7. Defending the ‘Undefendable’? Taking Judicial Notice of Genocide

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1. Introduction

The position of the defense, consisting of the accused and his defense counsel, in genocide trials is incomparable to the position of the defense in any other criminal trial. Genocide trials are complex cases which involve by definition a great amount of factual allegations of the most serious nature and which—with a few exceptions—generally take place at international criminal tribunals. Furthermore, because genocide cases are difficult to prove, the accusation of genocide is always combined with an accusation of crimes against humanity and/or war crimes.

In the face of massive accusations the defense is fighting an uphill battle. Generally, a fundamental reassurance in respect to his position is the absolute and unconditional burden of proof on the Prosecutor. As a result, the defense should be in a position to react to the Prosecution and should not primarily be worried that the innocence of the accused must be demonstrated; rather, it is for the Prosecutor to prove beyond a reasonable doubt that the accused is guilty of the crimes charged.

While nobody will disagree with this fundamental notion of the presumption of innocence and corresponding burden of proof, the case law of the ad hoc Tribunals demonstrates certain exceptions. We are especially concerned here with the phenomenon of taking judicial notice of adjudicated facts and facts of common knowledge, which is of increasing importance in the practice of the ad hoc Tribunals. This practice was triggered by an interest in not having to repeatedly establish elements in the indictment which have already been adjudicated. To put it simply, when there are, for example, a number of cases dealing with crimes committed against detainees in the Omarska camp, is it really necessary to bring evidence in each of these cases that the conditions in this camp were poor, that the Bosnian Serbs were in control of this camp, that there was an armed conflict going on, that the treatment of prisoners in the camp was related to that conflict etc.? In the interests of expediting proceedings one may be tempted to find no objection in taking judicial notice of such (recurring) facts, which do not go to the heart of the individual criminal responsibility of the accused. An additional factor may also be that it is regarded as simply ‘not done’ to question such horrible events like the Rwandan genocide or the
massacre in Srebrenica. But what about the position of the defense and the fundamental principles underlying the criminal process? In light of both these issues, the thesis proposed here is that taking judicial notice of material elements in the indictment should be approached with more caution than has been done by the ad hoc Tribunals thus far. The issue may be simplified, as we will do here, by submitting the question of whether judicial notice of genocide can be taken, and when this is done, whether the defense is not put in an indefensible position.

In order to address these questions we will first give a brief outline of the position of the defense in international criminal proceedings (2). Next we will provide an overview of the practice of judicial notice in international criminal law, as it has developed in the law and practice of the ad hoc Tribunals (3). At the center of this paper is a critical analysis of the ICTR Karemera decision, where the appeals chamber took judicial notice of genocide (4). We end with some concluding observations (5).

2. The Position of the Defense in International Criminal Proceedings

If one takes a defense perspective on judicial notice, a few words need to be said first about the position of the defense in international criminal proceedings generally. This paper does, however, not allow for a detailed analysis.¹

To understand the position of the defense at international criminal proceedings, two matters must be borne in mind. First, criminal proceedings at the international level are predominantly of an adversarial nature.² This implies that the proceedings are dominated by the parties and that they carry the responsibility for collecting their own evidence and developing their own case strategy. In respect of fact-finding, the Judges are generally passive. Compared to its role in inquisitorial systems, the defense in adversarial systems has to be far more active from an early stage. The defense cannot simply sit back and react to the evidence presented by the Prosecutor but must be very active in finding its own witnesses and other evidence. Furthermore, the defense must also critically challenge evidence presented by the Prosecutor; cross-examination is an important tool for the defense, requiring special skills which inquisitorial defense counsel rarely possess.

The bottom line is that in inquisitorial systems the defense can generally rely on a prosecution service which is supposed to objectively establish the facts and a bench which actively engages in fact-finding, both pre-trial and at trial. These are such significant safeguards that even in event of a defense’s poor performance, positive results and even acquittals are possible.³ Conversely, in adversarial systems, the

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¹ Others have done this and we can recommend the recent book by J. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (The Hague: T.M.C. Asser Press, 2009).


³ The objective role of the Prosecutor and the active fact-finding role for the judges in inquisitorial systems also goes a long way in explaining why trials in the accused’s absence are allowed, and can still produce a positive outcome for the accused.