Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings

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4.1 Introduction

The previous Chapter described what a full criminal trial entails in Dutch criminal proceedings. The main characteristics of the proceedings were discussed, with a focus on three elements: the admissibility of evidence, the weighing of the evidence and the element of a reasoned judgement. The mechanisms were discussed that either diverted the case from the proceedings altogether or provided for a shortcut to proof. Similar to the previous Chapter, the characteristics of the full criminal trial in international criminal proceedings will be discussed here with these three elements in mind. The proceedings at the two *ad hoc* Tribunals, the ICTY and ICTR, will be discussed, as well as the proceedings before the ICC. Subsequently, the diversions and shortcuts that can be discerned in international criminal proceedings will be discussed. First, some preliminary observations are made regarding the terminology that is used in international criminal law regarding basic concepts of evidence law.

For a detailed analysis of the procedural models at the *ad hoc* Tribunals and the ICC, see: S. Zappalà, ’Comparative Models and the Enduring Relevance of the Accusatorial - Inquisitorial Dichotomy’, in: Sluiter, G.K., et al. (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford 2013, p. 44-54. Zappalà argued that the proceedings at the ICTY and ICTR are adversarial in nature. However, the judges at these Tribunals have tried to increase judicial control over the proceedings in order to provide for efficient trials. Regarding the ICC, Zappalà observed that the proceedings are a mix of adversarial and inquisitorial elements.
4.1.1 Preliminary Observations

In his contribution to *International Criminal Procedure: Principles and Rules*, Klamberg observed that:

One standard of admissibility is shared by all international criminal courts, namely that they are not bound by any national rules of evidence. However, key terms such as relevance, probative value, reliability and credibility are not used in a coherent way. This becomes an even greater problem during the final evaluation of the evidence. There is arguably a difficulty in clarifying these terms through amendments to the Statutes and/or the RPE’s. Instead the judges should, through reasoned opinions, explain or indicate how these terms are to be understood.²

It is true that the case law of the international criminal courts concerning these basic concepts of evidence law is far from consistent and clear. Concepts are defined differently (although, mostly, not to a great extent), which leads, in turn, to academic debates on the correct interpretation of these concepts. The aim of the drafters of the Rules of Procedure and Evidence (RPE), to unshackle themselves from the technical, common-law approach to evidence, has, paradoxically, led to ill-defined or ambiguous concepts. Basic notions such as relevance, probative value and weight are used in an inconsistent manner. This has sometimes resulted in highly technical observations from the judges in their decisions. An example is this excerpt from the Appeal Judgment in *Naletilić & Martinović* on the admission of documentary evidence:

Pursuant to Rule 89 (C), a Chamber may admit any relevant evidence which it deems to have probative value. The implicit requirement that a piece of evidence be *prima facie* credible – that it have sufficient indicia of reliability – ‘is a factor in the assessment of its relevance and probative value’.³

Both relevance and probative value have to be determined by an implicit (!) requirement of *prima facie* credibility, which consists of sufficient indicia of reliability. The wording of decisions on the admissibility of evidence almost seems to imply that the question of whether or not to admit a particular piece of evidence is an exercise in taxonomy: the RPE provide two basic concepts (relevance and probative value), which are then to be sub-divided into concepts reminiscent of the manner in which evidence is processed in common law jury trials. Evidence law in common law countries is often highly technical in order to facilitate the parties to carefully review whether certain evidence may be brought to the attention of the jury. It is doubtful whether


such a detailed analysis of evidence during the admissibility stage is anything more than semantics, particularly in trial proceedings conducted before professional judges. One may distinguish theoretically between the concepts of ‘credibility’ and ‘reliability’, but it is unlikely that such a distinction is really helpful for determining the admissibility of a piece of evidence. To structure the analysis it is essential that consistent terminology is used, but the number of terms will be kept to a minimum. For this analysis there is no need for all kinds of technical sub-rules and observations from case law that distinguish between factors that are, for the most part, only relevant within a specific judicial setting: the trial by jury. The most important and basic notions regarding evidence are relevance, probative value and weight.

Relevance, contained in Rule 89 (C) ICTY and ICTR RPE and Article 69 (4) ICC Statute, can be defined as the logical relationship between a factum probans and a factum probandum. In other words, evidence is relevant when it relates to a fact that has to be proven. To identify which facts have to be proven in criminal proceedings, one has to take into account the legal framework in which the proceedings are conducted. The charges and the underlying facts have to be proven, and any fact that testifies to the probability of such facts is relevant. Facts that relate to the existence of an alibi or a defence are also relevant: they relate to the facts that have to be proven (in case of an alibi this is an inverse relationship). When it is clear which facts have to be proven, the question of whether a piece of evidence is relevant to the proceedings becomes a matter of common sense.

Probative value, given that the evidence is relevant, refers to the degree of trustworthiness of the particular piece of evidence. In other words, does the evidence make the existence of a fact more or less likely? The factors that help to determine the probative value of a piece of evidence during the admissibility stage are numerous and vary among different categories of evidence. For example, to determine the probative value of hearsay evidence, Chambers have taken into account whether the statement was given voluntarily and whether it was truthful and trustworthy.4 Regarding the admissibility of documentary evidence, relevant factors include the origin, source and use of the documents involved.5 For expert evidence to be admissible, the expert statement or report must be sufficiently reliable:

there must be sufficient information as to the sources used in support of statements, and these must be clearly indicated in order to allow the other party or the Trial Chamber the basis on which the expert witness reached his or her conclusions.6

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4 ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Prosecutor v. Aleksovski, Case No.: IT-95-14/1-AR73, A. Ch., 16 February 1999, par. 15.
5 ICTY, Decision to Unseal Confidential Decision on the Admissibility of Certain Challenged Documents and Documents for Identification, Prosecutor v. Hadžihasanović, Case No.: IT-01-47-T, T. Ch. II, 2 August 2004, par. 56.
6 ICTY, Decision on Prosecution Motion for Admission of Morten Torkildsen Report and its Associated Exhibits, Prosecutor v. Hadžić, Case No.: IT-04-75-T, T. Ch., 15 July 2013, par. 9. Cf. Trial
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In *Katanga*, ICC Trial Chamber II stated:

> Once the probative value of a particular item of evidence has been determined, the Chamber must weigh this against the potential prejudice, if any, that its admission might cause.\(^7\)

It is instructive to discuss the relationship between probative value and prejudice regarding the admissibility of evidence. Article 69 (4) ICC Statute states that the Court, ruling on admissibility, may take into account any prejudice the evidence may cause to a fair trial or to the fair evaluation of the testimony of a witness. The notion of prejudice is a well-known concept in common law criminal law systems, where the judge has to rule on the prejudicial effect a certain piece of evidence may have on the jury. A classic example is bad character evidence, where the jury is getting acquainted with the criminal record, or its relevant parts, of the accused. Such evidence is normally inadmissible because its probative value is expected to be outweighed by its prejudicial effect.\(^8\) However, such a reading of prejudice in international criminal proceedings would be incorrect: it would require the judges to estimate the prejudicial effect the evidence, when admitted, would have on their final deliberations. Acknowledging its prejudicial effect would, in fact, result in eliminating its prejudicial effect. It seems more plausible to consider ‘fair evaluation of testimony’ as part of a fair trial. Any prejudice to a fair evaluation of a witness statement would then have to be determined from the perspective of the defence: does the admission of the evidence have a prejudicial effect on the right of the accused to examine and challenge the witness or his statement?\(^9\)

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Chamber III in *Stanišić & Simatović*: ‘[...] the expert statement must meet the minimum standards of reliability. There must be sufficient information as to the sources used in support of the statements. The sources must be clearly indicated and accessible in order to allow the other party or the Trial Chamber to test or challenge the basis on which the expert witness reached his or her conclusions. In the absence of clear references or accessible sources, the Trial Chamber will not treat such a statement or report as an expert opinion, but as the personal opinion of the witness, and weigh the evidence accordingly.’ ICTY, Decision on Prosecution’s Submission of the Expert Report of Nena Tromp and Christian Nielsen pursuant to Rule 94bis, *Prosecutor v. Stanišić & Simatović*, Case No.: IT-03-69-PT, T. Ch. III, 18 March 2008, par. 9.


9  Piragoff argued that this provision is not solely concerned with the interests of the accused: ‘Therefore, a fair trial, and prejudice thereto, may also incorporate or be counter-balanced by some aspects of the fair treatment of victims and witnesses, and not merely fair treatment of an accused, provided that these aspects are not “prejudicial to or inconsistent with the right of the accused or a fair and impartial trial.”’. The fairness of a trial may encompass considerations that are broader than the rights of an accused and other participants, and may require a balancing process of the factors mentioned in article 64 par. 2 which may be inter-related rather than distinct. Alternatively, if some
In *Katanga*, the Trial Chamber identified several categories of prejudicial evidence that may infringe upon the rights of the accused. Repetitive and time-consuming evidence, although probative, may be excluded in order to respect the accused’s right to be tried without undue delay. Witness statements, although probative, may be excluded when the witness is not available for examination at trial (provided the accused has not waived his right to examine the witness, or had the opportunity to examine the witness when the statement was recorded). To do otherwise would infringe upon the right to examine the witnesses. A statement of a co-accused may be excluded, because the co-accused cannot be compelled to be examined by, or on behalf of, the accused. And, finally, statements made by the accused may be excluded when there are serious concerns that they have been obtained in violation of his right to remain silent and his right not to incriminate himself.

The final basic notion discussed here is the weight of the evidence. As understood here, weight refers to the ultimate probative value the Chamber attaches to a piece of evidence. Determining weight, therefore, is done holistically after the close of proceedings, when all evidence has been presented. Considering that the final determination is conducted by professional judges, statutory rules of weight (such as the rule on corroborative evidence) are virtually absent.

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14 Cf. Trial Chamber II in *Katanga & Ngudjolo Chui*: ‘The Chamber wishes to remind the parties that probative value and evidentiary weight are two similar but distinct concepts. Under article 69 (4) of the Statute, probative value is a key criterion in any determination on admissibility. It follows that the Chamber must determine the probative value of an item of evidence before it can be admitted into the proceedings. Probative value is determined on the basis of a number of considerations pertaining to the inherent characteristics of the evidence. Evidentiary weight, however, is the relative importance that is attached to an item of evidence in deciding whether a certain issue has been proven or not.’ ICC, Decision on the Prosecutor’s Bar Table Motions, *Prosecutor v. Katanga & Ngudjolo Chui*, Case No.: ICC-01/04-01/07, T. Ch. II, 17 December 2010, par. 13 (emphasis in original).
16 Cf. Rule 63 (4) RPE ICC: ‘Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.’
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Rules of weight infringe upon the prerogative of the judge to weigh each piece of evidence in the context of the totality of the evidence (which, in fact, results in a hermeneutic process: each piece of evidence is weighed against the totality of the evidence, and the totality of the evidence is, at the same time, influenced by weighing the individual pieces of evidence). Rules of weight do exist, however, in relation to the distinct category of evidence in cases of sexual violence. Rule 70 ICC RPE precludes the Chamber from inferring consent on the part of the victim in certain circumstances (such as the silence of, or lack of resistance by, the victim). 17

Besides the few statutory rules of weight, the case law of the Tribunals provides for some rules of weight. The Appeals Chamber held in Martić that evidence which has not been subjected to cross-examination and goes to the acts or conduct of the accused must, if used for the conviction, be corroborated. 18 However, a general rule of corroboration does not exist:

The Appeals Chamber recalls that a Trial Chamber is at liberty to rely on the evidence of a single witness when making its findings. The testimony of a single witness may be accepted without the need for corroboration, even if it relates to a material fact. 19

After the total weight of the evidence has been determined, it is juxtaposed with the standard of proof. 20 In the Ntagurera et al. appeals judgement, the Appeals Chamber commented on the process of evaluating the evidence before a Chamber may enter a conviction. According to the Appeals Chamber, this process consists of three stages. First, the Chamber evaluates the credibility of each piece of evidence in light of the total body of evidence presented; second, the Chamber determines whether the alleged facts are proven beyond a reasonable doubt; and finally, the Chamber decides whether all elements of the crime and the mode of liability have been proven. 21

The proof beyond a reasonable doubt standard is a principle of international criminal law. 22 This common law concept can be equated with the conviction intime

17 See also Rule 96 ICTY and ICTR RPE.
18 ICTY, Decision on the Appeal against the Trial Chamber’s Decision on the Evidence of Witness Milan Babić, Prosecutor v. Milan Martić, Case No.: IT-95-11-AR73.2, A. Ch., 14 September 2006, par. 20.
19 ICTY, Judgement, Prosecutor v. Haradinaj et al., Case No.: IT-04-84-A, A. Ch., 19 July 2010, par. 219.
20 The rather mechanical terminology used does not imply that fact-finding in criminalibus is, in fact, a mechanical or mathematical exercise in which pieces of evidence have a certain weight that can be quantified and added to the total corpus of evidence. These terms are used to describe the judge’s task in, at least for lawyers, familiar terminology.
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and conviction raisonnée standards that are applicable in continental Europe. As discussed earlier, the main difference between these two standards of proof is not the degree of belief (both standards require, in fact, the same degree of belief in the guilt of the accused), but the obligation for the judge to hand down a reasoned opinion.

With these preliminary observations in mind, we now turn to the rules concerning the admissibility of evidence, the weighing of evidence and the requirement of providing reasons for the final judgement.

4.1.2 Rules of Admissibility in International Criminal Proceedings

The admissibility of evidence in international criminal proceedings is governed exclusively by the Statutes and Rules of Procedure and Evidence of the international courts. The legal instruments of the ICTY, ICTR and the ICC all contain provisions stating that national rules of evidence are not binding upon them.\(^{23}\)

The general provisions of the international tribunals on the admission of evidence provide for a lenient approach to the admissibility of evidence: all evidence is to be admitted, unless stated otherwise.\(^{24}\) Technical rules on admissibility are not included in the legal instruments, which resembles the principle of free proof. Thus, the Statutes and Rules of Procedure and Evidence have an inclusionary character (‘no relevant evidence may be excluded, unless stated otherwise’). Evidence is only declared inadmissible when it is irrelevant, does not have any probative value or when its admission would be contrary to values extraneous to accurate fact-finding. When we analyse the exceptions to the inclusionary principle, we are confronted with numerous situations in which evidence is declared inadmissible, however. These exceptions will be discussed. The exceptions to the principle of the free admission of evidence will be categorised according to the objective the exclusion strives to achieve. Similar to the discussion in the previous Chapter, exclusionary rules (or, rules of non-admissibility in relation to the standard of proof. The Appeals Chamber held: ‘A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him [...]. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.’ ICTY, Judgement, Prosecutor v. Delalić et al., Case No.: IT-96-21-A, A. Ch., 20 February 2001, par. 458 (emphasis in original).

\(^{23}\) Rule 89 (A) ICTY RPE, Rule 89 (A) ICTR RPE, Rule 63 (5) ICC RPE.

\(^{24}\) Rule 89 (C) ICTY RPE and Rule 89 (C) ICTR RPE state: ‘A Chamber may admit any relevant evidence which it deems to have probative value.’ Article 69 (4) ICC Statute provides: ‘The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.’
can be divided into intrinsic and extrinsic exclusionary rules. Intrinsic exclusionary rules refer to those rules that exclude evidence to enhance the accuracy of the fact-finding process. Such rules may also be called epistemic exclusionary rules because they aim to exclude evidence that, from a non-legal perspective, does not contribute to accurate fact-finding. Extrinsic exclusionary rules are rules that exclude evidence in order to achieve an aim extraneous to accurate fact-finding. For example, rules excluding illegally obtained evidence exist, *inter alia*, to ensure that the authorities abide by their own laws.

In his analysis of the law of evidence of England and Wales, Andrew Choo distinguished between exclusionary *rules* and exclusionary *discretion*. An exclusionary rule is a rule, which, upon the fulfilment of certain conditions, excludes a piece of evidence categorically: it is an imperative rule. A classic example is the common law hearsay rule. Roberts and Zuckerman observed that:

> the hearsay rule excludes (1) out-of-court statements (2) adduced for their truth, unless a well-established exception to the exclusionary rule applies.

Leaving the numerous exceptions to the rule aside for now, the rule obliges the trial judge to exclude a statement when the conditions enumerated under (1) and (2) have been fulfilled. Rule 96 ICTY RPE and Rule 71 ICC RPE, to be discussed in more detail below, are examples of such exclusionary rules: any evidence that goes, in cases of sexual assault, to the prior sexual conduct of the victim or witness shall not be admissible. In such cases, the Chamber is asked to answer two simple questions: (1) does the sexual assault involve the witness or victim? (2) does the evidence testify to the prior sexual conduct of the witness or victim? If so, the evidence must be excluded.

Exclusionary discretion is a more complex concept because it bestows upon the Chamber a discretionary power to rule on the admissibility of evidence. However, this discretionary power is firmly put in context. For example, Article 69 (7) (b) ICC Statute states that evidence that was obtained in violation of the ICC Statute or internationally recognised human rights shall be declared inadmissible if the admission would be antithetical to and seriously damage the integrity of the proceedings. It is within the Chamber’s discretion to determine whether the admission of the evidence would result in the forbidden effect stated in this article. The exercise of discretion is

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restricted, or put in context, by the general objective to safeguard the integrity of the proceedings.

The distinction between exclusionary rules and exclusionary discretion may be useful to analysing the different wording of the relevant Rules of Procedure and Evidence: Rule 96 (iv) ICTY RPE precludes the admission of evidence relating to prior sexual conduct of the victim categorically (‘shall not be admitted in evidence’). Rule 89 (D) ICTY RPE, on the other hand, is an example of exclusionary discretion: the Chamber may exclude evidence if the probative value is substantially outweighed by the need to ensure a fair trial.

When discussing admissibility, one other important distinction must be made. This is the distinction between facts concerning the individual criminal responsibility of the accused and facts that are more peripheral or contextual to the acts of the accused. This distinction can also be discerned in the rules of admissibility. For example, Rule 92bis ICTY RPE allows for the admission of written statements or transcripts without the attendance of the witness concerned when the testimony relates to matters other than the acts and conduct of the accused. Considering the scope of international criminal proceedings in terms of the charges, the factual basis of the charges and the massive volume of evidence presented, the need to streamline the proceedings is pressing. In terms of admissibility, a two-track system has been put into place. ICC Trial Chambers have held that relevant factors to determine whether prior recorded testimony may replace viva voce testimony are:

(i) that the testimony relates to issues which are not materially in dispute; (ii) that it is not central to core issues in the case, but rather provides relevant background information; and (iii) that it is corroborative of other evidence.28

Although these ICC decisions concern the admission of prior recorded written witness statements with the witness present in court for cross-examination, they are relevant to point to the distinction being made between contextual facts and facts that go directly to proof of the individual criminal responsibility of the accused. The difference between core issues and contextual issues does not have an absolute character, but may vary from case to case. In cases concerning low-level perpetrators, the contextual elements, such as the existence of a widespread or systematic attack, are indeed contextual: the accused himself was not able to influence in any way the existence of the context in which he operated. Trial Chambers should be conscious about such distinctions and allow the accused to participate and challenge any evidence that goes to proof of his personal criminal responsibility.

4.1.2.1 Intrinsic Exclusionary Rules

The existence of intrinsic exclusionary rules in international criminal proceedings seems at odds with the fact that the fact-finding process is conducted by professional judges. The ratio for excluding material that is \textit{prima facie} relevant, but subject to an exclusionary rule, is normally found in the mistrust in lay adjudicators, who must be shielded from material that they are most likely not able to weigh appropriately. Professional judges, so the argument goes, are able to identify such prejudicial material and leave it out of their final deliberations.

Intrinsic exclusionary rules are indeed hard to find in international criminal law. The legal frameworks of the \textit{ad hoc} Tribunals and the ICC both contain only one provision that can be characterised as an (at least partially) intrinsic exclusionary rule. Rule 95 ICTY RPE and ICTR RPE states:

\begin{quote}
No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.
\end{quote}

Article 69 (7) (a) ICC Statute:

\begin{quote}
Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) the violation casts substantial doubt on the reliability of the evidence; [...].
\end{quote}

Both provisions oblige Trial Chambers to exclude unreliable evidence. The first part of Rule 95 ICTY and ICTR RPE can be characterised as an intrinsic exclusionary rule: evidence which, due to the manner in which it was obtained, is unreliable must be excluded. Article 69 (7)(a) ICC Statute is more specific regarding the source of the unreliability of the evidence. Evidence that is unreliable must be excluded according to this Article when the unreliability stems from a violation of the Statute or internationally recognised human rights.

The term ‘reliability’ warrants some discussion, particularly in the light of the general admissibility requirement that each piece of evidence must be relevant and have probative value.\textsuperscript{29} Klamberg, in his analysis of the case law of the \textit{ad hoc} Tribunals, shows that the concept of reliability is not easily defined.\textsuperscript{30} The ICTY Appeals Chamber held that evidence is reliable when it may prove the truth of its contents.

\textsuperscript{29} Rule 89 (C) ICTY RPE and ICTR RPE: ‘A Chamber may admit any relevant evidence which it deems to have probative value.’; Article 69 (4) ICC Statute: ‘The Court may rule on the relevance or admissibility of any evidence, taking into account, \textit{inter alia}, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.’

The evidence, a hearsay statement in this particular case, must be voluntary, truthful and trustworthy.\textsuperscript{31} In fact, the requirement of voluntariness can easily be subsumed under the general requirements of truthfulness and trustworthiness. These last requirements are, arguably, nothing more than aspects of one of the basic concepts of admissibility: probative value.\textsuperscript{32}

Regarding the reliability of documentary evidence during the admissibility stage, the Trial Chamber in \textit{Ngirabatware} held that some factors are taken into account:

the extent to which their [the documents', KV] content is corroborated by other evidence; their provenance; whether the documents submitted are originals or copies; if copies, whether these were registered or filed with an institutional authority; and whether these are signed, sealed, stamped or certified in any way.\textsuperscript{33}

ICC Trial Chamber I in \textit{Lubanga} stated that the following indicia of reliability, regarding several logbooks and notebooks, were taken into account: the absence of any motive for the fabrication of the documents; the fact that the documents were created contemporaneously with the events they described; that the documents are internally consistent; that the documents seem to be corroborated by a witness statement and, finally, that the documents are signed by ‘relevant social workers’.\textsuperscript{34} The Appeals Chamber in \textit{Kordić & Čerkez} held that:

a piece of evidence may be so lacking in terms of the indicia of reliability that it is not ‘probative’ and is therefore inadmissible.\textsuperscript{35}

And, in somewhat circular terms:

At the stage of the admission of evidence, the implicit requirement of reliability means no more than that there must be sufficient indicia of reliability to make out a prima facie case [for the admission of the evidence, KV].\textsuperscript{36}

\textsuperscript{31} ICTY, Decision on Prosecutor’s Appeal on Admissibility of Evidence, \textit{Prosecutor v. Aleksovski}, Case No.: IT-95-14/1-AR73, A. Ch., 16 February 1999, par. 15.

\textsuperscript{32} Cf. ICTR, Decision on Joseph Nzirorera’s Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts, \textit{Prosecutor v. Karemera et al.}, ICTR-98-44-AR73.17, A. Ch., 29 May 2009, par. 14: ‘Only evidence that is reliable and credible may be considered to have probative value.’ The other concept of admissibility is relevancy.


\textsuperscript{34} ICC, Decision on the Admissibility of Four Documents, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06, T. Ch. I, 13 June 2008, par. 37-40.


\textsuperscript{36} ICTY, Decision on Application of Defendant Zejnil Delalić for Leave to Appeal Against the Deci-
From this perspective, Rule 95 ICTY and ICTR RPE and Article 69 (7) (a) ICC Statute underline the importance of admitting solely evidence that has some probative value and emphasise that evidence obtained by methods that may have jeopardised or minimised its probative value, must be excluded. ‘Some’ probative value (or *prima facie* probative value) suffices at the admissibility stage: only when all the evidence has been presented, the court will determine the ultimate weight it attaches to particular pieces of evidence, weighed against the other evidence.

When reliability is indeed regarded as synonymous to probative value, it becomes clear why the first part of Rule 95 ICTY and ICTR RPE and Article 69 (7) (a) ICC Statute have been categorised under the intrinsic exclusionary rules. The message they convey is that the Chamber has to ensure that relevant evidence that has been collected in a manner that jeopardises its probative value is excluded from the proceedings. It is noted that this is different from exclusionary rules that exclude evidence obtained by illegal methods but where the particular piece of evidence, nevertheless, has probative value. The question of whether or not to exclude evidence obtained during an illegal search and seizure surely concerns the *method* of obtaining the evidence, but it does not necessarily concern the *probative value* of the evidence. Such evidence is excluded because the methods by which it was obtained violate an extrinsic value, such as the right to privacy or the fact that the investigating authorities must abide by the law. The Rule and Article discussed are concerned with the intrinsic value of accurate fact finding.

### 4.1.2.2 Extrinsic Exclusionary Rules

The legal frameworks of the ad hoc Tribunals and the ICC contain a wide variety of extrinsic exclusionary rules: rules that exclude relevant (and possibly probative) evidence due to an objective extraneous to accurate fact-finding. Considering that the exclusion of such material potentially undermines the most central goal of any criminal trial (accurate fact-finding), a solid justification must be provided for each rule. First, the extrinsic exclusionary rules of the ad hoc Tribunals will be discussed, followed by the rules that are contained in the legal framework of the ICC.

#### 4.1.2.2.1 The ad hoc Tribunals

The general rule: Rule 89 (D) ICTY RPE

The most general extrinsic rule is Rule 89 (D) ICTY RPE: ‘A Chamber may exclude ev-
idence if its probative value is substantially outweighed by the need to ensure a fair trial’. Despite its general wording, the provision has not been used often.

In an early decision on interlocutory appeal, the Appeals Chamber held that:

> the threshold standard for the admission of evidence [...] should not be set excessively high, as often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence gathered.

Examples where Rule 89 (D) was applied include disclosure violations that caused prejudice to the defence, ‘restrictions on the content and manner of presentation of the testimony of the witness’, and the situation in which a statement made by the accused in his capacity as a witness was subsequently included in his own case. Considering the tendency to admit as much relevant evidence as possible, the fact that this particular Rule has not often been applied should not come as a surprise.

Protection against self-incrimination: Rule 90 (E) ICTY and ICTR RPE

Rule 90 (E) ICTY and ICTR RPE protects witnesses from giving self-incriminatory testimony. However, the Trial Chamber has the power to compel the witness to answer a particular question, even if the answer would incriminate the witness. This statement may not be used in any subsequent proceedings against the witness (except for the offence of perjury). In Karemera et al, an accused refused to testify in another trial, because he feared his testimony would touch upon matters that were excluded in his own trial. Testifying on these matters could lead, he argued, to a reopening of his case on these matters, despite the protection of Rule 90 (E). The Trial Chamber concurred and held that his testimony was not essential for the current proceedings. The motion by the defence to hear the witness was accordingly denied.

Such an extrinsic exclusionary rule lies, according to the European Court of Human Rights, at ‘the heart of a notion of a fair trial’. Its rationale lies in respect for the

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38 The Rules of Procedure and Evidence of the ICTR do not contain a similar provision.
40 ICTY, Decision on Application Of Defendant Zejnil Delalić for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence, Prosecutor v. Delalić et al., Case No.: IT-96-21-AR73.2, A. Ch., 5 March 1998, par. 20.
41 ICTY, Decision on Joint Defence Oral Motion Pursuant to Rule 89(D), Prosecutor v. Haradinaj et al., Case No.: IT-04-84bis-T, T. Ch. II, 28 September 2011, par. 7.
42 E.g. ICTY, Decision on Accused’s Motion to Subpoena Svetozar Andrić, Prosecutor v. Karadžić, Case No.: IT-95-5/18-T, T. Ch., 28 May 2013, par. 16.
43 ICTR, Decision on Joseph Nzirorera’s Motion to Postpone or Compel the Testimony of Augustin Ngitabatware, Prosecutor v. Karemera et al., T. Ch. III, Case No.: ICTR-98-44-T, 3 May 2010.
will of the accused and the need to prevent compulsion or coercion by the investigating authorities.\textsuperscript{44}

Unavailable witnesses: Rule 92\textit{quater} ICTY RPE and Rule 92\textit{bis} ICTR RPE

Rule 92\textit{quater} ICTY RPE and Rule 92\textit{bis} ICTR RPE provide for the admission of written testimony or transcript from an unavailable witness. Such evidence may be admitted even if not all the requirements of Rule 92\textit{bis} ICTY RPE and Rule 92\textit{bis} (B) ICTR RPE have been observed. If a witness has given testimony in other proceedings or otherwise and the witness has subsequently died, is untraceable or is unable (either physically or mentally) to testify, the previous statement may be admitted. Rule 92\textit{bis} (D) ICTR RPE states that such evidence may only go to proof of matters other than the acts or conduct of the accused. The corresponding Rule in the ICTY RPE leaves it to the Chamber’s discretion whether or not to admit such evidence. Rule 92\textit{quater} (B) states:

If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

This limb of the Rule must be read in conjunction with the general admissibility requirements of Rule 89 (C) and Rule 89 (D), concerning relevancy, probative value and the question of whether evidence must be excluded due to fair trial considerations.\textsuperscript{45}

Considering that Rule 92\textit{quater} (B) has to be read in conjunction with the general admissibility rules, a question may arise as to why it is not categorised under the intrinsic exclusionary rules: Rule 89 (C) states that evidence must be declared inadmissible when it has no probative value. Rule 92\textit{quater} (B) is categorized under the extrinsic exclusionary rules, because if the Chamber had found that the statement was unreliable it would have already excluded it under Rule 92\textit{quater} (A).\textsuperscript{46} According

\textsuperscript{44} ECtHR (GC), 17 December 1996, App. No.: 19187/91, \textit{(Saunders v. United Kingdom)}, par. 68.

\textsuperscript{45} ICTY, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92\textit{quater}, \textit{Prosecutor v. Milutinović et al.}, Case No.: IT-05-87-T, T. Ch., 5 March 2007, par. 6: ‘Thus, Rule 92\textit{quater} requires that two conditions be satisfied, namely the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein. In addition, the Trial Chamber must ensure that the general requirements of admissibility of evidence as set out in Rule 89 are satisfied, namely that the proffered evidence is relevant and has probative value as provided in Rule 89 (C). The Trial Chamber must also consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89 (D) and thereby not unduly prejudicial.’

\textsuperscript{46} Rule 92 (A): ‘The evidence of a person on the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92\textit{bis}, if the Trial Chamber: (i) is satisfied of the person’s unavailability as set out above; and (ii) find from the circumstances in which the statement was made and recorded that it is reliable.’
to Rule 92*quater*(B), a factor against the admission of the witness statement is when the statement relates to the acts and conduct of the accused. To admit such evidence could infringe upon the right of the accused to challenge any incriminating evidence against him.

Protecting the integrity of the proceedings: Rule 95 ICTY and ICTR RPE

The first part of Rule 95 ICTY and ICTR RPE has been discussed as an intrinsic exclusionary rule. The second part of the rule has an extrinsic exclusionary character: evidence shall not be admissible if its admission would be antithetical to and seriously damage the integrity of the proceedings. The rule is mandatory and provides for a high threshold: violations of domestic criminal procedural law are normally insufficient and the use of terms such as ‘antithetical’ and ‘seriously damage’ indicates that the violation must be substantial. In *Brdanin*, the Trial Chamber held that:

\[
\text{in applying the provisions of Rule 95, this Tribunal considers all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be seriously damaged.}\]

and:

\[
\text{before this Tribunal evidence obtained illegally is not, } a\ pri\text{o}ri, \text{ inadmissible, but rather that the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility.}\]

It is not the Tribunal’s task to deter and punish criminal investigators for obtaining evidence illegally. Involuntary statements of witnesses, obtained by way of oppressive conduct may be excluded under Rule 95. The same holds true for witness testimony that has been tampered with by one of the parties. In the Tribunals’ case

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52 ICTR, Decision on Interlocutory Appeal Regarding Witness Proofing, *Prosecutor v. Karemera et
law, evidence has not often been declared inadmissible under Rule 95. The fact that the Tribunals do not regard themselves as judicial bodies that should monitor the activities of the (domestic) investigating authorities may explain the reluctance of the Tribunals to exclude relevant and probative evidence under this provision.53

Prior sexual conduct of the victim: Rule 96 (iv) ICTY and ICTR RPE

Rule 96 (iv) ICTY and ICTR RPE states that evidence relating to the prior sexual conduct of the victim shall not be admissible. The ICTR version of the rule adds that prior sexual conduct may not be raised as a defence. In an early decision in the history of the Tribunals, the Delalić Trial Chamber observed that the exclusion of such evidence was to protect the victims from 'harassment, embarrassment and humiliation'.54 The protection the rule provides cannot be waived by the witness giving testimony: it is an imperative exclusionary rule.55 It is noteworthy that the rationale for this rule is found solely in the emotional well-being of the witness and not in any prejudicial effect such testimony may have on the judges. The fact that a witness may not testify on this matter under any circumstances, even if the testimony has probative value and the witness gives testimony voluntarily, infringes upon the fact-finding capacities of the Trial Chamber. This is not to say that a vulnerable witness should be exposed to aggressive cross-examination regarding their sexual history. However, in a court setting where professional judges direct the proceedings and can influence the way the parties conduct their questioning (both on the content of their questions and the manner in which they phrase their questions), the rule seems superfluous.

4.1.2.2.2 The International Criminal Court

Fair trial considerations: Article 69 (4) ICC Statute

According to Article 69 (4) ICC Statute, the court must, when ruling on the relevancy or admissibility of the evidence, take into account the prejudicial effect the evidence may cause to the fair trial rights of the accused or to a fair evaluation of the testimony of a witness.56 The Appeals Chamber has held that this provision is mandatory, in

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53 The Trial Chamber in Brdanin held: 'By excluding what would appear to be on a prima facie basis relevant and important evidence, it would only be denying itself the possibility of having available evidence which would be otherwise difficult, if not impossible, to obtain. The function of this Tribunal is not to deter and punish illegal conduct by domestic law enforcement authorities by excluding illegally obtained evidence.' ICTY, Decision on the Defense "Objection to Intercept Evidence", Prosecutor v. Brdanin, Case No.: IT-99-36-T, T. Ch II, 3 October 2003, par. 63.

54 ICTY, Decision on the Prosecution's Motion for the Redaction of the Public Record, Prosecutor v. Delalić et al., Case No.: IT-96-21-T, T. Ch., 5 June 1997, par. 48.

55 ICTY, Decision on the Prosecution's Motion for the Redaction of the Public Record, Prosecutor v. Delalić et al., Case No.: IT-96-21-T, T. Ch., 5 June 1997, par. 58.

56 The Article specifically states that the court must take into account the prejudicial effect the
the sense that the Trial Chamber must consider relevance, probative value and any prejudicial effect at some point during the proceedings. This may be done when the evidence is submitted, during the trial or at the end of the trial.57

Prejudice, a concept derived from common law, can best be described here as evidence which is pejorative to the need to ensure a fair trial. Evidence that, if admitted, may raise a fair trial issue (such as admitting witness testimony without the possibility of witness examination) can be excluded at the admissibility stage. Piragoff, commenting on Article 69, wrote that:

> evidence may possess prejudicial value that tends to obscure the true degree of probative value of an item of evidence or tends to offend or prejudice other values that the trial is supposed to protect, such as a fair trial or the fair trial evaluation or protection of a witness. 58

The first part of this quote is problematic and seems to be based on a common law approach to the possible prejudicial effect of evidence. In a bifurcated court setting, it is indeed possible to consider the prejudicial effect certain evidence (for example, character evidence) may have when it is presented to the jury. This is, however, impossible in international criminal proceedings. It would require the judges to deliberate on any prejudicial effect the admission of the evidence would have on their own determination of the correct probative value of the evidence. To undertake this would, in fact, result in the elimination of any prejudicial effect: once a judge is aware of any prejudicial effect, he should be able to correctly assess the evidence. An example of a Trial Chamber deliberating on the possible prejudicial effect of evidence can be found in Bagosora, where the ICTR Appeals Chamber commented on the Trial Chamber’s findings:

> The Trial Chamber correctly stated that evidence of prior criminal acts of the Accused is inadmissible for the purpose of demonstrating ‘a general propensity or disposition’ to commit the crimes charged. The Trial Chamber emphasised that ‘this does not preclude the introduction of such evidence for other valid purposes’. The Trial Chamber found that the Prosecutor failed to show that the proposed testimony had any relevance beyond showing that the Accused committed crimes on previous occasions, which was not directly relevant to the crimes charged in the Indictments. Thus, the Trial Chamber

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57 ICC, Judgment on the Appeals from Mr Jean-Pierre Bemba Gombo and the Prosecutor Against the Decision of Trial Chamber III entitled “Decision on the Admission into Evidence of Materials Contained in the Prosecution’s List of Evidence”, Prosecutor v. Bemba, Case No.: ICC-01/05-01/08 OA 5 OA 6, A. Ch., 3 May 2011, par. 37.

correctly excluded the evidence because it had a low probative value but a substantial prejudicial effect.\textsuperscript{59}

This quote is an example of the difficult position a Chamber finds itself in when evidence is presented that is not directly relevant to the case, but which might very well influence the manner in which other evidence is weighed. The example concerns the possible prejudicial effect on the fair assessment of the evidence and not the possible prejudicial effect on the fair trial rights of the accused. An example of evidence that might negatively impact on these rights would be the admission of a substantial number of anonymous witness statements or witness statements from unavailable persons.\textsuperscript{60}

Considering the flexible admissibility regime at the ICC, it is unlikely that this Article will result in the exclusion of a considerable amount of pieces of evidence due to the negative impact on the fair trial rights of the accused.

Protecting the integrity of the proceedings: Article 69(7)(b) ICC Statute
The Chamber must declare evidence inadmissible when the evidence has been obtained by a violation of the Statute or internationally recognised human rights and where the admission of such evidence would be antithetical to and seriously damage the integrity of the proceedings. The violation as such is insufficient: the admission of the evidence must be antithetical to and seriously damaging to the integrity of the proceedings.\textsuperscript{61} A non-serious violation may lead to the inadmissibility of the evidence, as long as the criteria of Article 69 (7)(b) are met.\textsuperscript{62} However, similar to the ad hoc Tribunals, the ICC is hesitant to exclude evidence. The Trial Chamber in \textit{Lubanga} held that:

\begin{quote}
the Chamber endorses the human rights and ICTY jurisprudence which focuses on the balance to be achieved between the seriousness of the violation and the fairness of the trial as a whole.\textsuperscript{63}
\end{quote}


\textsuperscript{60} Rule 68 ICC RPE allows for prior recorded testimony to be admitted, provided that the prosecutor and defence have had the opportunity to examine the witness during the recording or when the witness is available in court and does not oppose the submission of the recorded testimony.


\textsuperscript{62} ICC, Decision on the Admission of Material from the “Bar Table”, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06, T. Ch. I., 24 June 2009, par. 35.

\textsuperscript{63} ICC, Decision on the Confirmation of Charges, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06, Pre-T. Ch. I, 29 January 2007, par. 89.
Trial Chamber I held that violations of domestic procedural norms (including those that aim to protect human rights) are, as such, insufficient to meet the criteria of Article 69 (7)(b). Ambos argued convincingly, however, that evidence obtained by torture must be declared inadmissible (either under Article 69 (7)(a) or (b) ICC Statute).

The fact that the ICC exclusively hears cases involving serious violations of international criminal law is not a factor that is taken into account in decisions on the admissibility of evidence. In other words, the focus is on the violation and its effect on the proceedings: the Chamber will not balance the violation against the seriousness of the case.

Prior sexual conduct of the victim: Rule 71 ICC RPE
The rationale for the exclusion of evidence relating to the prior or subsequent sexual conduct of a witness or victim has been discussed above regarding the ad hoc Tribunals and corresponds with the rationale behind Rule 71 ICC RPE. In addition to the corresponding rules at the ad hoc Tribunals, the ICC Rule also precludes admission of the subsequent sexual conduct of a victim or witness. The Rule is ‘subject to Article 69, paragraph 4’ (the general admissibility standard of evidence), which means that exceptions to the Rule are possible.

Admissibility during pre-trial proceedings
In Katanga the question was raised whether different admissibility standards apply during the confirmation hearing and the trial proceedings. The Single Judge held that:

the admission of evidence at [the pre-trial] stage is without prejudice to the Trial Chamber’s exercise of its functions and powers to make a final determination as to the admissibility and probative value.

The Trial Chamber in Lubanga held that evidence admitted during the pre-trial proceedings is not automatically admitted during the trial proceedings.

64 ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga Dyilo, Case No.: ICC-01/04-01/06, T. Ch. I., 24 June 2009, par. 36.
66 ICC, Decision on the Admission of Material from the “Bar Table”, Prosecutor v. Lubanga Dyilo, Case No.: ICC-01/04-01/06, T. Ch. I., 24 June 2009, par. 44.
69 ICC, Decision on the Status Before the Trial Chamber of the Evidence Heard by the Pre-Trial Chamber and the Decisions of the Pre-Trial Chamber in Trial Proceedings, and the Manner in Which
The ultimate weight to be attached to the evidence is of course a matter for the Trial Chamber. During the confirmation hearing, the prosecutor must support the charges with sufficient evidence to establish reasonable grounds to believe the person committed the crime. The Single Judge held that this criterion of Article 61 (5) ICC Statute is a *lex specialis* in relation to the general admissibility standard of Article 69 ICC Statute. However, the prosecution is not allowed to rely upon witnesses during the confirmation hearing, upon which it cannot rely during the trial proceedings. The Single Judge emphasised that the question of admissibility is left to the Trial Chamber. Although the purpose and legal framework of the confirmation hearing and trial proceedings are indeed different, it seems that patently inadmissible evidence (either due to a lack of relevance or probative value) should be excluded by the Single Judge. Here, the Single Judge must anticipate the final decision of the Trial Chamber regarding admissibility.

### 4.1.3 Weighing the Evidence

Article 74 (2) ICC Statute states that the Trial Chamber’s final decision can be based solely on evidence that has been submitted and discussed before the Chamber during trial proceedings. The Appeals Chamber in *Bemba* reiterated that evidence which has not been submitted and discussed during the trial proceedings may not be relied on. A similar provision is absent in the legal instruments of the *ad hoc* Tribunals. However, to base a finding on evidence that has not been presented or discussed properly would violate the right to an adversarial trial. Respecting the principle of immediacy is vital in order to ensure that the accused can effectively participate and challenge the evidence against him.

In the *Lubanga* judgment, ICC Trial Chamber I held that evidence submitted and discussed at trial encompassed both oral testimony as well as any written statements tendered into evidence. Accordingly, the judgment can only be based on admissible evidence that has been discussed (that is, evidence that is part of the trial record). The applicable standard of proof before the *ad hoc* Tribunals and the ICC is similar: proof beyond reasonable doubt. This standard applies to each element of the crimes.

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70 Article 61 (5) ICC Statute.


72 ICC, Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Lubanga Dyilo*, Case No.: ICC-01/04-01/06, T. Ch. I, 14 March 2012, par. 98.


74 Art. 66 ICC Statute; Rule 87 (A) ICTY and ICTR RPE;
charged and must be applied to the entire body of evidence, instead of being applied to isolated pieces of evidence.\(^\text{75}\) This means that a holistic approach must be taken regarding the standard of proof. An atomistic evaluation of the pieces of evidence is reserved for the admissibility stage. When the evidence allows for any other reasonable explanation than the guilt of the accused, the accused must be acquitted.\(^\text{76}\)

Numerous attempts have been made to define the concept of proof beyond reasonable doubt. References are made to famous common law definitions of the concept, as well as their civil law counterparts (\textit{conviction intime, conviction raisonnée}).\(^\text{77}\) Defining and re-defining this concept is, in my view, not very helpful. Each definition boils down to the observation that proof beyond reasonable doubt requires a high degree of probability that the accused is in fact guilty of the crimes charged. Such degree of probability is sometimes expressed as a percentage (where proof beyond reasonable doubt is somewhere in the 85-100\% range). The \textit{in dubio pro reo} principle gives the accused the benefit of the doubt, which underlines the high level of certainty required for a conviction. The definition of beyond reasonable doubt is, for all practical purposes, that of a high degree of probability or certainty of the guilt of the accused.

Weighing the totality of the evidence instead of determining the weight of each piece of evidence in isolation can be discerned in all international courts.\(^\text{78}\) This approach to the massive volume of evidence presented during international criminal proceedings seems, at first sight, to be a proper and epistemologically sound method for determining the guilt or innocence of the accused. However, upon closer scrutiny some conceptual problems arise. A holistic approach to weighing the evidence seems to be possible only when the volume of evidence is limited: a holistic approach


\(^{76}\) ICTR, Judgement and Sentence, \textit{Prosecutor v. Karemera & Njirumpatse}, Case No.: ICTR-98-44-T, T. Ch. III, 2 February 2012, par. 100. Cf. the Mrkšić Appeal Judgment, referring to the Tadić Appeal Judgement: ‘the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt.’ ICTY, Judgement, \textit{Prosecutor v. Mrkšić & Šljivančanin}, Case No.: IT-95-12/1-A, A. Ch., 5 May 2009, par. 220.


can be undertaken in cases in which the evidence consists of only a small number of different pieces of evidence, for example witness statements. Any deficiencies or inconsistencies in each particular witness statement can be repaired or compensated by taking into account the other evidence. Thus, deficient witness statements still have probative value since they are not weighed in isolation. It would be contrary to the aim of accurate fact-finding to do otherwise. However, in international criminal proceedings it is not unusual for the judges to hear dozens or even hundreds of witnesses testifying on a variety of matters over an extended period of time. Besides oral and written testimony, hundreds or thousands of exhibits are admitted into evidence.\footnote{Cf. the Trial Chamber in Stanišić and Župljanin: ‘The Trial Chamber admitted a large body of evidence during the trial. The Prosecution called 80 witnesses to give evidence \textit{viva voce}, and the Defence called 12 witnesses. The Trial Chamber admitted the evidence of 30 witnesses tendered by the Prosecution and seven witnesses tendered by the Defence pursuant to Rule 92 \textit{bis}; 45 witnesses tendered by the Prosecution and three by the Defence pursuant to Rule 92 \textit{ter}; nine witnesses tendered by the Prosecution and four witnesses by the Defence pursuant to Rule 92 \textit{quater}; and six witnesses tendered by the Prosecution and three witnesses by the Defence pursuant to Rule 94 \textit{bis}. The Trial Chamber admitted into evidence 3,028 exhibits tendered by the Prosecution and 1,349 exhibits tendered by the Defence. The Trial Chamber took judicial notice of 1,042 adjudicated facts, and the parties agreed to 113 facts.’ ICTY, Judgement, \textit{Prosecutor v. Stanišić \\& Župljanin}, Case No.: IT-08-91-T, T. Ch. II, 27 March 2013, par. 17.}

The ICTR Appeals Chamber in \textit{Musema}, referring to \textit{Tadić}, held that:

\begin{quotation}
\begin{center}
a tribunal of fact must never look at the evidence of each witness as if it existed in a hermetically sealed compartment; it is the accumulation of all the evidence in the case which must be considered. The evidence of one witness, when considered by itself, may appear to be of poor quality, but it may gain strength from other evidence of the case.\footnote{ICTR, Judgement, \textit{Prosecutor v. Musema}, Case No.: ICTR-96-13-A, A. Ch., 16 November 2001, par. 134 (emphasis in original).}
\end{center}
\end{quotation}

In \textit{Ntagerura et al.}, discussed earlier, the Appeals Chamber discerned three stages in the fact-finding process of Trial Chambers. First, the credibility of the relevant evidence must be assessed. This must be done by evaluating individual pieces of evidence against the background of the entire body of evidence. The second step is to determine whether the evidence presented by the prosecution is sufficient to establish the existence of an alleged fact. It is here that the standard of proof beyond a reasonable doubt must be applied. During the final deliberations, the Trial Chamber has to determine whether all elements of the crimes alleged and the mode of liability have been proven.\footnote{This final step is reminiscent of the civil law concept of qualifying or categorising the facts that have been proven. ICTR, Judgement, \textit{Prosecutor v. Ntagerura et al.}, Case No.: ICTR-99-46-A, A. Ch., 7 July 2006, par. 174.}

In the \textit{Lubanga} trial judgment, the Trial Chamber followed a similar approach, when it stated that individual pieces of evidence had been weighed in the context of
‘any other admissible and probative material.’ The Chamber also held that the ‘parties and participants were responsible for identifying the evidence that is relevant to the Article 74 Decision in their final submissions.’ This emphasis on the role of the parties and participants in providing the evidentiary framework for the Chamber’s ultimate decision is at odds with Article 69 (3) ICC Statute, which specifically gives the Chamber the authority to request the submission of all evidence it deems relevant for the determination of the truth. This provision underlines the autonomous position of the Chamber in fact-finding: it should not depend on the submissions from the parties.

4.1.3.1 Combining Evidence in International Criminal Proceedings

Considering the massive volume of evidence presented in international criminal proceedings, the question arises as to how evidence can be properly combined in such complex proceedings. Evidence scholars Anderson, Schum and Twining have formulated five questions regarding the evaluation of evidence. Although they have not specifically addressed the evaluation or weighing of evidence in international criminal proceedings, their observations are a good starting point for an analysis of how international tribunals deal with this matter.

These authors compared the evaluation of evidence with the grading of exams: they argued that every trier of fact or grader wants his decision to be as accurate and rational as possible. At the same time, however, they realise that there remains an ‘in-escapable personal element’ in the evaluation or grading process. These are the questions they ask themselves:

1. How can we express assessments of weight (the vocabulary of evaluation, analogous to a marking scheme)?
2. What are the standards for decision of factual issues (cf. the pass mark)?
3. How can judgments of weight and probative force be combined?
4. What are the criteria for evaluating the probative force of individual items of evidence or the weight of a “mass” of evidence in a given case (cf. reasons for awarding or debiting marks or awarding a particular overall grade)?
5. To what extent could the law of evidence prescribe rules of weight or evaluation (cf. marking rules)?

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82 ICC, Judgement, *Prosecutor v. Lubanga Dyilo*, Case No.: ICC-01/04-01/06, T. Ch. I., 14 March 2012, par. 94.
Chapter 4

The first question is addressed in the majority of the judgments delivered by the *ad hoc* Tribunals. Similarly, ICC Trial Chambers have devoted chapters to the evaluation of evidence in their final judgements. In the judgements, the findings of facts are normally preceded by an overview of factors that were taken into account in relation to the distinct categories of evidence. For example, relevant factors regarding the evaluation of testimony of *viva voce* witnesses include the witness’ demeanour during his testimony, the internal consistency of the testimony, the lapse of time between the event and the testimony and the possible impact the event had on the witness. Factors relevant for the evaluation of documentary evidence include the source of the document and the chain of custody. Regarding the evaluation of expert evidence, Chambers have taken into account the competence of the expert and the methodologies that were used.

The second and fourth question combined are concerned with the question of how reliable or trustworthy the evidence in fact is: what is the weight or probative value of each particular piece of evidence? Statements from, for example, witnesses who have committed atrocities themselves may be regarded as less reliable and therefore carry less weight.

The third question is, for present purposes, the most interesting one: how do judges combine the findings in a case with a massive amount of evidence? Convictions for international crimes require the prosecution to present evidence regarding, *inter alia*, the mode of liability of the accused, the contextual elements of the crime and the factual basis of the underlying crimes. The structure of the judgments mirrors this approach. The table of contents of the *Tolimir* judgment, for example, consists of four parts describing the Chamber’s factual findings on the structure of the military and police of the Republika Srpska and the events in Žepa and Srebrenica. These factual parts are followed by two parts on the legal findings and the individual criminal responsibility of the accused.

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In weighing the evidence, Chambers have consistently held that they evaluate each piece of evidence in light of the entire body of evidence. However, the judges fail to explain what they actually mean by this. To evaluate a random witness statement in light of the entire body of evidence seems, from an epistemological point of view, simply wrong: to do so would take into account irrelevant evidence in the evaluation of the witness statement. If witnesses A1 and A2 testify on events in village A, why should their statements be evaluated in light of the testimony of witness B on events in village B, witness C on village C and so on? What would make sense is to evaluate the statement of witness A1 in light of the statement of witness A2. At this point, we could conclude that evaluating a piece of evidence in light of the other evidence is simply wrong: the judges have lost sight of a basic concept of evidence law, namely, to consider solely relevant evidence. However, in such complex proceedings as the ones conducted before the international tribunals, things get more complicated. In these proceedings the evidence of events in village A does have some relevancy considering the evidence on similar events in village B. The fact that, for example, extermination as a crime against humanity can only be proven when the extermination is part of a widespread or systematic attack results in a complex interdependency of the individual pieces of evidence. Seemingly isolated events may then be construed as a widespread or systematic attack. Evaluating each piece of evidence in light of the entire body of evidence then becomes much more complex: it in fact describes a process in which pieces of evidence are evaluated back and forth. In order to determine the probability of the occurrence of a particular fact, the evidence is juxtaposed against the other evidence. This also occurs the other way around: to determine the probability of the occurrence of contextual elements, one has to look at the isolated events. This resembles a hermeneutic circle: the larger part (e.g. a widespread attack) can only be understood or construed by looking at several isolated events (e.g. atrocities committed in several villages in a certain area) and vice versa. The isolated events, in turn, may then be regarded as part of the bigger picture.\(^9\) In Stanišić and Simatović, ICTY Trial Chamber I held that:

In making factual findings, the Trial Chamber generally considered the alleged crimes separately and by incident. When the circumstances so allowed, the Trial Chamber considered the evidence on certain crimes together. The Trial Chamber remained mindful of

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\(^9\) Cf. C.K. Hall on Article 7 ICC Statute: ‘The Statute and the Elements of Crimes both make clear that the acts must occur as part of an attack. However, the acts could constitute the attack itself. For example, the mass murder of civilians may suffice as an attack against the civilian population. There is no requirement that a separate attack against the same civilians, within which the murders were committed, should be proven.’ C.K. Hall, ‘Article 7’, in: Triffterer, O., Commentary on the Rome Statute of the International Criminal Court, C.H. Beck/Hart/Nomos, Munich 2008 (2nd edition), p. 174-5 (emphasis in original).
events occurring in temporal and geographical proximity of an incident and considered whether relevant inferences could be drawn from such events.\textsuperscript{91}

The Chamber started with stating that evidence has been evaluated separately to make factual findings on a specific point. It continued by stating that such evidence may also be combined to form the evidentiary basis for other crimes. This reflects the interdependency of the individual pieces of evidence referred to above.

Here, some final remarks on the evaluation of evidence in international criminal proceedings. In most judgements, the Chambers of the \textit{ad hoc} Tribunals and the ICC devote several pages to the general framework of the evaluation of specific categories of evidence. For example, the manner in which the testimony of traumatised witnesses is weighed indicates that Chambers are well aware of the possible pitfalls of such testimony. The same holds true for the authenticity and reliability of documents that were collected many years ago during an armed conflict and of which the chain of custody is not always clear. Findings of expert witness are evaluated with the (academic) qualifications of the expert in mind, including the methodology used in the expert’s report. However, despite the efforts to evaluate different types of evidence in an epistemologically sound manner, the reasoning of the Chambers is unsatisfactory. What is missing is a clear and concise explanation of how the Chambers cope with the massive volume of evidence that is presented over several years. The magnitude of the evidentiary basis presented and the often prolonged proceedings must have consequences for the evaluation of evidence. Klamberg concluded on the evaluation of evidence by the \textit{ad hoc} Tribunals, that they:

\begin{quote}
have adopted ‘the exclusion of every reasonable hypothesis of innocence method’ whereby alternative hypothesis are eliminated.\textsuperscript{92}
\end{quote}

This is a useful insight. However, the question of how fact-finders cope or should cope with the quantities of evidence in international criminal proceedings is left unanswered in both the literature and the Tribunals’ case law. This question is more pertinent if we take into account that the tribunals’ process cases that are often concerned with the same factual basis. Add to this the existence of a considerable number of undisputed or undisputable facts that have emerged from years of litigation and the \textit{sui generis} character of the international evidentiary context becomes clear.


There is no ready answer to the question raised, but how fact-finders process evidence is of great importance for understanding the process of weighing evidence.93

4.1.4 Reasoned Judgements

The Statutes and Rules of Procedure and Evidence of all international courts oblige the Chamber to provide reasons for its decision on the guilt or innocence of the accused.94 The obligation to hand down a reasoned judgement is a principle of the law of international criminal procedure.95 A reasoned judgment is necessary to provide for a fair trial. A reasoned judgment allows the accused to consider whether or not to file an appeal, and it also enables the parties to verify whether the Chamber has taken their arguments into account. From the perspective of the Chamber, the obligation to hand down a reasoned judgment obliges the judges to make sure that the weighing or evaluation process is accounted for. This, in turn, ensures that the parties, the Appeals Chamber (provided an appeal is filed) and the public in general can get acquainted with the reasoning of the Chamber.96 According to the 2009 ICTY Manual on Developed Practices, the drafting process of the final judgement should start well before all the evidence is heard. Considering the size and complexity of the cases, the timing of the final judgment would be unreasonably delayed if the judgment would be drafted from scratch after the close of proceedings.97 ICTY Chambers have held that it is not required that each and every detail is accounted for in the final judgement: the fact that a certain piece of evidence is not explicitly mentioned in the judgement does not mean it has not been taken into account by the Chamber.98

93 Klamberg concluded that judges in international criminal proceedings evaluate the evidence in a Baconian way. M. Klamberg, Evidence in International Criminal Trials. Confronting Legal Gaps and the Reconstruction of Disputed Events, Martinus Nijhoff Publishers, Leiden, Boston 2013, p. 161. Anderson, Schum and Twining stated: “What Bacon argued was that we would be far better off performing evidential tests designed to eliminate any hypothesis we are considering. The hypothesis that best resists our most concerted efforts to eliminate it, as well as any other hypotheses, is the one in which we should have increasing confidence. This strategy has become known as induction by elimination.’ T. Anderson, D. Schum, W. Twining, Analysis of Evidence, Cambridge University Press, Cambridge 2005, p. 257 (emphasis in original).
94 Article 23 (2) ICTY Statute; Article 22 (2) ICTR Statute; Article 74 (5) ICC Statute.
96 Cf. The Grand Chamber of the ECtHR in Taxquet v. Belgium: ‘[...] for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness. As the court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the Convention. [...] In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society.’ ECtHR (GC), 16 November 2010, App. No.: 926/05, (Taxquet v. Belgium), par. 90.
98 ICTY, Judgement, Prosecutor v. Stanislić & Simatović, Case No.:IT-03-69-T, T. Ch. I, 30 May 2013,
The judgements of the international courts are lengthy: describing factual findings regarding multiple crime sites, contextual elements and the individual criminal responsibility of the accused result in hundreds of pages of legal and factual findings. For present purposes, the manner in which Chambers have evaluated the evidence on a particular charge is not of primary interest. What are of interest are the ‘preliminary’ observations by the Chambers, in which the Chambers account for the weighing of various categories of evidence. Although this approach makes clear whether the judges are aware of the epistemological issues that may arise in respect to each category, this approach does not as such provide for a thorough analysis of the process of evaluating the evidence. The judgements are for the most part narratives summing up the factual findings of the Chamber. The footnotes, referring to witness testimony or exhibits, allow for verification of the Chamber’s findings, but in a rather implicit manner. The Chamber apparently believed a certain witness or found that a certain exhibit had sufficient probative value. Only when specific evidence or charges have been challenged does the Chamber provide a more detailed account of its findings. This manner of drafting judgments means that, unless evidence is challenged specifically, the Chamber will start with outlining in a general way the manner in which categories of evidence are evaluated and proceed by presenting factual findings without explicitly discussing the probative value of each piece of evidence.

4.1.5 Conclusion

In international criminal proceedings, the full criminal trial can be defined as follows. The *nulla poena sine iudicio* principle can be regarded as the cornerstone of the legal framework in which the international courts operate. At the *ad hoc* Tribunals, the original Statutes and Rules of Procedure and Evidence did not provide for abbreviated proceedings after the parties had entered into plea negotiations. At the ICC, however, the original Statute already provided for proceedings on an admission of guilt.

Full trial proceedings before the Chamber are regarded, both at the *ad hoc* Tribunals and the ICC, as the forum in which fact-finding is conducted and in which the fair trial rights of the accused can be effectively respected. Ideally, evidence is presented and discussed in an adversarial setting in which the parties can participate effectively.

In order to facilitate the fact-finding mission of the Chamber, rules of admissibility regarding evidence are not very prominent: the Chamber is entrusted to rule on the relevance and probative value of the evidence presented. Technical rules of admissibility, important evidentiary gatekeepers in common law systems, are kept to a minimum in international criminal proceedings. Similarly, the Chamber is left considerable discretion regarding the weighing of evidence: the total amount of evidence

is weighed holistically after the close of the proceedings. Subject to the standard of proof beyond reasonable doubt, the Chamber must determine whether the evidence that was presented regarding the elements of the charges meets this standard. This considerable freedom regarding the evaluation of evidence must be accounted for, however: the Chamber is obliged to hand down a reasoned judgement in which it accounts for the factual and legal conclusions it draws.

4.2 Diversions in the Law of International Criminal Procedure

4.2.1 Introduction

In the following pages, the diversions and shortcuts that are used in international criminal proceedings are discussed. The guilty plea and admission of guilt are discussed first, as diversions from the full criminal trial. Subsequently, the various shortcuts in the legal frameworks of the ad hoc Tribunals and ICC are presented.99

4.2.2 Guilty Pleas

The archetypical diversion from the full criminal trial is the guilty plea: by confessing to the charges, the accused acknowledges his criminal responsibility. This obviates the need to have his guilt determined by the court after full criminal proceedings. In an adversarial context, there is no need to determine the guilt of the accused when there is no contested issue left: when the parties agree not to bring the case before the trier of fact, the autonomy of the parties to determine the course of the proceedings has to be respected.

Although the ad hoc Tribunals have accepted a significant number of plea agreements, the use of this diversion in international criminal proceedings is still contro-

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99 At the ICTY and ICTR, the defence can request the Trial Chamber to deliver a judgement of acquittal after the close of the prosecutor’s case (‘no case to answer’-motion). Such motions, filed pursuant to Rule 98 bis ICTY/ICTR RPE, will not be included in the analysis: a judgement of acquittal is not an avoidance mechanism. A motion for a judgement of acquittal invites the Trial Chamber to acquit the accused after the prosecution has closed its case and before the commencement of the case of the defence. This by no means implies that the defence waives the right to challenge the evidence: the defence only argues that there is no (sufficient) evidence to challenge in the first place. Cf. the remark by the Trial Chamber in Kordić and Čerkez: ‘The test that the Chamber has enunciated – evidence on which a reasonable Chamber could convict – proceeds on the basis that generally the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98bis, leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider such matters: it is where the Prosecution’s case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross examination as to the reliability and credibility of witnesses that the Prosecution is left without a case.’ ICTY, Decision on Defence Motions for Judgement of Acquittal, Prosecutor v. Kordić and Čerkez, Case No.: IT-95-14/2-T, T. Ch., 6 April 2000, par. 28. See also ICTY, Decision on Motion for Judgement of Acquittal, Prosecutor v. Milošević, Case No.: IT-02-54-T, T. Ch., 16 June 2004, par. 13.
versial. Is it appropriate to negotiate on the criminal responsibility of an accused that faces charges of genocide? Are guilty pleas desirable in the context of complex international crimes with regard to the aims of accurate fact-finding and the creation of an accurate historical record? Such questions are legitimate and explain in part why this diversion is often criticised. For present purposes, however, the guilty plea and the admission of guilt (the ICC functional equivalent of the guilty plea) will be regarded as a given: the legal framework of the *ad hoc* Tribunals and the ICC provide for this diversion, and a rather detailed framework has emerged regarding guilty pleas and admissions of guilt. The Chapter will refrain from discussing whether negotiations in the international context are desirable or appropriate: it will give a detailed overview of the working of this diversion instead.¹⁰⁰ First, guilty pleas at the *ad hoc* Tribunals are discussed, followed by admissions of guilt at the ICC.

4.2.3 *Legal Framework of Guilty Pleas before the ad hoc Tribunals*

The guilty plea criteria of the *ad hoc* Tribunals originate from their early case law: the original Rules of Procedure and Evidence did not provide for a detailed legal framework regarding the criteria for a valid guilty plea. In the original RPE, the accused was called upon to enter a plea of guilty or not guilty at his initial appearance before the Trial Chamber.¹⁰¹ The practice of plea bargaining, however, made it necessary to amend the Rules of Procedure and Evidence to provide for an accurate framework. The amendment followed the seminal ruling of the ICTY Appeals Chamber in *Erdemović*, in which the criteria for a valid guilty plea were discussed in detail. Currently, Rule 62bis ICTY RPE and Rule 62 (B) ICTR RPE contain four criteria that will be discussed below.

4.2.3.1 Voluntariness

The criterion of voluntariness was first formulated in October 1997 by Judges McDonald and Vohrah, in their separate opinion to the Appeals Chamber judgement in *Erdemović*. They divided voluntariness into two components. First, the accused must be mentally competent to understand the consequences of pleading guilty.¹⁰² Second, the plea must have been entered into without threats or inducements other than the expectation of a sentence reduction.¹⁰³ This second component is closely

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¹⁰⁰ Cf the sentencing judgement in *Nikolić*, in which the Trial Chamber elaborated on the question whether plea agreements are appropriate in international criminal proceedings. ICTY, Sentencing Judgement, *Prosecutor v. Nikolić*, Case No.: IT-02-60/1-S, T. Ch. I, 2 December 2003, par. 57-73.

¹⁰¹ Rule 62 (iii) ICTY RPE (original version of 11 February 1994); Rule 62 (iii) ICTR RPE (version of 29 June 1995).

¹⁰² ICTY, Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, A. Ch., 7 October 1997, par. 10

related to the right not to incriminate oneself. It follows from ICTR case law that the criteria ‘freely’ and ‘informed’, as incorporated in the ICTR RPE, can be equated with the two components of the requirement of voluntariness. To determine whether a guilty plea was entered into voluntarily, the Trial Chamber may consider the conditions under which the agreement was reached. In practice, the Trial Chamber verifies whether the plea was entered into freely and voluntarily by asking the accused during the plea hearing whether he was threatened or induced to enter a guilty plea. No plea agreements have been refused by the Chamber on the ground that they were entered into involuntary.

The criterion of voluntariness resembles the criteria for a valid waiver of procedural rights. One of the criteria for a valid waiver is whether the accused has waived his rights out of his own free will, without being threatened or induced to do so. The European Court of Human Rights held that a plea bargain may only be accepted when the bargain was accepted in a ‘genuinely voluntary manner’.

4.2.3.2 Informed

In their separate opinion to the Appeals Chamber judgement in Erdemović, Judges McDonald and Vohrah commented on the informed-criterion and stated that ‘informed’ consists of two components. First, the accused must understand the nature of the charges and the consequences of pleading guilty in general. This relates to the first sub-criterion of voluntariness. Second, the accused must be aware of the nature and distinction between any alternative charges, such as, in Erdemović, the distinction between murder as a crime against humanity and murder as a war crime.

105 ICTY, Sentencing Judgement, Prosecutor v. Nikolić, Case No.: IT-02-60/1-S, T. Ch. I, 2 December 2003, par. 52.
106 For example, ICTR, Judgement and Sentence, Prosecutor v. Serugendo, Case No.: ICTR-2005-84-I, T. Ch. I, 12 June 2006, par. 11.
107 ECtHR, 29 April 2014, App. No.: 9043/05, (Natsvlishvili and Togonidze v. Georgia), par. 92. See also ECtHR, 27 February 1980, App. No.: 6903/75, (Deweer v. Belgium), par. 49.
108 The judges argued for the insertion in the RPE of the common law criteria on guilty pleas: ‘This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.’ ICTY, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Prosecutor v. Erdemović, Case No.: IT-96-22-A 7 October 1997 par. 2.
109 Idem, par. 14. In the plea hearing on the original guilty plea, Presiding Judge Jorda tried to ensure that the accused was aware of the alternative charges. However, the questioning of the accused consisted of indicating that the accused was charged with alternative charges. No substantive inter-
When Chambers determine whether the accused was sufficiently informed to enter a guilty plea, they focus on the nature of the charges and the consequences of pleading guilty in terms of waiving a number of rights. These elements are indeed vital for any valid plea: the accused must be sufficiently informed on the procedural consequences of pleading guilty and the fact that his case will not be brought before an independent and impartial tribunal. Moreover, the accused must be informed of the fact that the Trial Chamber is not bound in any way by the sentencing recommendations of the parties. Regarding the evidence, the accused is unable to challenge the evidence during regular trial proceedings. Weigend and Turner argued that, considering the disclosure obligations in the legal framework of the *ad hoc* Tribunals, the prosecutor should disclose any exculpatory evidence to the accused in order to comply with the informed-criterion. In Chapter 5, it will be argued that this obligation should also include the incriminating evidence or at least a summary thereof: only in this way can the accused be considered to be truly informed regarding his plea. The Chamber can only accept a guilty plea when there is a sufficient factual basis for the charges to which the accused pleads guilty. The sufficient factual basis, discussed in more detail below, can be derived from either objective indicia or the lack of any disagreement between the prosecutor and accused. This implies that, in general, the accused will have knowledge on the facts of the case (and, ideally, of the evidence supporting these facts). However, Chambers do not determine whether the accused was sufficiently informed regarding the evidence against him when he pleaded guilty. In *Erdemović*, the Appeals Chamber held that the plea was not informed because the accused and his counsel did not fully grasp the difference between murder as a crime against humanity and murder as a war crime. After the Appeals Chamber remitted the case to another Trial Chamber, the accused was asked again if he understood the charges against him. Presiding Judge Mumba explained, albeit very briefly, the difference between the two murder charges and asked whether the accused understood the charges and had discussed them with his lawyer. After the accused answered in the affirmative, the accused was asked to enter pleas to the charges. ICTY, Transcript of proceedings 31 May 1996, *Prosecutor v. Erdemović*, Case No.: IT-96-22-D, p. 7; ICTY, Transcript of proceedings, *Prosecutor v. Erdemović*, 14 January 1998, Case No. IT-96-22-Tbis, p. 17-18.

110 For example, in *Deronjić*, the accused waived: ‘(a) the right to plead not guilty and require the Prosecution to prove the charges in the Indictment beyond a reasonable doubt at a public trial; (b) the right to prepare and put forward a defence to the charges at such public trial; (c) the right to be tried without undue delay; (d) the right to be tried in his presence, and to defend himself in prison at trial or through legal assistance of his own choosing at trial; (e) the right to examine at trial, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf at a trial under the same conditions as witnesses against him; and (f) the right not to be compelled to testify against himself.’ ICTY, Plea Agreement, *Prosecutor v. Deronjić*, Case No.: IT-02-61-PT, 29 September 2003, par. 13.

against humanity (to which the accused pleaded guilty) and murder as a war crime.\textsuperscript{112}

The transcript of proceedings before the Trial Chamber revealed that the presiding judge did not explicitly explain the difference between the two charges and relied on the assumption that counsel had properly instructed the accused.\textsuperscript{113} As noted by Judges McDonald and Vohrah, the counsel for the accused did not possess sufficient knowledge of international humanitarian law to understand the distinction between the different charges.\textsuperscript{114}

Normally, the presiding judge will ask the accused whether he has made an informed choice. In the \textit{Todorović} plea hearing, the presiding judge asked the accused:

\begin{quote}
Have you discussed the matter fully with your counsel, and has he informed you of the nature of the charges against you and of the consequences of pleading guilty to a crime against humanity?\textsuperscript{115}
\end{quote}

Upon the response of the accused ('Yes'), the informed-criterion was complied with. The plea hearings in other cases follow a similar pattern, whereby the Chamber is satisfied when the accused affirms that he has made an informed decision. When it appears that the accused is not fully aware of the nature of his plea or the consequences of pleading guilty, a more detailed discussion between the Chamber and the accused is necessary.

\subsection*{4.2.3.3 Not Equivocal}

A valid guilty plea must not be equivocal: the plea must be unqualified, clear and unconditional.\textsuperscript{116} McDonald and Vohrah observed that this resembles the guilty plea practice in most common law jurisdictions:\textsuperscript{117}

\begin{quote}
This requirement imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to
\end{quote}

\begin{footnotesize}
\textsuperscript{112} ICTY, Judgement, \textit{Prosecutor v. Erdemović}, Case No. IT-96-22-D, A. Ch., par 20.
\textsuperscript{116} The ECtHR also held that a waiver of rights must be unequivocal. ECtHR, 21 February 1990, App. No.: 11855/85, (\textit{Håkansson and Sturesson v. Sweden}), par. 66.
\textsuperscript{117} With the notable exception of the United States. McDonald and Vohrah argued: ‘It would appear that in the United States the constitutional right to plead as one chooses outweighs any requirement that a defence be tested on the merits at trial.’ ICTY, Joint Separate Opinion of Judge McDonald and Judge Vohrah \textit{Prosecutor v. Erdemović}, Case No.: IT-96-22-A, A. Ch., 7 October 1997, par. 29.
\end{footnotesize}
In *Erdemović* the accused stated that he acted under duress, which provided a reason for Judge Cassese to conclude in his dissenting opinion that the plea of the accused was equivocal. Pleading guilty and invoking the defence of duress renders the plea equivocal.119 In *Momir Nikolić*, the Trial Chamber stated that in order to determine whether the plea was unequivocal, the Trial Chamber considered whether the accused intended to raise any defence.120 Apart from *Erdemović*, this criterion has never been a contested matter in proceedings before the *ad hoc* Tribunals.

4.2.3.4 Sufficient Factual Basis

The Trial Chamber can only accept a guilty plea when there is a sufficient factual basis for the crimes to which the accused pleaded guilty. This entails that it is not for the prosecutor and accused to divert the case from the Trial Chamber. Even when the accused has reached an agreement with the prosecutor regarding his criminal responsibility, it is for the Chamber to approve the diversion from the full trial proceedings. The factual basis for the guilty plea, which can be derived either from ‘independent indicia’ or from the ‘lack of any material disagreement between the parties’.121

Although it is for the Trial Chamber to accept the guilty plea, the guilty plea is regarded as a diversion and not as a shortcut to proof. One could argue that, considering this requirement of judicial approval, the guilty plea is a shortcut to proof: the *nulla poena sine iudicio* principle is respected, and the Trial Chamber conducts fact-finding itself. This would, however, be a misrepresentation of the manner in which guilty pleas are regarded in the practice of the *ad hoc* Tribunals. In general, Chambers have not conducted in-depth fact-finding themselves. Clarifications or the presentation of some additional evidence have been required, but the absence of any material disagreement regarding the facts is normally sufficient to meet the standard of a sufficient factual basis. This entails that the factual basis for the guilty plea is provided by the parties themselves, with only marginal judicial supervision.122

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118 Idem, par. 29.
119 ICTY, Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, A. Ch., 7 October 1997, par. 50. Judges McDonald and Vohrah did not find the plea to be equivocal, but opted for remittal on the ground that the plea was uninform. ICTY, Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Prosecutor v. Erdemović*, Case No.: IT-96-22-A, A. Ch., 7 October 1997, par. 88-91.
121 Rule 62bis (iv) ICTY RPE; Rule 62 (B) (iv) ICTR RPE.
122 At the ICTY, 15 out of 21 guilty plea cases relied exclusively on agreements between the prosecutor and the accused; in 2 cases material presented at trial was included in the plea agreement. In only 4 cases did the Chamber rely on independent indicia (Mrđa, Jokić, Češić and Milan Babić). At the ICTR, all guilty plea cases derive the factual basis underlying the conviction from the absence
Trial Chambers rely predominantly on the absence of disagreement between the parties and base the sentencing judgement on the facts that are agreed upon in the plea agreement. Although the plain wording of Rule 62bis ICTY RPE and Rule 62 (B) ICTR RPE allows the Chamber to rely on facts that are not included in the plea agreement, the Trial Chamber in Dragan Nikolić stated:

Having accepted a guilty plea on the basis of a plea agreement, a Trial Chamber operating in a party-driven system such as the ICTY is thereafter limited to what is specifically contained in, or annexed to, the plea agreement. Simply put, the Trial Chamber cannot go beyond what is contained in a plea agreement with regard to facts of the case and the legal assessment of these facts.¹²³

The Trial Chamber further acknowledged the problematic nature of plea agreements in international criminal proceedings, when it stated that plea agreements might create a gap between historical accuracy and the parties’ version of the crimes.¹²⁴ The ability to provide an accurate historical record of events may be undermined by relying solely or to a decisive extent on a partisan presentation of the relevant facts.

In Mrđa, Jokić, Češić and Milan Babić, the Trial Chamber took independent indicia into account, next to the agreed facts that were included in the plea agreements. In Mrđa and Jokić, witness statements delivered in the pre-trial phase were used to establish the required factual basis.¹²⁵ Although the Chamber did not examine these statements thoroughly (in fact they were only referred to), the Chamber was not satisfied with the absence of disagreement between the parties in order to accept the plea. In Milan Babić, supplementary material was filed next to the plea agreement and the

statement of facts. In Češić, independent indicia included witness statements and documentary evidence. Unlike Mrda and Jokić, the Trial Chamber in Češić derived the independent indicia from the submissions of the parties. During the plea hearing, the prosecution and defence were asked whether any independent indicia existed to establish the sufficient factual basis. When both parties answered in the affirmative, the Chamber concluded that a sufficient factual basis therefore existed for the guilty plea.

In Simić, where the accused entered into a plea agreement 51 months after his initial appearance and where the prosecution had been presenting evidence for 83 days, the Trial Chamber relied on the facts in the plea agreement. Although the plea agreement refers to evidence presented at trial, it is unclear why the Trial Chamber did not include independent indicia in determining the factual basis and the validity of the guilty plea.

In Plavšić, the accused, co-president of the Serbian Republic of Bosnia and Herzegovina, pleaded guilty to persecutions as a crime against humanity and was sentenced to 11 years imprisonment. The factual basis was derived solely from the so-called ‘Factual Basis for Plea of Guilt’ filed jointly by the prosecution and defence.

In Kambanda, where the Rwandan prime minister of the 1994 interim government stood trial, the Trial Chamber accepted the plea agreement and stated on the factual basis underlying the charges of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide and murder and extermination as crimes against humanity:

Considering the factual and legal issues contained in the agreement concluded between you [the accused, KV] and the Office of the Prosecutor and that you have acknowledged that both you and your counsel have signed, the Tribunal finds you guilty on the six counts brought against you.

Kambanda was sentenced to life imprisonment, a verdict upheld on appeal. He not only faced the most severe charges the Tribunal’s mandate provided for, he was also

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126 Consisting of an expert report on propaganda and material that related to public speeches made by the accused. ICTY, Sentencing Judgement, Prosecutor v. Milan Babić, Case No.: IT-03-72-S, T. Ch. I, 29 June 2004, par. 11.
127 ICTY, Transcript of proceedings, Prosecutor v. Češić, Case No.: IT-95-10-PT, T. Ch. I, 8 October 2003, p. 91-92.
one of the first accused to be convicted by the ICTR. The factual basis was derived from the absence of disagreement between the parties; the sentencing judgement of the Trial Chamber contained no reference to independent indicia. In addition to facts concerning specific acts of the accused, such as his personal involvement in inciting low-level officials to kill civilians, contextual facts or *chapeau* elements were also included in the plea agreement:

Jean Kambanda admits that there was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi, the purpose of which was to exterminate them.\(^{131}\)

To include contextual elements and legal characterisations in the plea agreement is, as such, not problematic: the accused acknowledges that he committed his crimes within the context of genocide or an armed conflict. It transpires from the sentencing judgement that the factual basis for these contextual elements was found in the agreement between the accused and the prosecutor.

4.2.3.5 Discretionary Powers of the Trial Chamber?

The wording of Rule 62bis ICTY RPE and Rule 62 (B) ICTR RPE implies that the Trial Chamber may refuse to accept a guilty plea, even when all the requirements have been met: the Trial Chamber *may* enter a finding of guilt. Is there any discretion left for the Trial Chamber to reject the agreement between the prosecutor and accused? Vasiliev observed that Trial Chambers will accept a guilty plea when the formal criteria have been fulfilled. He referred to the Trial Chamber in *Momir Nikolić*, in which the Chamber held that it could refuse to accept a guilty plea if it is in the interests of justice to do so.\(^{132}\) In *Obrenović*, the Trial Chamber observed:

> the acceptance of a guilty plea pursuant to a plea agreement must follow careful consideration by a trial chamber of numerous factors including *inter alia* whether the remaining charges reflect the totality of an accused’s conduct, whether an accurate historical record will be created, whether the terms of the agreement fully respect the rights of the accused, and whether due regard is accorded to the interests of victims.\(^{133}\)

Such remarks by Trial Chambers are rare: only in *Momir Nikolić* and *Obrenović* did the Trial Chamber refer to any discretion regarding the judicial approval of guilty pleas. A related question is how Chambers should approach guilty pleas that are the result of

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fact and charge bargaining. A factual bargain entails the prosecutor and accused negotiating on the factual basis underlying the charges; a charge bargain entails negotiations on the charges (and legal qualifications) of the conduct of the accused. In his dissenting opinion to the Trial Chamber’s sentencing judgement in Deronjić, Judge Schomburg vehemently opposed such bargains. He argued that the prosecutor must ensure that the ‘entire picture’ of the crimes is presented to the Chamber. Although he acknowledged that the prosecutor is responsible for the drafting of the charges, this may not lead to an ‘arbitrary selection of charges or facts’.

4.2.4 Admissions of Guilt at the ICC

4.2.4.1 Introduction

The ICC Statute provides for proceedings on an admission of guilt. This resembles the guilty plea practice of the ad hoc Tribunals, although the wording of the relevant article differs. Guariglia and Hochmayr argue that this difference was the result of the drafting process of the Rome Statute, in which delegations from both common law countries and civil law countries had to agree on this diversion. From a common law perspective, the archetypical guilty plea obviates the need for a contested trial altogether, whereas from a civil law perspective a confession is merely a means of proof that the court has to take into account. This has resulted in a somewhat hybrid formulation, which is both reminiscent of the guilty plea and the confession. Weigend and Turner concluded that, despite the different wording, negotiations between the prosecutor and accused are allowed under this provision. This, in fact, introduces plea-bargaining in the procedural framework of the ICC.

4.2.4.2 Legal Framework

Article 65 ICC Statute contains the criteria for the proceedings after an admission of guilt has been filed. First, the admission of guilt must be informed: the accused must understand the nature and consequences of the admission of guilt (Article 65 (1)(a)). Second, the accused must have made the admission voluntarily after consultation

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134 ICTY, Dissenting Opinion of Judge Wolfgang Schomburg, Prosecutor v. Deronjić, Case No.: IT-02-61-S, T. Ch. II, 30 March 2004, par. 7.
135 ICTY, Dissenting Opinion of Judge Wolfgang Schomburg, Prosecutor v. Deronjić, Case No.: IT-02-61-S, T. Ch. II, 30 March 2004, par. 10. The Trial Chamber in Dragan Nikolić, presided over by Judge Schomburg, observed in its sentencing judgement that ‘the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis.’ ICTY, Sentencing Judgement, Prosecutor v. Dragan Nikolić, Case No.: IT-94-2-S, T. Ch. II, 18 December 2003, par. 122.
with defence counsel (Article 65 (1)(b)). Finally, the admission must be supported by the facts of the case, which can be derived from the charges, agreed facts or any other evidence that was presented by the prosecutor or the accused (Article 65 (1)(c)).

**Understanding the nature and consequences of the admission of guilt**

This criterion resembles the informed-criterion of the *ad hoc* Tribunals. In order for an admission of guilt to be accepted, the accused must be aware of the nature of the charges (i.e. the differences between the charges, the modes of liability etc.) and of the procedural consequences of an admission of guilt. This refers to the waiver of procedural rights that the accused would enjoy during regular trial proceedings. In this respect, it also vital that the accused is aware of the fact that sentencing is ultimately a matter for the Trial Chamber to decide upon: sentencing recommendations are, similar to the *ad hoc* Tribunals, not binding upon the Chamber.\(^\text{138}\) Unlike the *ad hoc* Tribunals, the criterion of non-equivocation is not mentioned explicitly. Guariglia and Hochmayr argued convincingly, however, that this criterion is included in the informed-criterion of Article 65 (1)(a) ICC Statute.\(^\text{139}\)

**Voluntariness**

In order for the Chamber to accept the admission of guilt, the Chamber must determine whether the admission has been made voluntarily. The accused must have admitted his guilt in the absence of any coercion, threats or promises other than the conditions contained in the admission. An important difference in the legal frameworks of the *ad hoc* Tribunals is the fact that the ICC Statute explicitly requires that the accused has had sufficient consultation with his defence counsel regarding his admission of guilt. This enables the accused to make a well-informed and voluntary decision.

**Factual basis of the admission of guilt**

Any admission of guilt must be supported by the facts of the case: diverting from the full criminal proceedings is not permitted without a solid factual basis for the criminal responsibility of the accused. Unlike the *ad hoc* Tribunals, the ICC’s legal framework refers to three categories of evidence from which the factual basis of the admission of guilt can be derived:

(i) The charges brought by the Prosecutor and admitted by the accused; (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.\(^\text{140}\)

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\(^\text{138}\) Article 65 (5) ICC Statute.


\(^\text{140}\) Article 65 (1)(c) ICC Statute.
The mere absence of disagreement between the prosecutor and accused does not suffice for the establishment of a sufficient factual basis: the Chamber is required to conduct more substantial fact-finding in this regard. Article 65 (2) ICC Statute states that when the Chamber is satisfied that the criteria of paragraph 1 have been complied with, it shall determine whether all the ‘essential facts that are required to prove the crime’ have been established. If this is the case, the Chamber may convict the accused.

The Chamber may require a more complete presentation of the facts if this is in the interests of justice. In particular, the interest of the victims has to be taken into account when the Chamber is presented with an admission of guilt. Thus, the agreement between the prosecutor and accused on diverting the case from full criminal proceedings is, as such, not decisive: the Chamber has to determine whether a more complete presentation of the case would be in the interests of justice. Weigend and Turner concluded that the ICC Trial Chambers have a more significant role regarding the acceptance of admission of guilt than the *ad hoc* Tribunals.\(^\text{141}\) When the admission of guilt is not accepted by the Trial Chamber, the admission will be regarded as not having been made. The case will then be remitted to another Trial Chamber in order to provide for a full contested trial. So far, no admissions of guilt have been filed: it remains to be seen how the Trial Chambers will proceed when an admission of guilt is filed.

4.3 Shortcuts in the Law of International Criminal Procedure

4.3.1 Introduction

In the following pages, the shortcuts to proof that can be discerned in international criminal proceedings are discussed. As stated in the Introduction, shortcuts are mechanisms that allow for an abbreviated presentation and discussion of the evidence before the trier of fact. The principle of immediacy is infringed upon: the evidence is not fully presented and discussed during the proceedings. The shortcuts that are discussed include agreed facts, facts of common knowledge, judicial notice of adjudicated facts and appeal proceedings.

4.3.2 Agreed Facts

The prosecutor and the accused can agree that particular facts are not in dispute between them. Such uncontested facts can be brought to the attention of the Chamber. When the Chamber notes the agreement on the uncontested facts, no evidence has to be presented to prove the particular facts. This shortcut to proof enables the parties and the Chamber to focus on the issues that remain contested between them (pro-
vided that the Chamber, acting *proprio motu*, does not require the presentation of additional evidence or submissions regarding the agreed facts). First, the practice at the *ad hoc* Tribunals is discussed, followed by the ICC.

### 4.3.2.1 The *ad hoc* Tribunals

Rule 65ter (H) ICTY RPE and Rule 73bis (B)(ii) ICTR RPE stipulate that the parties may record uncontested matters, including facts that are not in dispute between them. The parties can even be ordered to make an effort to submit a list of agreed facts to the pre-trial Judge or the Trial Chamber. Both provisions are related to the pre-trial phase, but their scope is broader: Chambers can also note agreed facts during the trial phase.

The consequences of agreed facts are in the first place a matter for the parties themselves: the Chamber merely notes that certain facts are uncontested between the prosecutor and accused. This explains why the general admissibility criteria of Rule 89 ICTY/ICTR RPE are not consistently applied by the Chambers when they note the agreement between the parties. The Chamber has not conducted a thorough analysis of the facts and the supporting evidence itself. However, the legal effect is

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142 According to Rule 65ter (E)(i) ICTY RPE the prosecutor must indicate in its pre-trial brief which matters are uncontested. Rule 73bis (B)(ii) ICTR RPE contains a similar provision.


144 E.g. ICTY, Decision on Agreed Facts, *Prosecutor v. Karadžić*, Case No.: IT-95-5/18-T, T. Ch., 14 February 2013, par. 3. Rule 65ter (M) ICTY RPE states that the Trial Chamber may exercise any function of the pre-trial Judge. Rule 73bis ICTR RPE concerns the pre-trial conference, presided over by the Trial Chamber. The Rule does not contain a similar provision as Rule 65ter (M) ICTY RPE.

145 In *Perišić*, the Trial Chamber did take Rule 89 (C) ICTY RPE into account, regarding the relevance and probative value of the agreed facts. The Trial Chamber in *Karadžić*, however, observed: ‘The Prosecution asserts that the Chamber “must” accept such recorded agreed facts as evidence under Rule 89 (C), requiring a finding of relevance and probative value. However, while some other Trial Chambers have previously noted that the effect of recording points of agreement between the parties at trial is to accept those points of agreement as evidence pursuant to Rule 89, this Chamber respectfully differs from that proposition. It considers that the admission of evidence, or indeed the taking of judicial notice of adjudicated facts or facts of common knowledge pursuant to Rule 94 (B), is an entirely different process from a simple recording that the parties have agreed on certain facts. In the former case, it is clearly necessary for a Chamber to be satisfied as to relevance before admitting testimony or a piece of documentary evidence, or before taking judicial notice. However, agreement between the parties is primarily a matter for the parties themselves, and they may choose to agree on any number of matters which the Chamber may, ultimately, consider have no bearing on the case.’ ICTY, Decision on “Prosecution Response to Karadžić’s Submission of Agreed Facts and Motion for Reconsideration, *Prosecutor v. Karadžić*, Case No.: IT-95-5/18-T, T. Ch., 26 August 2010, par. 9; ICTY, Second Decision in Respect of Srebrenica Agreed Facts, *Prosecutor v. Perišić*, Case No.: IT-04-81-T, T. Ch. I, 30 September 2009, p. 1.
more substantial than simply recording an *inter partes* agreement. The Trial Chamber in *Karadžić* held:

> it is the view of the Chamber that where the parties do agree on matters of fact and this agreement is recorded by the Chamber, it does not render those facts evidence, but rather simply makes them facts in support of which no evidence needs be brought and upon which the Chamber may rely, should it so choose, in its final judgement.\(^{146}\)

Consequently, facts that are uncontested and agreed upon by the parties can be included in the Chamber’s final judgement. For instance, the Trial Chamber in *Perišić* held that when the Chamber refers in the judgement to an agreed fact, the fact is regarded as ‘accurate’.\(^{147}\) Such facts are normally referred to in a footnote, without discussing the particular relevance and probative value of the facts: the Chamber apparently considered them to be relevant and probative.\(^{148}\)

Agreed facts may refer to (detailed) factual situations,\(^{149}\) but also to the *chapeau* elements of the crimes alleged. In *Stanišić & Simatović*, the Trial Chamber held:

> The parties agreed as to the existence of an armed conflict in Croatia and Bosnia-Herzegovina at all times relevant to the crimes alleged in the Indictment. The Trial Chamber has considered the parties’ agreement in the light of a number of Adjudicated Facts and evidence with regard to the outbreak of the armed conflict in Croatia and Bosnia-Herzegovina. Accordingly, the Trial Chamber finds that there was an armed conflict in the territory of Croatia and Bosnia-Herzegovina that extended throughout the period relevant to the crimes charged in the Indictment.\(^{150}\)

Unlike the criteria for taking judicial notice of adjudicated facts, agreed facts may go

\(^{146}\) E.g. ICTY, Decision on Agreed Facts, *Prosecutor v. Karadžić*, Case No.: IT-95-5/18-T, T. Ch., 14 February 2013, par. 5. In *Stanišić & Simatović*, the Chamber observed that ‘the Chamber may rely on these facts for the truth of their content without additional evidence, but is not bound by them’. ICTY, Decision on Motion for Admission of Agreed Facts, *Prosecutor v. Stanišić & Simatović*, Case No.: IT-03-69-T, T. Ch. I, 12 January 2011, p. 1.

\(^{147}\) ICTY, Judgement, *Prosecutor v. Perišić*, Case No.: IT-04-81-T, T. Ch. I, 6 September 2011, par. 62. In *Haradinaj*, the Trial Chamber held that is considered the agreed facts with all the other evidence in the case. This again shows the holistic approach to weighing the evidence. ICTY, Judgement, *Prosecutor v. Haradinaj et al.*, Case No.: IT-04-84-T, T. Ch. I, 3 April 2008, par. 17.


\(^{149}\) E.g., the prosecution and defence counsel in *Delić* agreed that ‘On 8 June 1993, the RBiH Presidency issued a decision on the restructuring of the ABiH Supreme Command Headquarters to include establishing the post of Commander of the Main Staff.’ ICTY, Judgement, *Prosecutor v. Delić*, Case No.: IT-04-83-T, T. Ch. I, 15 September 2008, par. 5.

to the acts and conduct of the accused. In Blagojević & Jokić, the Trial Chamber held in this regard:

An accused may agree to a prejudicial or incriminating fact. In such cases, particularly where the fact may have direct impact on establishing the guilt of an accused, the Trial Chamber as guarantor of the rights of the accused, may find it necessary to enquire whether the accused has made such an admission voluntarily and understands the possible consequences of such an admission.\textsuperscript{151}

This is reminiscent of the manner in which Trial Chambers determine whether a guilty plea has been entered according to the criteria of Rule 62\textit{bis}. It stands to reason that when the accused agrees to particular facts relating to his criminal responsibility, the same guarantees apply when the accused waives his right to trial proceedings altogether and pleads guilty to the charges.

Apart from the fact that agreement between the parties is required before the Chamber can note an agreed fact, the main difference with adjudicated facts concerns the probative value of such facts. Agreed facts can be relied upon in the final judgement when the particular fact is relevant, has probative value and is reliable.\textsuperscript{152} The Chamber determines this in a holistic manner: the agreed fact is weighed against the background of all the other evidence admitted. When the Chamber decides to judicially notice an adjudicated fact, it considers the fact as a ‘well-founded presumption for the accuracy of that fact’.

The use of agreed facts at the ICTY and ICTR is rather limited, compared to the practice of judicially noticing facts under Rule 94 (A) and (B). At the ICTY, Trial Chambers have noted agreements of fact only in ten cases, whereas the practice at the ICTR seems to be absent.\textsuperscript{153}

4.3.2.2 The International Criminal Court

Rule 69 ICC RPE stipulates that the prosecutor and defence may agree on factual issues. Such an agreement is submitted to the Chamber, which may consider that no further evidence has to be presented regarding these facts.\textsuperscript{154} Similar to the provisions


\textsuperscript{152} Although not all Chambers consider the agreed fact in light of the general admissibility criteria of Rule 89 (C) when an agreement is noted, when the agreed fact is included in the final judgement the Chamber must consider whether the fact is relevant and reliable. Seen this way, Chambers differ only regarding the moment when the criteria have to be considered: when the agreed facts are noted or after the close of the proceedings.

\textsuperscript{153} At the ICTY, agreements of fact were noticed in Halilović, Stanišić & Simatović, Milutinović et al, Boškoski & Tarčulovski, Haradinaj et al, Dragomir Milošević, Rasim Delić, Hadžić, Karadžić, Mladić, and Perišić.

\textsuperscript{154} E.g. ICC, Decision on Agreements as to Evidence, Prosecutor v. Katanga & Ngudjolo Chui, Case
on admissions of guilt, the Chamber may order that a more complete presentation of the facts is in the interests of justice, particularly in the interests of the victims. For example, the legal representatives of the victims in *Nourain & Jerbo Jamus* opposed the ‘drastic truncation of the facts’, which would result from the joint submission of the prosecutor and accused. They argued that evidence has to be presented in order to do justice to the full criminal responsibility of the accused. 155

The prosecutor and accused are often encouraged by the Chamber to reach agreement on as many factual issues as possible, which hopefully will result in expedited proceedings focused on the contested issues of the case. 156 In *Nourain & Jerbo Jamus* the prosecution and defence not only reached agreement on particular facts, they even indicated which issues would be contested during the proceedings. In this way, they proposed to narrow the trial proceedings to a significant extent. 157 The Chamber concurred and held that the proceedings would be focused on the contested issues identified in the agreement between the prosecutor and defence. It also held that additional evidence or submissions could be required at a later stage, if required by the interests of justice. 158 This entails that the Chamber remains fully responsible for accurate fact-finding: when necessary, the Chamber can require a more complete presentation of the facts and supporting evidence.

The striking difference with the provisions at the *ad hoc* Tribunals concerning agreed facts is that ICC Chambers have to take into account the interests of justice when an agreement on factual issues is submitted. The Chamber may order that evidence will be presented in order to allow the victims to participate effectively. In *Katanga*, the Chamber included a limited number of agreed facts in the final judge-

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156 The Trial Chamber in *Bosco Ntaganda* encouraged the parties to reach agreements on factual issues. ICC, Decision on Prosecution and Defence Joint Submission on Agreed Facts, *Prosecutor v. Bosco Ntaganda*, Case No.: ICC-01/04-02/06, T. Ch. VI, 22 June 2015. Regulation 54 stipulates that the Trial Chamber, at a status conference, may issue an order regarding any evidence on which the prosecution and defence agree under Rule 69.

157 In their Joint Submission, the prosecution and defence agreed that only three issues remained contested: i) Whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; ii) If the attack is deemed unlawful, whether the Accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and iii) Whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations. ICC, Decision on the Joint Submission regarding the Contested Issues and the Agreed Facts, *Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Case No.: ICC-02/05-03/09, T. Ch. IV, 28 September 2011, par. 3.

This means that the uncontested facts were considered conclusively proven, based on the agreement between the prosecutor and Katanga’s defence. Similarly, the Trial Chamber in *Ngudjolo* took the agreed facts into account in its final judgement. So far, not much use has been made of agreed facts before the ICC. The number of cases in which an agreement on factual issues was reached is small and the number of agreed facts in those cases is limited. Although agreed facts are a shortcut to proof, in practice they will only contribute marginally to an expeditious trial that is focused on the contested issues of the case.

### 4.3.3 Judicial Notice of Facts of Common Knowledge

#### 4.3.3.1 Introduction

Facts of common knowledge in international criminal proceedings provide for an interesting shortcut to proof: facts of common knowledge are conclusively proven. This entails that the prosecutor is not required to present evidence to establish the particular fact and that evidence in rebuttal is inadmissible. In international criminal proceedings, the practice of taking judicial notice of facts of common knowledge is of particular relevance because such facts have been used to prove parts of the charges.

#### 4.3.3.2 Legal Framework

The Rules of Procedure and Evidence of the *ad hoc* Tribunals contain a similar provision on facts of common knowledge: ‘A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.’

A noticeable difference between the legal framework of the *ad hoc* Tribunals and the ICC is the fact that the ICC Statute seems to leave the Chamber discretion to judicially notice facts of common knowledge. The ICC Statute states that: ‘The Court shall not require proof of facts of common knowledge but may take judicial notice of them’. Piragoff argued that the different wording can be explained by the aim of the ICC to provide an accurate historical record and to provide the victims with as much reliable evidence as possible. Therefore, judicial notice may be taken in one case, whereas it is denied in the other, because it is in the interest of the victims to do so. The Chamber will instead hear the complete presentation of evidence. The aim of providing an accurate historical record is also often heard at the *ad hoc* Tribu-

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159 ICC, Judgement Pursuant to Article 74 of the Statute, *Prosecutor v. Katanga*, Case No.: ICC-01/04-01/07, T. Ch. II, 7 March 2014, par. 73.


161 Rule 94 (A) ICTY/R RPE.

162 Article 69 (6) ICC Statute. Emphasis added.

nals. The *Karemera* decision on the Rwandan genocide serves as a prime example. By concluding authoritatively on a solid evidentiary basis that atrocities were committed and declaring such findings to be established beyond any doubt, judicial notice serves the very aim of providing victims a complete and incontestable narrative. Moreover, when facts reach the standard of indisputability, no evidence in rebuttal is admissible. This effectively silences deniers and may be an antidote for politically motivated accused that want to present a revisionist version of history. On the other hand, extensive use of judicial notice, in particular in relation to historical facts, may result in an imposed narrative, whereby the tribunal’s narrative can be perceived as politically motivated.

For the analysis of the practice of facts of common knowledge, the case law of the *ad hoc* Tribunals will be discussed; those Tribunals have produced the most extensive and relevant case law on this shortcut to proof.

### 4.3.3.3 Rationale for Judicial Notice of Facts of Common Knowledge

Chambers take judicial notice of facts of common knowledge for several reasons. Most prominent is the enhancement of judicial economy, resulting in a trial without undue delay: if indisputable, and mostly undisputed, facts must be proven by the regular means of proof the result will be protracted and inefficient trials. In order to avoid this, the Chamber may deem facts to be of common knowledge and concentrate on those facts that are in dispute and require formal proof. In his Separate Opinion to an Appeals Chamber interlocutory decision at the SCSL, Judge Robertson stated on the expediency argument:

> In my view, expedition and judicial economy do not accurately reflect the real purpose of this Rule [Rule 94, KV], and the 'balance' sets up a false dichotomy between the assumed purpose of economy and the rights of the defendant. Expedition and economy may be the result of judicial notice, but the purpose of the Rule is rather to promote a fair trial for all parties both by relieving them of the burden of proving facts that have been established convincingly elsewhere and by enabling the tribunal to take into account in its decision the full panoply of relevant facts currently available in the world. [...] Judicial notice is not, most emphatically, a prosecution tool that must be 'balanced' or 'weighed' against countervailing rights to a fair trial: it is a procedure that can and also should be used by defendants to simplify a task which might otherwise be beyond their resources. They benefit, as much as the Prosecution and the Court, from any expedition that results. Facts that can be judicially noticed must be judicially noticed – Rule 94 (A) is mandatory.

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165 SCSL, Separate Opinion of Justice Robertson to Fofana-Decision on Appeal against ‘Decision
Another reason in favour of judicial notice is the desire to deliver consistent and uniform judgements on factual issues: it is undesirable when Chambers of the same Tribunal arrive at different factual conclusions concerning the same crime base.\(^{166}\) This also relates to the aim of creating an accurate historical record of mass atrocities: from that perspective, which should not hold too prominent of a place in criminal proceedings concerning the determination of guilt or innocence of individuals, diverging judgements are indeed undesirable.\(^{167}\) Nevertheless, if a Chamber concludes, on the basis of new evidence or on a different interpretation of existing evidence, that a particular factual situation existed, it should feel free to conclude accordingly, even if it contradicts the findings of other Chambers.

4.3.3.4 Probative Value of Facts of Common Knowledge

When a Chamber concludes that a fact is of common knowledge, the fact is established conclusively.\(^{168}\) Facts of common knowledge cannot be challenged further during the proceedings: evidence in rebuttal is inadmissible.\(^{169}\)

The ICTR Appeals Chamber in *Karemera* emphasised that taking judicial notice of facts of common knowledge is not discretionary but mandatory, which follows from the plain wording of Rule 94 (A) ICTR RPE. When a Trial Chamber iden-
tifies a fact of common knowledge, that is relevant to the case, it must take judicial notice of that fact. Moreover, and more importantly, when the Appeals Chamber has determined that a fact is of common knowledge, Trial Chambers must take judicial notice if the particular fact is relevant to the case. Consequently, facts of common knowledge do not only prevent the parties to the current proceedings from presenting evidence in rebuttal; this also extends to future cases when the fact is relevant to the proceedings. Trial Chambers are bound by decisions of the Appeals Chamber, but not by other Trial Chambers in this respect.

### 4.3.3.5 Identifying Facts of Common Knowledge

Before discussing the specific requirements for judicial notice under Rule 94 (A), it is important to note that proposed facts must still meet the Rule 89 (C) criteria of relevancy and probative value. The ICTR Appeals Chamber has held that ‘Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevancy and thereby clutter the record with matters that would not otherwise be admitted.’

How can one discern a fact of common knowledge? According to the Trial Chamber in *Semanza*:

> The term 'common knowledge' is generally accepted as encompassing '…those facts which are not subject to reasonable dispute including, common or universally known facts of recent history.'

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171 ICTY, 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, *Prosecutor v. Simić et al.*, ICTY-IT-95-9-PT, T. Ch., 25 March 1999, p. 4; ICTY, Decision Granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts pursuant to Rule 94 (B), *Prosecutor v. Stanišić and Župljanin*, ICTY-IT-08-91-T, T. Ch. II, 1 April 2010, par. 26: ‘no principle of stare decisis applies between Trial Chambers of the Tribunal.’ ‘The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.’ ICTY, Judgement, *Prosecutor v. Aleksovski*, ICTY-IT-95-14/1-a, A. Ch., 24 March 2000, par. 114. ICTR, Decision on Motion for Judicial Notice, *Prosecutor v. Karemera et al.*, ICTR-98-44-R94, T. Ch. III, 9 November 2005, par. 6.


facts, such as general facts of history, generally known geographical facts and the laws of nature.' A common example of a fact of common knowledge are the days of the week. In addition, and perhaps more importantly for the present purposes, 'common knowledge' also encompasses those facts that are generally known within a tribunal’s territorial jurisdiction.\(^\text{174}\)

The Trial Chamber then undertook a two-pronged test: first, it determined whether a fact is common knowledge, and second, whether this matter is reasonably indisputable. A fact is indisputable ‘if it is either universally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be called into question.’\(^\text{175}\) In part, this is circular reasoning: in order to determine whether a fact is of common knowledge, the Chamber determines whether it is universally known within the jurisdiction of the Tribunal. A more convincing approach would be when facts of common knowledge must have some factual basis in trustworthy sources such as an encyclopaedia or scientific literature. It is possible that a certain belief is universally known within the jurisdiction of a court, but lacks any (scientific) credibility. It would be unjust to consider this as common knowledge and take judicial notice of it. It is not necessary that a matter is universally known, as long as it is known within the Tribunal’s jurisdiction.\(^\text{176}\) That the facts must have some public character appears to be undisputed.\(^\text{177}\)

A contested issue is whether judicial notice can be taken of legal characterisations. One could argue that only facts can be judicially noticed. On the basis of these facts, the Chamber can then draw legal conclusions. This is not, however, how judicial notice of facts of common knowledge has been interpreted by the ad hoc Tribunals. The Appeals Chamber has consistently held that:

The question is not whether a proposition is put in legal or layman’s terms (so long as the terms are sufficiently well defined such that the accuracy of their application to the


\(^{177}\) ICTY, Decision on Appellant’s Motion for Judicial Notice, Prosecutor v. Nikolić, ICTY-IT-02-60/1-A, A. Ch., 1 April 2005, par. 34. The Appeals Chamber held, quite obviously, that military secrets of material labelled ‘strictly confidential’ are not facts of common knowledge.
described situation is not reasonably in doubt). The question is whether the proposition can reasonably be disputed.\textsuperscript{178}

Accordingly, the Appeals Chamber took judicial notice under Rule 94 (A) of terms as ‘widespread or systematic attacks against a civilian population’\textsuperscript{179} and of the existence of ‘an armed conflict not of an international character in Rwanda between 1 January 1994 and 17 July 1994’.\textsuperscript{180} Most prominently and controversially, the Appeals Chamber in \textit{Karemera} took judicial notice of the Rwandan genocide as a fact of common knowledge: ‘The fact of 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.”’\textsuperscript{181} Unlike the criteria for judicial notice under Rule 94 (B), Chambers cannot even consider whether the proposed fact is (or contains) a legal characterisation: Chambers do not enjoy any discretion and must judicially notice the fact when the Appeals Chamber has held that the fact is of common knowledge and not reasonably disputable.\textsuperscript{182}


\textsuperscript{180} ICTR, Judgement, \textit{Prosecutor v. Semanza}, ICTR-97-20-A, A. Ch., 20 May 2005, par. 192. In December 2007, ICTY Trial Chamber II declined to take judicial notice of these proposed facts of common knowledge: ‘During the period from at least April to 31 December 1992, a state of armed conflict existed on the territory of Bosnia and Herzegovina’, and, ‘During the period from at least April to 31 December 1992, there was an ongoing widespread or systematic attack against the Bosnian Muslim and Bosnian Croat civilian population on the territory of the Serbian Republic of Bosnia Herzegovina, later known as \textit{Republika Srpska}'. ICTY, Decision on Judicial Notice, \textit{Prosecutor v. Stanišić}, ICTY-IT-04-79-PT, T. Ch. II, 14 December 2007.


\textsuperscript{182} ICTY, Decision on Interlocutory Appeals against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, \textit{Prosecutor v. Milošević}, ICTY-IT-9829/1-AR73.1, A. Ch., 26 June 2007, par. 21. Under Rule 94 (B), proposed facts may not include findings or characterisations that are of an essentially legal nature. ICTY, Decision on Motion for Judicial Notice of ICTY Convictions, \textit{Prosecutor v. Perišić}, ICTY-IT-04-81-PT, T. Ch. I, 25 September 2008, par. 12; ICTY, Decision on Third and Fourth Prosecution Motions for Ju-
In order to assess whether the fact is of common knowledge and not subject to reasonable dispute, the purported fact must be well defined: a conviction as such is not sufficiently well defined to be taken judicial notice of.\textsuperscript{183} This also holds true for ‘documents’ contained in the United Nations Blue Book Series: without a proper identification of the documents judicial notice is requested for, judicial notice will be denied.\textsuperscript{184} Chambers have categorically refused to take notice of documents pursuant to Rule 94 (A) and have held that only facts are eligible for judicial notice under this rule.\textsuperscript{185} Chambers differ in respect to facts that are contained in documents generated by a (non-judicial) body of the United Nations. The ICTY Trial Chamber in \textit{Prlíc} declined to take judicial notice, because facts contained in such documents did not become facts of common knowledge, where the ICTR Trial Chamber in \textit{Ngirabatware} seemed to base the finding of notoriety of the fact on its origins, namely an organ of the United Nations.\textsuperscript{186} ICTR Trial Chambers have held that:

- legislative, executive, and administrative and organizational laws of Rwanda properly qualify for judicial notice and that the legislation and documents relating to the administrative organization of a geographic area and the legislative law of a country fall within matters of common knowledge, which may fairly be judicially noticed.\textsuperscript{187}

The adoption of a Resolution by the General Assembly of the United Nations is regarded as common knowledge.\textsuperscript{188} Under the old Rules of Procedure and Evidence, which did not include Rule 94 (B), an ICTR Trial Chamber took judicial notice of the ‘contents of resolutions of the Security Council because it is an organ of the United Nations which established the Tribunal.’\textsuperscript{189} This is remarkable because Chambers

\begin{itemize}
  \item \textsuperscript{184} ICTR, Decision on the Prosecutor’s Motion for Judicial Notice pursuant to Rules 73, 89 and 94, \textit{Prosecutor v. Bagosora et al.}, ICTR-98-41-T, T. Ch. III, 11 April 2003, par. 57.
  \item \textsuperscript{187} ICTR, Decision on the Prosecutor’s Motion for Judicial Notice, \textit{Prosecutor v. Ndahimana}, ICTR-2001-68-PT, T. Ch. III, 7 April 2010, par. 5. With references to other case law.
  \item \textsuperscript{188} ICTY, Judgement, \textit{Prosecutor v. Brdanin}, ICTY-IT-99-36-T, T. Ch. II, 1 September 2004, par. 152.
\end{itemize}
normally take judicial notice of the adoption, existence or authenticity of documents, without judicially noticing their contents. The Trial Chamber in *Nyiramasuhuko* took judicial notice under Rule 94 (A) of the existence and authenticity of documents (certain Rwandan laws) but refused to take judicial notice of the facts contained therein.\(^\text{190}\) A similar approach was followed by the Trial Chamber in *Bizimungu*.\(^\text{191}\) The Trial Chamber in *Karemera* however, took judicial notice of the existence, authenticity and contents of the Rwandan constitution, several domestic laws and the Arusha Accords. It declined to take judicial notice of the interpretation of these legal documents, though.\(^\text{192}\)

Since the adoption of Rule 94 (B), Chambers can easily judicially notice documents without putting them in the indisputable category of facts of common knowledge.\(^\text{193}\)

### 4.3.3.6 Facts of Common Knowledge and the *Probandum*

In international criminal proceedings, facts of common knowledge have been used to prove significant parts of the *probandum*. Contextual elements of crimes have been established by referring to common knowledge. The most notorious example is found in *Karemera*, in which the prosecution requested the Trial Chamber to take judicial notice of six facts as facts of common knowledge. The most contentious ones were:

Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group,

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\(^{193}\) Rule 94 (B) was included in the ICTR RPE on 3 November 2000.
and,

The following state of affairs existed in Rwanda between 6 April 1994 to 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 person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.\textsuperscript{194}

The Trial Chamber, as other Trial Chambers and the Appeals Chamber had done before, refused to take judicial notice of these facts.\textsuperscript{195} The Trial Chamber in \textit{Semanza} held on the request of the prosecutor to judicially notice the Rwandan genocide as common knowledge:

A fundamental question in this case is whether ‘genocide’ took place in Rwanda. Notwithstanding the over-abundance of official reports, including United Nations reports confirming the occurrence of genocide, this Chamber believes that the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime.\textsuperscript{196}

The Appeals Chamber endorsed this finding.\textsuperscript{197} However, the Appeals Chamber in \textit{Karemera}, deciding upon an interlocutory appeal from the prosecution against the Trial Chamber’s refusal to take judicial notice of the Rwandan genocide, did take ju-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{194} As cited in: ICTR, Decision on Interlocutory Appeal of Decision on Judicial Notice, \textit{Prosecutor v. Karemera et al.}, ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 33. The other facts are: ‘Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa.’; ‘In 1994, Rwanda was a State party to the Genocide Convention of 1948, to the Geneva Convention of 1949, and to the Additional Protocol II of 1977 of the Geneva Conventions.’; ‘Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character.’
\item\textsuperscript{196} ICTR, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54, \textit{Prosecutor v. Semanza}, ICTR-97-20-I, T. Ch. III, 3 November 2000, par. 36. The Chamber did however take judicial notice of the ‘existence of the enumerated acts comprising the crime of genocide as provided in Article 2 and recited in paragraph 3 (a) of Appendix A, including killing or causing serious bodily harm to members of a group.’
\item\textsuperscript{197} ICTR, Judgment, \textit{Prosecutor v. Semanza}, ICTR-97-20-A, A. Ch., 20 May 2005, par. 192. The Appeals Chamber did also endorse the Trial Chambers’ finding that it was common knowledge that widespread and systematic attacks against a Tutsi civilian population occurred and that an armed conflict not of an international character existed.
\end{enumerate}
\end{footnotesize}
dicial notice of the Rwandan genocide as a ‘classic’ fact of common knowledge. Notice was also taken of the existence of widespread or systematic attacks on the Tutsi civilian population and of the fact that a non-international armed conflict existed in Rwanda between 1 January 1994 and 17 July 1994. The Appeals Chamber commented on the relationship between facts of common knowledge and components of crimes (the probandum). It stated that even if facts of common knowledge are components of crimes, Chambers are obliged to judicially notice them. The ICTR Appeals Chamber held that instead of submitting formal proof to prove the components of the crime, facts of common knowledge may provide for an alternative way to meet the burden of proof:

Of course the Rule 94 (A) mechanism sometimes will alleviate the Prosecution’s burden to introduce evidence proving certain aspects of the case. As the Appeals Chamber explained in Semanza, however, it does not change the burden of proof, but simply provides another way for that burden to be met.\(^{198}\)

In Semanza, the Appeals Chamber made a distinction between contextual facts and facts that relate to the criminal responsibility of the accused. Facts that do not touch upon the individual criminal responsibility of the accused can be proven by facts of common knowledge.\(^{199}\) We may take, for example, an accused facing a charge of murder as a crime against humanity allegedly committed during the genocidal campaign of 1994. The relevant provision in the ICTR Statute reads:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, (a) murder, [...].\(^{200}\)

Various Chambers, including the Appeals Chamber, took judicial notice of the following facts of common knowledge: ‘widespread or systematic attacks based on Tutsi ethnic identification occurred’ and ‘Rwandan citizens were classified by ethnic group between April 1994 and July 1994’.\(^{201}\) The Twa, Hutu and Tutsi are protected groups under the Genocide Convention, which means that they also constitute a protected group under the ICTR Statute.\(^{202}\)

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\(^{199}\) ICTR, Decision on Motions for Reconsideration, Prosecutor v. Karemera et al., ICTYR-98-44-AR73(C), A. Ch., 1 December 2006, par. 16.

\(^{200}\) Article 3 ICTR Statute. Similar provisions are included in the Statutes of the other tribunals.


\(^{202}\) The 1948 Genocide Convention protects national, ethnical, racial and religious groups. These correspond with Article 3 ICTR Statute. ICTR, Decision on Prosecution Motion for Judicial Notice, Prosecutor v. Karemera, ICTR-98-44-R94, T. Ch. III, 9 November 2005, par. 8; ICTR, Decision on
What are the consequences of these decisions? First, all the above facts of common knowledge have been identified or endorsed by the Appeals Chamber under Rule 94 (A). This means that Trial Chambers are obliged to take judicial notice of them. Second, the probandum is proven to a significant extent by facts of common knowledge. The context is regarded as common knowledge, which means that the only components the prosecution has to formally prove are the charge of murder and that the murder is part of a widespread or systematic attack; the attack as such has been judicially noticed already. This reduces the burden of proof for the prosecutor and results in indisputable findings: the judicially noticed facts cannot be challenged by the accused.

The same approach was taken in cases concerning genocide and war crimes. As stated earlier, the Appeals Chamber judicially noticed the Rwandan genocide in Karemera as a fact of common knowledge. Previously, the Trial Chamber had declined to take judicial notice of this fact, and its reasons for doing so deserve close attention. The Chamber stated:

As a result, it 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 it is not a fact to be proved.203

On appeal, the Appeals Chamber stated that whether or not genocide had occurred in Rwanda was of obvious relevance to the prosecutor’s case: it is a necessary, although not sufficient element that has to be proven.204 By judicially noticing the Rwandan genocide, relevant context is provided for a better understanding of the accused’s individual actions. This ‘genocidal context’ is not only relevant for accused facing charges of genocide: the nationwide genocidal campaign can also be used to establish the context of other crimes, such as extermination or persecutions as crimes against humanity.205 It follows that formal proof is only required for the genocidal acts under Article 2 ICTR Statute, including the special intent (dolus specialis) necessary for a conviction for genocide. Heller, commenting on the relationship between common knowledge and special intent, argued that the Karemera decision and the Trial Chamber’s judgement in Akayesu form a ‘potentially lethal pair’. In Akayesu, the Trial

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204 ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Prosecutor v. Karemera et al., ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 36.
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Chamber held that in the absence of a confession, the accused’s intent can be inferred from presumptions of fact. In other words, the special intent can be inferred from the context in which the accused has committed his actions. It is this (genocidal) context of which Karemera took judicial notice under Rule 94 (A), and this would then result in proving the genocidal intent by inferring it from an indisputable fact of common knowledge. According to Heller, this would amount to ‘an unacceptable prejudicial result.’ In the Gatete judgement, the Trial Chamber reiterated established case law when it stated that:

In the absence of direct evidence, a perpetrator’s intent to commit genocide may be inferred from relevant facts and circumstances that can lead beyond any reasonable doubt to the existence of the intent. Factors that may establish the specific intent include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.

In cases concerning war crimes charges, the existence and nature of the armed conflict is regarded as common knowledge. The ICTR held that a non-international armed conflict existed in Rwanda between 1 January 1994 and 17 July 1994.

In proceedings before the ICTY, the Trial Chamber in Simić et al. referred to the Appeals Chamber interlocutory decision in Tadić in which the Appeals Chamber held that it would be for each Chamber to determine the existence and character of an armed conflict in the territory of the former Yugoslavia. This does not mean, however, that the Chamber declined to take judicial notice of the existence of an armed conflict in a certain area: judicial notice under Rule 94 (B) has been taken of the exis-

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210 ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadić, ICTY-IT-94-1-AR72, A. Ch., 2 October 1995; ICTY, 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, Prosecutor v. Simić et al., ICTY-95-9-PT, T. Ch., 25 March 1999, p. 4.
ence of an armed conflict in a specific area or town.\footnote{E.g.: ICTY, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses pursuant to Rule 92bis, \textit{Prosecutor v. Krajšinik}, ICTY-IT-00-39-PT, T. Ch. I., 28 February 2003; ICTY, Prosecution’s Motion for Judicial Notice of Adjudicated Facts, \textit{Prosecutor v. Krajšinik}, ICTY-IT-00-39-PT, T. Ch. I., 7 November 2002, fact 150. Judicial notice was taken of: ‘On 8 April 1992, an armed conflict broke out in Foca town, mirroring events unfolding in other municipalities.’} Thus, accused before the ICTY may still present evidence in rebuttal, but accused before the ICTR may not.

4.3.3.7 Submission by the Parties or \textit{Proprio Motu}?

The provisions on facts of common knowledge state that Chambers do not enjoy discretion when deciding on judicial notice of facts of common knowledge: when a fact is considered common knowledge, judicial notice must be taken. The provisions are silent on the question of whether the Chamber may only take judicial notice at the request of the parties or whether it must take judicial notice \textit{proprio motu}.\footnote{In the majority of cases, it is the prosecution that files a motion for judicial notice. A rare example of a defence motion regarding judicial notice under Rule 94 (A): ICTR, Decision on Defence Motion for the Trial Chamber to take Judicial Notice of the Value of the Rwandan Currency, \textit{Prosecutor v. Nshogozza}, ICTR-07-91-T, T. Ch. III, 16 April 2009.} This differs from Rule 94 (B) of the \textit{ad hoc} Tribunals, according to which judicial notice of adjudicated facts and documentary evidence may be taken either at the request of the parties or by the Chamber itself after hearing the parties. When judicial notice under Rule 94 (A) must be taken \textit{proprio motu}, decisions of the Appeals Chamber on common knowledge must, when the facts are relevant for the case, be judicially noticed in future proceedings. The major difference is that judicial notice \textit{proprio motu} under Rule 94 (B) requires the Chamber to hear the parties, whereas Rule 94 (A) does not. In \textit{Simić et al.}, the Trial Chamber did not take judicial notice of the international character of the armed conflict in Bosnia and Herzegovina, but it did take judicial notice \textit{proprio motu} under Rule 94 (A) of the date of independence of Bosnia and Herzegovina and its recognition by the European Community.\footnote{ICTY, 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, \textit{Prosecutor v. Simić et al.}, ICTY-IT-95-9-PT, T. Ch., 25 March 1999, p. 5.} The prosecution had not requested the Trial Chamber to do so, which means that the defence in its response did not comment on these facts but concentrated on the character of the armed conflict.\footnote{ICTY, Defense Response to pre-Trial Motion by the Prosecution requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, \textit{Prosecutor v. Simić et al.}, ICTY-IT-95-9-PT, T. Ch., 3 February 1999; ICTY, Pre-Trial Motion by the Prosecution requesting the Trial Chamber to take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, \textit{Prosecutor v. Simić et al.}, ICTY-IT-95-9-PT, T. Ch., 16 December 1998.} The facts of common knowledge, therefore, were not discussed in court.\footnote{Cf. E.M. Morgan, ‘Judicial Notice’, \textit{57 Harvard Law Review} 269, 1943-1944, p. 294.}
In earlier decisions in Stanišić, Prlić et al. and in the Dissenting Opinion of Judge Hunt in Milošević, it was held that the onus rests upon the prosecution to establish that a proposed fact of common knowledge is not subject to reasonable dispute.\(^{216}\) This has the advantage that when the prosecution provides reasons for its request, it gives the defence the opportunity to respond. In Dragomir Milošević, the Trial Chamber first determined whether any of the proposed facts should be judicially noticed under Rule 94 (A), although no request towards that end was made.\(^{217}\) Thus, Chambers have the authority to judicially notice facts of common knowledge \textit{proprio motu}, notwithstanding a Rule 94 (B) motion.

Article 69 (6) ICC Statute allows the Court to take judicial notice of facts of common knowledge. The wording suggests that a Chamber may take judicial notice \textit{proprio motu}, without hearing the parties. In practice, however, it seems that parties are invited to submit proposed facts of common knowledge to the Chamber, which are, preferably, also agreed upon by the prosecution and defence.\(^{218}\) Although the wording of Article 69 (6) is a bit ambiguous (‘The Chamber shall not require proof of facts of common knowledge but \textit{may} take judicial notice of them.’), the ICC Chambers will not require proof of such facts.

4.3.3.8 Judicial Notice and Appeal Proceedings

Unlike motions on appeal concerning the admissibility of evidence in general, interlocutory motions concerning facts of common knowledge are subject to \textit{de novo} review at the \textit{ad hoc} Tribunals.\(^{219}\) Determining whether a fact is of common knowledge is a legal question. This means that the Appeals Chamber can fully review the Trial Chamber’s decision.\(^{220}\) When the Appeals Chamber has decided that a particular fact

\(^{216}\) ICTY, Decision on Judicial Notice, Prosecutor v. Stanišić, ICTY-IT-04-79-PT, T. Ch. II, 14 December 2007, par. 12; ICTY, Decision on “Prosecution motion for Judicial Notice of Facts of Common Knowledge and Admission of Documentary Evidence pursuant to Rules 94 (A) and 89 (C), Prosecutor v. Prlić et al., ICTY-IT-04-74-PT, T. Ch. II, 3 February 2006, p. 6; ICTY, Dissenting Opinion of Judge Hunt to 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, Prosecutor v. Milošević, ICTY-IT-02-54-AR73.5, A. Ch., 28 October 2003, par. 11.


\(^{218}\) ICC, Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64 (3)(a) of the Statute), Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07, T. Ch. II, 13 November 2008, p. 9.

\(^{219}\) Interlocutory appeals are subject to leave by the Trial Chamber (Rule 72 (B) ICTY RPE; Rule 73 (B) ICTR RPE; Article 82 (1) (d) ICC Statute). No interlocutory appeals have been lodged at the ICC regarding facts of common knowledge.

\(^{220}\) ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Prosecutor v. Karemera et al., ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 23.
is of common knowledge, Trial Chambers are bound by this decision, provided the fact is relevant for the proceedings.

4.3.4 Judicial Notice of Adjudicated Facts and Documentary Evidence

4.3.4.1 Introduction

Taking judicial notice of adjudicated facts and documentary evidence has become an important mechanism in international criminal proceedings to speed up trials. Although the concept is rooted in domestic practice, the manner in which the ad hoc Tribunals have relied upon this shortcut to proof is without precedent. The ICTR Trial Chamber in Ntakirutimana held 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.’

Although these categories are indeed related, it will be shown that judicial notice of adjudicated facts and documentary evidence has distinctive features that must be clearly distinguished from facts of common knowledge.

When a Chamber takes judicial notice of an adjudicated fact or documentary evidence, it ‘imports’ the factual conclusions of another Chamber into the proceedings: the judicially noticed facts are presumed to be correct, and no evidence has to be presented to establish these facts. Although evidence in rebuttal is admissible, judicial notice provides for an important shortcut to proof: when no evidence in rebuttal is presented, the judicially noticed fact is normally conclusively established.

4.3.4.2 Legal Framework

The Rules of Procedure and Evidence of the ad hoc Tribunals allow Chambers to judicially notice both adjudicated facts and documentary evidence. Rule 94 (B) ICTY RPE explicitly states that judicial notice can only be taken of the authenticity of the documents. Besides documentary evidence, judicial notice can be taken of adjudicated facts from other proceedings before the ad hoc Tribunals. The legal framework of the ICC does not provide for taking judicial notice of adjudicated facts and docu-


222 Rule 94 (B) ICTY RPE; Rule 94 (B) ICTR RPE. Sub-rule 94 (B) was adopted by the ICTY judges in the revised Rules of Procedure and Evidence of 9 and 10 July 1998. Not surprisingly, it was envisaged by the judges that this rule would expedite proceedings. Cf. 1998 Annual report by the President of the ICTY submitted to the UN Security Council ad General Assembly, A/53/219, S/1998/317, 10 August 1998, p. 28-29. O-Gon Kwon, ‘The Challenge of an International Criminal Trial as Seen from the Bench’, Journal of International Criminal Justice, Vol. 5 Issue 2, 2007, p. 360-376. Sub-rule 94 (B) was adopted by the ICTR judges on 3 November 2000.

223 Rule 94 (B) ICTY RPE.
mentary evidence. The following analysis is therefore based on the case law of the *ad hoc* Tribunals.

### 4.3.4.3 Rationale for Judicial Notice of Adjudicated Facts and Documentary Evidence

The most prominent reason to take judicial notice is to enhance judicial economy and to deliver uniform judgements.\textsuperscript{224} Stewart observed that ‘the scope of judicial notice is much broader in a specialist jurisdiction specifically established to try a small range or offences within a limited geographical and temporal sphere.’\textsuperscript{225} This holds true for the *ad hoc* Tribunals, which have a limited temporal and geographical jurisdiction. This may explain why the Statute and Rules of Procedure and Evidence of the ICC provide solely for judicial notice of facts of common knowledge: it is unlikely that large numbers of accused will face charges concerning the same crime base.

The objective of providing an authoritative and just historical record favours taking judicial notice of large numbers of adjudicated facts. The Appeals Chamber in *Karemera* has ruled, however, that the aim of creating uniform case law cannot weigh against the right of the accused to present evidence in rebuttal on judicially noticed facts.\textsuperscript{226}

Closely related to the aim of promoting judicial economy is the concentration on the contested issues of the case: the Chamber should not be concerned with those matters that are either indisputable, previously adjudicated or agreed upon by the parties: the sooner the Chamber can concentrate on the disputed issues of the case, the better. From the perspective of the victims, judicial notice prevents witnesses from re-traumatisation by avoiding the need for them to give testimony over and over again regarding traumatic events.\textsuperscript{227}


4.3.4.4 Probative Value of Adjudicated Facts and Documentary Evidence

Before turning to the probative value of facts under Rule 94 (B), it is important to first refer to consistent case law on the admission and probative value of evidence in general. All evidence must comply with the admissibility criteria of Rule 89 (C): the evidence must be relevant to the case and have some probative value. The Appeals Chamber held that the doctrine of judicial notice may not be used to circumvent the criteria of Rule 89 (C).\(^{228}\)

Since the 2003 judicial notice decision by the Appeals Chamber in Milošević, Chambers have consistently held that the probative value of judicially noticed facts is the establishment of ‘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.’\(^{229}\) Judicially noticed facts are presumed to be correct: it is not necessary that they are undisputed by the parties. The status of judicially noticed facts, as far as their probative value is concerned, deviates from the general evidentiary regime, where it remains entirely within the Chamber’s discretion to determine the probative value of each piece of evidence after the close of proceedings. In his Dissenting Opinion to an interlocutory decision in Milošević, Judge Hunt advocated a concept of judicial notice of adjudicated facts that is similar to the concept of judicial notice of facts of common knowledge:

> When Rule 94 (B) was added, it used the same expression ‘judicial notice’ as Rule 94 (A) had used. Judicial notice was therefore clearly intended to mean the same thing in both paragraphs, that the fact in question is not the subject of reasonable dispute, and thus evidence to establish it is unnecessary.\(^{230}\)

It follows that evidence to rebut the judicially noticed fact must be declared inadmissible. In his Separate Opinion to the same Appeals Chamber decision, Judge Shahabuddeen argued in favour of a right of presenting evidence in rebuttal: if such a right would not exist, it would infringe upon the presumption of innocence. This infringement would be the result of the impossibility of the parties to dispute evidence that has been conclusively established in another case.\(^{231}\) According to Shahabuddeen,


\(^{229}\) ICTY, 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, Prosecutor v. Milošević, ICTY-IT-02-54-AR73.5, A. Ch., 28 October 2003, p. 4.; ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, Prosecutor v. Karemera et al., ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 42.

\(^{230}\) ICTY, Dissenting Opinion of Judge David Hunt to the 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, Prosecutor v. Milošević, ICTY-IT-02-54-AR73.5, A. Ch., 28 October 2003, par. 8.

\(^{231}\) ICTY, Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber’s Decision Dated 28 October 2003 on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10
the ultimate probative value of a fact judicially noticed under Rule 94 (B) depends on whether one of the parties wishes to present evidence in rebuttal:

it appears that the taking of judicial notice of an adjudicated fact creates, if not a presumption, something like a presumption, in that the court must draw an inference that the adjudicated fact judicially noticed is accurate – but only unless and until rebutted.232

Judicial notice as envisaged by Hunt has the major advantage that as soon as the court has taken judicial notice of a proposed fact, the probative value of the particular fact is clear: conclusive and not open to evidence in rebuttal. Shahabuddeen more or less leaves it to the non-moving party to rebut the judicially noticed fact. This party-driven approach entails that when evidence in rebuttal is not presented, the fact that was presumed accurate during proceedings becomes conclusive evidence after the close of proceedings. In the Trial Chamber’s judgement in Krajišnik, for example, it remained unclear whether the Chamber regarded the hundreds of judicially noticed facts as conclusive evidence because the defence did not rebut these facts, or because the Chamber assessed their probative value in the context of all the evidence received and made a determination of the probative value itself.233

However, the Trial Chamber in Popović et al., recalling the probative value of facts under Rule 94 (B), did state that after the close of proceedings, judicially noticed facts are still to be assessed in the light of all the evidence, particularly evidence in rebuttal brought by the non-moving party.234 When such evidence in rebuttal is absent, the Chamber must still assess the weight of the well-founded presumption. If the Chamber concludes that the judicially noticed fact, ‘taking into consideration the totality of the trial record’, has probative value the fact is regarded as conclusive evidence. It transpires from the reasoning of the Trial Chamber in Hadžihasanović that facts relating to the historical, political or military context are fairly easily admitted under Rule 94 (B), but the probative value the Chamber adheres to such facts remains within the Chamber’s discretion.235 This results in a system of free admission of evidence, whereby the probative value of the admitted evidence is assessed after the close of

232 ICTY, Separate Opinion of Judge Shahabuddeen Appended to the Appeals Chamber’s Decision Dated 28 October 2003 on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Milošević, ICTY-IT-02-54-AR73.5, A. Ch., 31 October 2003, par. 21.
233 ICTY, Judgement, Prosecutor v. Krajišnik, ICTY-IT-00-39-T, T. Ch. I, 27 September 2006, par. 1197: ‘The Chamber took judicial notice of a number of adjudicated facts pursuant to Rule 94 (B). Adjudicated facts admitted into evidence are presumed to be accurate and do not need to be proven again at trial. However, the opposing party may bring evidence to disprove them. Thus, the Chamber has carefully evaluated adjudicated facts in this case in light of all the evidence received.’
234 ICTY, Judgement, Prosecutor v. Popović et al., ICTY-IT-0588-T, T. Ch. II, 10 June 2010, par. 71.
235 ICTY, Final Decision on Judicial Notice of Adjudicated Facts, Prosecutor v. Hadžihasanović and
proceedings.\textsuperscript{236} This seems inconsistent with the specific probative value the Appeals Chamber attaches to facts judicially noticed under Rule 94 (B). Assessing the ultimate probative value of the judicially noticed facts against the background of the entire evidentiary record is, however, consistent with the holistic approach to the weighing of evidence of the Chambers. Particular pieces of evidence will be weighed against the backdrop of the entire record.

4.3.4.5 Documentary Evidence

The probative value of judicially noticed documentary evidence deserves some distinct attention. The Trial Chamber in Milošević, referring to Milutinović, stated that ‘the legal effect of judicially noticing documentary evidence is to admit the documents into evidence and to use them for their contents and not merely for their existence and authenticity’.\textsuperscript{237} Moreover, the Trial Chamber attached the same probative value to judicially noticed documents as to judicially noticed facts.\textsuperscript{238}

In December 2010, the judges of the ICTY amended Rule 94 (B): judicial notice of documentary evidence entails that judicial notice of the \textit{authenticity} of the document is taken and not of its contents.\textsuperscript{239} Prior to the amendment, judicial notice was sometimes taken of both the authenticity and reliability of the document.\textsuperscript{240} Reliability, however, must be discerned from the probative value the Chamber ultimately attaches to the document. It seems that this criterion does not add anything substantial to the general requirements of relevance and probative value of Rule 89 (C).\textsuperscript{241}

At the ICTR, no amendment to Rule 94 (B) has been made, but it is established case law that judicial notice of documentary evidence only involves the authenticity


\textsuperscript{237} ICTY, Decision on Prosecution’s Motion for Admission of Documentary Evidence Pursuant to Rule 89 (C) and Rule 94 (B) of the Rules, \textit{Prosecutor v. Milošević}, ICTY-IT-98-29/1-T, T. Ch. III, 24 January 2007, p. 3.

\textsuperscript{238} ICTY, Decision on Prosecution’s Motion for Admission of Documentary Evidence Pursuant to Rule 89 (C) and Rule 94 (B) of the Rules, \textit{Prosecutor v. Milošević}, ICTY-IT-98-29/1-T, T. Ch. III, 24 January 2007, p. 3. ICTY, Decision on Prosecution Motion to admit Documentary Evidence, \textit{Prosecutor v. Milošević et al.}, ICTY-IT-05-87-T, T. Ch., 10 October 2006, par. 31.

\textsuperscript{239} Amendment of 8 December 2010. Article 15 of the ICTY Statute states that the judges shall adopt rules of procedure and evidence.


\textsuperscript{241} ICTY, Decision on Prosecution Motions for Judicial Notice of Documents Pursuant to Rule 94 (B), \textit{Prosecutor v. Šešelj}, ICTY-IT-03-67-T, T. Ch. III, 16 June 2008, par. 27.
and existence of the document, unless specifically stated otherwise.\textsuperscript{242} The existence and authenticity of documents stemming from organs of the United Nations, for example, do not require proof.\textsuperscript{243} The authenticity of documents is assessed by verifying the source and chain of custody of the document: in whose possession was the document before it was tendered into evidence?\textsuperscript{244}

4.3.4.6 Identifying Adjudicated Facts

Over the years, Trial Chambers have formulated requirements that must be fulfilled before a Chamber may take judicial notice. In Karadžić the Trial Chamber listed the requirements for adjudicated facts:

(a) The fact must be relevant to the current proceedings;
(b) The fact must be distinct, concrete, and identifiable;
(c) The fact, as formulated by the moving party, must not differ in any substantial way from the formulation of the original judgement;
(d) The fact must not be unclear or misleading in the context in which it is placed in the moving party’s motion. In addition, the fact must be denied judicial notice “if it will become unclear or misleading because one or more of the surrounding purported facts will be denied judicial notice”;
(e) The fact must be identified with adequate precision by the moving party;
(f) The fact must not contain characterizations of findings of an essentially legal nature;
(g) The fact must not be based on an agreement between the parties to the original proceedings;
(h) The fact must not relate to the acts, conduct, or mental state of the accused; and
(i) The fact must clearly not be subject to pending appeal or review.\textsuperscript{245}

Judicial notice may still be denied, however, when taking judicial notice would not be in the interest of justice. When discussing judicial notice of adjudicated facts, it is useful to distinguish between admissibility requirements and the discretionary power of the Chamber. The requirements summed up above are concerned with admissibility:

\begin{itemize}
\item \textsuperscript{242} E.g., ICTR, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, \textit{Prosecutor v. Bizimungu et al.}, ICTR-99-50-I, T. Ch. II, 2 December 2003, par. 32-44. ICTR, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54, \textit{Prosecutor v. Semanza}, ICTR-97-20-I, T. Ch. III, 3 November 2000, par. 38. The Trial Chamber stated that besides judicially noticing the existence and authenticity of the documents (Security Council Resolutions and statements by the President of that council) it also took judicial notice of its contents, because the Security Council is a UN organ that established the Tribunal.
\item \textsuperscript{244} ICTY, Judgement, \textit{Prosecutor v. Blagojević and Jokić}, ICTY-IT-02-60-T, T. Ch. I., 17 January 2005, par. 29.
\item \textsuperscript{245} ICTY, Decision on Accused’s Motion for Judicial Notice of Adjudicated Facts Related to Count One, \textit{Prosecutor v. Karadžić}, Case No.: IT-95-5/18-T, T. Ch., 21 January 2014, par. 6.
\end{itemize}
is the proposed fact truly adjudicated and does it not relate to the individual criminal responsibility of the accused? If all these criteria have been met, it still remains within the Chamber’s discretion to deny judicial notice.\footnote{This includes both the Trial and Appeals Chamber. Rule 107 of the ICTY RPE: ‘The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply \textit{mutatis mutandis} to proceedings in the Appeals Chamber.’ Cf. ICTY, Decision on the Motions of Drago Josipovic, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94 (B), \textit{Prosecutor v. Kupreškić et al.}, ICTY-IT-95-16-A, A. Ch., 8 May 2001, par. 6. The Appeals Chamber did, however, limit the scope of Rule 94 (B) in this decision. It stated that, before taking judicial notice, it must have received a request from a party. This seems to contradict the plain wording of Rule 94 (B) that allows Chambers to take judicial notice \textit{proprio motu}.} The criteria emphasise that every proposed fact must have been contested during the previous proceedings, which is the reason why facts contained in plea agreements or agreements of fact cannot be judicially noticed under Rule 94 (B). A fact is considered an agreed fact:

where the structure of the relevant footnote in the original judgement cites the agreed facts between the parties as a primary source of authority. If a Trial Chamber cannot readily determine, by examining the citations in the original judgement, that the fact was not based on an agreement between the parties, it must refrain from taking judicial notice of the fact.\footnote{ICTY, Decision Granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), \textit{Prosecutor v. Stanišić and Župljanin}, ICTY-IT-08-91-T, T. Ch. II, 1 April 2010, par. 38.}

Chambers have to make sure that facts contained in judgements are indeed adjudicated facts and not the summing up of witness statements: it needs to be considered whether the Chamber accepted the fact as evidence and ‘made its findings in accordance with it.’\footnote{ICTY, Decision Partially Granting Motion of Mićo Stanišić for Judicial Notice of Adjudicated Facts, \textit{Prosecutor v. Stanišić and Župljanin}, ICTY-IT-08-91-T, T. Ch. II, 29 June 2011, par. 5.}

\textbf{It follows that proposed facts may not be under appeal or review because only facts that have been settled conclusively are eligible for judicial notice.} Although facts must have been contested at least once, problems may arise when an accused in the original proceedings only marginally contested a fact because it was of minor relevance for his case. When the fact is of great relevance for the case of another accused in later proceedings, it is questionable whether the fact was really contested during the original proceedings and eligible for judicial notice.\footnote{As the Appeals Chamber stated in \textit{Karemera}: ‘there is reason to be particularly sceptical of facts adjudicated in other cases when they bear specifically on the on the actions, omissions, or mental state of an individual not on trial in those cases as 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.’ ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, \textit{Prosecutor v. Karemera}, ICTR-98-44-AR73(C), A. Ch., 16 June 2006, par. 51.} Judicially noticed
facts may not go to the acts, conduct or mental state of the accused, which diminishes the danger of infecting the evidentiary record with matters that were only marginally contested. Within the context of Rule 92bis, the Trial Chamber in Slobodan Milošević held that acts and conduct of the accused is a ‘plain expression and should be given its ordinary meaning: deeds and behavior of the accused.’\textsuperscript{250} The Appeals Chamber in Galić distinguished, also within the context of Rule 92bis, between:

(a) the acts and conduct of those others who commit the crimes for which the indictment alleges that the accused is individually responsible, and (b) the acts and conduct of the accused as charged in the indictment which establish his responsibility for the acts and conduct of those others.\textsuperscript{251}

The latter category concerns the ‘real’ acts and conduct of the accused of which no judicial notice can be taken. The above decisions concern Rule 92bis, but they are applicable to Rule 94 (B) as well: both Rules aim to tender into evidence those facts that provide the background for the accused’s actions. Neither Rule was intended to facilitate the prosecutor in proving the individual criminal responsibility of the accused. Facts contained in judgements under appeal may still be eligible if the appeal does not touch upon the accuracy of those particular facts. When the appeal is solely concerned with sentencing, for example, the factual basis is not subject to appeal. The Trial Chamber in Delić, however, declined to take judicial notice of any fact deriving from the trial judgement in Hadžihasanović (delivered by another Chamber) because the defence of the accused Hadžihasanović had filed an appeal challenging the ‘methodology of the conduct of the trial.’\textsuperscript{252} The defence argued that by systematically questioning witnesses, the Trial Chamber had erred in law and gave the impression of partiality. Without commenting on the merits of this argument, the Delić Trial Chamber concluded that if the Appeals Chamber would find merit in the submissions of the defence, it would render the whole trial judgement unsafe, including any factual conclusion. Therefore, no judicial notice of any fact from the Hadžihasanović judgement could be taken.\textsuperscript{253}

According to Karemera, adjudicated facts do not have to be beyond reasonable dispute.\textsuperscript{254} This enhances the adversarial character of proceedings: the judicially no-

\textsuperscript{250} ICTY, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of viva voce Testimony pursuant to Rule 92bis(D) - Foča Transcripts, Prosecutor v. Slobodan Milošević, ICTY-IT-02-54-T, T. Ch., 30 June 2003, par. 11.
\textsuperscript{251} ICTY, Decision on Interlocutory Appeal Concerning Rule 92bis (C), Prosecutor v. Galić, ICTY-IT-98-29-AR73.2, A. Ch., 7 June 2002, par. 9.
ticed fact remains rebuttable during proceedings, even if the fact was conclusive evidence in the original proceedings.255

An important question is whether judicial notice can be taken of facts that are disputed by the non-moving party. Chambers are obliged to hear parties on motions requesting judicial notice. It is not necessary that the parties agree on the proposed fact, and if one party objects, the Chamber may still take judicial notice.256 The fact that agreement is not necessary also follows from the possibility to present evidence in rebuttal. Unlike other Trial Chambers, the Chamber in Šešelj stated that judicial notice may only be taken when the proposed fact cannot reasonably be contested by the opposing party.257 This runs counter to the principle that facts judicially noticed under Rule 94 (B) are rebuttable. If the Trial Chamber finds, a priori, that a judicially noticed fact cannot be contested, then judicial notice under Rule 94 (B) would result in the same probative value as judicial notice under Rule 94 (A): conclusive, instead of rebuttable evidence. Considering the consistent case law on the requirements of Rule 94 (B), it is not a prerequisite for judicial notice that the non-moving party cannot reasonably contest the judicially noticed fact. The Trial Chamber in Šešelj erred in this respect.

4.3.4.7 Discretionary Power

When the admissibility requirements are met, Chambers still enjoy discretion to deny judicial notice. It will be denied if it is in the interests of justice to do so, in particular when taking judicial notice would not comply with the rights of the accused to a fair and expeditious trial.258 The Trial Chamber in Popović et al. refused to take judicial notice of a number of facts on the basis of its discretionary power. The overarching consideration of the Chamber was whether taking judicial notice would indeed enhance judicial economy while preserving the fair trial rights of the accused. Attention

255 Cf. ICTY, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94 (B), Prosecutor v. Mejakić et al., ICTY-IT-02-65-PT, T. Ch., 1 April 2004. The Trial Chamber stated explicitly that the facts judicially noticed pursuant to Rule 94 (B) are subject to evidence in rebuttal.
must be paid to the volume and type of evidence the accused is expected to produce if he wishes to challenge a judicially noticed fact: if it is likely that an accused will challenge a judicially noticed fact, judicial economy will not be served. On the contrary, it might even take more time to present evidence in rebuttal. It is then in the interest of justice to deny judicial notice, despite the fact that all admissibility requirements are fulfilled. Trial Chambers have taken judicial notice of thousands of facts, resulting in a significant burden for the accused to present evidence in rebuttal if he wishes to do so. In Krajišnik, the Trial Chamber warned the prosecution that large numbers of facts that refer to ‘highly detailed descriptions of minor incidents’ might result in a unmanageable quantity of judicially noticed facts.

If an accused objects to judicial notice and announces to present evidence in rebuttal, the Chamber may decide to refuse judicial notice: presenting evidence in rebuttal will take considerable time, thereby nullifying the aim of promoting judicial economy. In Mejakić, the Chamber, in its discretion, denied judicial notice of facts that 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.’ Some of these categories (relevance, too broad, too tendentious) are reminiscent of the admissibility criteria, discussed above. When there is a significant difference between the factual findings of two judgements, Chambers will most likely deny judicial notice.

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260 E.g. ICTY, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), Prosecutor v. Tolimir, Case No. IT-05-88/2-PT, 17 December 2009 (judicial notice was taken of over 500 facts); ICTY, Decision Granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), Prosecutor v. Stanišić and Župljanin, Case No. IT-08-91-T, T. Ch. II, 1 April 2010 (judicial notice was taken of over 1,000 facts); ICTY, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts, 5 June 2009; Decision on Second Motion for Judicial Notice of Adjudicated Facts, 9 October 2009; Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, 9 July 2009; Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2009; Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Karadžić, Case No. IT-95-5-/18-T, T. Ch. III, 14 June 2010. In these five decisions, the Trial Chamber took judicial notice of over 2,400 facts.
262 ICTY, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94 (B), Prosecutor v. Tolimir, ICTY-IT-05-88/2-PT, T. Ch. II, 17 December 2009, par. 32.
4.3.4.8 Documentary Evidence

Rule 94 (B) concerns both adjudicated facts and documentary evidence. However, the requirements for adjudicated facts and documentary evidence are not the same.\(^{265}\) Documentary evidence ‘consists of documents produced as evidence for evaluation by the Tribunal’.\(^{266}\) It includes ‘not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, videotapes, photographs, slides and negatives.’\(^{267}\) Documentary evidence does not need to be adjudicated: the only requirements are that the documents were admitted into evidence into previous proceedings and are relevant to the case.\(^{268}\) Since the amendment of Rule 94 (B) in the ICTY Rules of Procedure and Evidence, the Chamber has to determine whether the document was authenticated and admitted into evidence in the original proceedings. It is immaterial whether or not the documents are under appeal or review: the only test is whether they are relevant and authentic.\(^{269}\) This leaves open the possibility that a party challenges the authenticity of the documents on appeal in the original proceedings. What if the Appeals Chamber in the original proceedings finds the document not to be authentic after all? The conclusion must be that the well-founded presumption of the authenticity of the documentary evidence no longer exists and that the Chamber in the case at hand must determine the rele-


\(^{266}\) ICTR, Judgement, Prosecutor v. Musema, ICTR-96-13-T, 27 January 2000, par. 53.


\(^{268}\) ICTY, Decision on Appellant’s Motion for Judicial Notice, Prosecutor v. Nikolić, ICTY-IT-02-60/1-A, A. Ch., 1 April 2005, par. 45. Referring to the Trial Chamber in Bizimungu. Rule 94 (B), as the Appeals Chamber held, may not be used to circumvent the general requirements of relevance and probative value of Rule 89 (C). This includes a \textit{prima facie} determination of whether the documents are reliable. The statement by Nerenberg and Timmermann that reliability does not need to be demonstrated when judicial notice is taken of that document is therefore unsound. M. Nerenberg, W. Timmermann, Documentary Evidence in: K.A.A. Khan, C. Buisman, C. Gosnell (eds.), Principles of Evidence in International Criminal Justice, Oxford University Press, Oxford 2011, p. 457. Cf. K.A.A. Khan, R. Dixon, Archbold International Criminal Courts Practice, Procedure and Evidence, Sweet & Maxwell, London 2009, p. 723.

\(^{269}\) ICTY, Decision on the Prosecution’s Motion for Judicial Notice of Intercepts Related to the Sarajevo Component and Request for Leave to Add One Document to the Rule 65 ter Exhibit List, Prosecutor v. Karadžić, ICTY-IT-95-5/18-T, T. Ch., 4 February 2011, par. 16.
vance and authenticity of that evidence itself, bearing in mind the Appeals Chamber’s decision.

4.3.4.9 Judicial Notice and the Probandum

It is established case law that judicial notice may not go to the acts, conduct or mental state of the accused. In other words, judicial notice of the actus reus and mens rea is not allowed. Nevertheless, facts must be relevant to the proceedings and must have some (remote) connection to the criminal responsibility of the accused. The Appeals Chamber in Karemera held that:

Facts that are not related, directly or indirectly, to that criminal responsibility are not relevant to the question to be adjudicated at trial, and, as noted above, thus may neither be established by evidence nor through judicial notice. So judicial notice under Rule 94 (B) is in fact available only for adjudicated facts that bear, at least in some respect, on the criminal responsibility of the accused.²⁷⁰

This balancing exercise between the relevance of the proposed fact and the prohibition to judicially notice acts or the mental state of the accused has, until the present day, caused much controversy. Dragomir Milošević provided an instructive example in this regard. The prosecution requested the Trial Chamber to take judicial notice of facts derived from the trial and appeal judgement in Galić. The proposed facts concerned the shelling and sniping campaign launched by the Sarajevo Romanija Corps (SRK) against the civilian population of Sarajevo between 1992 and 1994. The SRK stood under the command of Galić until Milošević took over in the summer of 1994. The prosecution alleged that Milošević ‘inherited and continued’ this campaign and, therefore, had knowledge or was put on notice of the crimes committed under Galić’s command. This would go to prove the allegation in the indictment that the accused continued this shelling and sniping campaign and was aware of its existence since May 1992.²⁷¹ The Trial Chamber concluded first that none of the facts derived from Galić related to the acts, conduct or mental state of the accused. It then stated that the acts committed under the command of the accused’s predecessor have a ‘strong link’ with the crimes the accused is charged with, ‘particularly those which may in effect put the Accused on notice.’²⁷² Apparently, putting the accused on notice does not re-

²⁷¹ ICTY, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecu-
²⁷² ICTY, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecu-
late to the mental state of the accused.\textsuperscript{273} The Trial Chamber, in its discretion, denied judicial notice of these facts because to judicially notice them would be inconsistent with the accused’s rights, in particular his right to examine witnesses. Judicial notice would result in imposing a burden to produce evidence to rebut those facts. Reference is made to Karemera, where the Appeals Chamber held that in exercising their discretion, Chambers must take into account proposed facts that relate to conduct of physical perpetrators for which the accused is held accountable.\textsuperscript{274} Both parties appealed the Milošević decision. The prosecution appealed on the ground that the Trial Chamber had erroneously exercised its discretion. The Appeals Chamber held that judicial notice may be taken of the existence of crimes committed by others for which the accused is held accountable: the \textit{actus reus} and \textit{mens rea}, however, must be proved by other means than judicial notice.\textsuperscript{275} Judicially noticing the existence of these crimes does not imply that the accused knew they were committed or was put on notice.\textsuperscript{276} Accordingly, the Trial Chamber erred in exercising its discretion: the rights of the accused are fully respected when judicial notice is taken of these facts, as long as no inferences are drawn regarding the mental state of the accused.

In Kvočka et al., the Trial Chamber took judicial notice of 444 facts agreed upon by the parties. The facts were derived from the Trial Chamber judgements in Tadić and Čelebići. The Trial Chamber judicially noticed the common elements of Articles 3 and 5 of the Statute (violations of the laws or customs and war and crimes against hu-


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manity, respectively). The Trial Chamber considered that at the relevant times and places there existed an armed conflict, which included a widespread and systematic attack against the Muslim and Croat civilian population, and that there was a nexus between the armed conflict and the widespread and systematic attack on the civilian population. It further took judicial notice of the existence of the Omarska, Keraterm and Trnopolje detention camps and the mistreatment of prisoners in those camps. This decision is remarkable for two reasons. First, the Trial Chamber took judicial notice of all the contextual elements of the crimes alleged: a significant part of the probandum. Second, it explicitly decided that those elements were established. Normally, Trial Chambers merely state that they take judicial notice of certain facts. In this case, the Trial Chamber gave the judicially noticed facts a different status: instead of a well-founded presumption of accuracy, it regarded those facts as proven beyond reasonable doubt. In the judgement, the Trial Chamber reiterated the existence of the contextual elements and referred to its judicial notice decision, thereby explicitly stating that the contextual elements were proven by judicial notice.

4.3.4.10 No Legal Characterisations

Under Rule 94 (A) legal characterisations can be judicially noticed: it is immaterial whether or not facts are put in legal terms. If a fact is indisputable, judicial notice has to be taken. This differs from Rule 94 (B), which precludes taking judicial notice of legal characterisations.

Factual findings concern questions such as: ‘Was witness A in village X at a certain date?’, ‘Did he see people getting killed?’, ‘Did he recognise certain persons killing others?’. These are plain, factual questions that do not involve the interpretation of any legal principle. Assume that witness A testified on these questions and that a Trial Chamber concluded that the testimony is reliable and that it is proven beyond reasonable doubt that witness A was present in village X at a certain date and

277 The facts were also agreed upon by the parties. Taking judicial notice of adjudicated facts, however, is the sole prerogative of the Trial Chamber: it is irrelevant whether the parties agree on the facts.


279 ‘Decides that at the times and places alleged in the indictment, there existed an armed conflict; that this conflict included a widespread and systematic attack against notably the Muslim and Croat civilian population; and that there was a nexus between this armed conflict and the widespread and systematic attack on the civilian population and the existence of the Omarska, Keraterm and Trnopolje camps and the mistreatment of the prisoners therein.’ ICTY, Decision on Judicial Notice, Prosecutor v. Kvočka et al., Case No.: IT-98-30/1-T, T. Ch., 8 June 2000, p. 7.

280 ICTY, Judgement, Prosecutor v. Kvočka et al., Case No.: IT-98-30/1-T, T. Ch. 2 November 2001, par. 122, 790.

281 E.g. the early decision in Simić. ICTY, 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, Prosecutor v. Simić et al., ICTY-IT-95-9-PT, T. Ch., 25 March 1999, p. 3.
recognised people killing others. This factual finding may then, provided it does not attest to the acts or conduct of the accused, be judicially noticed under Rule 94 (B). If, however, the Trial Chamber concluded on the basis of this testimony that the killings constituted murder, judicial notice may not be taken, because this is a legal finding based upon facts provided by the witness.\textsuperscript{282}

The conclusion that the accused committed crimes against humanity is the prerogative of the Chamber hearing the case and cannot be judicially noticed as such. In the Tribunals’ case law, findings such as ‘widespread and systematic attack’\textsuperscript{283}, ‘civilian population’\textsuperscript{284} and ‘armed conflict’\textsuperscript{285} have been judicially noticed. This raises the question of whether legal components of crimes may be judicially noticed. A finding is legal, ‘when it involves interpretation or application of legal principles.’\textsuperscript{286} The Trial Chamber in \textit{Krajišnik} stated that:

many findings have a legal aspect, if one is to construe this expression broadly. It is therefore necessary to determine on a case-by-case basis whether the proposed fact contains findings or characterizations of an essentially legal nature, and which must, therefore, be excluded.\textsuperscript{287}

The Chamber gave no guidance on how to discern an essentially legal characterisation. In decisions on judicial notice in \textit{Karadžić}, the objection was raised by the defence that the proposed facts are, or contain, essentially legal characterisations. The Chamber provided little or no reasons why the contested facts were not legal characterisations. It is often stated that:

the Chamber has carefully assessed each of the disputed facts in determining whether it contains findings or conclusions of an essentially legal nature, and is satisfied that in none of the proposed facts challenged by the Accused, the abovementioned terms are used in such a way as to render the facts essentially legal in nature.\textsuperscript{288}

\textsuperscript{282} Cf. Dutch criminal procedure, where these questions are clearly separated in Article 350 CCP. The court has to first determine whether the accused committed the acts alleged. Then, the court determines whether the acts constitute the crime alleged.


For example, Trial Chambers deemed the following facts to be of an essentially legal nature: relating to the charge of deportation, ‘the non-Serb population did not leave on their own free will’, ‘the measure was intended to dissuade the Bosnian Muslims and the Bosnian Croats leaving the territory from returning at a later stage’, ‘military operations were undertaken with the specific purpose to drive Bosnian Muslim and Bosnian Croat residents away’, ‘Bosnian Muslim and Bosnian Croat departures were involuntary in nature,’ and ‘on 12 and 13 July 1995, upon the arrival of Serb forces in Potocari, the Bosnian Muslim refugees taking shelter in and around the compound were subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes and murders.’

Whether a particular fact contains an essentially legal finding is hard to determine, and Chambers have interpreted this criterion in different ways. The conclusion must be that components of international crimes (which are sometimes legal characterisations or of a legal nature themselves) are judicially noticed on a regular basis.

4.3.4.11 Submission by the Parties or Proprò Motu?

The prosecution, defence and the Chamber itself may take the initiative to take judicial notice of adjudicated facts or documentary evidence. Unlike Rule 94 (A), it is obligatory to hear both parties before judicial notice can be taken. Mostly, it is the prosecution that files a motion for judicial notice of adjudicated facts or documentary evidence. A Chamber is not obliged to take judicial notice when both parties file a motion to that end. In Stanislić, for example, the prosecution did not oppose 18 facts for which the defence requested judicial notice. The Trial Chamber did not consider whether these proposed facts complied with the Rule 94 (B) criteria but admitted them under Rule 65ter (H) instead.\footnote{T. Ch., 9 July 2009, par. 41; ICTY, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Karadžić, ICTY-IT-95-5/18-PT, T. Ch., 14 June 2010, par. 47.}

This Rule states that points of agreement on matters of law and fact shall be recorded.\footnote{ICTY, Decision on Second Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Karadžić, ICTY-IT-95-5/18-PT, T. Ch., 9 October 2009, par. 45. Emphasis omitted.} Although the proposed facts were admitted into evidence, they lack the specific probative value of Rule 94 (B): they are part of the trial record, but are not well-founded presumptions. It is remarkable that the Chamber did not determine whether the criteria of Rule 94 (B) had been met. By admitting those facts into evidence pursuant to Rule 65ter (H), the Chamber may have interfered with the case strategy of the parties. It would have been better to apply the Rule 94 (B) test and, if some proposed facts were denied judicial notice, invite the parties to file sep-

\footnote{ICTY, Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Karadžić, ICTY-IT-95-5/18-PT, T. Ch., 9 July 2009, par. 45.}

\footnote{ICTY, Decision on Judicial Notice, Prosecutor v. Stanislić, ICTY-IT-04-79-PT, T. Ch. II, 14 December 2007, par. 31.}

\footnote{The Rule refers to the pre-trial Judge, but Rule 65 ter (M) allows the Trial Chamber to exercise any of the functions of the pre-trial Judge.}
arate motions on factual or legal agreements. Interestingly, after Stanišić was joined with the case of Stojan Župljjanin, the same Trial Chamber (composed of different judges, though) observed that the absence of any objection by the non-moving party does not mean the facts proposed for judicial notice are agreed upon pursuant to Rule 65ter (H): ‘It is in the interest of justice to consider facts proposed by one party, to which the other party does not object, as adjudicated facts. This allows the other party to challenge the proposed fact at trial.’

4.3.4.12 Judicial Notice and Appeal Proceedings

Decisions on judicial notice of the ad hoc Tribunals are open to interlocutory appeal when the criteria of Rule 72 (B) ICTY RPE or Rule 73 (B) ICTR RPE are met. The standard of appellate review on Trial Chamber’s decisions on judicial notice under Rule 94 (B) was described by the Appeals Chamber:

a Trial Chamber’s exercise of discretion will only be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patentely incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.

The scope of review for factual findings is rather limited, especially when parties wish to challenge a Trial Chamber’s decision that denied judicial notice based on discretionary considerations. Normally, when the Appeals Chamber concludes that the Trial Chamber erred in applying Rule 94 (B), the decision will be remanded; the Appeals Chamber will not evaluate all the proposed facts itself.

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293 ICTY, Decision granting in Part Prosecution’s Motions for Judicial Notice of Adjudicated Facts pursuant to Rule 94 (B), Prosecutor v. Stanišić and Župljjanin, ICTY-IT-08-91-T, T. Ch. II, 1 April 2010, par. 27.
294 Interlocutory appeal may be lodged with certification of the Trial Chamber. Certification can be granted when the issue can significantly affect a fair and expeditious trial or the outcome of the trial and for which, according to the Trial Chamber, an immediate resolution by the Appeals Chamber is required.
296 ICTY, Decision on Interlocutory Appeals Against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s Catalogue of Agreed Facts, Prosecutor v. Dragomir Milošević, ICTY-98-29/1-AR73.1, A. Ch., 26 June 2007; ICTY, Decision on Appeals Chamber Remand of Judicial Notice of Adjudicated Facts with Separate Opinion of Judge Robinson, Prosecutor v. Dragomir Milošević, ICTY-98-29/1-T, T. Ch. III, 18 July 2007; ICTY, 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, Prosecutor v. Slobodan Milošević, ICTY-IT-02-54-AR73.5, A. Ch., 28 October 2003, p. 3. ICTR, Decision on Prosecutor’s Interlocutory Appeal of Deci-
This approach is in line with the manner in which fact-finding is conducted on appeal. The ICTY and ICTR Statutes state that the Appeals Chamber shall hear appeals when an error of fact has resulted in a miscarriage of justice. This indicates that the burden for a party to challenge a factual finding of a Trial Chamber is quite high: a factual error as such is insufficient as a ground for appeal; the error must have resulted in a miscarriage of justice. The Appeals Chamber emphasised that fact-finding is primarily the task of the Trial Chamber; the Appeals Chamber will only substitute its own factual finding if the Trial Chamber’s finding is ‘wholly erroneous’.  

4.3.4.13 Quantitative Analysis of Judicial Notice at the ad hoc Tribunals

Judicial notice of adjudicated facts and documentary evidence is a frequently used shortcut to proof in proceedings before the ICTY. In a substantial number of cases, judicial notice has been taken of adjudicated facts and documentary evidence. At the ICTR, judicial notice of adjudicated facts and documentary evidence has been taken in only 6 out of 77 cases. The number of judicially noticed facts is significantly lower than at the ICTY.

In the cases in which judicial notice was taken, on average 551 facts were noticed by ICTY Trial Chambers; ICTR Trial Chambers took judicial notice of 22 facts, on average. The average number of judicially noticed facts provides only an indication of the diverging practices of the ICTY and ICTR, because the differences between individual cases at the respective Tribunals are substantial. In Sikirica et al., for example, ICTY Trial Chamber III took judicial notice of 45 adjudicated facts, whereas ICTY Trial Chamber I in Stanišić & Simatović took judicial notice of 1,003 facts. The same

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holds true for the ICTR Trial Chambers: in *Bizimungu et al.* Trial Chamber II took judicial notice of 2 adjudicated facts; Trial Chamber III in *Karemera et al.* took notice of 102 facts.302

Table 1. (see pages 202 to 207) gives an overview of the cases before the ICTY and ICTR in which Trial Chambers have taken judicial notice of adjudicated facts and documentary evidence. The first four columns list the tribunal, case, case number and the date on which a decision on judicial notice has been taken. In some cases only one decision on judicial notice has been taken, whereas in others as many as seven have been taken. In columns five and six the number of adjudicated facts and documentary evidence are listed for each judicial notice decision. Column seven lists the sources of the adjudicated facts and documentary evidence: in *Stanković*, for example, the 36 facts of which notice was taken are derived from the Trial Chamber's judgement (‘TJ’) and Appeal Chamber's judgement (‘AJ’) in *Kunarac*. Remarks are made in column eight; columns nine and ten list the total number of adjudicated facts and documentary evidence for each case.

It follows from Table 1. that judicial notice of adjudicated facts and documentary evidence is not taken frequently at the ICTR. When it is taken the number of facts is negligible compared to ICTY practice, *Karemera et al.* being a notable exception. The difference between the practice at the ICTY and the ICTR can probably be explained by the appeal judgement in *Semanza* (2005) and the interlocutory decision of the Appeals Chamber in *Karemera et al.* (2006). As was stated before, the Appeals Chamber considered important contextual elements of genocide, crimes against humanity and war crimes to be of common knowledge.303 When contextual elements are proven under Rule 94 (A), the need to take notice of those contextual elements as adjudicated facts is superfluous: the elements are considered notorious and therefore proven. The Appeals Chamber’s findings in *Semanza* and *Karemera et al.* are unparalleled in ICTY case law on the Yugoslav conflict. The Appeals Chamber has never ruled as categorically on the Yugoslav conflict regarding its legal character as it has done regarding the Rwandan conflict. The Trial Chamber in *Simić*, referring to the Appeals Chamber in *Tadić*, stated:

> it would be for each Trial Chamber, depending on the circumstances of each case, to make its own determination on the nature of the armed conflict upon the specific evi-

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Popović, Vujadin et al.  IT-05-88-T  26 September 06  260  Krstić TJ/AJ; Blagojević & Jokić TJ

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Perišić, Momcilo  IT-04-81-PT  26 June 08  262  Galić TJ/AJ

01 September 08  30  Popović Decision

Documentary evidence may be derived from decisions. Cf. Par. 9.2.5.
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\(^1\) Includes 2 Tribunal judgements in IT-08-91-T and 3 Tribunal judgements in IT-09-92.
(Footnotes)

1  ICTY, Decision on Ratko Mladić’s Appeal Against the Trial Chamber’s Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Mladić, Case No.: IT-09-92-AR73.1, A. Ch., 12 November 2013, par. 2

2  The Appeals Chamber, in an interlocutory decision, removed 61 facts from the lists of judicially noticed facts. According to the Appeals Chamber, the Trial Chamber exceeded its discretion in noticing these facts. ICTY, Decision on Ratko Mladić’s Appeal Against the Trial Chamber’s Decisions on the Prosecution Motion for Judicial Notice of Adjudicated Facts, Prosecutor v. Mladić, Case No.: IT-09-92-AR73.1, A. Ch., 12 November 2013.

Table 1. Overview judicial notice ICTY and ICTR March 1999 – June 2011.
If the Appeals Chamber had ruled that the existence and character of an armed conflict in a certain region was common knowledge, it is likely that the number of judicially noticed adjudicated facts in ICTY proceedings would have been much lower. Considering that ICTR practice on judicial notice pursuant to Rule 94 (B) is negligible, the focus in the following pages will be on ICTY case law.

The first decision on judicial notice was taken in March 1999 in Kvočka et al. This decision was taken after trial judgements were handed down in Tadić (May 1997) and Čelebići (November 1998), which had resulted in a considerable number of adjudicated facts. The number of judicially noticed facts is on the rise since the end of 2007. There are several reasons for this trend.

First, more and more factual findings have been made by the Trial Chambers, which increased the number of adjudicated facts of which judicial notice could be taken. The sources from which the adjudicated facts or documentary evidence are selected have become more varied over the years, although early judgements such as Tadić and Čelebići remain an important source for adjudicated facts.

Second, the completion strategy of the ICTY encouraged Chambers to speed up the proceedings as much as possible. In 2006 for example, the ICTY judges adopted recommendations of the ‘Working Group on Speeding Up Trials’, which was established to investigate how proceedings could be conducted more efficiently. The Working Group was composed of Judges Bonomy, Hanoteau and Swart. The greater use of judicial notice of adjudicated facts (especially in the pre-trial phase of the proceedings) was one of the recommendations. This recommendation was endorsed by the judges of the Tribunal and brought into practice.

Third, considering the factual findings in other cases, defence counsel might reason that it is useless to object to all proposed facts contained in the prosecution’s judicial notice motions, because certain facts have been proven over and over again.

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304 ICTY, 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, Prosecutor v. Simić et al., ICTY-95-9-PT, T. Ch., 25 March 1999, p. 4.
306 See column 7 of Table 1.
This means that the Trial Chamber is confronted with a motion by the prosecution, to which the defence does not object, or only on minor points. The Trial Chamber, provided that the admissibility requirements for judicial notice are fulfilled, might reason that it is of no use to not judicially notice a fact to which both parties agree and which has been proven by other Chambers. It is hard to trace such reasoning in the text of the decisions. When it can be traced, it is still rather anecdotal and easily contradicted by cases in which the accused is uncooperative and opposes all facts proposed for judicial notice. For example, in Stanišić & Simatović, the defence did not object to judicial notice of hundreds of facts. In Karadžić, on the other hand, the accused opposed every judicial notice motion filed by the prosecution. Nevertheless, if both parties agree on judicial notice of certain facts, Trial Chambers are reluctant to not notice such facts.

The primary aim of judicial notice, as has been stated before, is to enhance judicial economy. It follows that when adjudicated facts meet the admissibility requirements for judicial notice, those facts do not have to be proven again during trial proceedings: they are presumed to be correct. Since all evidence must comply with the requirements of Rule 89 (C), judicially noticed facts are relevant and have (some) probative value. One would expect that such facts become conclusive evidence unless (1) other evidence of a fact in issue is presented, and that evidence is considered more reliable than taking judicial notice of the particular fact; (2) the non-moving party has presented successfully evidence in rebuttal; or (3) after the close of proceedings, the judicially noticed fact is found to be irrelevant or unreliable in light of all the evidence presented. One would also expect that the majority of judicially noticed facts will be incorporated in the final judgement: it is inefficient to take judicial notice and not use those facts in the judgement.

In order to test the assumption that judicially noticed facts are normally incorporated in the judgement unless the fact is replaced by better evidence, rebutted or found unreliable or irrelevant after all, four ICTY cases have been analysed in detail: Krajišnik, Kvočka et al., Dragomir Milošević and Popović et al. In these cases, a sub-

313 The evidence can be presented by the party that filed the motion for judicial notice, or by order of the Trial Chamber pursuant to Rule 98 ICTY RPE (production of additional evidence)
314 Non-moving party refers to the party that is invited to comment upon a motion for judicial notice filed by the other party. In the majority of cases, the prosecution (the moving party) files a motion for judicial notice upon which the defence may respond (non-moving party).
A substantial number of facts have been judicially noticed. All cases have been finally settled on appeal.

In Tables 2. and 3. (see pages 212 and 213), the practice of judicial notice in these four cases is shown. In the first column of both tables the sources of the adjudicated facts are listed and in the second column the number of facts derived from a particular source. The third column indicates, as a percentage, the relative size of the facts derived from a particular source. For example, in *Krajišnik*, 252 facts have been judicially noticed that were derived from the Trial Chamber’s judgement in *Tadić*. Those 252 facts correspond to 39% of the total number of adjudicated facts in *Krajišnik*. Both Tables also indicate how many judicially noticed facts have been incorporated in the final judgement. In *Krajišnik*, 488 out of 645 judicially noticed facts have been used in the final judgement, which equals 76%. From these Tables, the following observations can be made.

First, the number of judicially noticed facts that is incorporated in the Trial Chamber’s judgement is remarkably low. Even in *Krajišnik*, which shows the highest percentage of used facts, only three-quarter of the judicially noticed facts are incorporated in the judgement. The percentages in *Popović et al.* (47%) and *Dragomir Milošević* (28%) are significantly lower, and in *Kvočka et al.*, only a mere 2% of previously judicially noticed facts is included in the judgement. Considering the aim of judicial economy and the recommendations by the Working Group on Speeding Up Trials, this begs the question of how judicial notice can speed up trials when, in the end, so little use is made of it.

Second, facts that are judicially noticed are predominantly derived from one single source. In *Krajišnik*, 252 facts are judicially noticed on the basis of one source: the *Tadić* trial judgement. The same holds true for the 199 facts derived from the *Krnojelac* trial judgement. Only 30 facts out of a total of 645 are derived from multiple sources: 26 facts from the trial judgements in both *Tadić* and *Čelebići* and 4 from *Krnojelac* and *Kunarac*. In *Kvočka et al.*, 50 out of 444 facts are derived from multiple sources and in *Popović et al.* 107 out of 328. In *Dragomir Milošević*, all facts are derived from a single Trial Chamber’s judgement. This means that a substantial number of judicially noticed facts have been scrutinised only once: in the original proceedings, which were held (many) years ago. One could argue that cases which are often used as sources for judicial notice, such as *Tadić* and *Čelebići*, have been finally settled on appeal, which provides an additional factual check: if the Trial Chamber erred on the facts, the Appeals Chamber is able to rectify the mistake. We have seen, however, that the standard for appellate review on factual issues is relatively high.

If we take a closer look at the facts that were judicially noticed but not incorporated in the judgement, it appears that Trial Chambers rarely explain why certain facts have
not been included the judgement. In general, judgements contain an introductory paragraph in which the Chamber indicated how it has evaluated particular types of evidence that were presented during the proceedings. On judicial notice, a general remark is often made that judicially noticed facts are considered against the background of all the evidence available.

Judicially noticed facts can be left out the judgement when better evidence or evidence in rebuttal is presented, or when the Trial Chamber reconsiders its earlier decision on judicial notice. An example of the first category can be found in Popović et al., where the Trial Chamber took judicial notice of the fact that:

The plan for Krivaja 95 specifically directed the Drina Corps to 'split apart the enclaves of Zepa and Srebrenica and to reduce them to their urban areas.'

This fact had been adjudicated in the Krstić trial judgment. In the Popović et al. judgement, this fact is incorporated in the Chamber’s factual findings, but no reference is made to its earlier decision on judicial notice. Instead, the source for this fact is an order given by the Drina Corps Command in July 1995. Such an order is a more direct and better piece of evidence. In Krajišnik, of the 157 judicially noticed facts that were not used in the judgement, 19 facts were proven by other evidence; in Kvočka et al., of the 435 unused facts only 1 fact was proven by other evidence; in Dragomir Milošević, no better evidence was presented; and in Popović et al., 7 of the 173 judicially noticed facts not used in the judgement were proven by other evidence.

The second category, successful presentation of the evidence in rebuttal by the non-moving party, is not easily detected. To determine this, all the evidence must be analysed and contrasted with the judicially noticed facts. It is unlikely, though, that

315 The difference between the number of judicially noticed facts and the number of those facts that are incorporated in the judgement, cannot be explained by an amendment of the charges. Most judicial notice decisions have been taken after the indictment was confirmed. In Kvočka et al, the judicial decisions were taken after the amended indictment has been filed. It remains remarkable that no explanation was provided why so little judicially noticed facts have been incorporated in the final judgement.


### Krajišnik

<table>
<thead>
<tr>
<th>Source</th>
<th># Judicially noticed facts</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tadić TJ</td>
<td>252</td>
<td>39.07%</td>
</tr>
<tr>
<td>Čelebići TJ</td>
<td>4</td>
<td>0.62%</td>
</tr>
<tr>
<td>Kupreškić TJ</td>
<td>1</td>
<td>0.16%</td>
</tr>
<tr>
<td>Kunarac TJ</td>
<td>73</td>
<td>11.32%</td>
</tr>
<tr>
<td>Kvočka TJ</td>
<td>38</td>
<td>5.89%</td>
</tr>
<tr>
<td>Krnojelac TJ</td>
<td>199</td>
<td>30.85%</td>
</tr>
<tr>
<td>Vasiljević TJ</td>
<td>44</td>
<td>6.82%</td>
</tr>
<tr>
<td>Tadić TJ/AJ</td>
<td>1</td>
<td>0.16%</td>
</tr>
<tr>
<td>Tadić AJ</td>
<td>3</td>
<td>0.47%</td>
</tr>
<tr>
<td>Tadić TJ/Čelebići TJ</td>
<td>26</td>
<td>4.03%</td>
</tr>
<tr>
<td>Krnojelac TJ/Kunarac TJ</td>
<td>4</td>
<td>0.62%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>645</strong></td>
<td><strong>100.00%</strong></td>
</tr>
</tbody>
</table>

Total # judicially noticed facts in decisions: 645

Total # judicially noticed facts in judgement: 488

Pct. facts used in judgement: 75.7%

### Kvočka et al.

<table>
<thead>
<tr>
<th>Source</th>
<th># Judicially noticed facts</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tadić TJ</td>
<td>389</td>
<td>87.81%</td>
</tr>
<tr>
<td>Čelebići TJ</td>
<td>4</td>
<td>0.90%</td>
</tr>
<tr>
<td>Tadić TJ/Čelebići TJ</td>
<td>50</td>
<td>11.29%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>443</strong></td>
<td><strong>100.00%</strong></td>
</tr>
</tbody>
</table>

Total # judicially noticed facts in decisions: 444

Total # judicially noticed facts in judgement: 9

Pct. facts used in judgement: 2.0%

**Table 2. Judicial notice in Krajišnik and Kvočka et al.**
### Popović et al.

<table>
<thead>
<tr>
<th>Source</th>
<th># Judicially noticed facts</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Krstić TJ</td>
<td>122</td>
<td>37.20%</td>
</tr>
<tr>
<td>Krstić AJ</td>
<td>3</td>
<td>0.91%</td>
</tr>
<tr>
<td>Blagojević &amp; Jokić TJ</td>
<td>42</td>
<td>12.80%</td>
</tr>
<tr>
<td>Krstić TJ/Blagojević &amp; Jokić TJ</td>
<td>97</td>
<td>29.57%</td>
</tr>
<tr>
<td>Krstić TJ/Krstić AJ</td>
<td>4</td>
<td>1.22%</td>
</tr>
<tr>
<td>Krstić TJ/Krstić AJ/Blagojević &amp; Jokić TJ</td>
<td>9</td>
<td>2.74%</td>
</tr>
<tr>
<td>Krstić AJ/Blagojević &amp; Jokić TJ</td>
<td>1</td>
<td>0.30%</td>
</tr>
<tr>
<td>Krajišnik TJ</td>
<td>17</td>
<td>5.18%</td>
</tr>
<tr>
<td>Orić TJ</td>
<td>33</td>
<td>10.06%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>328</strong></td>
<td><strong>100.00%</strong></td>
</tr>
</tbody>
</table>

| Total # judicially noticed facts in decisions | 328           |
| Total # judicially noticed facts in judgement| 155           |
| Pct. facts used in judgement               | 47.3%         |

### Dragomir Milošević

<table>
<thead>
<tr>
<th>Source</th>
<th># Judicially noticed facts</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Galić TJ</td>
<td>116</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

| Total # judicially noticed facts in decisions | 116       |
| Total # judicially noticed facts in judgement| 33        |
| Pct. facts used in judgement               | 28.5%     |

Table 3. Judicial notice in Popović et al. and Dragomir Milošević
the explanation for the omission of the judicially noticed facts in the judgement is to be found in an effective evidence-in-rebuttal strategy: presenting evidence in rebuttal is a very time-consuming enterprise and requires the defence to conduct extensive research on its own.²²⁰ Moreover, if the defence had been successful, one would have found remarks by the Trial Chamber that a significant number of judicially noticed facts were not incorporated in the judgement, because reliable evidence in rebuttal was presented. As stated before, apart from some general considerations on judicial notice, the Trial Chambers made no such remarks.

Besides the presentation of better evidence and evidence in rebuttal, a third explanation for not using judicially noticed facts may be that Trial Chambers have reconsidered their decision(s) on judicial notice. After all, such decisions have been taken during the proceedings, and it could well be that after the close of the proceedings the facts that were deemed reliable and relevant when the decision on judicial notice was taken are not so relevant and reliable in light of all the evidence presented. Considering the length of proceedings before the Tribunals, it is not unusual that a decision on judicial notice was taken years before the judges delivered their judgement.

It is important to note that in Krajinić, Dragomir Milošević and Popović et al., the composition of the Chamber that took the decision(s) on judicial notice is the same as the Chamber delivering the judgement. It is not unusual that the composition of the Chamber varies over the years, which could explain why facts judicially noticed by a particular bench will not be used in the judgement delivered by other judges. In Kvočka et al., the first decision on judicial notice in March 1999 was taken by Judges May, Bennouna and Robinson, whereas the second decision (June 2000) and the final judgement (November 2001) were delivered by Judges Rodrigues, Riad and Wald. Even in this case, the discrepancy between the number of judicially noticed facts and facts used in the judgement cannot be explained by a different composition of the Chamber because the majority of the judicially noticed facts were identified by the same judges that delivered the judgement.

A related question is what kind of facts are left out the judgement. It may be that during trial, or even pre-trial, certain facts seem relevant to the case, but after the close of proceedings in the final evaluation it turns out that those facts are actually rather peripheral, if not outright irrelevant. In Kvočka et al., over one hundred facts were judicially noticed concerning the historical and geographical background of the conflict, including the process of disintegration of the Socialist Federal Republic of Yugoslavia. Considering that the accused were charged with atrocities committed in the Omarska, Keraterm and Trnopolje camps, it should come as no surprise that only a handful of those facts were incorporated in the judgement. The relevance of this kind of facts in cases concerning low-level perpetrators can indeed be questioned. It remains unclear what the reasons were for the Trial Chamber to not include these

²²⁰ In the majority of cases, the non-moving party is the defence. This means that it is upon the defence to present evidence in rebuttal.
facts. This is unsatisfactory: the Trial Chamber should have provided reasons why these facts were not included in the judgement.

4.2.4.14 Concluding Remarks

The quantitative analysis of judicial notice at the ad hoc Tribunals leads to three conclusions. First, the use of judicial notice differs profoundly between the ICTY and ICTR. Whereas the ICTY noticed thousands of facts, the ICTR only reluctantly used Rule 94 (B). Reasons have been given to explain the different approaches, the most prominent of which is the use of facts of common knowledge at the ICTR. This obviated the need to take notice of adjudicated facts.

Second, it transpires from the analysis of the four ICTY cases that the percentage of judicially noticed facts that are actually incorporated in the judgement is relatively low and in one case (Kvočka et al.) even negligible. Possible explanations have been suggested. A small number of judicially noticed facts were replaced by better evidence, but whether evidence in rebuttal was successfully presented or whether Chambers reconsidered their earlier decisions cannot be concluded from these cases.

Finally, Chambers have not given detailed reasoning in their judgements as to why they made certain choices when evaluating the evidence. Why was a certain fact included in the judgement and others not? This is a more general point of criticism: compared to the extensive reasoning in the judicial notice decisions, the reasoning in the judgements is rather minimal. Considering the large numbers of unused judicially noticed facts, more elaborate reasoning on this point would have been desirable.

4.3.5 Appeal Proceedings

4.3.5.1 Introduction

The appeal stage in international criminal proceedings allows for a second stage in the proceedings, in which both the conviction and the sentence can be challenged. The possibility for the accused to appeal both conviction and sentence aims, *inter alia*, to enhance accurate fact-finding, to verify whether fair trial rights have been observed during the trial proceedings and to enable the accused (or the prosecutor) to formulate objections against the trial judgment. The right to appeal does not imply that a *quasi* retrial is held in which all the evidence is presented a second time. On the contrary: mostly, the applicants are requested to limit themselves to those parts of the trial judgement they disagree with. This enables, for example, the accused to limit his appeal to the sentence, without challenging the factual conclusions of the Trial Chamber.

Appeal proceedings in international criminal law are conducted in a hierarchical structure, in which the Appeals Chamber has the final say in both legal and factual
matters. Damaška argued that appeal proceedings in a hierarchical structure result in ‘provisional’ judgements of the lower courts:

The great significance attributed to ‘quality control’ by superiors in a hierarchical organization inevitably detracts from the importance of original decision making: the latter acquires an aura of provisionality [sic].321

The character of appeal proceedings in international criminal proceedings differs, however, from Damaška’s characterisation. The Appeals Chamber of the ICTY and ICTR has consistently held that appeal proceedings are not trials de novo: evidence will not be re-evaluated, nor will new evidence be admitted on appeal unless there is a pressing need to do so.322 Both the accused and the prosecutor are required to put forward their objections to well-defined legal or factual matters. For present purposes, the manner in which errors of law are handled in appeal proceedings is not relevant; this section is solely concerned with the manner in which evidence is processed in appeal proceedings. The manner in which factual errors are addressed by the Appeals Chamber in international criminal proceedings is of interest here.

4.3.5.2 Legal Framework

Article 25 ICTY Statute and Article 24 ICTR Statute allow for two distinct grounds of appeal. First, both the prosecutor and the accused may appeal on the ground that the Trial Chamber made an error of law that has invalidated the judgement. Second, both parties may appeal when the Trial Chamber made an error of fact that has resulted in a miscarriage of justice. The Appeals Chamber has the same powers as the Trial Chamber: the Rules of Procedure and Evidence apply mutatis mutandis to the appeal proceedings.323

The ICC Statute makes a distinction between the prosecutor and the convicted person, regarding the grounds of appeal. According to Article 81 (1) (a) ICC Statute, the prosecutor may appeal on the grounds that the Trial Chamber has made a procedural error, an error of fact or an error of law. The convicted person, or the prosecutor on that person’s behalf, may also appeal on these grounds and may, additionally, appeal on ‘any other ground that affects the fairness or reliability of the proceedings or decision’ (Article 81 (1) (b) ICC Statute). Rule 149 ICC RPE states that the rules governing the proceedings before the Pre-Trial Chamber and the Trial Chamber apply mutatis

322 Cf. the remarks of Mohamed Shahabuddeen, former judge in the ICTY/ICTR Appeals Chamber: ‘A court of rehearing does not appear to exemplify the ICTY appeal procedures; the Appeals Chamber of the ICTY seems to bear a closer affinity to a court of review.’ M. Shahabuddeen, International Criminal Justice at the Yugoslav Tribunal: A Judge’s Recollection, Oxford University Press, Oxford 2012, p. 100.
323 Rule 107 ICTY RPE; Rule 107 ICTR RPE.
mutandis to the appeal proceedings. This includes the provisions on the submission of evidence.\textsuperscript{324}

The provisions of the Statutes of the ad hoc Tribunals contain a rather high threshold for a successful appeal: the alleged error must have resulted in either an invalid decision (in case of an error of law) or a miscarriage of justice (in case of an error of fact). The ICC Appeals Chamber may reverse or amend the decision or sentence or order a new trial on two grounds: unfairness of the trial proceedings that has affected the reliability of the Trial Chamber’s decision; or, when one of the errors enumerated in Article 81 (1) ICC Statute has materially affected the Trial Chamber’s decision.\textsuperscript{325}

The parties have a decisive say regarding the scope of the appeal proceedings: the Appeals Chamber will concentrate the appeal proceedings primarily on the grounds brought forward by the applicants. As the Appeals Chamber held in Kunarac et al.:

As set out in Article 25 of the Statute, the Appeals Chamber’s mandate cannot be effectively and efficiently carried out without focused contributions by the parties. In a primarily adversarial system, like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfill its mandate in an efficient and expeditious manner.\textsuperscript{326}

The ICC Appeals Chamber held that when the accused alleges that the Trial Chamber committed a factual error, the accused must provide the Appeals Chamber with detailed submissions regarding the interpretation of the evidence. Merely repeating arguments that were presented during the trial proceedings does not suffice: the accused must make clear that the Trial Chamber acted unreasonably in weighing the evidence.\textsuperscript{327}

Although the Statutes and Rules of Procedure and Evidence do not specifically address the question, it is highly unlikely that the Appeals Chamber will address factual issues proprio motu, i.e. without a specific ground of appeal submitted by the applicants. The Appeals Chambers of the ad hoc Tribunals and the ICC are, however, not barred from conducting such a proprio motu fact-finding exercise: Rule 98 ICTY

\textsuperscript{324} See also Article 83 (1) ICC Statute, which states: ‘For the purposes of proceedings under Article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.’

\textsuperscript{325} Article 83 (2) ICC Statute.

\textsuperscript{326} ICTY, Judgement, Prosecutor v. Kunarac et al., Case No.: IT-96-23 & IT-96-23-A, A. Ch., 12 June 2002, par. 43.

\textsuperscript{327} ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, Prosecutor v. Lubanga Dyilo, Case No.: ICC-01/04-01/06 A 5, A. Ch., 1 December 2014, par. 33. The ICTY Appeals Chamber held that deficient submissions by the parties do not need to be considered on the merits. When a submission is made regarding an alleged factual error, the accused must ensure that his submission is clear and not a repetition of arguments raised at trial. Cf. ICTY, Judgement, Prosecutor v. Tolimir, Case No.: IT-05-88/2-A, A. Ch., 8 April 2015, par. 14.
RPE and ICTR RPE allows the Appeals Chamber to order the production of additional evidence during the appeal proceedings. Similar provisions can be found in the ICC Statute. Appeal proceedings are, for all practical purposes, limited to the alleged errors identified by the prosecutor or accused. This means that the accused must act diligently in order to bring factual errors to the attention of the Appeals Chamber.

The Appeals Chamber of the ICTY and ICTR consistently held that appeal proceedings are corrective and not trials de novo: the primary responsibility for accurate fact-finding lies with the Trial Chamber. A margin of deference is given to the Trial Chamber because the Trial Chamber hears, for example, witnesses and is therefore able to properly assess the reliability of the witness testimony and weigh this against the other evidence. The prominent position of the Trial Chamber regarding fact-finding also means that the parties may not use the appellate stage to remedy their mistakes or omissions made during the trial proceedings. For example, additional evidence on appeal is not admissible if the evidence was already available during trial: counsel is expected to act diligently and present all relevant and available evidence before the Trial Chamber. Only when ‘gross negligence is shown to exist’ on the part of the counsel may the Appeals Chamber admit additional evidence that was already available during the trial proceedings. Gross negligence of counsel should not be detrimental to the interests of the accused.

The Appeals Chamber in Limaj summed up which evidence the Appeals Chamber will consider during the appeal: evidence referred to by the Trial Chamber in the body of the judgement or in a footnote; evidence in the trial record, referred to by the parties; and any additional evidence admitted during the appeal. Considering the volume of evidence presented during the trial proceedings, it makes sense to limit the amount of evidence that is considered in-depth on appeal: it is impossible to present and weigh

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328 Rule 107 ICTY RPE and ICTR RPE state: ‘the rules of procedure and evidence that govern proceedings in the Trial Chamber shall apply mutatis mutandis to proceedings in the Appeals Chamber.’
329 Article 83 (1) ICC Statute and Article 69 (3) ICC Statute.
330 ICTY, Judgement, Prosecutor v. Vasiljević, Case No.: IT-98-32-A, A. Ch., 25 February 2004, par. 5. ICTY, Judgement, Prosecutor v. Kordić & Čerkez, Case No.: IT-95-14/2-A, A. Ch., 17 December 2004, par. 19, 21. Cf the Appeals Chamber in Krajiniški: ‘The Appeals Chamber will not review the entire trial record de novo. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal.’ ICTY, Judgement, Prosecutor v. Krajiniški, Case No.: IT-00-39-A, A. Ch., 17 March 2009, par. 13.
331 ICTY, Judgement, Prosecutor v. Erdemović, Case No.: IT-96-22-A, A. Ch., 7 October 1997, par. 15.
332 ICTY, Judgement, Prosecutor v. Kupreškić et al., Case No.: IT-95-16-A, A. Ch., 23 October 2001, par. 50-51.
333 ICTY, Judgement, Prosecutor v. Limaj et al., Case No.: IT-03-66-A, A. Ch., 27 September 2007, par. 10.
all the evidence anew. This limitation can only be justified if the Trial Chamber has indicated in detail which evidence it finds reliable and supportive for the charges. In order to be an effective supervisory mechanism, marginal supervision regarding the facts requires a well-reasoned judgement of the Trial Chamber. It is hard, however, for Trial Chambers to fully comply with this requirement. As the Appeals Chamber held in *Brđanin*:

Evidence before a Trial Chamber is notoriously voluminous: a Trial Chamber cannot be expected to refer to all of it. The Appeals Chamber has to presume that *all relevant evidence* was taken into consideration by the Trial Chamber even if not expressly referred to by it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. A Trial Chamber does not have to explain every decision it makes, as long as the decision, with a view to the evidence, is reasonable.334

The margin of deference regarding factual issues is then rather substantial: the parties, in particular the accused, have to specifically draw the Appeals Chamber’s attention to contested factual issues.

At the ICC, two appeal judgements have been handed down so far. The Appeals Chamber referred to the similarities between the legal framework of the *ad hoc* Tribunals and the ICC with regard to appeal proceedings. The margin of deference that is given to the Trial Chambers of the ICTY and ICTR regarding factual issues will be applied by the ICC Appeals Chamber as well.335

4.3.5.3 Additional Evidence on Appeal

Rule 115 ICTY RPE and ICTR RPE allows for the admission of additional evidence on appeal. A party requesting additional evidence to be admitted during the appeal proceedings must indicate to which factual finding of the Trial Chamber the additional evidence is directed. If the evidence is relevant and credible and was not available at trial, the Appeals Chamber will determine whether the additional evidence, together with any evidence in rebuttal, could have been a decisive factor in the Trial Chamber’s deliberations. If this is the case, the Appeals Chamber will consider the additional evidence together with the evidence already on the record. This provision is concerned with additional evidence regarding the guilt or innocence of the accused. If one of the

334 ICTY, Judgement, *Prosecutor v. Brđanin*, Case No.: IT-99-36-A, A. Ch., 3 April 2007, par. 11. Emphasis added. It is noted that this quotation does not include *irrelevant* evidence: it is a matter of common sense that evidence which has no probative value or is irrelevant is not referred to in the judgement. Cf. ICTY, Judgement, *Prosecutor v. Hadžihasanović*, Case No.: IT-01-47-A, A. Ch., par. 13.

335 ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, *Prosecutor v. Lubanga Dyilo*, Case No.: ICC-01/04-01/06 A 5, A. Ch., 1 December 2014, par. 27. ICC, Judgement on the Prosecutor’s Appeal against the Decision of Trial Chamber II entitled “Judgement pursuant to Article 74 of the Statute”, *Prosecutor v. Ngudjolo Chui*, Case No.: ICC-01/04-02/12 A, A. Ch., 7 April 2015, par. 18-27.
parties wishes to challenge other matters, the general admissibility requirements of Rule 89 (C) ICTY and ICTR RPE apply.\textsuperscript{336}

Additional evidence may also be presented during appeal proceedings at the ICC: Article 83 (1) ICC Statute and Rule 149 ICC RPE state that the Appeals Chamber has the same powers of the Trial Chamber. This means that additional evidence can be admitted. In the first appeal judgement on the merits, the Appeals Chamber observed that it ‘will generally not admit additional evidence on appeal unless there are convincing reasons why such evidence was not presented at trial, including whether there was a lack of due diligence.’\textsuperscript{337}

4.3.5.4 Standard of Review

The standard of factual review is the standard of reasonableness: the Trial Chamber's findings of fact will not be overturned lightly.\textsuperscript{338} The Appeals Chamber will only 'substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.'\textsuperscript{339} The Appeals Chamber will only overturn the alleged error of fact when the error has resulted in a miscarriage of justice, which has been defined as 'a grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime.'\textsuperscript{340} The ICC Appeals Chamber held that:

> when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence \textit{de novo} with a view to determining whether it would have reached the same factual conclusions as the Trial Chamber.\textsuperscript{341}

\textsuperscript{336} ICTY, Judgement, \textit{Prosecutor v. Kupreškić et al.}, Case No.: IT-95-16-A, A. Ch., 23 October 2001, par. 55 (with references to case law).

\textsuperscript{337} ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06 A 5, A. Ch., 1 December 2014, par. 58.


\textsuperscript{340} ICTY, Judgement, \textit{Prosecutor v. Simić}, Case No.: IT-95-9-A, 28 November 2006, par. 10 (with references to case law).

\textsuperscript{341} ICC, Judgement on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction, \textit{Prosecutor v. Lubanga Dyilo}, Case No.: ICC-01/04-01/06 A 5, A. Ch., 1 December 2014, par. 27. See also ICC, Judgement on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled "Judgement pursuant to Article 74 of the Statute", \textit{Prosecutor v. Ngudjolo Chui}, Case No.: ICC-01/04-02/12 A, A. Ch., 7 April 2015, par. 23-27.
This entails that the Appeals Chamber accords the Trial Chamber a margin of deference regarding the determination of factual issues.

**Standard of review and additional evidence on appeal**

When additional evidence is admitted during the appeal proceedings, the Appeals Chamber has more evidence to consider than the Trial Chamber did. What are the consequences for the standard of review?

In the *Blaskić* appeal judgement, the Appeals Chamber made a distinction between two scenarios in which additional evidence has been admitted. If, in the first scenario, the Appeals Chamber comes to the conclusion that no reasonable trier of fact could have reached a finding of guilt based on the evidence before the Trial Chamber and the additional evidence, the Appeals Chamber must apply a deferential standard of review. It will not determine whether it is itself convinced beyond reasonable doubt, but will merely state that no reasonable trier of fact could be convinced beyond reasonable doubt. Although this reasoning is somewhat formalistic (if one states that no reasonable trier could be convinced of the guilt of the accused, one does not apply a deferential standard but the beyond reasonable doubt standard itself), it is instructive to compare it with the second scenario.

In the second scenario, the Appeals Chamber finds, on the basis of the evidence before the Trial Chamber and the additional evidence on appeal, that a reasonable trier of fact could reach a finding of guilt beyond reasonable doubt. In such cases, the Appeals Chamber will not apply a deferential standard, but will consider whether it is convinced beyond a reasonable doubt of the guilt of the accused. This way, the totality of the evidence has been properly weighed once. In practice, if an appeal is filed by the defence alleging that the Trial Chamber made an error of fact and additional evidence has been admitted, the Appeals Chamber will proceed as follows. It will first verify whether, on the basis of the trial record alone, a reasonable trier of fact could be convinced beyond reasonable doubt of the guilt of the accused. If not, no further examination of the additional evidence is needed: the Trial Chamber’s judgement will be reversed. If, however, the Appeals Chamber concludes that a trier of fact could have reached a finding of guilt beyond reasonable doubt on the basis of the evidence presented to it, it will then consider the totality of the evidence and determine whether it is itself convinced of the guilt of the accused beyond reasonable doubt.

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342 ICTY, Judgement, *Prosecutor v. Blaškić*, Case No.: IT-95-14-A, A. Ch., 29 July 2004, par. 20-24. If the Appeals Chamber finds that the Trial Chamber applied a wrong legal standard to a factual finding, the Appeals Chamber will proceed in a similar manner. First, after pronouncing the correct legal standard, the Appeals Chamber determines whether it is itself convinced of the guilt of the accused beyond reasonable doubt. If it is, the Appeals Chamber will then determine whether it is still convinced beyond reasonable doubt when the additional evidence has been taken into account. See also: ICTY, Judgement, *Prosecutor v. Krajišnik*, Case No.: IT-00-39-A, A. Ch., 17 March 2009, par. 11-15.
In her dissenting opinion to the Blaškić appeal judgement, Judge Weinberg de Roca criticised the concept of ‘the totality of the evidence’. She pointed out that the Appeals Chamber is not presented with the whole evidentiary record, but solely with the evidence the Trial Chamber has referred to in its judgement. Consequently, the Appeals Chamber is not in a position to consider the totality of the evidence of the case, she argued.\(^\text{343}\)

The ability of the Appeals Chamber to consider the totality of the evidence can indeed be questioned. The evidence the Trial Chamber has referred to in its judgement is a selection from the total amount of evidence presented during the trial proceedings. Evidence the Trial Chamber deemed irrelevant or without probative value has been put aside, and the remaining evidence has been weighed holistically. Therefore, the only Chamber that has full knowledge of the total amount of evidence (besides, of course, the additional evidence presented on appeal) of the case is the Trial Chamber. Leaving patently clear cases aside, it is hard to see how the Appeals Chamber is able to actually weigh properly the totality of the evidence. From an epistemological point of view, it would make more sense to refer the case back to the Trial Chamber to have it re-consider carefully the part of the judgement to which the additional evidence related. This would be in line with the deferential standard the Appeals Chamber normally applies concerning factual issues. Such a referral also allows the accused to challenge and comment on such additional evidence before the trier of fact that has all the evidence at his disposal.

The right to appeal the trial judgement is a principle of international criminal procedure.\(^\text{344}\) It entails that the factual basis of the conviction or acquittal can be reviewed: the evidence on which the Trial Chamber relied can be challenged, and additional evidence can be admitted. This second stage of the proceedings does not, however, provide for a full rehearing and reassessing of all the evidence the Trial Chamber has been provided with. The deferential standard of the Appeals Chamber regarding factual issues precludes a ‘fresh’ determination of the facts of the case. In fact, the Appeals Chamber relies to a significant extent on the factual conclusions of the Trial Chamber. The specific character of the appeal proceedings results in a shortcut in which the accused must act diligently and actively in order to effectively participate during the appeal stage. Considering the fact that the Appeals Chamber is hesitant to reverse the factual findings of the Trial Chamber \textit{proprio motu}, an informed and assertive accused is of the essence.
