Moreover, to the extent the request relates to a genocidal plan in Rwanda as a whole, it is difficult to see how this would assist the assessment in the present case. The same applies to the preparation of lists targeting the Tutsi elite, the civil defence programme and the screening of identity cards. As for the alleged genocidal plan in Kibuye, counsel for the Prosecution stressed, during the oral hearing, the need to see the present case "in a broad perspective"; "as one, an overall picture, just executed in different locations".[33] More specifically, reference was made to the events in Mubuga Parish, the Mugonero complex, Home St. Jean Parish and the Kibuye stadium, from 15 to 18 April 1994.[34] However, such issues are matters for factual determination after a full trial on the merits and should not be subject to judicial notice.

46. The Chamber therefore declines to take judicial notice of items 5(a) to 5(d).

Annexure Items 5(e)-5(g) - Commission of Crimes against Humanity

47. The Chamber does not see how the three general statements that "some Rwandan citizens", during the April-to-July 1994 period, committed murder, extermination, or other inhumane acts (as crimes against humanity), are related to the present case. If items 5(e) to 5(g) are not related to the present case, the Chamber does not have to consider whether they constitute adjudicated facts.

[31] Transcripts of 10 October 2001 pp. 28-35. On the Prosecution's theory of a single, planned genocide see pp. 2, 5-6, 8-10, and 19-20.
[32] *Akayesu* para. 523, emphasis added; *Rutaganda* judgement (TC) para. 61 and *Musema* judgement (TC) para. 166; see also *Kayishema and Ruzindana* (TC) para. 93.
[33] Transcripts of 10 October 2001 pp. 19-20.
[34] Ibid. pp. 8-9.

48. If the Prosecution is attempting to have judicial notice taken of the alleged "widespread or systematic" nature of attacks in Rwanda, the Chamber refers to its consideration of item 3, above.

Annexure Item 5(h) - Protection by Common Article 3

49. By this item the Prosecution wishes to have judicial notice taken of the alleged adjudicated fact that persons in Rwanda, and by implication in Kibuye Prefecture, were, at the relevant time, protected by Common Article 3 of the Geneva Conventions and by Additional Protocol II. The Chamber is doubtful that it would assist judicial economy to take judicial notice of this item at the present stage of the proceedings. It also observes that the proposed formulation involves the legal interpretation of facts. To date the Tribunal has not handed down a conviction for war crimes pursuant to Article 4 of the Statute, and this area has received limited scrutiny by the Appeals Chamber of the ICTR.

Annexure Item 5(i) - "Tutsi Ethnic Group" Protected by Genocide Convention

50. The Prosecution is requesting the Chamber to take judicial notice of the alleged adjudicated fact that "[t]he Tutsi ethnic group constitutes a group protected by the Genocide Convention … and hence, by Article 2 of the Statute". The Chamber recalls that the Prosecution has also requested (Item 1 of the Annexure) that such notice be taken of the fact that citizens native to Rwanda were identified according to "the following ethnic classifications: Tutsi, Hutu and Twa", and that there is adequate common ground between the parties in this respect (see paras. 11-14 above). In the context of the present case, the Chamber considers this to be sufficient. The Prosecution is, of course, free to refer to previous case law as support for its request that the Tutsi are an "ethnic group" within the meaning of the Genocide Convention and the Statute.

Annexure Item 5(j) - Non-international Armed Conflict between FAR and RPF

51. The Chamber declines to take judicial notice of this item. As noted above (para. 49), the Chamber is not convinced that the taking of judicial notice of this issue will assist judicial economy in the present case. Moreover, the Tribunal has made only limited findings on the subject of war crimes.

Final Remarks

52. The Chamber's deliberations should not be taken to exclude the possibility that certain facts alleged in the Annexure to the Prosecution's motion may be judicially noticed in a different context.

53. Moreover, nothing in these deliberations prevents the Prosecution from drawing support for its arguments in the present case from findings made in judgements of the Tribunal. That is a different matter entirely.

54. Finally, the Chamber has not seen it as its task to reformulate the requests made by the Prosecution.

FOR THESE REASONS THE CHAMBER:

DENIES the motion.

Arusha, 22 November 2001

Erik Møse	Navanethem Pillay	Andrésia Vaz
Presiding Judge	Judge	Judge

(Seal of the Tribunal)