GENOCIDE AS A FACT OF COMMON KNOWLEDGE

Abstract Judicial notice has become a widely used tool in the practice of international criminal tribunals but its use has always been constrained by the fair trial rights of the accused. This article considers the possible impact on those rights of the decision of the International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber to take judicial notice of the genocide in Rwanda as a notorious fact against the backdrop of the legal requirements for judicial notice as a fact of common knowledge and as an adjudicated fact. The question whether it would have been more appropriate to notice the Rwandan genocide as an adjudicated fact is addressed in the context of the implications for other instances of genocide, for example Srebrenica.

I. INTRODUCTION

Provisions on judicial notice have been a common feature of the rules of evidence of international criminal tribunals from as early as Nuremberg, recognizing that the prosecution of international crimes may require a 'broader evidential canvas'[1] than trial by jury, with its historical emphasis on the rule against hearsay. The International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) have a two-tiered system, incorporating judicial notice of adjudicated facts in addition to the better-known category of 'notorious' facts. The Rules of Procedure and Evidence of each of these Tribunals contain a similarly worded Rule 94:

> (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 matters at issue in the current proceedings.[2]

Judicial notice has its origins in the common law but is also known to civil law jurisdictions.[3] Traditionally, it is a doctrine that permits a departure from the normal rules

[1] *Prosecutor v Sam Hinga Norman, Moinina Fofana and Allieu Kondewa (Fofana—Decision on Appeal against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence)* SCSL-2004-14-AR73 (16 May 2005) (*Fofana* Appeal Decision), Separate Opinion of Justice Robertson, para 6.

[2] Paragraph (B) was added on 9–10 July 1998 with respect to the ICTY and 3 November 2000 with respect to the ICTR. Rule 94(B) of the SCSL Rules states: 'At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings.' The Statute and Rules of Procedure and Evidence of the International Criminal Court (ICC) take a different approach. Article 69 of the ICC Statute provides that 'The Court shall not require proof of facts of common knowledge but may take judicial notice of them.' There is no provision on judicial notice of adjudicated facts.

[3] See JG Stewart, 'Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent' (2003) 3 Intl Crim L Rev 245, 246–7 and nn 8–9, who notes that apart from the common law jurisdictions of Australia, Canada, India, Malaysia and Singapore,

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of leading evidence in that it requires the court to act upon its own knowledge rather than upon evidence adduced by the parties. Its general purpose is to maintain consistency in judicial findings in areas that are not reasonably open to dispute and to save the time and costs involved in unnecessarily bringing formal proof of evidence. The rationale behind the doctrine has been said to be, in the first instance, to expedite the trial by dispensing with the need to submit formal proof on issues that are patently indisputable; and secondly, to foster consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair.[4]

The rights of the accused provide the important constraining element on the use of the doctrine. Efforts to realize its full potential in the face of external pressure to bring the work of ad hoc tribunals to a speedy conclusion place the spotlight more centrally on the protection of these rights. International tribunals at first proceeded hesitantly with the result that a coherent body of principles was slow to develop. However, judicial notice has now become a widely used tool in practice and caution was ultimately thrown to the wind by the ICTR Appeals Chamber when on 16 June 2006 it took judicial notice pursuant to Rule 94(A) of the fact that *'[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group*'.[5]

The definition of genocide has remained fixed since the adoption of the 1948 Genocide Convention, although this has not precluded judicial creativity in refining the contours of the elements of the crime. Genocide is defined as any of five acts, for example killing or causing serious bodily or mental harm, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[6] The specific intent is a strict requirement. There must be proof of an intention to annihilate the targeted group, in whole or in part, as a separate and distinct entity.

The application of the law on genocide in different historical contexts has permitted the crime to evolve and break loose from its post-Second World War origins.[7] Notable developments in the jurisprudence have included the recognition that rape and sexual violence may constitute genocide when committed with the relevant specific intent,[8] and the elaboration of what is meant by the destruction of a group 'in part'.[9] However, the ICTY Appeals Chamber has held that forcible transfer does not constitute in and of itself a genocidal act.[10] In the *Blagojevic* case, the Appeals Chamber

New Zealand, Uganda, United Kingdom and United States, civil law jurisdictions such as Germany and Russia have incorporated 'procedural mechanisms that dispense with the need to prove matters of established truth'.

[4] *Prosecutor v Laurent Semanza (Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54)* ICTR-97-20-T (3 Nov 2000) (*Semanza* Decision) para 20, citing C Tapper, *Cross and Tapper on Evidence* (8th edn, Butterworths, London, 1995) 78.

[5] *Prosecutor v Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera (Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice)* ICTR-98-44-AR73(C) (16 June 2006) (*Karemera* Appeal Decision) paras 33–7. Emphasis added.

[6] Convention on the Prevention and Punishment of the Crime of Genocide (9 Dec 1948) 78 UNTS 277.

[7] See further G Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP, Oxford, 2005) 199–202.

[8] *Prosecutor v Jean Paul Akayesu (Judgment)* ICTR-96-4, Trial Chamber (2 Sept 1998) para 731.

[9] *Prosecutor v Radislav Krstic (Judgment)* IT-98-33, Appeals Chamber (19 Apr 2004) paras 21, 26.

[10] ibid para 33.

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found that the accused's awareness of facts related to the forcible transfer operation was insufficient to prove complicity in genocide in the absence of knowledge of the mass killings at Srebrenica.[11]

One of the more difficult substantive questions has been that of the definition of the targeted group. The Genocide Convention protects four groups only and this restriction has presented a challenge both to the ICTY and the ICTR. On the whole, although the ICTY has rejected the notion that groups may be defined in negative terms (such as non-Serbs),[12] the Tribunals have demonstrated flexibility in finding that the targeted group is covered by the categories protected under the Convention. The definition of the group is likely to be a major issue before the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court, for example in the case relating to Darfur.[13] These issues highlight the difficulties that may be presented where history has judged a certain event to be genocide—a fact of common knowledge from the perspective of the victims—but the law falls short of expectations.

The Appeals Chamber's decision to take judicial notice of the Rwandan genocide was hailed in a press release as having an immediate impact on all current and pending trials before the ICTR and as silencing the 'rejectionist camp' which had been disputing the occurrence of genocide.[14] Nonetheless, it raises concerns as to its impact on the presumption of innocence and its appropriateness in the context of proceedings against individuals designed to determine whether legally the definition of genocide is satisfied.

II. TAKING JUDICIAL NOTICE OF GENOCIDE IN RWANDA

The Prosecutor of the ICTR had on several occasions sought judicial notice of the fact of genocide in Rwanda. In the *Akayesu* judgment, the first judgment rendered by the Tribunal, it was determined that genocide had been committed against the Tutsi as a group in Rwanda in 1994, but that this fact could not influence the Trial Chamber in its decisions as to the individual criminal responsibility of the accused for the crimes with which he was charged.[15] A similar position was taken in the *Kayishema* case.[16] In that case the Trial Chamber found that the question whether genocide took place in Rwanda in 1994 was one of general importance to the case, and one that could be regarded as settled in view of the many reports confirming the occurrence of genocide. However, the Trial Chamber considered the question to be so fundamental to the case against the accused that it felt obliged to make a finding of fact on this issue.[17]

In the *Semanza* decision, the Trial Chamber, being guided by the *Akayesu* judgment, took judicial notice that:

[11] *Prosecutor v Vidoje Blagojevic and Dragan Jokic (Judgment)* IT-02-60-A (9 May 2007) paras 119–24.

[12] *See Prosecutor v Milomir Stakic (Judgment*) IT-97-24, Appeals Chamber (22 Mar 2006) paras 16–28.

[13] See UN International Commission of Inquiry on Darfur, paras 494–501 and 508–12, <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf>.

[14] Press Release, 'ICTR Appeals Chamber takes Judicial Notice of Genocide in Rwanda' ICTR/INFO-9-2-481.EN (Arusha, 20 June 2006).

[15] *Prosecutor v Jean-Paul Akayesu (Judgment)* ICTR-96-4-T (2 Sept 1998) paras 126 and 129.

[16] *Prosecutor v Clément Kayishema and Obed Ruzindana (Judgment)* ICTR-95-1-T (21 May 2001).

[17] ibid para 273.

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> The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994. There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there was a large number of deaths of persons of Tutsi ethnic identity.[18]

Again, however, the Trial Chamber found that the question of the occurrence of genocide was so fundamental that formal proof at trial was necessary.[19]

Subsequent cases demonstrated a reluctance to notice facts that acknowledged the existence of genocide on a national scale in Rwanda.[20] In the *Ntakirutimana* case, the Trial Chamber declined to take judicial notice pursuant to Rule 94(B) of any adjudicated facts relating to the existence and execution of a genocidal plan. This was on the basis that some of the facts derived from guilty pleas or admissions and that, in relation to the findings in *Akayesu* and *Kayishema*, 'the cited conclusions are . . . inferences from findings relating to charges of genocide brought against the three accused, in those two cases, as individuals'[21] while the *Ntatikirutimana* Chamber was being asked to take notice of the modus operandi and execution of a genocidal plan. Judicial notice of these facts was also found to have the potential to compromise the accused's defence, since the defence disputed the theory that genocide, or a single genocide, had occurred. Furthermore, the Trial Chamber questioned how the existence of a genocidal plan in Rwanda as a whole would assist the assessment in the case under consideration.[22] In the *Kajelijeli* case, the Trial Chamber refused to take judicial notice of a substantially similar fact to the one judicially noticed in *Semanza* because it found that judicial notice of organized, widespread and systematic attacks would amount to a finding that conspiracy to commit such attacks existed, which was reasonably disputed by the defence.[23] As a result it has been noted that 'the case law seems to show that no Trial Chamber asked to recognise the genocide as a fact of common knowledge, regarded the question as being incapable of adjudication'.[24]

The Trial Chamber in *Karemera* had found as follows:

> [I]t does not matter whether genocide occurred in Rwanda or not, the Prosecutor must still prove the criminal responsibility of the Accused for the counts he has charged in the Indictment. Taking judicial notice of such a fact as common knowledge does not have any impact on the Prosecution's case against the Accused, because that is not a fact to be proved. In the present case where the Prosecutor alleges that the Accused are responsible for crimes occurring in all parts of Rwanda, taking judicial notice of the fact that genocide has occurred in that country would appear to lessen the Prosecutor's obligation to prove his case.[25]

[18] *Semanza* Decision (n 4) Annex A, para 2. [19] ibid para 36.

[20] See, eg *Prosecutor v Pauline Nyiramasuhuko (Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence)* ICTR-98-42-T (15 May 2002) paras 122–29; *Prosecutor v Eliezer Niyitigeka (Decision on the Prosecutor's Motion for Judicial Notice of Facts)* ICTR-96-14-T (4 September 2002) finding: 'Given that there are no new facts that can be considered adjudicated by this Tribunal, the Prosecutor's resubmission of items denied in the recent decisions does not contribute to judicial economy' para 3. See generally N Maitra, 'A Perpetual Possibility? The International Criminal Tribunal for Rwanda's Recognition of the Genocide of 1994' (2005) 5 Intl Crim L Rev 573–99.

[21] *Prosecutor v Elizaphan Ntakirutimana (Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts)* ICTR-96-10-T and ICTR-96-17-T (22 Nov 2001) para 43.

[22] ibid paras 40–6.

[23] *Prosecutor v Juvenal Kajelijeli (Decision on the Prosecutor's Motion for Judicial Notice pursuant to Rule 94 of the Rules)* ICTR-98-44A-T (16 Apr 2002) para 19.

[24] Maitra (n 20) 589.

[25] *Prosecutor v Édouard Karemera (Decision on Prosecution Motion for Judicial Notice)* ICTR-98-44-R94, 9 November 2005 para 7.

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The Appeals Chamber, overturning the Trial Chamber, ruled in determined language that the 'fact of the Rwandan genocide is a part of world history . . . a classic instance of a "fact of common knowledge"'.[26] The Appeals Chamber pointed to the contradictory nature of the Trial Chamber's reasoning and confirmed that the question whether genocide occurred in Rwanda was of relevance to the prosecution's case. In relation to the prosecutor's obligation to prove his case, the Appeals Chamber noted that there was no question of lessening the burden of proof or violating the procedural rights of the accused. 'Rather, it provides an alternative way that that burden can be satisfied, obviating the necessity to introduce evidence documenting what is already common knowledge'.[27] The prosecution must 'still introduce evidence demonstrating that the specific events alleged in the Indictment constituted genocide and that the conduct and mental state of the Accused specifically make them culpable for genocide'.[28]

III. LEGAL REQUIREMENTS FOR JUDICIAL NOTICE

The notion of facts of common knowledge 'encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography or the laws of nature'.[29] The category includes 'matters so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary'.[30] According to the ICTR Appeals Chamber, 'notorious historical events and phenomena, such as, for instance, the Nazi Holocaust, the South African system of apartheid, wars, and the rise of terrorism'[31] are covered. 'Not subject to reasonable dispute' means that the fact is 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.[32] A fact of common knowledge must be relevant to the proceedings before being judicially noticed.[33]

An adjudicated fact relates to a fact in a trial upon which the judges have made a finding. In accordance with the case law, in order for a Chamber to consider a proposed fact to be an adjudicated fact, and therefore eligible for judicial notice, the fact must be truly adjudicated in the sense that:[34]

[26] *Karemera* Appeal Decision (n 5) para 14.
[27] ibid para 37.
[28] ibid para 37.
[29] *Prosecutor v Laurent Semanza (Judgment)* ICTR-97-20-A, Appeals Chamber (20 May 2005).
[30] *Semanza* Decision (n 4) para 25, cited in *Fofana* Appeal Decision (n 1) para 21.
[31] *Karemera* Appeal Decision (n 5) para 30.
[32] *Semanza* Decision (n 4) para 24.
[33] *Prosecutor v Vujadin Popovic (Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge pursuant to Rule 94(A))* IT-05-88-T (26 Sept 2006) para 11. Rule 89(C) of the ICTY and ICTR Rules provides that 'A Chamber may admit any relevant evidence which it deems to have probative value'. The equivalent SCSL Rule (also Rule 89(C)) provides that 'A Chamber may admit any relevant evidence.'
[34] See generally *Karemera* Appeal Decision (n 5) paras 45–56; *Prosecutor v Vujadin Popovic (Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex)* IT-05-88-T (26 Sept 2006); *Prosecutor v Momcilo Krajisnik (Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts)* IT-00-39 (24 Mar 2005) para 14; *Prosecutor v Enver Hadzihasanovic and Amir Kubura (Final Decision on Judicial Notice of Adjudicated Facts)*

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(i) it is distinct, concrete and identifiable;
(ii) it is relevant to an issue in the case at hand;
(iii) it is in the same or substantially similar form as it was expressed by the trial or appeals chamber;
(iv) it is not unclear or misleading in the context in which it is placed in the moving party's motion;
(v) it is restricted to factual findings of a trial or appeals chamber and does not include characterizations that are of an essentially legal nature;
(vi) it is not based on facts voluntarily admitted in a previous trial or on plea agreements in previous cases;
(vii) it was contested at trial and forms part of a judgment which has either not been appealed or has been finally settled on appeal; or it was contested at trial and now forms part of a judgment which is under appeal, but falls within issues which are not in dispute on appeal;
(viii) it does not have a direct bearing on the acts, conduct and mental state of the accused; and
(x) it does not impact upon the right of the Accused to a fair trial.

It has been established in recent jurisprudence that there is no requirement that adjudicated facts not be in dispute between the parties, the legal effect of judicial notice under Rule 94(B) being to create a presumption that may be rebutted by the disputing party with evidence at trial.[35] Notably, it has been found that the only facts of which a Chamber may take judicial notice are those that constitute part of the factual findings in previous proceedings. Facts contained in the introductory part of a judgment or the historical context set out in some judgments, do not qualify.[36]

IT-01-47-T (20 Apr 2004); *Prosecutor v Vidoje Blagojevic and Dragan Jokic (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence)* IT-02-60-PT (18 Dec 2003) para 15; *Prosecutor v Enver Hadzihasanovic and Amir Kubura (Decision on Judicial Notice of Adjudicated Facts following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005)* IT-01-47-T, Trial Chamber II (14 Apr 2005); *Prosecutor v Slobodan Milosevic (Decision on Prosecution's Motion for Judicial Notice of Adjudicated facts Relevant to the Municipality of Brcko)* IT-02-54-T (5 June 2002) 3; *Prosecutor v Zoran Kupreskic (Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be taken pursuant to Rule 94(B))* IT-65-16-A (8 May 2001) para 6; *Prosecutor v Elizaphan Ntakirutimana (Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated facts Rule 94(B) of the Rules of Procedure and Evidence)* ICTR-96-10-T and ICTR-96-16-T (22 Nov 2001) paras 32–9 and 54.

[35] *Karemera* Appeal Decision (n 5) paras 40 and 42; *Prosecutor v Vujadin Popovic (Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex)* IT-05-88-T (26 Sept 2006) para 19. See also *Prosecutor v Slobodan Milosevic (Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts)* IT-02-54-AR73.5 (28 Oct 2003); *Momir Nikolic v Prosecutor (Decision on Appellant's Motion for Judicial Notice)* IT-02-60/1-A (1 Apr 2005) para 11; *Prosecutor v Jadranko Prlic (Decision on Motion for Judicial Notice of Adjudicated Facts pursuant to Rule 94(B))* IT-04-74-PT (14 Mar 2006). Similarly, the Trial Chamber in the *Krajisnik* case adopted the statement in *Milosevic*: *Prosecutor v Momcilo Krajisnik (Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts)* IT-00-39-T (24 Mar 2005) para 13.

[36] See *Prosecutor v Bizimungu (Decision on the Prosecutor's Motion and Notice of Adjudicated Facts. Rule 94(B) of the Rules of Procedure and Evidence)* ICTR-99-50-T, Trial Chamber II (10 Dec 2004) para 14.

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While Rule 94(A) is of a mandatory nature—'A Chamber . . . *shall* take judicial notice' of facts of common knowledge[37]—judicial notice under Rule 94(B) is discretionary.[38] In the exercise of a Chamber's discretion, factors that may be taken into account include whether the facts will be of such a large number as to compromise the principle of a fair and expeditious trial, and whether the facts are 'too broad, too tendentious, not sufficiently significant, too detailed, too numerous, repetitive of other evidence already admitted by the Chamber, or not sufficiently relevant to the case' so as to be excluded from the operation of Rule 94(B).[39] A Chamber's decision to take judicial notice might be based on factors such as whether this would advance consistent case law, judicial economy, or is otherwise in the interests of justice,[40] but it retains a discretion to refuse to take judicial notice if the interests of justice, including the right of the accused to a fair trial, so require.[41]

IV. GENOCIDE IN RWANDA AS FACT OF COMMON KNOWLEDGE OR ADJUDICATED FACT

A. Test of Relevance

Under both Rule 94(A) and Rule 94(B), the fact at issue must satisfy the relevancy test. One of the criticisms of the Appeals Chamber's decision in *Karemera* is that, contrary to the Chamber's averment that the issue of whether genocide occurred in Rwanda was of 'obvious relevance'[42] to the prosecution's case, the existence of a nationwide campaign of genocide is simply irrelevant to the individual criminal responsibility of an accused for acts of genocide.[43] It is certainly true that the definition of genocide does not require proof of a contextual element in the same way as the definition of crimes against humanity, for example, requires proof that the acts were widespread or systematic. Genocide requires the commission of the actus reus of the crime (such as killing or causing serious bodily or mental harm to members of the targeted national, ethnical, racial or religious group) with the specific intent to eradicate all or part of the protected group. In practice, however, genocide, generally considered to be a species of crime against humanity,[44] provides the classic example of 'system criminality'[45] and

[37] *Karemera* Appeal Decision (n 5) para 22.

[38] *Prosecutor v Slobodan Milosevic (Decision on the Prosecution's Interlocutory Appeal against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts)* IT-02-54-AR73.5 (28 Oct 2003).

[39] *Prosecutor v Zeljko Mejakic* (*Decision on Prosecution Motion for Judicial Notice pursuant to Rule 94(B))* IT-02-65-PT (1 April 2004) 6.

[40] *Prosecutor v Casimir Bizimungu (Decision on the Prosecutor's Motion and Notice of Adjudicated Facts. Rule 94(B) of the Rules of Procedure and Evidence)* ICTR-99-50-T, Trial Chamber II (10 Dec 2004) para 12.

[41] *Prosecutor v Enver Hadzihasanovic and Amir Kubura (Decision on Judicial Notice of Adjudicated Facts following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005)* IT-01-47-T, Trial Chamber II (14 Apr 2005) 3.

[42] *Karemera* Appeal Decision (n 5) para 36.

[43] KJ Heller, 'Prosecutor v Karemera, Ngirumpatse & Nzirorera, Case No. ICTR-98-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, June 16, 2006' (2007) 101 AJIL 157, 159. See also Maitra (n 20).

[44] See NHB. Jørgensen, 'The Definition of Genocide: Joining the Dots in the Light of Recent Practice' (2001) 1 Intl Crim L Rev 285, 287–8 and related footnotes.

[45] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (TMC Asser Press, The Hague, 2003) 4–5.

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the lone *génocidaire*[46] is the exception rather than the norm. Most cases before international tribunals are not concerned with direct participation in genocide, but rather with complicity or joint criminal enterprises amongst senior leaders. Trial Chambers have repeatedly held that complicity in genocide requires a finding that genocide was committed and have proceeded to determine whether genocide occurred in a particular geographical and/or temporal sphere before considering the individual responsibility of the accused.[47]

In *Karemera*, the Appeals Chamber found that the fact of the nationwide campaign was relevant because it provided the context for understanding the individual's actions and potentially also provided the relevant context for other charges, such as crimes against humanity.[48] The key point was perhaps that evidence of the context had generally been regarded as relevant and admissible under Rule 89(C)[49] and the novelty lay exclusively in the decision to take judicial notice of it. Since judicial notice under Rule 94(A) is mandatory, the Appeals Chamber, having found the genocidal context to be a fact of common knowledge, had no alternative but to proceed as it did.

Where there is no direct evidence of the expression of the required mental element of a crime, the existence of the mental element is frequently derived from the surrounding circumstances:

> The *mens rea* of the accused need not be explicit, it may be inferred from the circumstances. Indeed, as *mens rea* is a state of mind, its proof is typically a matter of inference. The standard of proof dictates, of course, that it be the only reasonable inference from the evidence.[50]

In *Akayesu*, the Trial Chamber found that 'specific [genocidal] intent . . . is a mental factor which is difficult, even impossible, to determine' and went on to say:

> This is the reason why, 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. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[51]

There is no doubt that these pronouncements in *Akayesu* read together with *Karemera* generate unease over the presumption of innocence even if the relevancy of the wider

[46] *Prosecutor v Goran Jelisic (Judgment)* IT-95-10, Trial Chamber (14 Dec 1999) paras 100–1.

[47] *Prosecutor v Vidoje Blagojevic and Dragan Jokic ('Judgment')* IT-02-60-T (17 Jan 2005) para 638.

[48] *Karemera* Appeal Decision (n 5) para 36.

[49] ibid.

[50] *Prosecutor v Pavle Strugar (Judgment)* IT-01-42-T, Trial Chamber (31 Jan 2005) para 333.

[51] *Prosecutor v Jean-Paul Akayesu (Judgment)* ICTR-96-4-T (2 Sept 1998) para 523. In the later case of *Prosecutor v Sylvestre Gacumbtsi (Judgment)* ICTR-2001-64-T, Trial Chamber (17 June 2004) para 253, citing the Trial Chamber in the cases of *Kayishema* and *Kajelijeli*, it was found that: 'Evidence of genocidal intent can be inferred from "the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing".'

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genocidal context is accepted. The suggestion is that it will be all too easy in the future to infer genocidal intent.[52] However, the actual impact of *Karemera* is unlikely to be so great since evidence related to the genocidal context would most likely in any case be admissible as relevant evidence from which inferences could be drawn even if judicial notice were denied. Future Trial Chambers tasked with determining individual criminal responsibility for genocide in Rwanda will be required to refine the modalities of assessing whether the evidence in a particular case demonstrates that the specific events alleged in the indictment constitute genocide, and that the accused has the requisite mental state to make him culpable of genocide, against the backdrop of the judicially noticed fact.

B. Facts Attesting to the Criminal Responsibility of the Accused

A fact that attests directly or indirectly to the criminal responsibility of the accused cannot be judicially noticed under Rule 94(A). This is a necessary and well-accepted consequence of the right to a fair trial, which includes the presumption of innocence and the right to examine witnesses. It also reflects the fact that if an accused pleads not guilty, there can be no facts related to his criminal responsibility that are so notorious as to meet the standard under Rule 94(A). In the *Semanza* decision the Trial Chamber stressed that it was drawing no impermissible inferences regarding the accused's involvement in those matters of which it took judicial notice: 'The burden of proving the Accused's guilt, therefore, continues to rest squarely upon the shoulders of the Prosecutor for the duration of the trial proceeding. The critical issue is what part, if any, did the Accused play in the events that took place'.[53] The Trial Chamber went on to stress:

> By taking judicial notice…the Chamber merely provides a backdrop—a blank canvas—against which the Prosecutor is still saddled with the daunting burden of adducing formal evidence to paint the picture establishing the personal responsibility of the Accused for the offence with which he is charged in the indictment beyond a reasonable doubt.[54]

In his Separate Opinion to the *Fofana* appeal decision on judicial notice, Justice Robertson mirrored the view of the Trial Chamber in *Semanza*:

> The doctrine of judicial notice does not and cannot relieve the Prosecution of proving the elements of the offence. The defendant, by pleading 'not guilty', puts in issue his *mens rea* or guilty mind which cannot in consequence be the subject of judicial notice. He also puts in issue the *actus reus*, i.e. that description of offending conduct to which the court must be satisfied that his actions amount. Judicial notice may be taken of facts which are relevant to characterise his actions, but those actions themselves must be proved by evidence. In practice, any fact which is within the knowledge of the defendant, but which he denies, cannot be made the subject of judicial notice: his denial must be accepted by the court as indicative that the alleged fact is reasonably disputable if only because the defendant himself disputes it and intends to do so on oath or affirmation or to call witnesses to dispute it.[55]

More specifically, with regard to Rule 94(B), the Trial Chamber in the *Karemera* case had concluded that it could not take judicial notice of certain adjudicated facts because

[52] See Heller (n 43) 160–2.
[53] *Semanza* Decision (n 4) para 43.
[54] ibid para 47.
[55] *Fofana* Appeal Decision (n 1) Separate Opinion of Justice Robertson, para 16.

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those facts directly or indirectly incriminating the accused.[56] This had been the general approach of the Trial Chambers. For example, in the *Stankovic* case, it was stated that:

> The Chamber agrees with the Defence that great caution should be exercised when assessing whether to admit adjudicated facts according to Rule 94(B) of the Rules, lest the right of the accused to a fair trial be compromised. The request for judicial notice should be dismissed if related to adjudicated facts which, directly or indirectly, tend to incriminate the Accused.[57]

However, in the *Karemera* appeals decision, the Appeals Chamber stated that it had never found this to be the position under Rule 94(B) and did not agree with this approach on the basis that it would render Rule 94(B) a dead letter. According to the Appeals Chamber, judicial notice under Rule 94(B) would in fact only be available for adjudicated facts that *do* bear on the criminal responsibility of the accused because if they are not related to criminal responsibility, they are simply not relevant at all.[58] This statement tends to contradict the Chamber's analysis of relevance under Rule 94(A). Some exceptions to the categorical statement were noted in a footnote, namely facts bearing on the Tribunal's jurisdiction such as the location of territorial boundaries.[59]

The Appeals Chamber went on to marry its observations with the presumption of innocence. It had previously noted that it would 'plainly be improper' for facts judicially noticed to be the basis for proving criminal responsibility in the sense of being sufficient in themselves to establish responsibility.[60] It went on to explain that Rule 94(B) did not shift the ultimate burden of persuasion but only the initial burden of production, although it was recognized that even this limited shifting of the burden had implications for the accused's procedural rights. As a result, the Appeals Chamber considered that judicial notice should not be taken of adjudicated facts relating to the acts, conduct and mental state of the accused.[61] The Appeals Chamber was satisfied that this interpretation struck the appropriate balance between the procedural rights of the accused and the interest of expediency. Finally, the Appeals Chamber drew a comparison with Rule 92*bis* of the ICTY Rules which is similarly interpreted to exclude any written statement which goes to proof of the acts and conduct of the accused, and concluded that facts related to the existence of a joint criminal enterprise and the conduct of its members other than the accused, as well as facts related to the conduct of physical perpetrators of a crime for which the accused is being held criminally responsible through some other mode of liability, could potentially be judicially noticed. The Trial Chamber nevertheless retained its discretion to determine consistency with the rights of the accused under the circumstances of a particular case.

The position taken by the Appeals Chamber does not in substance differ radically from the approach of the Trial Chambers. Essentially it confirms that the judicially noticed fact must be relevant to the proceedings but that there are limits to its role in proving individual criminal responsibility. A careful and detailed exercise of discretion

[56] *Prosecutor v Édouard Karemera (Decision on Prosecution Motion for Judicial Notice)* ICTR-98-44-R94 (9 Nov 2005) para 15.

[57] *Prosecutor v Radovan Stankovic (Decision on Prosecution's Motion for Judicial Notice pursuant to Rule 94(B))* IT-96-23/2-PT (16 May 2003) para 10.

[58] *Karemera* Appeal Decision (n 5) para 48.

[59] ibid n 85.

[60] ibid para 47.

[61] ibid para 50.

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is required that clearly distinguishes facts that relate indirectly to criminal responsibility from those that directly establish such responsibility. It may prove easier to accomplish this task in theory than in practice. Moreover, since international tribunals rely heavily on inferences, in particular as it concerns findings related to the mental element for crimes such as genocide, the danger that a judicially noticed fact could end up forming the basis for a conviction once again becomes apparent.

C. Facts Not Legal Characterizations

The existence of genocide is essentially a legal determination. The Appeals Chamber in *Karemera*, however, answering the defence argument to this effect, maintained that 'the term "genocide" is not distinct from other legal terms used to characterize factual situations, such as "widespread or systematic" or "not of an international nature", which the Appeals Chamber in *Semanza* already held to be subject to judicial notice under Rule 94(A).'[62] An ICTY Trial Chamber has determined, relying on the decision in *Karemera*, that whether a fact proposed for judicial notice under Rule 94(A) is a legal qualification is immaterial when it also describes a factual situation, and further, that there is no exception to the application of the Rule when a fact proposed for judicial notice constitutes an element of an offence charged in the indictment.[63]

The appropriate analogy would be between 'genocide' and 'crimes against humanity' rather than 'genocide' (incorporating a full legal definition) and an element of the concept of crimes against humanity such as 'widespread or systematic'. When construed in this broad sense the actual impact of the *Karemera* decision on the determination of individual criminal responsibility in future cases again appears quite limited as it could be interpreted to relate to genocide more as an historical, sociological or anthropological phenomenon. Indeed, it is only in this sense that genocide may be viewed as describing a factual situation divorced from its legal elements.[64]

An alternative and perhaps preferable approach would have been to consider taking judicial notice of genocide as an adjudicated fact pursuant to Rule 94(B). Even though the effect would be to create a rebuttable presumption that genocide occurred, it is unlikely that this fact could effectively be disputed. The Appeals Chamber noted that not even the accused had claimed that genocide might not have occurred in Rwanda in 1994.[65] While it is true that reports indicating that genocide occurred in Rwanda were a key impetus for its establishment, the ICTR was established precisely to determine in a *legal sense* whether genocide occurred and who was individually criminally responsible for acts of genocide. Taking judicial notice of genocide as a fact of common knowledge rather than as an adjudicated fact, many years after the establishment of the Tribunal, could be regarded as undermining previous case law and contradicting (rather than reaffirming) one of the reasons for its establishment. However, despite the finding of the occurrence of genocide on a national scale in the *Akayesu* and *Kayishema*[66]

[62] ibid para 37.

[63] *Prosecutor v Vujadin Popovic (Decision on Prosecution Motion for Judicial Notice of Facts of Common Knowledge pursuant to Rule 94(A))* IT-05-88-T (26 September 2006) para 14.

[64] See also B Heller, 'Noticing Genocide' (2006) 116 Yale L J Pocket Part 101.

[65] *Karemera* Appeal Decision (n 5) para 36.

[66] In the judgment in the *Kayishema* case, the Trial Chamber devoted a chapter to an assessment of 'whether the events in Rwanda as a whole, reveal the existence of the elements of the crime of genocide', on the basis that: 'Such a finding allows for a better understanding of the

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cases, Trial Chambers have not recognized this as an adjudicated fact.[67] Thus it seems that the finding in *Akayesu* has unfairly been relegated to the status of a fact that forms part of the 'historical context' that does not qualify as 'truly adjudicated'. Alternatively, taking the opposite stance from *Karemera*, it could be regarded as a fact containing findings or characterizations of an essentially legal nature, therefore disqualifying it for judicial notice.

It may also be noted that the Appeals Chamber in *Karemera* appeared to find support for its position that the genocide in Rwanda was a fact of common knowledge in the preceding jurisprudence establishing that genocide occurred on a national level. The Appeals Chamber referred to the gathering of evidence for the purposes of the historical record which 'unanimously and decisively confirmed the occurrence of genocide in Rwanda, which has also been documented by countless books, scholarly articles, media reports, UN reports and resolutions, national court decisions, and government and NGO reports'.[68] This results in a blurring of the distinction between Rule 94(A) and Rule 94(B) in the sense that the finding that genocide had occurred on a national level, which had withstood an appeal, helped to justify the finding that the fact of genocide was so notorious as to be beyond dispute.

V. CONCLUSION

It is interesting to note that the constitution of the ICTR Appeals Chamber in the *Karemera* case was identical (with the exception of one judge) to the constitution of the ICTY Appeals Chamber in the *Krstic* case. In the *Krstic* case the Appeals Chamber called 'the massacre at Srebrenica by its proper name: genocide' and observed that those responsible (members of the Bosnian Serb forces) would bear this stigma.[69] The decision to take judicial notice of the genocide in Rwanda may be a reflection of a new determination to name (and shame) what was once the 'crime without a name'.[70]

The fact of genocide in Srebrenica could possibly be considered as an adjudicated fact in subsequent ICTY proceedings related to Srebrenica.[71] Had it been a fact of common knowledge, the judges would have found themselves compelled to take judicial notice of it in *Krstic*. Notably, the International Court of Justice (ICJ), in its judgment in the *Case Concerning the Application of the Genocide Convention* (*Genocide*

context within which perpetrators may have committed the crimes alleged in the Indictment. Additionally, because the Indictment concerns events that took place in Kibuye, this Chapter of the Judgment includes a general examination of the events in that *prefecture*.' *Prosecutor v Clément Kayishema and Obed Ruzindana (Judgment)* ICTR-95-1-T (21 May 2001) ch 5.2.

[67] See, eg *Prosecutor v Casimir Bizimungu (Decision on the Prosecutor's Motion and Notice of Adjudicated Facts)* ICTR-99-50 (10 Dec 2004).

[68] *Karemera* Appeal Decision (n 5) para 35.

[69] *Prosecutor v Radislav Krstic (Judgment)* IT-98-33, Appeals Chamber (19 Apr 2004) para 37.

[70] Attributed to Winston Churchill, in W Schabas, *Genocide in International Law* (CUP, Cambridge, 2000) 14.

[71] Although notably, in the *Blagojevic* case, genocide in Srebrenica was found to be constituted differently than in *Krstic*, namely by forcible transfer, which also included killings and destruction of properties. *Prosecutor v Vidoje Blagojevic and Dragan Jokic (Judgment)* IT-02-60-T, Trial Chamber (17 Jan 2005).

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Case),[72] declined to take judicial notice of any of the facts surrounding the genocide at Srebrenica despite being urged to do so in the pleadings on behalf of Bosnia. The Court was asked to take judicial notice 'of that which is notorious', for example, the fact that 7–8000 persons were killed at Srebrenica over a period of a few days in July 1995, that thousands more were deported, and that the majority of the victims were Muslims.[73] The ICJ has on previous occasions noticed the 'notoriety of the facts'.[74] However, its approach in the *Genocide Case* was to analyse the jurisprudence of the ICTY and some of the factual bases for the conclusions reached by the Tribunal and then to draw its own conclusion that:

> the acts committed at Srebrenica falling within Article 2*(a)* and *(b)* of the [Genocide] Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide committed by members of the VRS in and around Srebrenica from around 13 July 1995.[75]

The ICJ gave considerable weight to adjudicated facts from the ICTY, but it appropriately did not identify the Srebrenica genocide as a fact of common knowledge, the issues of whether the specific intent existed and the acts complained of could be attributed to the State being the core issues contested by the respondent.

In view of the confirmation by two international courts that genocide occurred in Srebrenica, a tribunal dealing with unrelated proceedings may well decide to take judicial notice of the fact of genocide in Srebrenica as a fact of common knowledge in the future. The Appeals Chamber's approach to the Srebrenica genocide appears preferable to its approach to the Rwandan genocide. This is particularly so in view of the difficulty in determining which genocides are notorious historical events that are not reasonably open to dispute (Rwanda) and which must be subjected to legal scrutiny before acquiring an adjudicated characterization (Srebrenica). The problem has been acute within the European Union in the context of its debate over a Framework Decision on combating racism and xenophobia. The draft legislation prohibits public incitement to violence or hatred as well as the denial, public approval or gross trivialization of crimes of genocide if this amounts to racist or xenophobic agitation.[76] The example is given of a public claim that an act of genocide, the commission of which has been established as a fact by an international court, never happened and was invented by the group concerned with ulterior motives resulting in the incitement of hatred against that group.[77] This is to constitute a criminal offence within the EU. The proposed legislation recognizes only genocides that fall under the definition of genocide provided in the Statute of the ICC and the exclusion of the

[72] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Genocide Case) *(Judgment)* (26 Feb 2007). Avaialble on ICJ website: http://www.icj-cij.org/docket/files/91/13685.pdf.

[73] Genocide Case (n 72) Verbatim Record (28 Feb 2006) 23, para 11.

[74] *Fisheries Case (United Kingdom v Norway)* (1951) ICJ Reports 116, 139.

[75] Genocide Case (n 72) para 297.

[76] At the Member States' discretion, the denial, approval or gross trivialization of genocide may be criminalized even if there is no direct incitement to hatred and violence. Framework Decision on Combating Racism and Xenophobia, OJ C 75E, 26 Mar 2002, summary at <http://europa.eu/scadplus/leg/en/lvb/133178.htm>.

[77] EU Press Release, 'EU: Common Criminal Provisions against Racism and Xenophobia' (20 Apr 2007), <http://www.eu2007.de/en/News/Press_Releases/April/0420BMJRassismus.html>.

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massacre of Armenians during the First World War and the atrocities committed by Stalin has been controversial.[78] According to the legislation, criminal liability may be dependent on the determination by a national or international court that a specific historical event falls within the definition of genocide.[79]

The EU legislation places the emphasis squarely on the legal definition of genocide and again highlights the implications of recognizing the Rwandan genocide as a fact of common knowledge within the context of ICTR proceedings. It may have been wise for the ICTR Appeals Chamber to suppress the understandable urge to proclaim the notoriety of the fact of genocide in Rwanda both in the interests of the rights of the accused and of history, and to allow the adjudicated facts themselves to speak for what is undeniable.

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[78] D Charter, 'EU makes it against law to condone genocide' *The Times* (20 Apr 2007) 46; D Bilefsky, 'EU Adopts measure outlawing Holocaust denial' International Herald Tribunal (19 Apr 2007) <http://www.iht.com/articles/2007/04/19/news/eu.php>. The European Commission has pledged to prepare a Green Paper on 20th-century genocidal crimes and to carry out a review of whether denying these should come under the scope of the law.

[79] The framework decision will be formally adopted after the European Parliament has been consulted over the amendments made during the meetings of the Council of EU Justice Ministers.

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