Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent

JAMES G. STEWART*

I. Introduction

Judicial notice is “the means by which a court may take as proven certain facts without hearing evidence”.¹ The doctrine has had a significant but unhappy existence in international criminal law. In many respects its struggles are a product of the jurisdiction’s adolescence: judicial notice is full of potential, fused with serious dangers and struggling to establish its own legitimate identity out of the preconceptions of its many parent legal systems. Its history is full of conflict, confusion, inconsistency and failures to intervene. The need for reconciliation is profound.

Although ensuring consistent factual findings is an important function of judicial notice, its real potential lies in its ability to significantly expedite trial.² In his treatise on evidence, Thayer opined that “the failure to exercise [judicial notice] tends daily to smother trials with technicality and monstrously lengthens them out”.³ Those concerns are perhaps felt most profoundly in international criminal jurisdictions, where assessment of personal responsibility requires proof of a range of preliminary technicalities in the context of well founded criticism of the time taken to complete cases.⁴ In

* LLB(Hons)/BA, Diplôme en droit international humanitaire (CICR). Barrister and Solicitor of the High Court of New Zealand.


² According to Cross & Tapper on Evidence “There are at least two reasons why we should have a doctrine of judicial notice. In the first place, it expedites the hearing of many cases. Much time would be wasted if every fact which was not admitted had to be the subject of evidence which would, in many instances, be costly or difficult to obtain. Second, the doctrine tends to produce uniformity of decision on matters of fact where a diversity of findings might sometimes be distinctly embarrassing”. Colin Tapper (ed.), Cross & Tapper on Evidence (8th edn., 1995, Butterworths, London) at 78. (“Cross & Tapper on Evidence”).


⁴ See “Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International
addition, 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.\(^5\) Thus, an ability to take certain matters as proven without hearing evidence is arguably more appropriate and valuable to international criminal law than any other jurisdiction.

On the other hand, the dangers inherent in the exercise of judicial notice are also particularly pronounced. In dispensing with formal proof, judicial notice might undermine the prosecutorial burden to prove an accused’s guilt beyond reasonable doubt, represent an invasion of an accused’s right to present a full and public defence and tend to crystallise what are commonly held but inaccurate historical views. The concerns are particularly serious in the context of international criminal prosecutions because invariably “the first casualty of war is truth”.\(^6\)

Unsurprisingly given the delicate standoff between the doctrine’s potential and its peril, the Security Counsel appointed Expert Group charged with review of the functioning of the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for the former Yugoslavia (“ICTY”) recommended that:\(^7\)

“Further consideration should be given to greater use of judicial notice in a manner that fairly protects the rights of the accused and at the same time reduces or eliminates the need for identical repetitive testimony and exhibits in successive cases”.

As will be seen, that challenge has not been well met.

II. The basis for judicial notice

Although judicial notice is traditionally a common law concept,\(^8\) several civil law jurisdictions also incorporate procedural mechanisms that dispense with

\(^5\) Phipson on Evidence states that “[a] wider scope is allowed to judicial notice where a specialist tribunal is dealing with a case falling within its own particular sphere of competence”, M. N. Howard et al. (eds.), Phipson on Evidence (15th edn., 2000, Sweet & Maxwell, London), p. 46.

\(^6\) The statement is attributed to Hiram Johnson.

\(^7\) The Expert Group Report, above n 4, Recommendation 11, p. 102.

\(^8\) Australia: See Woods v. Multi-Sport Holdings Pty Ltd., 7 March 2002, High Court Of Australia, 186 A.L.R. 145; Canada: John Sopinka et al., The Law of Evidence in Canada (1992), India: Section 57 of the Indian Evidence Act 1872; Malaysia and Singapore: Janab’s