

**Judicial Notice as a Means of Preserving Judicial Economy at the Extraordinary  
Chambers in the Courts of Cambodia**

**By Richard L. Kilpatrick Jr.<sup>1</sup>**

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<sup>1</sup> Tulane University Law School Juris Doctor candidate class of 2012 and Documentation Center of Cambodia summer legal associate.

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## **I. Summary**

The doctrine of judicial notice is a procedural principle that has been widely used in both domestic common law and civil law jurisdictions as a means of encouraging judicial efficiency. It has likewise had a substantial presence in international criminal law. At its core, judicial notice is the practice of recognizing facts that are beyond reasonable dispute without the need for evidence to avoid repetitive and unnecessary litigation. This promotes expediency at trial and in the context of international criminal tribunals may eliminate preliminary technicalities often necessary to provide an adequate assessment of personal responsibility, such as the establishment of background facts. Also beneficial is the uniformity that judicial notice can contribute across court decisions and in the establishment of a historical record.

The Extraordinary Chamber in the Courts of Cambodia (ECCC) is unique from other international criminal tribunals in that it combines elements of Cambodian and international law, creating a hybrid court that is an independent entity within the Cambodian court structure. Consequently, in accordance with the ECCC Framework Agreement and subsequent jurisprudence, when determining the rules of procedure, the ECCC must first look to its Internal Rules, then to the Cambodian Code of Criminal Procedure, and finally to international standards. The Internal Rules do not provide specific guidelines regarding the principle of judicial notice, nor does the Cambodian Code of Criminal Procedure address judicial notice for domestic procedure. Therefore, the ECCC may look to the jurisprudence of other international criminal courts for guidance on the application of judicial notice.

International courts, including the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone and the International Criminal Court each have explicit rules for judicial notice in their rules of procedure. The ICTR and the ICTY in particular share an identical two-fold rule: first, Chambers must take judicial notice of facts of common knowledge; and second, Chambers may discretionarily take judicial notice of previously adjudicated facts from other proceedings. Both parts of this rule have been employed widely as a means of speeding up proceedings that would otherwise be slowed by repetitive and unnecessary litigation of facts that are already beyond reasonable dispute.

Taking judicial notice of facts of common knowledge is a practice used in many domestic jurisdictions and international criminal courts alike. Employing this mechanism, courts take notice of facts that are universally known and therefore beyond reasonable dispute. For example, general historical facts and geographical facts are often noticed. In essence, judicial notice of common knowledge facts presumes those facts to be so notorious or clearly established that evidence of their existence is unnecessary.

Judicial notice of adjudicated facts, however, is a mechanism unique to international criminal courts and offers another avenue for preserving judicial economy. Here, courts discretionarily take notice of facts that have been litigated in prior proceedings, even if those proceedings involved other parties. Once a court takes notice of a fact in this way, it creates a rebuttable presumption that can be challenged at trial. Thus, the rights of the parties are protected, while judicial efficiency is promoted.

International jurisprudence has also established limits to noticing adjudicated facts. For example, when determining whether to take judicial notice of a fact that has

been previously litigated, courts will consider whether the fact is essentially of legal character, whether the fact relates to acts, conduct, or the mental state of the accused, and whether the fact is subject to pending appeal or review, among other factors. Even when various criteria laid out by international precedent are satisfied, a court may decide whether justice is best served by taking judicial notice of the fact in question.

The ECCC could benefit greatly from implementing judicial notice as an evidentiary procedure. First, the court may find it useful for judicial efficiency purposes to take notice of any common knowledge facts relevant to the proceedings. In particular, the brief temporal jurisdiction of the ECCC from April 17, 1975, to January 6, 1979, especially caters to judicial notice of historical facts because the events of the Khmer Rouge era have already been heavily documented by researchers, scholars, and historians. Thus, the court will almost certainly depend on background facts commonly known that would otherwise be litigated unnecessarily, perhaps in multiple proceedings.

Additionally, although the court has a limited jurisdiction and will probably take on a substantially smaller load of cases than other internationalized courts, the crimes to be prosecuted are likely to include overlapping factual contexts or common issues of law and criminality. This may allow for the possibility to take judicial notice of previously adjudicated facts from prior proceedings. If facts litigated in Case 001, for example, are relevant to Case 002 or other future proceedings, the ECCC may consider taking judicial notice of adjudicated facts, creating a rebuttable presumption that could be challenged at trial.

Thus, judicial notice provides an opportunity to speed up the trial processes at the ECCC while protecting the rights of the Accused. If implemented consistently with

international standards, the interested parties may be more likely to survive the duration of the proceedings, the court may be more likely to maintain financial viability, and ultimately justice may be properly and swiftly rendered.

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## **II. Overview**

### **A. The Problem of Slow Proceedings**

International criminal tribunals are regularly criticized for their lack of efficiency.<sup>2</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) is no exception as donors and victims alike have voiced complaints about the unnecessarily slow and bureaucratic process of bringing to justice those most responsible for the crimes committed during the Khmer Rouge era.<sup>3</sup> Indeed, the Accused and many of the victims are in their twilight years, making judicial efficiency essential not only to preserve the credibility and financial viability of the court but also to ensure legal processes conclude within the lifetimes of the interested parties.<sup>4</sup> Thus, despite its unique structure, the ECCC may find it useful to implement procedural mechanisms adopted in other international criminal tribunals as a means of preserving judicial economy.

### **B. Judicial Notice as a Means of Efficiency**

The doctrine of judicial notice has been employed widely in both domestic common law and civil law jurisdictions as a means of encouraging judicial efficiency.<sup>5</sup> It

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<sup>2</sup> Daryl A. Mundis, *Improving Operations in International Criminal Tribunals*, 94 *Am. J. Int'l L.* 759, 759 (2000).

<sup>3</sup> Rory Byrne, *Cambodia Khmer Rouge Tribunal Trims Budget*, VOA, July 25, 2008, at ¶ 3; Andrew Nette, *"Killing Fields" Trials Set to Roll*, Inter Press Service, July 8, 2008, at ¶ 8.

<sup>4</sup> *Cambodians Seek Quick Genocide Trials*, Associated Press, December 25, 2007.

<sup>5</sup> James G. Stewart, *Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent*, 3 *Int'l Crim. L. Rev.* 245, 246-47. (2003) (citing common law examples from Australia, Canada, India, Malaysia and Singapore, New Zealand, Uganda, The United Kingdom, and the United States, and also citing civil law examples from the German Criminal Procedural Code and the Russian Penal Code). See also Par Kirk G. Shannon, *Passing the Poisoned Chalice: Judicial Notice of Genocide by the ICTR*, 19.2 *Revue Québécoise de Droit International* 95, 98

has likewise had a substantial presence in international criminal law procedure.<sup>6</sup> At its core, judicial notice is the practice of recognizing facts that are beyond reasonable dispute without the need for evidence to avoid repetitive and unnecessary litigation.<sup>7</sup> This promotes expediency at trial and in the context of international criminal tribunals may eliminate preliminary technicalities often necessary to provide an adequate assessment of personal responsibility.<sup>8</sup> Also beneficial is the uniformity that judicial notice can bring across court decisions and in the establishment of a historical record.<sup>9</sup>

### C. Procedural Hierarchy in the ECCC

The ECCC is unique in that it combines elements of Cambodian and international law, creating a hybrid court that is an “independent entity within the Cambodian court structure.”<sup>10</sup> Article 12(1) of the Framework Agreement between the United Nations and the Royal Government of Cambodia provides the following guidelines for determining the rules of procedure in the ECCC:

The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in the procedural rules established at the international level.<sup>11</sup>

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footnote 12 (2006) (citing civil law examples of procedural mechanisms comparable to judicial notice from the Italian, German, Dutch, and French legal systems).

<sup>6</sup> *Id.* at 257.

<sup>7</sup> *Id.* at 245-46.

<sup>8</sup> *Id.* at 245.

<sup>9</sup> Ralph Mamiya, *Taking Notice of Genocide? The Problematic Law and Policy of the Karemera Decision*, 25 *Wis. Int'l L.J.* 1, 17 (2007).

<sup>10</sup> Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias “Duch,” Case No. 001/18-07-2007-ECCC/OCIJ (PTC01), ¶ 19 (Pre-Trial Chamber, Dec. 3, 2007).

<sup>11</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the



Furthermore, the preamble to the Internal Rules expresses the purpose to “consolidate applicable Cambodian procedure for proceedings before the ECCC and...to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.”<sup>12</sup>

The Pre-trial Chamber has affirmed that the Internal Rules have primacy over the Cambodian Code of Criminal Procedure, noting that:

[The Internal Rules]...do not stand in opposition to the Cambodian Criminal Procedure Code...but the focus of the ECCC differs substantially enough from the normal operations of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the [Cambodian Code of Criminal Procedure].<sup>13</sup>

Where a question arises that is not addressed by the Internal Rules, the Cambodian Criminal Procedure Code is applicable, the Pre-trial Chamber has determined.<sup>14</sup> Internal Rule 2 provides a statutory basis for this: “Where in the course of ECCC proceedings, a question arises which is not addressed by the [Internal Rules], the Co-Prosecutors, Co-Investigating Judges or the Chambers shall decide in accordance with Article 12(1) of the Agreement...”<sup>15</sup> Thus, when determining the rules of its

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Period of Democratic Kampuchea (June 6, 2003), art. 12(1) (hereinafter Framework Agreement).

<sup>12</sup> Extraordinary Chambers in the Courts of Cambodia, Internal Rules Rev. 5. (February 9, 2010), preamble ¶ 5 (hereinafter Internal Rules).

<sup>13</sup> Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC/OCU (PTC06), ¶ 14 (Pre-Trial Chamber, Aug. 26, 2008).

<sup>14</sup> *Id.* ¶ 15.

<sup>15</sup> See Internal Rules, *supra* note 11, Rule 2.

procedure, the ECCC must first look to the Internal Rules, then to the Cambodian Code of Criminal Procedure, and finally to international standards.

The Internal Rules do not provide specific guidelines regarding the principle of judicial notice in its rules of evidence or elsewhere, nor does the Cambodian Code of Criminal Procedure address judicial notice for domestic procedure. Therefore, the ECCC may look to the jurisprudence of other international criminal courts for guidance on the application of judicial notice.

### **III. International Standards on Judicial Notice**

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have specific internal rules regarding judicial notice. Rule 94 in the ICTY Rules of Procedure and Evidence and the ICTR Rules of Procedure and Evidence read identically as follows:

(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.<sup>16</sup>

Furthermore, both courts have addressed questions of judicial notice regarding facts of common knowledge under Rule 94(A) and adjudicated facts under Rule 94(B).

Additionally, the Special Court for Sierra Leone and the International Criminal Court

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<sup>16</sup> International Tribunal for the Prosecution of Person Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Rules of Procedure and Evidence, art. 94, February 11, 1994 (hereinafter ICTY Rules of Procedure); International Tribunal for Rwanda, Rules of Procedure and Evidence, art. 94, March 14, 2008 (hereinafter ICTR Rules of Procedure).

have specific rules regarding judicial notice and corresponding case law, providing further insight into the application of the doctrine.<sup>17</sup> Thus, substantial jurisprudence exists for the application of judicial notice in the context of international criminal courts that may be helpful for the ECCC.

In fact, a 1999 report by a United Nations Expert Group reviewing effective operations and functioning at the ICTY and ICTR found that “further consideration should be given to greater use of judicial notice in a manner that fairly 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.”<sup>18</sup> The Expert Group reasoned that judicial notice can reduce the amount of time devoted to litigating background facts that have already been established in previous trials, noting that successive trials have often related to similar areas of law and issues of criminality.<sup>19</sup>

The ICTY and representatives from the Defense in a response to the Expert Group Report agreed that the use of judicial notice should be increased, but emphasized that the

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<sup>17</sup> Special Court for Sierra Leone, Rules of Procedure and Evidence, art. 94, amended Aug. 1, 2003 (“(A) A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof. (B) 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”); Rome Statute of the International Criminal Court, Jan. 16, 2002, art. 69(6), July 1, 2002 (“The Court shall not require proof of facts of common knowledge but may take judicial notice of them”).

<sup>18</sup> 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, ¶ 85, UN Doc. A/54/634 (1999) (hereinafter Expert Group Report).

<sup>19</sup> *Id.*

Accused's right to a fair trial must be preserved.<sup>20</sup> The Prosecution team also supported the recommendation, stressing that it is "important to find ways of determining before the trial those facts which are not required to be proved by leading evidence."<sup>21</sup> It reasoned that making judicial notice determinations after witnesses and evidence have been brought to the court would forfeit the benefits the judicial notice might offer.<sup>22</sup> In the response, the ICTR judges also commented that they favored "greater use of judicial notice to reduce identical, repetitive testimony and exhibits."<sup>23</sup>

#### **A. Facts of Common Knowledge**

Rule 94(A) in the ICTR and ICTY Rules of Procedure states that the Trial Chamber "shall not require proof of facts of common knowledge but shall take judicial notice thereof."<sup>24</sup> In its *Semanza* decision, the ICTR Trial Chamber defined "common knowledge" 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."<sup>25</sup> It noted that "a court may generally

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<sup>20</sup> Comments on the Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, ¶ 46, UN Doc. A/54/850 (2000).

<sup>21</sup> *Id.* ¶ 49 (emphasis in original).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* ¶ 61. See also Michael P. Scharf and Ahran Kang, *Errors and Misteps: Key Lessons The Iraqi Special Tribunal Can Learn From the ICTY, ICTR and SCSL*, 38 Cornell Int'l L. J. 911, 942-43 (2005) (recommending that the Iraqi Special Tribunal follow the examples of judicial notice taken by the ICTY and ICTR for efficiency purposes despite not having explicit procedural rules addressing judicial notice).

<sup>24</sup> See ICTR Rules of Procedure, *supra* note 15, art. 94; See ICTY Rules of Procedure, *supra* note 15, art. 94.

<sup>25</sup> Prosecutor v. Semanza, Case No. ICTR-97-20-I, ¶ 23, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, (Trial Chamber, Nov. 3, 2000) (citing M. Cherif Bassiouni & P. Manikas *The Law of the International Tribunal for the Former Yugoslavia* p. 952, 1996).

take judicial notice of matters ‘...so notorious, or clearly established or susceptible to determination by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary.’”<sup>26</sup> The Trial Chamber also added:

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.<sup>27</sup>

Trial Chambers have regularly taken judicial notice of facts of common knowledge, such as the shooting down of Rwandan President Habyarimana’s plane<sup>28</sup> or the Yugoslav ratification of the Geneva Conventions.<sup>29</sup> Additionally, however, more intricate and abstract notions have been noticed. For example in *Kanyabashi*, the ICTR Trial Chamber took judicial notice of:

the fact that the conflict in Rwanda created a massive wave of refugees, many of whom were armed, into neighbouring countries which by itself entailed a considerable risk of serious destabilisation of the local areas in the host countries where refugees had settled. The demographic composition of the population in certain neighbouring regions outside the territory of Rwanda, furthermore, showed features which suggest that the conflict in Rwanda might eventually spread to some or all of these neighbouring regions.<sup>30</sup>

Furthermore, despite the clarity of the *Semanza* definition, inconsistency in application of judicial notice of facts of common knowledge remains among international

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<sup>26</sup> *Id.* at ¶ 25 (citing Archibold Criminal Pleading, Evidence & Practice § 10-71, 2000).

<sup>27</sup> *Id.* ¶ 24.

<sup>28</sup> Prosecutor v. Nyiramasuhuko et al., Case No. ICTR-97-21-T, ¶ 105, Decision On the Prosecutor’s Motion For Judicial Notice and Admission of Evidence (Trial Chamber, May 15, 2002).

<sup>29</sup> Prosecutor v. Kovacevic, Case No. IT-97-24-PT, p. 2, Prosecutor’s Request For Judicial Notice (Trial Chamber, April 20, 1998).

criminal courts.<sup>31</sup> For example, in the ICTR case *Akeyesu*, regarding the nature of the conflict in Rwanda, the Trial Chamber held that “even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings were perpetrated throughout Rwanda in 1994.”<sup>32</sup> However, citing the *Semanza* language verbatim in the *Nyiramashuhuko* decision, the ICTR held “even if there are previous judgements referring to the nature of the conflict in Rwanda, and to crimes committed therein, the Chamber ‘prefers in the circumstances of the present case to hear evidence and arguments on the issue, rather than to take judicial notice’ of those legal conclusions.”<sup>33</sup>

In its *Ntakirutimana* decision, the ICTR addressed such inconsistency, reasoning that “the Chamber’s deliberations should not be taken to exclude the possibility that certain facts alleged... may be judicially noticed in a different context,” endorsing the view that a fact of common knowledge may be properly noticed in one situation while not in others.<sup>34</sup> Nonetheless, consistency regarding determinations of what is reasonably disputable is preferred for several reasons.<sup>35</sup> First, it is a plain function of common knowledge judicial notice to compel courts to consistently recognize facts that are beyond

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<sup>30</sup> Prosecutor v. Kanyabashi, Case No. ICTR-96-15-T, ¶ 21, Decision on the Motion on Jurisdiction (Trial Chamber, June 18, 1997).

<sup>31</sup> See Stewart, *supra* note 4, 3 Int’l Crim. L. Rev. at 250-51.

<sup>32</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, ¶ 114, Judgement (Sep. 2 1998).

<sup>33</sup> Prosecutor v. Nyiramashuhuko, *supra* note 27, ¶ 127. Although, the Chambers used the language “legal conclusions” as a basis for declining to take notice of the nature of the conflict in Rwanda, that particular fact does not appear to be a legal determination and thus should properly be subject to judicial notice as a fact of common knowledge if it is indisputable as prior proceedings suggest.

<sup>34</sup> Prosecutor v. Ntakirutimana, Case No. ICTR-96-10-T, ¶ 52, Decision On the Prosecutor’s Motion for Judicial Notice of Adjudicated Facts (Trial Chamber, November 22, 2001) (hereinafter *Ntakirutimana* decision).

<sup>35</sup> See Stewart, *supra* note 4, 3 Int’l Crim. L. Rev. at 252.

reasonable dispute.<sup>36</sup> Additionally, the mandatory language “shall take judicial notice thereof” of Rule 94(A) reflects the drafters’ perception that due to their indisputable nature common knowledge facts *must* be noticed.<sup>37</sup> However, despite the intended purpose to the contrary, the lack of uniformity in application of the rule lead one commentator to suggest, “the agreed *obligation* to take judicial notice of matters commonly known carries little weight.”<sup>38</sup>

Recently and controversially, the ICTR recognized genocide as a fact of common knowledge under Rule 94(A) in its *Karemera* decision.<sup>39</sup> The Appeals Chamber explained that “there is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda’s Tutsi population...” and that “...these basic facts were broadly known even at the time of the Tribunal’s establishment...”<sup>40</sup> Concluding that the “Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a ‘fact of common knowledge,’” the Appeals Chamber employed Rule 94(A) to take judicial notice of genocide.<sup>41</sup>

The Accused argued, and some commentators agree, that this was essentially a legal determination and thus not appropriate for judicial notice as a common knowledge

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<sup>36</sup> *Id.*

<sup>37</sup> See ICTR Rules of Procedure, *supra* note 15, art. 94.

<sup>38</sup> *Id.* (emphasis in original) Although this observation may be accurate, an obligation to notice common knowledge facts is preferred for the foregoing reasons.

<sup>39</sup> Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), ¶ 35, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (Appeals Chamber, June 16, 2006) (hereinafter *Karemera* decision).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

fact.<sup>42</sup> However, the Appeals Chamber dispensed with the objection of the Accused that the genocide characterization was legal in nature, reasoning that “Rule 94(A) does not provide the Trial Chamber with discretion to refuse judicial notice on [that] basis” and that “the term ‘genocide is not distinct from other legal terms used to characterize factual situations, such as ‘widespread or systemic’ or ‘not of international nature,’ which the Appeals Chamber in *Semanza* already held to be subject to judicial notice under Rule 94(A).”<sup>43</sup> It pointed out that “the question is not whether a proposition is put in legal or layman’s terms...the question is whether the proposition can reasonably be disputed.”<sup>44</sup>

Addressing the relevancy to the Prosecution’s case of noticing genocide, the Appeals Chamber responded that the fact of a nationwide campaign of genocide “provides the context for understanding the individual’s actions. And...may also provide relevant context for other charges against the Accused, such as crimes against humanity.”<sup>45</sup> It then explained that 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.”<sup>46</sup>

The *Karemera* decision was hailed as a victory by some who had long sought to “silence the rejectionist camp”—those who had disputed the occurrence of genocide in

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<sup>42</sup> *Id.*; Nina H.B. Jorgensen, *Genocide as a Fact of Common Knowledge*, 56 Int’l Crim. L. Q. 885, 895 (2007).

<sup>43</sup> See *Karemera* decision, *supra* note 38, ¶ 37. However, this line of reasoning is questionable because “genocide” appears distinct from other legal terms such as “widespread or systemic” in that it entails *mens rea* elements and implicates individual responsibility. This distinguishes it as an inherently legal term, not a fact appropriate for judicial notice.

<sup>44</sup> *Id.* para 29.

<sup>45</sup> *Id.* para 36.



Rwanda.<sup>47</sup> Nonetheless, the decision has been controversial among commentators for several reasons. First, it is questionable whether noticing genocide as a fact of common knowledge was relevant to the *Karemera* case because the existence of a nationwide campaign of genocide does not prove any of its legal elements.<sup>48</sup> Second, some have expressed fears that noticing genocide as a fact of common knowledge forfeits the opportunity to legitimize and solidify the historical record by fully litigating all elements of the crime.<sup>49</sup> Because facts of common knowledge are not rebuttable under Rule 94(A), judicial notice of genocide as such prevents further deliberation on the issue—“effectively truncating the judicial record,” as one commentator observes.<sup>50</sup> Consequently, it has also been suggested that Rule 94(B) is a better alternative of taking judicial notice for the purposes expressed in the *Karemera* decision.<sup>51</sup> Under 94(B), judicial notice may be taken of the adjudicated fact that genocide occurred, which would create a rebuttable presumption that could be addressed at trial.<sup>52</sup> Because of the overwhelming evidence that the *Karemera* decision cites as reason for taking judicial

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<sup>46</sup> *Id.* para 37.

<sup>47</sup> ICTR Press Release ICTR/INFO-9-2-481.EN, *ICTR Takes Judicial Notice of Genocide in Rwanda* (June 20, 2006).

<sup>48</sup> Kevin Jon Heller, *International Decision: Prosecutor v. Karemera*, 101 Am. J. Int'l L. 157, 159 (2007) (“The fact that individuals were killed on a nationwide scale does not make it more likely that the defendant killed one of them. The fact that the victims of the nationwide killings were members of a protected group does not make it more likely that the defendant's alleged victims were also members of that group. And the fact that other unnamed individuals specifically intended to destroy a protected group does not make it more likely that the defendant harbored the same specific intent.”) A counterargument would be that taking judicial notice genocide may contribute to judicial efficiency by putting the focus on litigating the *mens rea* element, thus it is relevant in the sense that it accomplishes the primary goal of judicial notice—a more expeditious trial.

<sup>49</sup> See Mamiya, *supra* note 8, 25 Wis. Int'l L.J. at 17-19.

<sup>50</sup> Brittan Heller, *Noticing Genocide*, 116 Yale L. J. Pocket Part 101, 103 (2006).

<sup>51</sup> See Jorgensen, *supra* note 41, 56 Int'l Crim. L. Q. at 895.

<sup>52</sup> *Id.*

notice of the genocide as a fact of common knowledge, it is unlikely that the fact could effectively be disputed even as a rebuttable adjudicated fact, which may be the more appropriate procedural mechanism in this context.<sup>53</sup>

Another criticism of *Karemera* is that the two meanings of genocide—the legal meaning and the sociological meaning—may be muddled in the decision.<sup>54</sup> The Appeals Chamber relied on “countless books, scholarly articles, media reports, U.N. reports and resolutions, national court decisions, and government and NGO reports” to determine that the Tribunal “need not demand further documentation” because the Rwandan genocide is “a fact as certain as any other.”<sup>55</sup> However books, articles and other kinds of media often conflate the colloquial meaning of genocide with the legal definition. The legal definition, of course, derives from the Convention on the Prevention and Punishment of the Crime of Genocide and is “by far the most standardized criminal offense worldwide,” according to one commentator.<sup>56</sup> It includes mens rea elements that are notoriously difficult to prove.<sup>57</sup> On the other hand, the sociological or common meaning of genocide often refers more generally to large-scale crimes based on discriminatory motives, which

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<sup>53</sup> *Id.* at 895-96.

<sup>54</sup> Stefan Kirsch, *The Two Notions of Genocide: Distinguishing Macro Phenomena and Individual Misconduct*, 42 Creighton L. Rev. 347, 349 (2009).

<sup>55</sup> See *Karemera* decision, supra note 35, ¶ 35.

<sup>56</sup> See Kirsch, supra note 53, 42 Creighton L. Rev. 347, 349 (citing ICTR art. 4(2) and ICTY art. 2(2), which read identically as follows: “Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

<sup>57</sup> *Id.* at 350-52.

may or may not be understood to encompass the requisite mental state of the legal definition.<sup>58</sup> Thus, the *Karemera* decision if read in this vein can be misleading as the evidence it relied on to notice genocide as a fact of common knowledge may substantiate only the sociological, anthropological sense of the term, not the legal meaning.<sup>59</sup> However, it must be presumed that in a court of law reference to genocide includes its legal components.

Thus, the *Karemera* decision has been both praised and criticized, but there is little doubt on either side that it broadens the scope of judicial notice regarding facts of common knowledge.<sup>60</sup>

## **B. Previously Adjudicated Facts**

Rule 94(B) of the ICTR and ICTY Rules of Procedure states that the Trial Chambers “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.”<sup>61</sup> The ICTY Appeals Chamber in its *Krajisnik* decision explained the legal effect of taking judicial notice of an adjudicated fact saying that it:

establishes a well-founded presumption for the accuracy of this fact,

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<sup>58</sup> *Id.* at 347-48.

<sup>59</sup> See Jorgensen, *supra* note 69, 56 Int’l Crim. L. Q. at 895.

<sup>60</sup> See K.J. Heller, *supra* note 47, 101 Am. J. Int’l L. at 162.

<sup>61</sup> See ICTR Rules of Procedure, *supra* note 15, art. 94; See ICTY Rules of Procedure, *supra* note 15, art. 94. *See also* Prosecutor v. Simic, Case No. IT-95-9-PT, ¶ 4, Decision 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 (Trial Chamber, 25 March 1999) Judicial notice of adjudicated facts under 94(B) was first addressed in this ICTY decision. There, the Chamber denied the prosecution’s request to recognize facts determined in previous cases concerning the nature of the armed conflict in Bosnia-Herzegovina, reasoning that “a balance should be struck between judicial economy and the right of the accused to a fair trial” when determining whether to apply judicial notice to previously adjudicated facts.

which therefore does not have to be proven again at trial—*unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial. In other words, the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial, but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party.<sup>62</sup>

The Trial Chamber then explained that this does not affect the Prosecutor’s role in proving criminal responsibility of the Accused because the “facts *have* already been subject to judicial review, and both parties are still allowed—in order to safeguard the fairness of the trial—to challenge the fact during trial by submitting evidence that calls into question the veracity of the adjudicated facts.”<sup>63</sup> Consequently, while the Prosecution is relieved of the initial burden to produce evidence on a particular point, the burden of persuasion ultimately remains.<sup>64</sup>

The October 2003 ICTY *Milovic* decision affirmed this view, noting that taking judicial notice of an adjudicated fact “establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial, but which, subject to that presumption, may be challenged at that trial.”<sup>65</sup> Following that decision, the Trial Chambers at the ICTY and the ICTR have more frequently judicially noticed adjudicated facts under Rule 94(B), sometimes recognizing hundreds of facts from

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<sup>62</sup> Prosecutor v. Krajisnik, Case No. IT-00-39-PT, ¶16, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis* (Trial Chamber, February 28 2003) (emphasis in original).

<sup>63</sup> *Id.* (emphasis in original).

<sup>64</sup> See Karemera decision, *supra* note 38, ¶ 42.

<sup>65</sup> Prosecutor v. Milosovic, Case No. IT- 02-54-AR73.5, p.4, 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 (Appeals Chamber, Oct. 28, 2003).

previous proceedings.<sup>66</sup>

More specifically, international criminal jurisprudence has developed guidelines for classifying the types of adjudicated facts that may be judicially noticed.<sup>67</sup> In *Popovic* the ICTY Trial Chamber laid out nine criteria that courts have consistently employed:

- 1) The fact must have some relevance to an issue in the current proceedings;
- 2) The fact must be distinct, concrete, and identifiable;
- 3) The fact as formulated by the moving party must not differ in any substantial way from the formulation of the original judgment;
- 4) The fact must not be unclear or misleading in the context in which it is placed in the moving party's motion;
- 5) The fact must be identified with adequate precision by the moving party;
- 6) The fact must not contain characterizations of an essentially legal nature;
- 7) The fact must not be based on an agreement between the parties to the original proceedings;
- 8) The fact must not relate to the acts, conduct, or mental state of the accused; and
- 9) The fact must clearly not be subject to pending appeal or review.<sup>68</sup>

However, these guidelines do not bind a Trial Chamber to recognize an adjudicated fact when the criteria is satisfied. It still “may exercise its discretion to withhold judicial notice if the Chamber determines that taking judicial notice would not serve the interests of justice.”<sup>69</sup> Nonetheless, they provide categorizations of facts that judges may find helpful in making such determinations.

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<sup>66</sup> O-gon Kwon, *The Challenge of an International Criminal Tribunal as Seen from the From the Bench*, J. Int’l Crim. Justice at 12 (2007); see e.g. Prosecutor v. Popovic, Case No. IT-05-88-T, Decision of Prosecution Motion of Judicial Notice of Adjudicated Facts with Annex (Trial Chamber, Sept. 26, 2006) (noticing 513 adjudicated facts from other previous proceedings); Prosecutor v. Stanisic, Case No. IT-08-91-T, Decision Granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B) (Trial Chamber, April 1, 2010) (noticing 1,086 adjudicated facts from other previous proceedings).

<sup>67</sup> Stanisic, supra note 65, ¶ 24.

<sup>68</sup> See Popovic, supra note 65, ¶¶ 5-14.

Although, the distinction between the “shall” in 94(A) and the “may” in 94(B) underscores the drafters’ intentions for only the latter to be discretionary, classifications of facts are not always clear. In *Ntakirutimana*, for example, the ICTR Chamber held the 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.”<sup>70</sup>

However, judicial notice of previously adjudicated facts differs from judicial notice of common knowledge facts in that the practice is “a new creation of international criminal procedure that does not exist in either common-law or civil-law national systems,” according to Judge Kwon of the ICTY.<sup>71</sup> Not only are adjudicated facts subject to judicial discretion, they are also not limited by common knowledge and consequently have further reaching effects.<sup>72</sup> They may also be rebutted at trial unlike their mandatory counterparts in 94(A) because they only establish a well-founded presumption of accuracy.<sup>73</sup> Thus, “it is for the Chamber to decide whether justice is best served by its taking judicial notice of adjudicated facts”<sup>74</sup> while facts of common knowledge by their very nature should be consistently noticed according to international standards.

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<sup>69</sup> See Stanistic, *supra* note 65, ¶ 44.

<sup>70</sup> *Id.* ¶ 25.

<sup>71</sup> See Kwon, *supra* note 65, J. Int’l Crim. Justice at 10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Ntakirutiamana decision, *supra* note 33, ¶ 28.

**a. Previously Uncontested Facts**

Facts admitted by parties of previous cases have been uniformly considered ineligible for judicial notice under Rule 94(B).<sup>75</sup> In *Semanza*, the Trial Chamber reasoned:

That an accused admits a fact pursuant to a plea agreement reveals nothing about the nature of the facts as either common knowledge or as indisputable. Similarly, facts that are voluntarily admitted by an accused in the context of a proceeding are not the proper subject of judicial notice because such admissions speak neither to the general currency of the fact nor to its indisputable character.<sup>76</sup>

In *Milosovic* the ICTY affirmed this principle, reasoning that “for a fact to be capable of admission under Rule 94(B)...it should be truly adjudicated and not based upon an agreement between parties to previous proceedings, such as agreed facts underpinning a plea agreement.”<sup>77</sup>

The ICTR Trial Chamber in *Karemera* also indicated a similar limitation noting:

judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused...there is reason to be particularly skeptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental state of an individual not on trial in those cases. As a general matter, the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another.<sup>78</sup>

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<sup>75</sup> See Stewart, supra note 4, 3 Int’l Crim. L. Rev. at 353-54.

<sup>76</sup> *Semanza* decision, supra note 24, ¶ 34.

<sup>77</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-T, p.3, Decision On Prosecution’s Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brcko, (Trial Chamber, June 5, 2002). Although the rule concerning plea agreements may not be directly relevant in civil law proceedings, the principle is nonetheless analogous because facts may not be considered adjudicated if they are admitted or otherwise left uncontested in the previous trial.

<sup>78</sup> See *Karemera* decision, supra note 38, ¶ 50-51.

For these reasons, facts admitted or left uncontested by defendants in previous cases are not eligible for judicial notice as adjudicated facts.

**b. Distinguishing Res Judicata**

Some have confused judicial notice of adjudicated facts with the principle of res judicata, a procedural mechanism that bars re-litigation of closely related claims in subsequent lawsuits.<sup>79</sup> While acknowledging their similarities Judge Kwon of the ICTY, points to some distinctions.<sup>80</sup> First, res judicata precludes parties from re-litigating issues that could have been raised previously, while judicial notice of adjudicated facts allows notice to be taken from previous proceedings involving an Accused other than the one in the current proceeding.<sup>81</sup> Second, the two doctrines have different purposes: res judicata seeks to limit the costs and annoyance of multiple lawsuits filed against a defendant, while judicial notice of adjudicated facts aims to speed up trials by reducing repetitive or overlapping background evidence.<sup>82</sup> However, they do have shared goals of encouraging judicial economy and uniformity across court findings.<sup>83</sup>

Addressing concerns over whether a factual finding from a previous case was subject to res judicata, the ICTY in *Delalic* held that it was not, reasoning that “the principle of res judicata only applies *inter partes* in a case where a matter has already been judicially determined within the case itself” and that in criminal cases res judicata is

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<sup>79</sup> See e.g. Nyiramasuhuko decision, supra note 27, ¶ 23, the Defense argued “that each decision has only confirmed the guilt of each Accused and should therefore be considered only as res judicata in respect of each particular case, and not in respect of each factual finding made in these judgements.”

<sup>80</sup> See Kwon, supra note 65, at 11-12.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



limited “to the question of whether, when the previous trial of a particular individual is followed by another of the same individual, a specific matter has already been fully litigated.”<sup>84</sup> Thus the principle of *res judicata* does not interfere with judicial notice of adjudicated facts, which is left entirely to the Chamber’s discretion under Rule 94(B).<sup>85</sup>

**c. Balancing Judicial Economy and Fairness**

From the perspective of the Accused, there is an understandable hesitation toward the use of judicial notice based on the fear that facts may be admitted without the proper procedural protections in place to allow the validity of evidence to be contested.<sup>86</sup> Former ICTY Judge Patricia Wald highlighted this concern in a 2001 article, noting that a broad reading of judicial notice rules would readily admit any relevant facts in one case into a different case with a new defendant.<sup>87</sup> She reasoned, “to accept as fact any matter already adjudicated would shorten trials—a desirable goal—but it also raises serious questions about fairness to the second set of defendants who were not before the Court in the first trial.” Subsequently, the 2006 ICTR *Karemera* decision adopted limitations addressing such concerns.<sup>88</sup> However, commentators with experience representing the Defense at the

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<sup>84</sup> Prosecutor v. Delalic, Case No. IT-96-21-T, ¶ 228, Judgement (Trial Chamber, Nov. 16, 1998).

<sup>85</sup> See Stewart, *supra* note 4, 3 Int’l Crim. L. Rev. at 257.

<sup>86</sup> Eugene O’Sullivan and Deirdre Montgomery, *The Erosion of the Right to Confrontation Under the Cloak of Fairness at the ICTY*, 8 J. Int’l Crim. Just. 511, 520 (2010).

<sup>87</sup> Patricia Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of and International Court*, 5 Wash. U. J.L. & Pol’y 87, 111 (2001).

<sup>88</sup> See *Karemera* decision, *supra* note 38, ¶ 50-51 (“judicial notice should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused... First, this interpretation of Rule 94(B) strikes a balance between the procedural rights of the Accused and the interest of expediency... Second, there is also a reliability

ICTY have suggested that despite efforts to balance efficiency and fairness, the rights of the Accused are not fully and properly protected when judicial notice of adjudicated facts is applied.<sup>89</sup>

Another issue for consideration is whether the use of judicial notice necessarily preserves judicial economy. The ICTY Trial Chamber in *Popovic* expressed this concern, reasoning that because taking notice of an adjudicated fact only creates a well-founded presumption of accuracy that may be rebutted a trial, Trial Chambers must be aware of the “possibility that anticipated attempts at rebuttal by one or more of the Accused may consume excessive time and resources, consequently frustrating the principle of judicial economy.”<sup>90</sup> It then reasoned that judicial economy is “more likely to be frustrated ... where the judicially noticed adjudicated facts are unduly broad, vague, tendentious, or conclusory.”<sup>91</sup> It also warned that the volume and type of evidence the Accused is expected to produce in rebuttal might place “a significant burden on them that it jeopardizes their right to a fair trial.”<sup>92</sup>

Thus, the challenge remains to strike a balance between protecting the procedural rights of the Accused to a fair trial and promoting the interests of expediency and consistency of case law that judicial notice can provide.<sup>93</sup> Trial Chambers must exercise

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concern—namely, there is reason to be particularly skeptical of facts adjudicated in other cases when they bear specifically on the actions, omissions, or mental state of an individual not on trial in those cases. As a general matter, the defendants in those other cases would have had significantly less incentive to contest those facts than they would facts related to their own actions; indeed, in some cases such defendants might affirmatively choose to allow blame to fall on another.”)

<sup>89</sup> O’Sullivan, *supra* note 85, 8 J. Int’l Crim. Just. 526.

<sup>90</sup> See *Popovic*, *supra* note 65, ¶ 16.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See *Karemera* decision, *supra* note 38, ¶ 51.

their discretion on whether to judicially notice facts with these competing interests in mind.<sup>94</sup>

#### **d. Adjudicated Historical Facts**

Historical facts are routinely judicially noticed under Rule 94(B) as previously adjudicated. In *Stanisic*, the ICTY Trial Chambers considered nearly 1,500 adjudicated facts from various prior proceedings, many of them historical in nature.<sup>95</sup> For example, it noticed facts such as “for centuries the population of Bosnia and Herzegovina, more than any other republic of the former Yugoslavia, has been multi-ethnic” and “[t]hroughout the years of...communist Yugoslavia, religious observance was discouraged.”<sup>96</sup>

Employing the *Popovic* factors, the Chambers used its discretion to notice 1,086 of the proposed facts, most of them being historical facts adjudicated in prior proceedings.<sup>97</sup>

Taking judicial notice in this way not only promotes judicial efficiency by establishing background facts that would otherwise be unnecessarily re-litigated, but also fosters uniformity in the historical record.

#### **C. Documents**

Various documents may be subject to judicial notice pursuant to both Rule 94(A) and 94(B).<sup>98</sup> From as far back as the Nuremburg Trials, many kinds of documents have been admitted through judicial notice in international criminal courts.<sup>99</sup> However, the practice has been contentious in the wake of the *Semanza* decision, which held that

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<sup>94</sup> See *Stanisic*, supra note 65, ¶44.

<sup>95</sup> *Id.* ¶ 50.

<sup>96</sup> *Id.* Annex 1 at p. 1-2.

<sup>97</sup> *Id.* ¶ 50.

<sup>98</sup> See Stewart, supra note 4, 3 Int’l Crim. L. Rev. at 257.

judicial notice can be taken “...of the existence and authenticity of...documents without taking judicial notice of the contents thereof.”<sup>100</sup>

According to James Stewart, taking judicial notice of the authenticity of documents and not their contents serves a similar purpose to another evidentiary rule common to the ICTR and ICTY—Rule 92*bis*, which comprehensively governs the admission of written statements and transcripts without oral testimony.<sup>101</sup> Thus, it has been suggested that judicially noticed documents should be limited to those whose contents, along with authenticity, are beyond reasonable dispute, leaving other documents to be admitted under other evidentiary provisions.<sup>102</sup>

#### **D. Facts of Legal Nature**

Generally, facts that are “unadorned legal conclusions” are not eligible for judicial notice.<sup>103</sup> However, in *Semanza* the Trial Chamber held that it was proper to take judicial notice of “factual elements constituting the crime of genocide, crimes against humanity” and other violations.<sup>104</sup> This effectively endorsed the view that the facts that make up a

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<sup>99</sup> *Id.*

<sup>100</sup> *Semanza* decision, supra note 24, ¶38. (“The Chamber...shall take judicial notice of the contents of resolutions of the Security Council and of statements made by the President of the Security Council because it is an organ of the United Nations which established the Tribunal. In addition, the Chamber takes judicial notice of the contents of Décret-Loi no. 01/81 and Arrête ministeriel no. 01/03, which are the copies of certain portions of the laws of Rwanda and properly qualify for judicial notice. The Chamber stresses, however, that by taking judicial notice of the existence and authenticity of the other documents in Appendix B, the Chamber does not take judicial notice of the facts recited therein.”)

<sup>101</sup> See Stewart, supra note 4, 3 Int’l Crim. L. Rev. at 260; See e.g. ICTY Rules of Procedure and ICTR Rules of Procedure, supra note 15, art. 92*bis*.

<sup>102</sup> See Stewart, supra note 4, 3 Int’l Crim. L. Rev. at 260.

<sup>103</sup> *Semanza* decision, supra note 24, ¶ 35.

<sup>104</sup> *Id.* at 30; See Stewart, supra note 4, 3 Int’l Crim. L. Rev. at 262.

crime may be judicially noticed without its requisite mens rea.<sup>105</sup>

Subsequently, the ICTR, in *Karemera*, judicially noticed genocide as a fact of common knowledge under Rule 94(A) as discussed above.<sup>106</sup> Some have suggested that the *Karemera* decision could be particularly inequitable when paired with the often-cited *Akayesu* holding that allows a defendant's specific intent to be inferred in various ways.<sup>107</sup>

Consequently, because a context of genocide was judicially noticed as a fact of common knowledge in *Karemera* and because the specific intent of the Accused may be inferred under *Akayesa*, as Kevin Jon Heller has said, a “potentially lethal pair” is formed.<sup>108</sup> Under such circumstances, “the prosecution will have ‘proved’ the defendant's specific intent without introducing any evidence of that intent at all—an unacceptably prejudicial result.”<sup>109</sup> Although this legal scenario is merely hypothetical and may oversimplify the complexity of linking personal responsibility to the crime of genocide, it

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<sup>105</sup> Semanza decision, supra note 24, ¶ 30 (“this Chamber may properly take judicial notice of the factual elements constituting the crime of genocide, crimes against humanity and violations of certain provisions of the Geneva Convention with respect to the large number of deaths of civilians in Rwanda during 1994.”)

<sup>106</sup> See *Karemera* decision, supra note 38, ¶ 37.

<sup>107</sup> See K.J. Heller, supra note 47, 101 Am. J. Int'l L. at 161; See *Akayesu* decision, supra note 8, ¶ 523 (“On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why...intent can be inferred from a certain number of presumptions of fact...[I]t 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.”)

<sup>108</sup> See K.J. Heller, supra note 47, 101 Am. J. Int'l L. at 161.

<sup>109</sup> *Id.*

nonetheless demonstrates that applying judicial notice to facts encompassing legal characteristics may have especially problematic consequences.

#### **E. Contextual Elements**

Judicial notice has also been employed to recognize contextual elements of crimes charged in multiple proceedings in courts with a temporal jurisdiction. For example, in the *Norman* case, the Special Court for Sierra Leone took judicial notice of the existence of an armed conflict.<sup>110</sup> This is of legal significance because in order to prosecute war crimes, an armed conflict is a requisite contextual element. However, this is distinguishable from recognizing elements that carry mens rea implications such as the judicial notice of genocide that was controversial in *Karemera*.<sup>111</sup> While taking notice of genocide presumes the existence of the mental state necessary to prosecute the crime, taking notice of a contextual element only establishes the legal background necessary for jurisdictional purposes.

As internationalized criminal courts move forward in prosecuting mass crimes in multiple proceedings, taking notice of contextual prerequisites such as the legal characterization of a relevant conflict serves as a mechanism for avoiding repetitive and unnecessary litigation.<sup>112</sup>

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<sup>110</sup> Decision on Prosecutor's Motion for Judicial Notice and Admission of Evidence, *Prosecutor v Norman*, Case No. SCSL-04-14-PT-117, (Trial Chamber, 2 June 2004); See also *Prosecutor v. Semanza*, Case No. ICTR-97-20-I, ¶ 23, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, (Trial Chamber, Nov. 3, 2000) Annex A ¶ 3, (taking notice of an armed conflict not of international character in Rwanda between 1 January 1994 and 17 July 1994).

<sup>111</sup> See supra § III A.

### **III. The Potential for Judicial Notice in ECCC Proceedings**

#### **A. Agreement of Facts**

While it is well settled that agreement of facts between parties is not necessary for a court to take judicial notice, agreement is another way in which a court may recognize facts without formal evidence.<sup>113</sup> A recently revised ECCC evidentiary provision addresses agreement of facts directly. Rule 86(6) of the Internal Rules reads:

Where the Co-Prosecutors and the Accused agree that alleged facts contained in the Indictment are not contested, the Chamber may consider such facts as proven.<sup>114</sup>

Because the Internal Rules provide for agreement of facts directly, the Trial Chambers need not look to international standards for guidance. However, just as judicial notice is encouraged as a means of preserving judicial economy in international tribunals, Rule 86(6) also holds promise as a mechanism for limiting unnecessary litigation over facts that are not in dispute. Its use in future ECCC proceedings should therefore be encouraged.

#### **B. Facts of Common Knowledge**

In accordance with international standards, the Trial Chamber at the ECCC may take judicial notice of various facts of common knowledge as a means of preserving judicial economy.<sup>115</sup> If the Chamber finds it appropriate to judicially notice common knowledge facts, it should include universally known facts pertaining to history, geography, or other matters so clearly established or susceptible to readily obtainable and

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<sup>112</sup> See Stewart, *supra* note 4, 3 Int'l Crim. L. Rev. at 264.

<sup>113</sup> *Id.* at 267.

<sup>114</sup> Internal Rules, *supra* note 11, Rule 87(6).

authoritative sources that evidence of their existence is unnecessary.<sup>116</sup> In particular, the brief temporal jurisdiction of the ECCC from April 17, 1975, to January 6, 1979, caters to judicial notice of historical facts because the events of the Khmer Rouge era have been heavily documented by researchers, scholars, and historians. Thus, the court will almost certainly depend on background facts commonly known that would otherwise be litigated unnecessarily, perhaps in multiple proceedings.

However, the Trial Chamber should be wary of taking judicial notice of facts that include legal components, as the highly contentious *Karemera* decision demonstrates. It is true, as the *Karemera* Appeals Chamber reasoned, that taking judicial notice of mass crimes as facts beyond reasonable dispute is logical due to the extensive amount of evidence publically available that may lend itself to such legal conclusions. But *Karemera* has been rightly criticized for overstepping the appropriate boundaries of judicial notice and interfering with the establishment of a credible historical narrative. More significant, however, are the consequences of noticing legal conclusions as common knowledge facts that cannot be rebutted at trial. As discussed above, this presents problematic consequences that may put to risk the fairness of the Accused. Thus, despite the potential contributions to judicial economy that noticing facts containing legal characteristics may provide, the impossibility of rebuttal would inequitably interfere with the proper balance between fairness and efficiency that international standards require.

In the ECCC's first case, *Prosecutor v. Kaing Guek Eav alias Duch*, the Trial Chamber outlined extensively the historical context of the Khmer Rouge era before

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<sup>115</sup> See e.g. ICTR Rules of Procedure, *supra* note 15, art. 94; See ICTY Rules of Procedure, *supra* note 15, art. 94.

<sup>116</sup> Semanza decision, *supra* note 24, ¶ 23.



addressing in detail the legal implications of the accused’s personal responsibility for crimes committed under his supervision at S-21 prison in Phnom Penh. The Trial Chamber in Case 002 and other future proceedings must also rely on this historical context, thus judicial notice may be taken of these historical facts that are beyond reasonable dispute. In accordance with international standards, the Trial Chamber should consider taking judicial notice of historical facts from the Duch Judgment such as the following:

- During most of the period of the DK [Democratic Kampuchea] regime, Cambodian and Vietnamese armed forces engaged in increasingly violent hostilities.<sup>117</sup>
- This culminated in the Vietnamese military offensive, the fall of Phnom Penh on 7 January 1979 and the DK leadership fleeing the capital.<sup>118</sup>
- The Cambodian-Vietnamese conflict stemmed from various factors, some of which dated back centuries.<sup>119</sup>
- The Vietnamese Southern expansion started in the 15<sup>th</sup> century, resulting in hereditary enmity between Cambodian and Vietnam.<sup>120</sup>
- Disputes over border demarcations drawn by the French, often favoring the Vietnamese side, further increased tension.<sup>121</sup>

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<sup>117</sup> *Prosecutor v. Kaing Guek Eav alias Duch*, Judgment, Extraordinary Chambers in the Courts of Cambodia, No. 001/18-07-2007/ECCC/TC (Trial Chamber July 26, 2010) ¶ 59 [hereinafter Duch Judgment].

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ¶ 60.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

Other historical background facts cited in the Duch Judgment from ¶ 59-83 may also be admissible as common knowledge facts under international standards of judicial notice.

## C. Adjudicated Facts

### 1. CPK Structure

The Trial Chamber may also employ its discretion to take notice of other previously adjudicated historical facts that are more nuanced or have special implications to the rights of the accused.<sup>122</sup> In particular, the Communist Party of Kampuchea (CPK) structure outlined in the Duch decision should be considered for judicial notice under this mechanism. The four accused charged in Case 002 are alleged senior leaders of the Khmer Rouge regime whose guilt or innocence will depend on their respective leadership roles within the CPK structure.<sup>123</sup> Although CPK structure has been heavily documented by historians, making it arguably common knowledge, it is more appropriately admissible as a previously adjudicated fact that can be challenged at trial.

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<sup>122</sup> See supra § III B. According to international practice, the Trial Chamber should consider the *Popovic* factors when determining whether to take notice of previously adjudicated facts.

<sup>123</sup> See “Closing Order” Case File No.: 002/19-09-2007-ECCC-OCIJ, September 15, 2010, [hereinafter Case 002 Closing Order], available at <http://www.eccc.gov.kh/english/cabinet/courtDoc/740/D427Eng.pdf>

Thus, the Trial Chamber in Case 002 and other future proceedings should consider taking judicial notice of the following facts concerning CPK structure established in the Duch Judgment:<sup>124</sup>

- Following the liberation of Phnom Penh, the CPK met at a party congress in January 1976 to formalize by statute, a complex, centrally-organized structure by which it intended to govern.<sup>125</sup>
- The CPK Statute provided that the entire government apparatus and the armed forces would be under the complete control of the CPK.<sup>126</sup>
- Its provisions reflected earlier policy and structures devised at the first congress of the CPK in 1960, including the establishment of a Central Committee and a Standing Committee.<sup>127</sup>
- In Practice, the Central Committee met rarely. Its Powers were delegated to, and exercised by its executive, the Standing Committee, the membership of which comprised the Secretary and Prime Minister Pol Pot, his Deputy Secretary Nuon Chea and seven other high-level members of the CPK, either as full or alternate members.<sup>128</sup>
- The Standing Committee met frequently and its daily work was conducted from Office 870 based in Phnom Penh. Office 870 and the Standing Committee were

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<sup>124</sup> This is not intended to be an exhaustive list of facts relevant to CPK structure; it is merely illustrative of the type of facts that are better suited to judicial notice as adjudicated facts that are rebuttable at trial.

<sup>125</sup> Duch Judgment, supra note 117, ¶ 84.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ¶ 85.

known also as the “Center”, the “Organization,” or “Angkar” and were responsible for monitoring and implementation of CPK policy nationwide. Office 870 discharged these responsibilities through a network of subsidiary offices.<sup>129</sup>

- The CPK Statue was a primary source of CPK policy, albeit applying directly only to those who were members of the party. Nonetheless its provisions had implications for the whole of the country.<sup>130</sup>
- From the outset, the entire civilian population was governed by a network of bodies tightly controlled by the Central Committee through the Standing Committee.<sup>131</sup>
- The country was divided into Zones, and then subdivided into Sectors, Districts, and Communes. Communes with traditionally had been divided into villages were combined into larger entities known as Cooperatives, within which communal eating and work were organized. Other Commune or Cooperative units comprised mobile brigades, groups of 100 workers and local militia. The Commune or Cooperative branches of the CPK were under the leadership of branch secretaries.<sup>132</sup>
- Zones were governed by three-person Zone Committees comprising a Secretary, Deputy-Secretary responsible for security and a Member responsible fore economics appointed by the Standing Committee.<sup>133</sup>

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129 *Id.*

130 *Id.* ¶ 86.

131 *Id.*

132 *Id.*

133 *Id.* ¶ 87.

- In addition to the six original Zones there were a number of autonomous sectors, and special municipal regions under military authority, including DK's capital city, Phnom Penh.<sup>134</sup>
- At each level, the leadership structure mirrored the Zone governing body; those governing were appointed by the body immediately superior to it, and the appointments were finally approved by the Standing Committee itself. Each body or organ reported to the body above it, and ultimately to the Standing Committee.<sup>135</sup>

The Duch Judgment also discussed other aspects of the CPK structure that may be relevant for future proceedings, thus the Trial Chamber should consider taking notice of such facts as previously adjudicated when opportunity to limit repetitive an unnecessary litigation arises.

## *2. Armed Conflict*

Prosecution of grave breaches of the Geneva Conventions require the existence of an armed conflict of international character.<sup>136</sup> In the Duch Judgment, the Trial Chamber determined that an armed conflict between Cambodia and Vietnam indeed existed during the time Duch was Chairman of S-21.<sup>137</sup>

In the Case 002 indictment, all four accused are charged with grave breaches of the Geneva Conventions, thus an armed conflict of international character must also be

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Anne Heindel, "Overview of the Extraordinary Chambers" ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS at 97.

<sup>137</sup> Duch Judgment, *supra* note 117, ¶ 423.

established for prosecution of these crimes.<sup>138</sup> Taking notice of this contextual element as a previously adjudicated fact would promote judicial economy by avoiding repetitive litigation on a legal characterization of the same conflict that has already been determined by the Trial Chamber in a prior proceeding.

When determining whether the armed conflict could be taken notice of in the form of a previously adjudicated fact, it must first be established that the fact was actually adjudicated. According to the Duch Judgment, “the existence of an international armed conflict between DK and Vietnam from the end of December 1977 to at least 6 January 1979 [was] uncontested by the parties.<sup>139</sup>” However, the Trial Chamber found that “armed hostilities existed between Cambodia and Vietnam from 17 April 1975 through 6 January 1979.<sup>140</sup> Whether Duch contested that the armed conflict had existed at this earlier date may be relevant in determining whether the fact was fully adjudicated. However, under international standards, facts admitted as previously adjudicated are only admissible as a rebuttable presumption that can be challenged at trial.<sup>141</sup> Thus, the rights of the accused are preserved by this procedural safeguard.

#### **D. Conclusion**

Although ECCC legislation does not contain explicit judicial notice rules, the Chamber may take notice of facts of common knowledge and previously adjudicated facts under international standards. This may be particularly useful at the ECCC where contextual overlap of crimes alleged is inherent due to the court’s limited temporal

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<sup>138</sup> See Case 002 Closing Order, *supra* note 122, ¶ 1613.

<sup>139</sup> Duch Judgment, *supra* note 117, ¶ 75.

<sup>140</sup> *Id.* ¶ 423.

jurisdiction. As proceedings move forward charging other senior leaders and those most responsible for the crimes committed during the Khmer Rouge era, instances where repetitive and unnecessary litigation may otherwise be required could be remedied through this widely employed procedural mechanism.

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<sup>141</sup> See supra § III B.