FAIR TRIAL GUARANTEE LIMITATIONS ON JUDICIAL NOTICE IN NATIONAL AND INTERNATIONAL CRIMINAL LAW

By Giorgi Burjanadze

LL.M. SHORT THESIS
COURSE: Human Rights and Criminal Justice
Professor: Jeremy McBride
Central European University
1051 Budapest, Nador utca 9.
Hungary

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ABSTRACT

The thesis focuses on threshold requirements on judicial notice from fair trial guarantee standpoint. It analyzes all forms of judicial notice and limits subject matter on judicial notice of adjudicated facts. The main goal of the thesis was to identify problematic aspects of judicial notice from fair trial guarantee perspective and set respective limitation clauses for them.

Initially thesis analyzes methods of proof and then concentrates on judicial notice as an exception from the above rule. Components and types of evidence are being defined in the light of different jurisdictions. International human rights institutions' case laws and legislative materials were used for framing fair trial standards. Equality of arms, adversariality, presumption of innocence, impartiality of the tribunal, reformation in pejus, nullum judicium sine lege and other elements were discussed in the light of judicial notice and respective threshold requirements were set for the preservation of balance between judicial efficiency and human rights.

Relevance and importance of the thesis is vital since all jurisdictions have problems with proper limitations of judicial notice. According to the thesis there is no perfect regulation of judicial notice and internalization and "lingua franca" nature of human rights can be used as a good way of limiting it. Thesis additionally stresses an importance of changing some case laws and the regulations of different states.

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INTRODUCTION

Generally all facts before courts of law need to be proved by the respective parties. They provide evidence for this. But besides this, there is also the possibility that some issues before the courts were decided by other means such as "Judicial Notice". This is traditionally defined as "taken facts which may be established from an authoritative source".[1] Judicial notice is similar to evidence, but it is procedurally different from it, since it can be used by the court without referring to parties' initiatives. It proves the existence of certain facts and gives a judge a possibility to use it in the reasoning of a judgment. Like every other proceeding, criminal justice also relies on judicial notice actively for several reasons. Firstly it ensures economy of the procedural costs and, additionally, it prevents court overburdening by repeating cases.

In criminal proceedings the presumption of innocence requires a prosecutor to provide all the relevant evidence which will confirm a criminal charge beyond reasonable doubt. In contrast, a defendant has the right to rebut all the evidence and thus present its own case. It is the very essence of the adversarial process where the judge has a limited capacity.

Due to the fact that criminal law has some specificity, judicial notice needs strict scrutiny when being applied. Criminal proceedings are governed by respective legislations which are mostly affected by basic human rights, guarantees and privileges of a defendant. Therefore judicial notice must be applied in such a manner that it will be compatible with fair and adversarial hearing principles. Otherwise, the criminal process will be nothing but fiction in some circumstances. For instance, in case of a co-perpetration or a conspiracy, the judgment of some defendants can be used as judicial notice against others.[2] In such cases defendants are

[1] Richard May, Steven Powles, *Criminal Evidence* (5th edn, Sweet & Maxwell, 2004) 87.
[2] This example generally covers a situation when one judgment proves a fact which is relevant for another case and it is used by the prosecution or by the judge *proprio motu.*

unable to defend their cases properly. There may be other instances when judicial notice may compromise the rights of other defendants when using *res judicata* judgments of other cases.[3] This leads to the conclusion that there should be some limitations on judicial notice from the standpoint of fair trial guarantees in order to ensure a fair balance between effective justice and the basic human rights of individuals.

In post soviet and some other jurisdictions judicial notice is used in a manner that is incompatible with human rights standards. The problem is that there are no unified or general rules or tests which can be used in every case. For instance, in 2011 the Public Defender of Georgia applied to the Tbilisi City Court with an *amicus curiae* brief[4], since judicial notice was used without any limitations in Georgian courts of ordinary jurisdiction.[5] There are some attempts to clarify these regulations in the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR),[6] but the problem still remains[7] and it needs a more general approach from the human rights perspective, taking into account modern comparative approaches, as well as development of human rights. In some cases judicial notice is used as a tool in politically motivated trials.[8]

An international human rights standard does not contain explicit references to using judicial notice and also respective tribunals have not yet decided too many cases. Therefore we will concentrate on existing fair trial standards of ICCPR, ECHR and IACHR and thus analyze

[3] For instance, when two offences are correlated to each other, inter alia, illegal possession of stolen goods and robbery.
[4] Amicus Curiae Brief of the Public Defender of Georgia, no 2983/04-8/0091-11/1 (July 28, 2011).
[5] As Criminal Procedure Code of Georgia does not contain any threshold requirement for the use of judicial notice, international standards and comparative analysis were presented before the national courts. The case is still pending.
[6] Inter alia, *Prosecutor v. Popovic et al*. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, ICTY, Trial Chamber II, September 26, 2006, para 3-19.
[7] Richard May, Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, 2003) 134-39.
[8] Ekaterine Popkhadze, Ekaterine Khutsishvili, Giorgi Burjanadze, *Legal Analysis of Cases of Criminal and Administrative Offences with Alleged Political Motive* (Georgian Young Lawyers' Association, 2011) 25, available online:
< http://www.gyla.ge/attachments/964_savaraudod%20politikuri%20motivaciis%20saqmeebi_Full_ENG.pdf > accessed March 19, 2012 (hereinafter *Gyla Report*)

judicial notice and set minimum standards for it. Since the above mentioned documents contain almost similar clauses of fair trial guarantee, my approach will be effective for almost every jurisdiction irrespective of its links to Civil or Common Law origins.

Due to the fact that there are few academic works on limitations of judicial notice, this paper will try to commence active academic debate on limitation clauses for judicial notice and will possible play a positive role in further changes and amendments of respective legislations and case laws. All the academic materials that have been published until today are mainly devoted to all aspects of judicial notice without due concentration on limitation necessities.[9] Moreover, judicial notice in some cases is used in a tacit manner and therefore sometimes problems are not even acknowledged by the parties of the cases.[10] In addition, international courts, like the European Court of Human Rights, has not yet developed its approach towards judicial notice from fair trial guarantees and thus the paper will be helpful for further strategic litigation and human rights protection.

The thesis will use basically research and comparative methods. Primary sources will be national and international legislative acts, court judgments and doctrinal approaches. I will analyze limitation clauses that are available in international criminal law and in some countries and thus set general limitation clauses. For a comparative perspective, both Civil and Common law jurisdictions will be analyzed and thus presented. I will provide examples of several jurisdictions including but not limited to France, Germany, Russia, Georgia, the United Kingdom, The United States of America, Canada, ICTY, ICTR and the Special Court of Sierra Leone (SCSL). These jurisdictions cover almost every system of criminal proceedings and therefore limitation clauses will be set in the light of them.

[9] Inter alia, Jefferson L. Ingram, *Criminal Evidence* (10th edn, Anderson Publishing, 2009) 107-134.
[10] D.L. Mathieson, *Evidence* (New Zealand edition, 2nd edn, Butterworths, 1971) 157.

First of all, I will provide the definition of judicial notice. Several jurisdictions regulate it in a different manner and some systems do not use it at all, therefore I will formulate a uniform, special for this thesis[11], definition of judicial notice. Afterwards, every aspect will be analyzed from International Human Rights Law guarantees standpoint. Furthermore, for the first time, this thesis will provide the compatibility of the judicial notice with the principle of prohibiting *reformatio in pejus*[12], which is often disregarded at international level, but usually used at national level[13]. Secondly, presumption of innocence, adversariality, equality of arms impartiality will be addressed.

[11] This model will include all the aspects of judicial notice that exist in all jurisdictions, since I aim to provide for an effective limitation clauses for every possible regulation.
[12] Change of the sentence in appeal proceedings to a more severe one or conviction by new charge when there was no prosecutor's motion with this claim.
[13] Venice Commission (Steering Committee for Human Rights) (CDHH), *Activity report: Sustained Action to Ensure the Effectiveness of the Implementation of the ECHR at National and European Levels*, CDDH (2008)008 Add I, 28.

I. THE METHODS OF PROOF IN CRIMINAL PROCEEDINGS

Every state that is governed by the rule of principle should provide minimum procedural guarantees to avoid arbitrariness in the process of state functioning. First of all, this principle is related to criminal proceedings where the individual has a legal and factual dispute before the state. Various guarantees should be provided – inter alia, an independent judiciary, right to legal representation – but the most prominent, vital, substantive and indicative are rules and procedures related to the evidence. This is due to the fact that each case should be proved beyond reasonable doubt in criminal proceedings *using evidence* and all other guarantees exist for its fair evaluation. For instance, judicial independence per se is not necessary, unless there is a need for a case to be decided on an impartial and adversarial manner based on evidence. In criminal proceedings the latter is a means for a prosecutor and for a defendant to prove their cases; therefore its importance, without exaggeration, is central and focal.[14] This applies irrespective of the fact that in international and national human rights law there are not enough guarantees about the rules of evidence and usually other aspects are regulated.[15]

Traditionally in Europe two different criminal procedural systems exist – inquisitorial[16] and adversarial. The difference between them is in having different roles of judges and substantive rules about evidence. In the first instance, the judge is an active truth finder in the case, he has a right to produce the evidence and thus help either side. The court is the sole responsible for the content of the judgment and therefore has to intervene in the case of a party's inaction and

[14] Paul Roberts, Adrian Zuckerman, *Criminal Evidence* (OUP 2004) 95.
[15] See inter alia European Convention on Human Rights and Fundamental Freedoms (hereafter also "European Convention"), International Covenant on Civil and Political Rights (hereafter also "ICCPR"), American Convention on Human Rights (hereafter also "ACHR").
[16] The term "inquisitorial" comes from the times when a judge was empowered with some coercive power to execute a person and in some instances to use certain inhuman methods. Today, it has different meaning and depicts judges' active role in criminal process.

provide for sufficient evidentiary basis.[17] In an adversarial model, the judge is an arbiter and is not involved in the process of the production of the evidence. [18] He is solely relying on parties' submissions and therefore his judgment reflects their position.

Not only the production of the evidence is different, but also the *form* of it is also divergent. In the latter case, the evidence should be orally presented before the judge and each party should have a right to corroborate it. Written evidence can only be admitted exceptionally and when there are sufficient legitimate aims for this.[19] In the inquisitorial process the judge receives a dossier from the prosecutor and has full access to all materials relevant to the case.[20] The difference is that the adversarial model relies on the "tabula rasa" principle when speaking about judge's specific pre-trial factual knowledge, while the opposite situation is applicable in the case of the continental European model of a judge.[21]

Alongside this above mentioned traditional method of proof – production of the evidence by the parties – respective comparative regulations also provide for other possibilities of argumentation and reasoning of a judgment. These are so called summary rules, which ensure speedy process and expeditious decision-making in cases. Theory and practice of law knows following methods of simplified proof:[22]

- Formal admission
- Judicial notice
- Presumption
- Rules about using previous judgments

[17] Richard Vogler, *A World View of Criminal Justice* (Ashgate, 2005) 88.
[18] Ibid. 132ff.
[19] Inter alia, *Al-Khawaja and Tahery v. the United Kingdom***,** nos. 26766/05 and 22228/06 (ECtHR, December 15, 2011) para 119.
[20] Caroline Buisman, 'Principles of Civil Law' in Karim A. A. Khan, Caroline Buisman, Christopher Gosnell (Eds), *Principles of Evidence in International Criminal Justice* (OUP, 2010) 20-27.
[21] Denis Salas (revised by Ajejandro Alvarez), The Role of the Judge' in Mireille Delmas-Marty and J.R. Spencer (Eds), *European Criminal Procedures* (CUP, 2006) 512-14.
[22] John C. Klotter, *Criminal Evidence* (10th edn, Anderson Publishing, 2009) 137-185.

It has to be mentioned that rules and procedures of each state or jurisdiction is not the same in applying the above means and it varies in almost every case. For instance, for the purpose of this paper, the doctrine of judicial notice also includes rules of using previous judgments as methods of proof like many other jurisdictions.[23] We will briefly address the above concepts, provide for its basic features and underline its basic justifications, since in some cases it justifies its existence.

Formal admission (*stipulation*) is a concept when both parties agree on certain facts and regard them as indisputable. This rule also applies in criminal cases and a decisive factor is the consent from the litigators. The concept is used in adversarial systems since the judge has the sole function of dispute resolution between the parties and their respective agreement is conclusive. The parties may apply together or just agree on each other's argumentation. This procedure ensures expeditious proceedings and in some cases it should be used by the parties at the very first possibility, otherwise a competing party may require redress of procedural costs if impaired any (for proving indisputable facts).[24] These admissions may be only subject to formal restrictions.[25]

Unlike formal restrictions *Judicial Notice* is not solely based on party's initiative. There are facts that are regarded to be generally known to the court and their truth and reliability are accepted without corroboration by the judge in deciding the case. The rationale behind judicial notice is that certain facts are so notorious or they provide for such high level of presumption[26] that it does not need any kind of proof, adversarial production of information and they can be the source of the judgment per se. In this instance, the judge, irrespective of

[23] See, below Section II.B.III.
[24] Adrian Kean, *The Modern Law of Evidence* (7th edn, OUP, 2008) 678.
[25] Ibid. 680.
[26] In some jurisdictions even the high level of presumption is prohibited since requirement to it is that it should be "irrefutable". For instance, see chapeau of Rule 201 (b) Federal Rules of Evidence of the United States of America,

the party's submission and opinion, is the sole body deciding the matter. The aim of using judicial notice is expeditious justice and consistent case law[27] of every jurisdiction.[28]

Presumptions are statutory provisions that set the possibility of existence or absence of concrete facts. This are not based on judges or parties' submissions and they just exist according to respective regulations. The difference between judicial notice and presumptions is that the former is mandatory to apply, while the latter – discretionary. In some instances there is also a difference in the level of credibility or probability of the presumed fact. The crucial issue for the presumptions is the possibility of rebuttal[29] and rational basis for the presumption[30].

In some jurisdictions the consistency of case law is regarded to be crucial and therefore *previous judgments* have automatic evidentiary effect. They prove the existence of a fact and therefore can be used automatically by the judge or in the case of a party's submission.[31] A previous judgment can be regarded as lex specialis of presumption, only with a high level of persuasion that can be rebutted in exceptional situations.[32] Both of them are applicable in both civil and common law jurisdictions.

As we can see from the above chapter, evidence is regarded to be focal point in criminal proceedings. Litigants provide them and they prove their cases before the court. There are some rules that are exceptional and provide for a possibility of a proof without evidence. These rules are either statutory (presumptions) and thus applicable to each case, either based on party's consent (stipulation) or rationalized by judge's general knowledge or necessity for

[27] Judicial notice may also cover the cases when the court sua sponte is using the facts proved in previous judgments without requiring for further evidence.
[28] James Stewart, 'Judicial Notice' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, 2009) 397.
[29] *Salabiaku v. France*, no. 10519/83, (ECtHR, October 7, 1988) para 28.
[30] Barbara E. Bergman, Nancy Hollander, *Wharton's Criminal Evidence*, (15th edn, West Group, 1998) Vol 2, para 3:3 and 3:4.
[31] Inter alia, Rules of Procedure and Evidence of SCSL, Rule 94 (B)
[32] See, below Section III.2.

ensuring factual consistency of case law (judicial notice). These regulations are different from traditional evidentiary rules and therefore need precise description and proper human rights limitations.

II. DEFINITION OF JUDICIAL NOTICE

Black's Law Dictionary defines judicial notice in the following terms: 'A court's acceptance, for purpose of convenience and without requiring a party's proof, of a well known and indisputable fact; the court's power to accept such a fact.'[33] Judicial Notice is a common law institution with limited applicability in civil law countries.[34] Each piece of legislation is different and has its unique feature which should be taken into account when defining elements of judicial notice. In this chapter we will provide for the content of the judicial notice in full detail which will correspond to modern requirements of criminal justice. I will present some regulation of judicial notice in different jurisdictions.

As we saw from the definition, judicial notice is a mechanism that is being used by the judge. He should be interested in applying it, since the process gets more expeditious and there is no need for further parties' corroboration at the trial (the latter is necessary for the judge to come to a conclusion). The principle of immediacy requires that all evidence is to be produced before a court, who will decide the case on the basis of the evidence heard.[35] Judicial notice is an exception from this general rule, since it gives the possibility to a judge to disregard it and apply his knowledge of certain facts. However, this should include information that is either indisputable or is presumed to be correct due to justified reasons.

Generally we have to differentiate two types of judicial notice:

- Judicial Notice of Law – when the law is being used by the court irrespective of parties submission.[36] In Europe this principle is expressed by the maxim 'Jura Novit

[33] Black's Law Dictionary, 863-4 (8th edn, Thomson West, 2004).
[34] Eugene O'Sullivan, 'Judicial Notice' in Richard May and others (Eds), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Kluwer Law International, 2001) 331.
[35] *Pitkänen v. Finland*, no. 30508/96 (ECtHR, March 9, 2004) para 58.
[36] Mutatis mutandis, *Military and Paramilitary Activities* (Nicaragua v. United States of America) J. 27.6.1986 I.C.J. Reports 1986, 14, paras 24-25.

Curia'[37] (the court knows the law).[38] This principle is not disputable from a fair trial guarantee standpoint since it concerns only the matter of law (in German *die geruchtskundige tatsache*) and therefore will not be discussed later.[39]

- Judicial Notice of Fact – this consists of two components – *legislative* and *adjudicated* facts. The former form of notice is used in constitutional law and applies to a situation when the judge is conducting a so called "legislative function" and takes into account some social, economic or other factual maters for interpretation, enactment or nullification of a law.[40] This factor will not be addressed since it is a constitutional law issue and does not contain any interest for our thesis. Judicial notices of adjudicated facts are sole maters that are issues of our current discussion. This covers all factual circumstances that are being adopted without formal proof by the judges.[41]

Judicial notice of adjudicated facts first of all requires the necessity of defining its rationale and then its components. Additionally, problematic aspects of notice will be addressed when defining special limitation clauses.

[37] Douglas Brooker, 'Va Savoir! - The Adage Jura Novit Curia" in Contemporary France', [2005] Bepress Legal Series, 845.
[38] European Court of Human Rights clearly indicated that [legal dispute] 'is characterized by the facts alleged in it and not merely by the legal grounds or arguments relied on'. *Gatt v. Malta,* no. 28221/08, (ECtHR, July 27, 2010) para 19.
[39] There are some important features of using of foreign law and many authors make it disputable whether judicial notice of other countries can be used or not. *See*: California Law Revision Commission, *Judicial Notice of the law of Evidence*, Recommendation and Study, February 1, 1957. Nowadays this principle is being covered by international public law and for instance 'Additional Protocol to the European Convention on Information on Foreign Law' (CETS No 097) regulates above matter and gives a possibility to a national judge to have knowledge of foreign criminal law.
[40] H.J. Glasbeek, *Evidence Cases and Materials* (Butterworths, 1977) 653ff.
[41] Some jurisdictions differentiate between terms "common or general knowledge" and "adjudicated facts" and include documentary evidence and factual circumstances of res judicata judgments under the second category (inter alia, Rules of Procedure and Evidence of ICTY, Rule, 94(A)(B)). Despite these sporadic examples we will use the term 'adjudicated facts' in all cases as the general term. This description depicts the general picture in a best way and underlines the importance of a judge's role in using judicial notice.

II.A. RATIONALE FOR JUDICIAL NOTICE

Judicial notice is a means for expediting trials. The modern criminal justice process is expensive and proceedings for each day are additional costs for countries or the international community's resources. Some human rights standards that are necessary requirements for avoiding arbitrariness are regarded as being costly and stretched in time. Taking into account the above considerations it is getting more and more important to incorporate judicial notice and use it effectively, since it can be regarded as a good solution to existing problems.[42]

Moreover, judicial notice has the aim of ensuring consistent factual case law, where diversity may be problematic.[43] Two issues have to be noted in this respect. First of all, facts of general knowledge may be normative in their sense and may require some judicial deliberation and further explanation. For instance, a famous case in the UK, which required definition whether a camel was a domestic or wild animal and the court supported the first position.[44] On the other hand, judicial notice ensures consistent precedent of factual decisions. When two cases are interrelated to each other at some point and they arrive at a different conclusion with interpretation of the same fact, consistency of a case law is flawed and trust in the judicial system is minimized. Thus judicially noticing of previous res judicata judgments is necessary for ensuring sufficiently precise and foreseeable case law (with due consideration on elements of adversarial proceedings).

[42] UN General Assembly. *Comprehensive report on the results of the implementation of the recommendations of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda,* A/56/853, Recommendation 11, 9.
[43] Uniform Law Conference of Canada, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (The Carswell Company Limited, 1982) 42-3;
[44] *McQuaker v.Goddard,* [1940] 1 KB 687.

II.B. COMPONENTS OF JUDICIAL NOTICE

II.B.I. NOTORIOUS FACTS

The basic requirement for judicial notice is to avoid unnecessary proof. Therefore its first target is notorious facts, which do not need specific evidence to proof. In theory and practice usually there are three types of notorious facts:

- Propositions of generalized knowledge – this includes information that is universally accepted and those propositions are not disputed by intelligent man.[45] Almost all jurisdictions adopt such regulations and judges do not need further proof for such generalized concepts.[46] This includes information, for instance, about material existence of the moon and the fact of celebrating Christmas on December 25 in certain countries.[47]
- Common knowledge of *specific facts* within the territorial jurisdiction of the trial court – these include specific facts that are known to citizens and persons living in a particular community.[48] This information is somehow personal in nature and not general, but since it may be objectively accessed and obtained, it is admitted at trial without formal proof.[49]
- Specific facts and propositions of generalized knowledge not universally accepted but whose accuracy may be subject to immediate determination by resort to easily

[45] American Law Institute, *Model Code of Evidence*, (1942), Rule 801.
[46] Inter alia, Criminal Procedure Code of Moldova, art 98; Criminal Procedure Code of Estonia art 60; Criminal Procedure Code of Serbia art 83. Available online: < http://legislationline.org/documents/section/criminal-codes > accessed March 18, 2012; Criminal Procedure Code of Germany, art 244 in Rudolphe Juy-Birmann, 'German System', in Mireille Delmas-Marty and J.R. Spencer (eds), *European Criminal Procedures* (CUP, 2006) 327. Criminal Procedure Code of Georgia art 73 (a) (In Georgian) Available online: < http://laws.codexserver.com/3918.doc > accessed March 18, 2012; Statute of International Criminal Court article 69 (6), The Code of Judicial Procedure of Sweden, chapter 35, section 2. Available online: < http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf > accessed March 18, 2012
[47] I.H. Dennis, *The Law of Evidence* (2nd edn, Sweet and Maxwell, 2002) 424-25.
[48] National Conference of Commissioners of Uniform State Laws, *Uniform Rules of Evidence* (1953) Rule 9(1) and 9 (2)
[49] *Ingram v. Percival*, [1969] 1 Q.B. 548; Nino Gogniashvili, 'Mtkicebuleba da Mtkicebis Procesi Sisxlis SamarTlis Processhi'(Evidence and Proof in Criminal Proceedings) in Revaz Gogshelidze (Ed) *(Sisxlis SamarTlis Procesi (Criminal Proceedings)*, Vol 1 (in Georgian, 2nd ed, Meridiani, 2009) 354.

> accessible sources.[50] This includes information about some specific matters that may be noticed by simple reference to accurate sources – domestic and foreign governmental and political matters, territoriality and borders of particular state or entity, public officials and their functions, official signatures and seals, official acts that have not been published officially, occupational and business facts, costumes and usages of business and professions, economic and financial facts, historic, geographic and topographic facts, science, law of physics, natural forces, traffic and travel, arts and inventions, phenomena of nature, time, seasons and plants, meaning of words etc.[51]

These above mentioned 3 categories are generally regarded under the term "general or common knowledge". This requires "reasonable indisputability" standard, which means that parties are not expected to have any legal objection with the content and scope of the information.[52] Wigmore's Code of Evidence defines it in the following terms:

> Matters which are not either necessary for the judge to know nor actually notorious, but are capable of such positive and exact proof, if demanded, that no party would be likely to impose upon the tribunal a false statement in the presence of an intelligent adversary.[53]

But this does not mean that they are conclusive and substantial presumptions and each party has a possibility to argue about the notoriety of concrete facts. Even scientific matters may be subject to revision by new explorations and some mistakes may exist in books.[54]

[50] The Law Reform Commission of Canada, *Evidence* (1973) 4, 8-9.
[51] Philip F. Herrick (Ed, rev), *Underhill's Criminal Evidence* Vol 1 (The Bobbs-Merrill Company, 1973) Chapter 7.
[52] See below sub-chapter III.2.
[53] John Henry Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law* (3rd edn, Little, Brown and Company, 1942) 537.
[54] Ibid. 534.

Specific facts and generalized propositions are targets of this sub category of adjudicated facts of judicial notice. They should not be acquired by personal experience or knowledge. Objectivity is a crucial factor in this situation and each piece of information must be assessed from an impartial standpoint. If a judge or juror has personal knowledge they should act as witnesses and dismiss the cases. Notorious facts are different from the above category due to the source of information. In the former case not only the trier of the fact but also other people has information about the fact and it is general, irrespective of individual knowledge.[55] In the UK this principle was not always precise and it took several years to clarify this limitation.[56]

The French Criminal Procedure Code does not have an independent institute of judicial notice, but still gives a possibility of using a judge's personal knowledge that has been gained in the professional field.[57] If the judge by deciding the case receives respective information it can be used in other cases without further proof, while other information (except notorious facts) is regarded to be personal and falls under the category of witness statements.[58]

II.B.II. DOCUMENTARY EVIDENCE

The second group of adjudicated facts may be inferred from documents[59] that are reliable and contain sufficient evidentiary information for the proceedings at stake. This form of judicial notice is the creation of international criminal law and first was actively used in the

[55] Colin Manchester, 'Judicial Notice and Personal Knowledge', (1979), Vol 42 #1, Modern Law Review, 23.
[56] Ibid. 26.
[57] *Lindon, Otchakovsky-Laurens and July v. France, nos.* 21279/02 and 36448/02, (ECtHR, October 22, 2007) para 79.
[58] Myriam Bouazdi, 'Principles of Civil Law' in Karim A. A. Khan, Caroline Buisman, Christopher Gosnell (Eds), *Principles of Evidence in International Criminal Justice* (OUP, 2010) 70.
[59] For further information see: New Zealand Law Commission, *Evidence Law: Documentary Evidence and Judicial Notice*, Preliminary Paper No 22. Available online:
< http://www.lawcom.govt.nz/sites/default/files/publications/1994/05/Publication_57_169_PP22.pdf > accessed March 25, 2012.

Nuremberg trials.[60] Rule 94(2) Rules of Procedure and Evidence of ICTY, ICTR and SCSL provide for the possibility of noticing documents at trial.[61] The difference is their content and scope.

ICTY Rule clearly indicates that only the authenticity of the document may have the effect of judicial notice.[62] According to the regulation, the content of the document is out of regulation, but in some cases ICTY made some exceptions.[63] Unlike this, Rules of Evidence and Procedure of ICTR and SCSL give the possibility of using documents' content and authenticity.

Two issues should be taken into account. First of all, the test used by the courts against the documents when deciding the case of using judicial notice is *reliability.*[64] Additionally, case law shows that judges can only notice documents or parts of documents that are related to the ongoing proceedings (wording is – "*proceedings at stake"*).[65]

[60] 'International Military Tribunal'. Blue Series, Vol. 3, 179.
[61] Rules of Procedure and Evidence of International Criminal Court (hereafter ICC) and Special Tribunal for Lebanon (hereafter STL) does not contain clauses about possibility of using judicial notice of documents. Despite the fact that some national regulations do not contain explicit standards of using judicial notice it is still possible under some broad clauses. According to art 83 of Criminal Procedure Code of Serbia: 'Facts assessed by the court as generally known, *sufficiently examined*, admitted to by the defendant in a manner making further examination of that evidence unnecessary (Article 88), or where the consent of the parties in relation to such facts is not contrary to other evidence, shall not be proven'; See also Jill Hunter, Camille Cameron, Terese Henning, *Evidence and Criminal Process* (7th ed, Butterworths, 2005) 1041, this publication is about Australian Uniform Evidence Act article 144, which has mutatis mutandis similar formulation.
[62] This distinction is fragile and there have been sufficient critics for this. Inter alia, James G. Stewart, 'Judicial Notice of International Criminal Law: A Reconciliation of Potential, Peril and Precedent', (2005) 3, International Criminal Law Review, 245, at 260.
[63] *Prosecutor v. Semanza*, ICTR-97-20-I, 'Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54', November 3, 2000, para 38.
[64] *Prosecutor v. Nikolic*, IT-02060/1-A, 'Decision on Appellant's Motion for Judicial Notice', April 1, 2005, para 11.
[65] *Prosecutor v. Norman et al*, SCSL-2004-14-AR73, 'Decision on Appeal against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', May 16, 2005, para 49.

II.B.III. ADJUDICATED FACTS FROM RES JUDICATA JUDGMENTS

Criminal proceedings require a high standard of clarity and thoroughness. Therefore each judgment which is being adopted by the respective bodies in criminal cases is subject to precise definition and description and can have some evidentiary effect in further proceedings. There are jurisdictions and countries which define this institute under the doctrine of judicial notice,[66] while others give it the status of independent evidence[67]. It is not disputed that this category is slightly different from the judicial notice of common knowledge.[68] Judge Shahabuddeen provided for four distinctions between Rule 94 (A) and Rule 94(B) of Rules and Procedures and Evidence of ICTY.[69]

Despite this inconsistent approach we have to include res judicata judgments under the doctrine of judicial notice for several reasons. First of all, it is generally justified to broaden legislatively components of judicial notice when there are objectively justified reasons for this

[66] Criminal Procedure Code of Azerbaijan, art 141.1.3; Criminal Procedure Code of Latvia art 125 (2) (this regulation not only gives automatic evidentiary effect to previous judgments, but also prosecutorial injunctions); Criminal Procedure Code of Germany art 244(3) Available online: < http://legislationline.org/documents/section/criminal-codes > accessed March 18, 2012; Rule 94 of ICTY, ICTR and SCSL Rules of Procedure and Evidence; Criminal Procedure Code of Georgia art 73(b) (In Georgian) Available online: < http://laws.codexserver.com/3918.doc > accessed March 18, 2012; Criminal Procedure Code of Russian Federation article 90 in I.L. Petrukhin, *Komentarii k ugalovnomu protsesualonmu kodeqsu rassiskoi federacii (Commentary to the Procedure Code of Russian Federation)* (2nd ed, Prospect, 2003) 156-7; see also A.P. Rijakov, *Komentarii k ugalovnomu protsesualonmu kodeqsu rassiskoi federacii (Commentary to the Procedure Code of Russian Federation)* (4th ed, Norma, 2004) 220, in Scotland, Margaret L. Ross, James Chalmers, *Walker and Walker The Law of Evidence in Scotland* (T&T Clark, 2000) 168-171; French criminal law permits of using judicial notice, see the case *Lindon, Otchakovsky-Laurens and July v. France*, above note 57; cf. Decision of the Criminal Chamber of the Cour de Cassation, November 30, 1993, *Bulletin Civil*, no 221, 429.

[67] For United Kingdom, Peter Murphy, *Murphy on Evidence*, (8th ed, OUP, 2003) 392-425; for Canada, John Sopinka, Sidney N.Lederman, Alan W. Bryant, *The Law of Evidence in Canada* (Butterworths, 1992) 988-1047; for New Zealand, J.D. Willis, *Principles of the Law of Evidence in New Zealand* (5th ed, Butterworths, 1966) 121-134; for the USA, Charles T. McCormick, *Handbook of the Law of Evidence* (West Publishing, 1954) 618-9, for ICC, William A. Schabas, *The International Criminal Court – A Commentary to the Rome Statute* (OUP, 2010) 847.

[68] *Prosecutor v. Ntakirutimana et al.*, ICTR-96-10-T, 'Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, November 22, 2001, para 25.

[69] *Prosecutor v. Milosevic*, IT-02-54-AR73.5, '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', October 31, 2003.

and it does not threaten the rights of the defendant.[70] Secondly, judicial notice of res judicata judgments corresponds to one of its rationales – ensuring of consistent case law. This is obviously necessary when the same fact can be assessed in a different manner.[71] Thirdly, using of factual characterizations of previous judicial decisions may be necessary under special circumstances for fairness and justice.[72] Additionally, broader judicial notice gives a possibility to a judge to use previous court decisions' factual assessments and thus ensure speedy process. Finally, in some cases condoning and denying of some factual elements of certain criminal judgments are regarded to be crimes and they are being prosecuted, therefore in these cases decisions should have binding force.[73]

Generally a previous conviction can be useful for both parties, since it may contain exculpatory and inculpatory information. Its importance is vital in those cases when ongoing proceedings are about "interconnected crimes".[74]

Further, judicial notice of previous res judicata judgments should be distinguished from the principle of res judicata.[75] The latter has a prohibitory function and with double jeopardy rule in criminal proceedings protects defendants from the prosecution of the same facts *inter parties.* While judicial notice of previous res judicata judgments gives *erga omnes* (*in rem*)

[70] Mutatis mutandis, M.N. Howard et al (Eds), *Phipson on Evidence* (15th edn, Sweet & Maxwell, 2000) 46; In this book it was clearly indicated that in case of special ad hoc tribunals it was possible to use wider doctrine for judicial notice.

[71] Inter alia, Judgment of Supreme Court of Georgia, no 11/saz, February 19, 2008. According to article 113 of old Criminal Procedure Code of Georgia two cases where presented before Supreme Court of Georgia since they evaluated one fact in two different ways and each assessment was crucial for validity of each judgment. The Court quashed one of the judgments.

[72] Karin N. Cakvi-Goller, *The Trial Proceedings of the International Criminal Court – ICTY and ICTR Precedents* (Martinus Nijhoff Publishers, 2006) 96.

[73] Inter alia, European Union Council, 'On Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law', Framework Decision, 2008/913/JH, November 28, 2008, art 1.1.(c)(d).

[74] For instance, burglary and selling of stolen goods. Without the first, the second does not exist.

[75] The term 'res judicata' in case of judicial notice is used as an adjective as defined in explanatory report of the European Convention on the International Validity of Criminal Judgments (CETS No.: 070) – 'This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them' (Part I, art 1, para 3). *Principle of res judicata* is independent guarantee and literally the term has a form of noun, rather than adjective.

factual effect[76] to final judgments and thus has different function.[77] Additionally res judicata principle is concentrated also on legal determinations and characterizations of judgments and its effects can be related to it,[78] when judicial notice concentrates on facts solely.[79]

[76] It should be distinguished from *erga omnes* legal effect when, judgment is precedential for other courts. It is generally applicable in common law jurisdictions and in national jurisdictions where constitutional courts exist. For further details see: Venice Commission, The Relationship Between Constitutional Courts, Legislators And Judicial Power In The European System of Judicial Review towards a Decentralized System as an Alternative to Judicial Activism?' CDL-JU(2010)01, July 7, 2010.

[77] Judicial notice of adjudicated facts is also different from the concept of *precedent.* See also, *Prosecutor v. Kajelijeli,* ICTR-98-44A-T, 'Decision on Juvenal Kajelijeli's Motion in Objection to the Pre-Trial Brief', April 11, 2001. ICTY has case law about judicial notice and one of the requirements is that facts from previous judgments must be *distinct, concrete and precise; Prosecutor v. Prlic and others,* IT-04-74-PT, 'Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)', March 14, 2011, para 12.

[78] This issue in the context of the principle of double jeopardy was decided in *Sergei Zolotukhin v. Russia,* no. 14939/03 (ECtHR, February 10, 2009).

[79] John R.W.D. Jones, *International Criminal Practice* (3rd ed, OUP, 2003) para 8.5.726.

III. LIMITATIONS ON JUDICIAL NOTICE

Fair trial guarantees takes it roots from previous centuries when gradually some states proclaimed them. Today almost every constitution of the world contains human rights standards, including fair trial guarantees. In the United States this principle is often cited as Due Process requirement.[80]

In the previous chapter judicial notice of adjudicated facts were analyzed and presented. As we saw, it is an effective tool in modern criminal justice and for several reasons its use is justified. Each jurisdiction (civil and common law) can benefit from it and therefore it has to be widely accepted. But fair trial guarantees require certain limitations on judicial notice which will make its application proper and consistent with basic human rights standards. In the introductory part two Georgian examples were mentioned, which showed possible mischief in the application of judicial notice without proper limits. In above cases fair trial guarantees were fully disregarded, therefore some limits on the application of judicial notice of adjudicated facts should be set.

There have not been cases before international human rights protection institutions which were related to judicial notice of adjudicated facts, but mutatis mutandis evidentiary rules apply on many occasions. We will analyze and provide for some limitations that are necessary for the smooth operation of judicial notice. Each jurisdiction should adopt its legislation or at least case law in this manner in order to strike a fair balance between ensuring fair trial guarantees and providing an effective and consistent adjudication process.

In determining standards of fair trials we will rely on the European Convention of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the American Convention on Human Rights and respective case laws. These three

[80] David Resnick, 'Due Process and Procedural Justice' in J.R. Pennok & J. Chapman (Eds), *Due Process* (New York University Press, 1977) 206ff.

jurisdictions have many identical regulations and unified tests for fair trial guarantees. We will mainly concentrate on the European model of human rights protection, since it is oldest and vastest and has the most effective system. Additionally, the UN Human Rights Committee's and Inter-American Court's case law will be provided when there is difference in standards or they fill a gap in the European model. Additionally, we will take into account different constitutional standards of various states, which sometimes frame international human right standards.[81]

III.2. LIMITATIONS ON JUDICIAL NOTICE FROM GENERAL PERSPECTIVE OF FAIR TRIAL

According to article 6 of the European Convention everyone is entitled to a fair hearing. Almost identical wording is available in article 14 of ICCPR. ACHR provides for a guarantee for the right to hearing, with due guarantees[82] and "full equality"[83]. These provisions provide for an adversarial process and equality of arms.[84] The former clause is more specific and requires that an accused persons be informed about the case against them, in the 'sense of knowing all the evidence or arguments which the court could take into account when determining the charge and that he or she have the opportunity to challenge this evidence and contradict the arguments'.[85] The latter is retrospective in nature and assessment can only be based on comparison with the opposing party.[86] These guarantees provide for an instrumental

[81] Inter alia, *Scoppola v. Italy* (no 2), no. 10249/03 (ECtHR. September 17, 2009).
[82] Paragraph 1 of article 8 of in ACHR.
[83] Ibid. chapeau of paragraph 2 of article 8.
[84] Inter alia, *Ruiz-Mateos v. Spain*, no. 12952/87 (ECtHR, June 23, 1993) para 25.
[85] Stefan Trechsel, *Human Rights in Criminal Proceedings* (with the assistance of Sarah J. Summers, OUP, 2005) 85.
[86] Ibid.

protection during proceedings and therefore have a crucial role in ensuring the principle of rule of law.[87]

The above mentioned principles were defined by respective case laws. General Comment #32 of UN Human Rights Committee defines it as a restriction to the court not to tolerate arguments of only the prosecution.[88] Strasbourg case law is more precise and defines equality of arms in the sense of fair balance between adverse parties, or in other words the opportunity of an accused to present the case without substantial disadvantage against prosecution.[89] The right to adversarial proceedings means each party's opportunity to have knowledge about the opposing party's evidence and respectfully comment on it.[90] When assessing fair trial rights generally the Council of Europe institutions concentrate on the whole case, with due concentration on the right of the defense. More concretely:

> It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its *reliability* or *accuracy*. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker. (Emphasis added).[91]

As we see from the above passage, fairness of the proceedings requires that the evidence should be assessed in a certain way in order to achieve fairness. The same rule is applicable in

[87] Stefan Trechsel, 'Why Must Trials be Fair?'(1997) Vol 31, #1-3, Israel Law Review, 94.
[88] Para 25.
[89] Inter alia, *Dombo Beheer B.V. v. the Netherlands*, no.14448/88 (ECtHR, October 27, 1993) para 19.
[90] Robin C A White, Clare Ovey, *Jacobs, White, and Ovey The European Convention on Human Rights* (5th edn, OUP, 2010) 261.
[91] *Yaremenko v. Ukraine*, no 32092/02, (ECtHR, June 12, 2008) para 76.

the case of judicial notice since it is also a means of proof and can have an adversary effect for the accused depending on the context. Therefore each application of judicial notice must be limited by the above mentioned standards. As indicated above we will concentrate on reliability and accuracy of judicial notice in more details below and will present possible standards for ensuring fair trials and provide criticism for existing ones.

Initially we have to mention that the problem with fairness may arise with all components of judicial notice. Human rights standards on the international level can assess reliability, relevancy and accuracy of each notice of facts. However, we have to mention that there are no uniform rules on limitations on this issue. Of course, fair trial guarantee has jus cogens status (at least in Europe[92]) and therefore has to be applied thoroughly in every case, but its content is still vague and we have to provide for clear, precise and more or less enumerated guarantees that have to be obeyed in every case. The case law of ICTY and ICTR, also the Criminal Procedure Code of Russian Federation, Rules of Procedure and Evidence of STL and SCSL have some limitation clauses for judicial notice, but they are not perfect as such and need a more systemic approach with respective incorporation of other elements. In some instances, the case law of human rights institutions are solely in the wrong direction and also some national regulations have to be changed in order to use judicial notice with due respect to fair trial guarantees.

As we saw from the above case law and principles, fair trial guarantees require that accuracy of the evidence be observed by the courts. The first principle which emerges in this point and which judicial notice should correspond to is relevancy. Every use of general knowledge or other notorious fact, document and facts from res judicata judgments must be relevant for the hearing. If respective fact is relevant for one case, it does not necessarily mean that the same

[92] *Yassin Abdullah Kad et al v. Council of the European Union***,** Joined Cases C-402/05 P, C-415/05 P, (ECJ, September 3, 2008).

will be for further cases also. ICTR case law is precise on this aspect,[93] since in an opposite case the rationale for judicial notice would be discredited and case dockets created.

A second limitation clause from the accuracy and reliability standpoint is authenticity of judicial notice. Again all aspects of judicial notice are relevant, except general propositions, which are sufficiently proved even without proper sources. Specific local or general knowledge, documents and facts from res judicata judgments require proof of authenticity. In the first two cases, the source should be reliable or its use must be justified by scientific evidence.[94] Res judicata judgments require special treatment and ICTY and ICTR developed special three-fold test:

- Accuracy – original judgments formulation must not be altered by the moving party (party who request judicial notice) substantially and originality should be maintained.[95] However, there may be some minor inaccuracy or ambiguity that may be cured by the judges, proprio motu.[96]
- Context Element – the moving party/judge must provide respective facts in their original context, since without it content may be misleading and clarity and accuracy flawed.[97] Surrounding facts must be assessed from the sources which are basis for proposed judicial notice.[98]
- Form – concrete fact should be noticed in a precise manner with due reference to paragraphs and pages of original judgments,[99] in order for the adverse party to have an

[93] Inter alia, *Semanza v. Prosecutor*, ICTR-97-20-A, Judgment, May 20, 2005, para 189.
[94] Ronald Joseph Delisle, *Evidence Principles and Problems*, (The Carswell Company Limited, 1984) 91.
[95] *Prosecutor v. Krstic*, IT-98-33-T, Judgment, August 2, 2001, para 18.
[96] Ibid.
[97] *Prosecutor v. Keremera et al*, ICTR-98-44-AR73(C) 'Decision on the Prosecution's Interlocutory Appeal of Decision on Judicial Notice', June 16, 2006, para 55.
[98] *Prosecutor v. Hadzihasanovic* IT-01-47-T, 'Decision on Judicial Notice of Adjudicated Facts Following the Motion Submitted by Counsel for the Accused Hadzihasanovic and Kubura on 20 January 2005', April 14, 2005.
[99] *Prosecutor v. Kupreskic et al*, IT-95-16-A, 'Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B)', May 8, 2001, para 12.

opportunity to provide counter argumentation and judge to decide the issue. The issue is problematic for instance in Georgia, where prosecutors simply refer to other decisions without indicated proper identification details.[100]

Judicial notice of adjudicated facts from res judicata judgments requires additional limitation from fair trial guarantee. The original judgment must not be based on agreements between parties and fact should not be subject to it.[101] This may have the form of plea bargaining, nolo contendere, stipulation or other procedural mechanisms. The rationale behind this restriction is that original fact may not be presumed accurate or reliable, because according to adversarial proceedings, any fact can be agreed without the judge's intervention. In this case facts have only *inter se* application and should not expand further, thus judicial notice is prohibited. Otherwise, by agreement with one co-defendant, the prosecutor can create a predetermined case for other accused and thus give fictional application to the fairness requirement.

Unfortunately, the case law of the European Commission of Human Rights (ECHR) and the courts of the UK are not fully compatible with the content of fair trial/hearing understanding when interpreting judicial notice of adjudicated facts.[102]

In the UK according to the first paragraph of article 74 of the Police and Criminal Evidence Act[103] the judgment of a person other than the accused may be used in the latter's case

- for proving relevant issues in an ongoing proceedings or
- The fact that another person had committed a certain crime.

[100] See above note 10, *Gyla Report.*
[101] *Prosecutor v. Milosevic,* IT-02-54-T, 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts', April 10, 2003, para 3.
[102] It has to be noted that in the UK, this situations are not covered by the doctrine of judicial notice and is regarded as evidence. About this issue see above, section II.B.III.
[103] The law is available online: < http://www.legislation.gov.uk/ukpga/1984/60/contents > accessed March 21, 2012.

The second issue is not problematic from a judicial notice standpoint. Only the first can create problems when there are agreements of parties in proceedings. For example, in the *O'Connor* case[104] the co-defendant pleaded guilty for conspiracy of fraud. This judgment was found admissible by the trial judge and the defense appealed since it could have an adverse effect on the fairness of the proceedings. But unfortunately the appeals court rejected the appeal and found the case to be compatible with fair trial guarantees. This principle was somehow limited in *Robertson and Golder*[105] by adding that it should only be used sparingly and the judge should give information to the jury that previous judgment does not have conclusive effect, but *O'Connor* was not overruled and it is still the law.[106]

A similar case went to ECHR from the UK – *MH v. UK*[107]where the defendant was charged with conspiracy to cheat the revenue service. The co-defendant pleaded guilty and the judgment was admitted as evidence. Higher courts found the case to be compatible with fair trial guarantees. The Commission concluded that the admission of the plea did not render the trial unfair, since this judgment was not the sole reason of proving conspiracy and there was also the possibility of cross examination of the co-defendant personally.[108] These arguments are weak and do not answer the question what would have happened by the cross examination of a co-defendant to the written judgment which was an independent source of information. Additionally, the first argument of the ECHR is also flawed, since it would be always unclear why an agreement was adopted by the parties in the original proceedings and thus credibility and reliability of that evidence is nominal.

To avoid the above situation, the Criminal Procedure Code of the Russian Federation clearly indicates that previous res judicata judgment cannot prove the guilt of the defendant for the

[104] *O'Connor* (1987) 85 Cr App R 298.
[105] *Robertson and Golder* [1987] QB 920, Lord Lane opinion.
[106] Peter Murphy, *Murphy on Evidence*, (8th ed, OUP, 2003) 418.
[107] Ben Emmerson, Andrew Ashworth, Alison Macdonald (Eds), *Human Rights and Criminal Justice* (2nd ed, Sweet & Maxwell, 2007) 653.
[108] Ibid. 654.

subsequent proceedings.[109] This regulation is incorporated to limit the use of judicial notice. The Supreme Court of the Russian Federation additionally added that any judge should refrain from explicit or implicit indication of the guilt of other people rather than accused in the judgment; even those persons are related to the case before them.[110]

The next limitation on judicial notice applies to its all components and prohibits determination of personal criminal responsibility by this exceptional rule of proof.[111] Generally speaking personal responsibility covers all aspects of criminal liability, but for the purpose of the current paper this context covers only act, conduct or mental state[112] of the accused. Judge Robertson clearly indicated the margins of using judicial notice:

> The defendant, by pleading "not guilty", puts in issue his *mens rea* or guilty mind which cannot in consequence be the subject of judicial notice. He also puts in issue the *actus reus,* i.e. that description of offending conduct to which the court must be satisfied that his actions amount. Judicial notice may be taken of facts which <u>are relevant to characterize his actions, but those actions themselves must be proved by evidence</u>. (Underline added).[113]

The above passage clearly indicates that judicial notice should have a supplementary and secondary role in proving facts. Since its initiation may be conducted by the judge, the defendant in the criminal case should not have an impression that the case against him is presented by the judge. Otherwise judicial economy and consistency of case law may damage

[109] A.V. Smirnov, K.B. Kalinovski, *Ugalovni pracess (Criminal Proceedings)*' (Piter, 2004) 227-8.
[110] Ordinance of the Plenary Session of the Supreme Court of Russian Federation on Judgments, #1, April 29, 1996, para 7.
[111] Jon R. Waltz, *Criminal Evidence* (Nelson-Hall Company, 1974) 283-4.
[112] Cf. Rules of Procedure and Evidence of STL, Rule 160(B), where the prohibition is only covering *act* or *conduct* without referring to *mental state* or *condition* (mens rea requirement).
[113] Separate Opinion of Justin Robertson, para 16, SCSL-2004-14-AR73, 'Decision on Appeal against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', May 16, 2005.

an independence and impartiality of the courts[114] and may infringe the accused's right to hear and confront the witness against him. Like in the above mentioned cases, in this instance the co-defendant may also blame someone and therefore it would be impossible to challenge that statement (which as such becomes part of the judgment).[115]

Another limitation of fair trial guarantees refers only to res judicata judgments and facts indicated therein. The judgments should be final as indicated from the name. This means that they should not be subject to appeal or cassation. In a case where the Public Defender of Georgia applied with amicus curiae brief before the courts, the judgment noticed was not final. Unfortunately, the Criminal Procedure Code of Georgia does not contain the requirement about the necessity of judgments to be final when using them as judicial notices. This creates the situation that reliability and credibility of evidence is low and therefore fair trial guarantees are violated. Additional criteria have been added to this rule by the case law of the ICTY and judgments that are subject to "pending review proceedings" are restricted from being a source of judicial notice of adjudicated facts.[116] In this situation there is still a possibility of changes in the content of a judgment.

One of the elements of fair trial guarantee is that parties should not be accorded an unjustified burden in criminal cases in adversarial proceedings. In this case the principle of adversariality will be violated and it should be avoided to the maximum extent. For instance, in the *Krajisnik* judgment ICTY rejected the prosecutor's motion for noting several adjudicated facts, since its anticipation attempts of rebuttal would have resulted in excessive time and

[114] For similar problem see: Göran Sluiter, 'Karadžić on Trial: Two Procedural Problems', (2008) 6 (4) Journal of International Criminal Justice, 617.
[115] Of course, this restriction does not apply to the other persons, for instance, in the proceedings against *X*, the judgments of *Y* may be presented in order to show the latter's culpability for certain crimes. This is especially true in the cases of conspiracy, co-perpetration, Joint Criminal Enterprise and other crimes that are committed by group of people.
[116] *Prosecutor v. Popovic et al,* IT-05-88-T, 'Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts', September 26, 2006, para 14.

recourse consumption.[117] The defense in this situation would be jeopardized and therefore this *fair balancing approach* should be used in every jurisdiction in order to preserve the efficiency in court adjudication and human rights protection. Judicial economy will be frustrated if facts noticed are broad, vague and tendentious or conclusory because of its scope or content.[118]

Also ICTY made it clear that when there are inconsistencies in the sources (covering all sources, but with special emphasis on res judicata judgments), judicial notice should not be taken, since reliability would be endangered.[119] This means that *in dubio pro reo* principle is also applicable in the process of using judicial notice. ICTY has also used the above restriction from the fairness of the proceedings standpoint when it was impossible to differentiate and discern facts that were directly related to *actus reus* and *mens rea* of an accused and that were not.[120]

As we can see from the above reasoning and compilations from different jurisdictions, there are problems in applying judicial notice from a general fair trial guarantee standpoint. Hardly any jurisdiction provides for detailed limitations from a general fair trial guarantee standpoint. This has to be amended and all above threshold requirements have to be incorporated either in laws or in the case laws, since without them fair hearing requirement becomes fictional. Additionally, the case law of the ECHR has to be amended and changed and modern developments of human rights have to be accorded to judicial notice also.

[117] *Prosecutor v. Krajisnik*, IT-00-39-T, 'Decision on Third and Fourth Prosecution Motions for Judicial Notice of Adjudicated Facts', March 25, 2005, para 16.
[118] *Prosecutor v. Mejakic*, IT-02-65-PT, 'Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B)', April 1, 2004, para 5.
[119] Inter alia, *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Judgment, January 17, 2005, para 354.
[120] *Prosecutor v. Karemera et al*, ICTR-98-44-AR73(C), 'Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice', June 16, 2006, para 52.

III.2.REBUTTAL OF JUDICIAL NOTICE

Right to rebuttal may have two dimensions. The first is absolute and covers the situation when it concerns the rebuttal of the whole case and is an issue of presumption of innocence.[121] The second is more specific and covers cases when an accused is given a right to refute concrete evidence.[122] Presumption of innocence gives everyone benefit from doubt that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to respective proceedings. The wording is almost identical in every international instrument.

The most famous case decided by the ECtHR was *Salabiaku v. France*[123] where the Court decided the issue whether persuasive evidential burden[124] on an accused contradicted presumption of innocence. The Court declared that presumptions of facts or of laws operated in every legal system and the Convention was not prohibiting them. It does, however, require states to remain within certain limits in this respect as regards criminal law.[125] This case law was subsequently affirmed in a number of judgments.[126] The same approach is taken by the UK courts[127] and by other jurisdictions,[128] but more restricted practice was adopted by the Supreme Court of Canada where it was declared that disproof of an important element of the crime should not be vested on the accused.[129] The latter practice was also supported by the Constitutional Court of South Africa.[130]

[121] Peter van Dijk, Marc Viering (rev), 'Right to a Fair and Public Hearing (Article 6)' in Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights* (4th Edn, Intersentia, 2006) 625.
[122] *Castillo-Petruzzi et al. v. Peru*, Inter American Court of Human Rights, Series C No. 52, Judgment of May 30, 1999, para 140.
[123] Application no. 10519/83 (ECtHR, October 7, 1988).
[124] This category includes the case when defense has to rebut *actus reus* or/and *mens rea* or its some elements. In contrast to this category there exists "evidential" burden, when defense is required to prove the *prima facie* case and so called "special defense" reversal, when exceptions from criminal liability has to be proved by an accused.
[125] Para 28.
[126] Inter alia, *Pham Hoang v. France, no. 13191/87* (ECtHR, September 25, 1992) paras 35-6; *Janosevic v. Sweden*, no. 34619/97 (ECtHR July 23, 2003) para 102.
[127] *Attorney General's Reference No4 of 2002; Sheldrake v. DPP* [2005] 1 A.C. 246, Lord Bingham, para 21.
[128] Inter alia, Constitutional Court of Georgia, Judgment, no 2/5/309,310,311, July 13, 2005.
[129] *R v. Oakes*, 26 D.L.R. (4th) 200.
[130] *State v. Mbatha*, [1996] 2 L.R.C. 208.

Rebuttal of concrete evidence is the issue of fairness of the proceedings which was addressed in the previous chapter and therefore the opportunity of challenging the authenticity/content of the evidence and of opposing its use will be subject to the same adversariality requirements.[131] This aspect may additionally raise the issue of the impartiality of the judge, since judicial notice may be adopted not only by the motion of the party, but also judicially in a *proprio motu* way.[132]

In this sub-chapter we will analyze each component of judicial notice from the standpoint of presumption of innocence and fairness of the proceedings (rebuttal of *in concreto* evidence), more particularly the right of the defendant to rebut the judicial notice. If we give conclusive power to judicial notice it should correspond to above standards since it has evidentiary power and should also be construed in a proper way.

Generally there exists principle – *non refert quid notum sit judici, si notum non sit in forma judicii* – this requires that irrespective of judge's knowledge all the facts should be proved in a case before the judge.[133] There is the exception from the above rule – *notoria non indigent probatione* which stresses the importance of some sources in order to prove the case and judicial notice is included in this sphere.[134] The court should not prove those facts that are known to it and are presumed not to be objected by the parties.

Before going into details we have to distinguish two types of judicial notice – discretionary and mandatory. Almost all jurisdictions differentiate them and the divergence is based on the credibility and notoriety of a fact. Those facts that are universally adopted and agreed are

[131] In a case *Kamasinski v. Austria*, ECHR declared that party's inability to comment on evidence that has been adduced by the judge was contrary to article 6(1) of the European Convention. no 9783/82, ECHR, December 19,1988.
[132] Venice Commission, *Right to a Fair Trial*, CDL-STD(2000)028, para II-H,
< http://www.venice.coe.int/docs/2000/CDL-STD(2000)028-e.asp#_Toc98299884 > accessed on March 24, 2012.
[133] James B. Thayer, 'Judicial Notice and the Law of Evidence', (1890) Vol III, No 7, Harvard Law Review, 286.
[134] L.E. Vladimirov, *Uchenie ab Ugalovnikh Dakazatelstvakh (Study about Criminal Evidence)* (in Russian, Avtograf, 200) 175-79.

covered under the limb of mandatory notice and those that require a more specific approach with respective inquiries are – discretionary. In the first case the judge should use the evidence, while in the latter case it is decided on a *sua sponte* basis. Therefore when courts take judicial notice by any of the above mentioned procedures, it is regarded to be compulsory and no evidence is permitted against it. From my point of view, this rule contradicts the presumption of innocence and the accused should have *a right to refute* all the notices taken judicially. Otherwise we may face violation of the principle that has been adopted in international human rights law and is also protected by many constitutions throughout the world. Without rebuttal, the presumption of innocence will be nominal and some matters noticed by the judges may jeopardize the right of the defendant. Below I will analyze the contradictory positions that exist at doctrinal and practical level about this issue and in the light of the above reasoning provide for respective argumentation.

Federal Rules of Evidence of the United States of America declare that judicial notice must not be subject to reasonable dispute.[135] This mandatory requirement is based on an assumption that judicial notice is the courts intervention in the evidentiary process and therefore equality should be ensured to the maximum extent. The result is that presentation of any evidence against judicial notice is prohibited and it has conclusive force. [136] Most of the authors rely their argumentations on historical understanding of judicial notice and indisputability is regarded as one of its aspects. This approach is simply exaggeration of the institution since the judge cannot predict the issue of parties consent in advance.

Some jurisdictions prohibit rebuttal of judicial notice since every party has the possibility to express their views freely before judge's final ruling on judicial notice and also because this

[135] Glen Weissenberger, *Federal Rules of Evidence – Rules, Legislative History, Commentary and Authority* (Anderson Publishing Co, 1999) 43-4.
[136] Spencer A. Gard, *Jones on Evidence* (Vol 1, Bancroft –Whitney, 6th edn, 1972) para 2:12.

process will undermine the rationale of judicial notice – expeditious litigation.[137] The first argument should not be supported since necessity of corroboration may arise after judicially noticing the fact. As for the second, speedy proceedings should not overcome the party's right to rebuttal, since without the latter fair trial does not exist and justice itself will be fictional and aversive. This will lead to the deprivation of the essence of the right. Some professors argue that if we give a possibility of rebuttal of judicial notice, the doctrine will be impossible to be distinguished from the presumptions.[138]

At the beginning of its operation ICTY and ICTR[139] have been consistently requiring that judicial should be conclusive and therefore no evidence could be used against it.[140] This practice was changed by the ICTY Appeal Chamber in the *Milosevic* case, where it was differentiated between adjudicated notorious facts and matters taken from previous res judicata judgment.[141] The former was regarded to be irrefutable, while the latter was formulated as presumption. The decision does not contain argumentation, but judge Shahabuddeen annexed separate opinion, which explains reasons.[142] The main argumentation was that when facts are derived from judicial decisions there may be less possibility of accurate verification.[143] And also there may emerge new evidence which has to be used by the

[137] The Law Reform Commission of Canada, *Evidence* (1973) 17
[138] John Macarthur Maguire, *Evidence – Common Sense and Common Law* (The Foundation Press, 1947) 175.
[139] For the practice of SCLS see: Separate Opinion of Justin Robertson, paras 5-9, SCSL-2004-14-AR73, 'Decision on Appeal against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', May 16, 2005.
[140] This approach partially was due to different formulation of Rule 94 of Rules of Procedure and Evidence of both tribunals. Inter alia, *Prosecutor v. Simic et al,* IT-95-9, 'Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Charter of the Conflict in Bosnia-Herzegovina, March 25, 1999.
[141] *Prosecutor v. Milosevic*, IT-02-54-AR73.5, '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', October 28, 2003.
[142] *Prosecutor v. Milosevic,* IT-02-54-AR73.5, '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', October 31, 2003.
[143] Ibid. para 11.

defense to prove their case.[144] For the above reasons and also taking into consideration the right of presumption of innocence, the judge found it compelling to have the possibility of rebuttal in case of res judicata judgments, in contrast to notorious facts.[145] Judge Hunt dissented and supported more traditional approach of "non-refutability" and "non-disputability" of judicial notice.[146]

John Henry Wigmore is regarded as the most prominent supporter of the idea of refutability of judicial notice. His approach is based on an assumption that judicial notice is a presumption and it is being used in cases when parties ordinarily have to provide the evidence.[147] It just assumes notoriety of particular fact, but opponent can provide for additional evidence if it finds disputable.[148] Wigmore provides for various examples where judicial notice was rebutted by the interested party and which was adopted by the judge.[149]

The same approach was adopted by James B. Thayer, who provided that judicial notice was *prima facie* case recognition of the fact, leaving the matter still open to controversy.[150] For him judicial notice is an instrument in the hand of a judge to presume certain facts until proved otherwise.[151] According to Thayer's argumentation, judicial notice has a proper and delicate utilitarian function in evidentiary law.[152] Special attention was devoted to the personal and human nature of a judge, who is judicially noticing facts and it was argued that

[144] Ibid. para 14.
[145] Ibid. para 15.
[146] Ibid. 'Dissenting Opinion of Judge David Hunt'.
[147] John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edn, Vol 9, Little, Brown and Company, 1940) para 265-6
[148] Ibid. para 267
[149] Ibid. para 267 footnote 1.
[150] James B. Thayer, 'Judicial Notice and the Law of Evidence' (1890) 3 Harvard Law Review, 285, at 309.
[151] Ibid. 310.
[152] Ibid. 310.

judges should not adopt conclusive predefined facts.[153] Additionally, some authors provide for 3 distinct possibilities when judicial notice can be rebutted by other evidences:

- Inapplicability of the judicial notice – when a party shows to the judge that a certain factual situation has changed and been modified and in these circumstances other conclusions should be chased.[154]
- So called "Partial Judicial Notice" – when the party proves that despite general proposition of the content of judicial notice it should not be used in a particular case.[155]
- Premature judicial notice – when the court judicially notices the fact without duly informing the parties and it turns out that other party could have provided evidence against it. This is especially important when judges can act on *sua sponte* basis.[156]

Taking into account the above considerations we have to conclude that judicial notice of adjudicated facts are a type of the presumptions. The latter is defined by the law and the judge automatically uses it on every occasion if certain conditions are fulfilled.[157] Unlike this, judicial notice is an ad hoc defined presumption. The judges define it on every occasion and use it in a respective case. Their impartial and independent role in proceedings gives them a possibility to acquire such function. This rule applies to all components of judicial notice and the only difference may be in the degree of persuasiveness and notoriety. When a judge adopts a presumption of general proposition of common and universal knowledge (e.g. that the moon is earth's satellite) it would be practically irrefutable because of its content. But

[153] Kenneth Culp Davis, 'Judicial Notice' (1955) 55 Columbia Law Review, 945, at 348-9; See also: Peter K. McWilliams, *Canadian Criminal Evidence* (2nd edn, Canada Law Book Limited, 1984) 649.
[154] G. D. Nokes, 'The Limits of Judicial Notice' (1958) 74 Law Quarterly Review, 59, at 73.
[155] Ibid. 73-4. Despite the fact that some authors disagree with the rebuttal of judicial notice, they still provide for a possibility of this exception. See: Edmund M. Morgan, 'Judicial Notice' (1944) Harvard Law Review, 57, 269, at 280ff; Michael Hirst, *Andrews & Hirst on Criminal Evidence* (4th Edn, Jordans, 2001) 122.
[156] Supra note 154 G.D. Nokes, 74-5.
[157] Sir John Smith, *Criminal Evidence* (Sweet & Maxwell, 1995) 47-53.

when there is special, local fact at stake or previous res judicata judgments they can be easily rebutted due to their not totally credible nature.[158]

Thus, we can differentiate de facto and de jure refutability in using judicial notice. In the first case we can say that some of them are refutable/irrefutable because of their nature and persuasive effect. But the latter requires that there should always be possibility for an individual to provide contrary evidence for judicial notice.[159] This is the requirement of presumption of innocence and fair trial guarantees which were presented above. Everyone should have a right to rebut evidence against him and this principle additionally applies to judicial notice because of its characteristics.

III.3. JUDICIAL NOTICE AND RIGHT TO IMPARTIAL TRIBUNAL

As was mentioned in the previous sub-chapter, judicial notice is a tool in the hands of the fact finder and it has to be used in a proper way in order to ensure fulfillment of prescribed aims and protection of human rights. An interesting case arises when judges judicially notice several facts and then direct them to the jury as mandatory standards. This issue has to be analyzed in the light of the right to impartial tribunal. This is of particular importance since juries are regarded to be solely responsible for fact finding and many jurisdictions regard them as ultimate determinants of non-legal aspects of cases.[160] We have to mention that jury trials usually exist in two ways – they are regarded to be the form of judicial administration or concrete right of a person. From the impartiality standpoint this divergence is irrelevant and inapplicable and our reasoning applies to both types.

[158] Generally speaking discovery of the moon and criminal proceedings are both the result of human acts. But in the first case, there is empirical study and the second is more based on deductive or inductive assumptions with less scrupulosity.
[159] This approach is also supported in the Criminal Procedure Code of Latvia, art 125, which gives a possibility of a rebuttal of all types of information that has been taken as judicial notice, including the so called "notorious facts".
[160] Richard Vogler, Barbara Huber (Eds), *Criminal Procedure in Europe* (Duncker & Humblot, 2008).

The UN Human Rights Committee defined judicial impartiality as the absence of a predefined conception about the matter before the judge with supporting interests of one of the adverse parties.[161] Additionally, the European Court of Human Rights has stated on a number of occasions that the impartiality of the judges means that the case will be decided by the fact finders on a reasonable assessment of evidence.[162] They have twofold criteria of assessing impartiality – subjective and objective elements. The former includes judge's personal attitude in a case,[163] while the latter concentrates on the public and assesses impartiality from the standpoint of an ordinary and objective citizen.[164] Objective impartiality has a close nexus with general judicial independence and in some cases they are decided together irrespective of their distinctness.[165] The concept of independence includes that the tribunal should have full independence and both *facts* and *laws* should be decided without other body's involvement.[166] According to the Venice Commission, this includes two aspects – *internal* and *external* independence.[167]

Judges play an important role in jury trials, but their main function is to assist jurors rather than to hinder their independence and impartiality. The evidentiary process at the level of admissibility is out of the juries' determinative scope. Therefore by analogy judicial notice of adjudicated facts falls under the ambit of the judge rather than lay persons. But the issue is whether judicial notice should have mandatory effect for jurors and whether there will be possibility of its rebuttal.

In the UK, for instance, the jury can be directed by the judge to decide the case according to judicial notice. This is a mandatory rule and it has to be complied in every case. In the

[161] *Karttunen v. Finland*, no. 387/1989 (Human Rights Committee, November 5, 1992) para 7.2.
[162] *Piersack v. Belgium,* no. 8692/79 (ECtHR, October 1, 1982) para 30.
[163] *Kyprianou v. Cyprus*, no 73797/01 (ECtHR, December 15, 2005) .
[164] *Incal v. Turkey*, no 22678/93 (ECtHR, June 09, 1998).
[165] *Moiseyev v. Russia,* no. 62936/00, (ECtHR, October 9, 2008) para 175
[166] *Albert and Le Compte v. Belgium*, nos 7299/75; 7496/76, (ECtHR, January 28, 1983) para 29.
[167] Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges,* CDL-AD(2010)00, March 16, 2010.

Simpson case the UK courts took the judicial notice of the fact that a flick-knife was an offensive weapon and therefore jury was informed in a mandatory manner.[168] Additionally, the Model Code of Evidence of American Law Institute provides for a compulsory instruction of jurors.[169] Its Rule 805 clearly indicates that the judge, who takes judicial notice (which in turn could have been proved by ordinary proceedings), should inform the juries to decide the case accordingly.[170]

This approach should not be tolerated and must be changed since it contradicts internal impartiality of the judiciary. As indicated in the previous paragraph, judicial notice is a de jure presumption which can be rebutted by the parties. This possibility, of course, has to be applied to the triers of the fact, since they decide the factual matters. The lay adjudicator's personal conviction is crucial for a decision, thus judges' involvement with mandatory tools are unnecessary. Otherwise judicial notice will lose its function and it would become suppression measure against democratic involvement in the judicial process.

Our argumentation is even more supported by the US legislation and the case law. Despite the fact that judicial notice is regarded as indisputable in the United States and its conclusive power is incontestable, still in criminal cases juries are informed that they are not bound by judicial prior determinations.[171] It is discretionary and therefore the jury can use it based on its credibility, in a similar way as they do with ordinary evidences.[172] This is constitutional limitation on judicial notice and therefore should be applied in every case.[173] An

[168] [1983] 1 WLR 1494.
[169] Supra note 45.
[170] Beside these examples there are some countries that do not regulate at all the issue, and therefore in that instances general rule of judicial notice (which is adopted by the judge) applies and judicial notice is mandatory to the jury. Inter alia, according to Criminal Procedure Code of Georgia there is no provision which will preclude judge from applying mandatory judicial notice on jury.
[171] Federal Rules of Evidence, Rule 201(g)
[172] David L.Hefflinger, 'Proposed Rule Broadens Scope of Judicial Notice', (1974) 53, Nebraska Law Review, 333, at 337.
[173] Murl A. Larkin, 'Article II: Judicial Notice' (1993) 30, Houston Law Review, 193.

understanding is that the Sixth Amendment of the US Constitution would be violated if applied otherwise.[174]

III.4. OTHER PROCEDURAL GUARANTEES FOR JUDICIAL NOTICE

In this chapter we will address three issues which are also equally important for smooth application of judicial notice and respective limitations from fair trial standpoint. These include the issue of procedural legality (*nullum judicium sine lege*), guarantees of providing equal opportunities before noticing facts and *reformation in pejus* principle. These aspects are equally important to the above mentioned guarantees, but for convenience and structure of the paper it was decided to include these parts in one sub-chapter.

III.4.I. NULLUM JUDICIUM SINE LEGE

Alongside *nullum crimen sine lege* guarantee, procedural legality exists - *nulla poena sine iudicio.* This principle requires that each judicial deliberation and dispute resolution in criminal law should be decided by the judiciary.[175] Procedural legality additionally was defined by the ECtHR and it was indicated that article 6 of the European Convention guarantees that criminal procedures must be laid down in the form of the foreseeable law.[176] In the *Coëme* case the issue was decided from the equality of arms standpoint, nevertheless its scope can be broadened and used in conjunction with other aspects.[177] The ECtHR made it clear that the 'primary purpose of procedural rules were to protect the defendant against any abuse of authority and it is therefore the defense which is the most likely to suffer from

[174] William M. Carter, 'Trust Me, I am a Judge: Why Binding Judicial Notice of Jurisdictional Facts Violates The Right to The Jury Trial' (2003) 68, Missouri Law Review, 649.
[175] Mario Chivario, 'The Rights of the Defendant and the Victim' in Mireille Delmas-Marty and J.R. Spencer (Eds), *European Criminal Procedures* (CUP, 2006) 546.
[176] *Coëme and Others v. Belgium,* nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, (ECtHR, June 22, 2000) para 102.
[177] Stefan Trechsel, *Human Rights in Criminal Proceedings* (with the assistance of Sarah J. Summers, OUP, 2005) 111.

omissions and lack of clarity in such rules'.[178] This rule is not related to retroactive or retrospective application of the law and simply speaks about the existence of the law for ensuring fair proceedings.[179] Absence of the law precludes state – inter alia prosecutor and judge to use procedures against a person even with analogy.

Judicial notice is a procedural matter and therefore the above mentioned rule applies mutatis mutandis. They contain information that may affect parties (from human rights and criminal law perspective only the accused) and therefore it should be used with maximum scrupulosity. Despite the fact that notice can be rebutted, it still can be an additional burden for the defendant and therefore the issue under fairness of the proceedings or impartiality of the court may arise.

This approach has support from academic and legal sources. In 'Jones on Evidence' it is clearly indicated that judicial notice should only be used of those facts that are clearly enumerated in the law.[180] This does not prohibit using general clauses, on the contrary it requires minimum level of legality. The Supreme Court of California implicitly supported this approach.[181]

The principle of Nullum judicium sine lege was subject to controversies in the case law of the United Nations criminal tribunals at the beginning of their operation since they have used very broad concepts of judicial notice and therefore achieved much ambiguity.[182] This should be avoided in the future.

[178] Ibid. *Coëme* case.
[179] For this issue and their difference see inter alia: *Martelli v. Italy* (dec), no. 20402/03, (ECtHR 12 April 2007).
[180] Spencer A. Gard, *Jones on Evidence* (Vol 1, Bancroft –Whitney, 6th edn, 1972) para 2:5.
[181] *Barreiro v. State Bar of California*, 2 Cal.3d 912, 88 Cal. Rep, 192 cited in Thomas J. Gardner, *Criminal Evidence – Principles, Cases and Readings* (Wes Publishing Co, 1978) 140.
[182] O-Gon Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench' (2007) 5 Journal of International Criminal Justice, 360, at 368ff.

III.4.II. PROCEDURAL GUARANTEES BEFORE TAKING JUDICIAL NOTICE OF ADJUDICATED FACTS

In this section we will generally analyze those aspects of judicial notice that have not been subject to due attention in national and international proceedings and legislations and which should be additionally incorporated. Absence of these regulations is not per se a violation of human rights, but their further inclusion in practice will make judicial notice more effective[183] and protection of human rights more possible.[184]

First of all, there should be time limits on using judicial notice.[185] This is necessary for a party of the proceedings to have an opportunity to rebut the judicial notice at the hearing by presentation of additional evidence. Without it fair trial will be violated and justice flawed.[186] For instance, The Trial Chamber of ICTR in the *Akayesu* case took judicial notice at the judgment stage, after the termination of the presentation of cases.[187] In this situation it is becoming impossible to conduct proper defense.

Secondly, when the court takes judicial notice of certain facts it should give the opportunity to each party to present their argumentations.[188] This requirement should be obeyed irrespective of the fact that judicial notice is refutable. At initial phase parties can comment about the scope of the notice and can provide their reliable sources for better identification of the issue. Of course, the accused can provide this information after notice and ask for its review or simply refute it (since judicial notice creates *prima facie* proof), but more time will be

[183] Jill Anderson, Jill Hunter, Neil Williams, *The New Evidence Law: Annotations and Commentary on the Uniform Evidence Acts* (LexisNexis Australia, 2002) 704.
[184] Speedy proceedings itself is one if the aspect of the fair trial guarantee.
[185] Supra note 62, *James G. Stewart*, 273. s
[186] Salvatore Zappala, 'The Rights of the Accused' in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* Vol II (OUP, 2002) 1293.
[187] Ibid. In a footnote 138.
[188] This regulation is more necessary in cases when judges take judicial notice proprio motu.

devoted to this issues and therefore speedy justice will have a nominal meaning.[189] Therefore with this limitation judicial notice is getting more effective and furthermore human rights are protected by equal and fair balancing.

III.4.III. REFORMATIO IN PEJUS PRINCIPLE

According to the principle of *reformatio in pejus* – the sentence or the conviction cannot be increased in higher courts when an accused is appealing the case.[190] According to the Venice Commission this principle is binding in 19 Council of Europe member states.[191] The rationale for *reformatio is pejus*[192] is that procedural realization of some basic rights should never be harmful to the rights holders.[193] UN Human Rights Committee clearly indicated:

> …the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus, and expeditious procedure.[194]

Judicial notice has evidentiary effect and therefore its scope may affect the rights of the accused. Thus when the case is appealed by the defendant, the judge should be refrained from taking judicial notice of facts that will be detrimental to the defense. Each jurisdiction should

[189] Gregory Lafontaine, Vincenzo Rondinelli, *Cox's Criminal Evidence Handbook* (Canada Law Book, 2009) para 8.63.
[190] Ruling of the Constitutional Court of Russia, no 5-P, May 11, 2005.
[191] Venice Commission (Steering Committee for Human Rights), *Sustained Action to Ensure the Effectiveness of the Implementation of the ECHR at National and European Levels*, CDDH(2008)008, Appendix V, para 12.
[192] In inter American Court of Human Rights the principle is worded in a following terms: 'principle of coherence or correlation between the indictment and the conviction'. Case of *Fermín Ramírez v. Guatemala*, Judgment, Series C No. 126, June 20, 2005, para 67.
[193] Recommendation of Public Defender of Georgia to High Judicial Council, #1142/04-8/2670-09, April 6, 2011.
[194] *Morael v. France*, no. 207/1986, July 28, 1989, para 9.3.

make clear prohibition of judicial notice at the appeal level for ensuring proper operation of reformation in pejus principle.

Usually countries, that has been subject to this research, have no restrictions in their legislations and appeal judges are capable of adopting judicial notice at any stage without due consideration of the issue of *reformation in pejus* principle.[195] ICTY Appeals Chamber declared that judicial notice could have been taken during the appeal proceedings also without referring to further limitation clauses and requirements.[196] Each jurisdiction should make implicit reference to the prohibition of using of judicial notice from *reformatio in pejus* standpoint in order to fully guarantee fair trial principle.

[195] Federal Rules of Evidence of the United States of America, Rule 201(f).
[196] *Prosecutor v. Kupreskic*, 'Decision on the Motions of Drago Josipovic, Zoran Kupreskic and Vlatko Kupreskic to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to Be Taken Pursuant to Rule 94(B)', May 8, 2001, para 6.

CONCLUSION

The main aim of the paper was to provide uniform limitation clauses on judicial notice from the fair trial guarantee standpoint using the examples of different countries. The issue was regarded to be problematic since case laws, regulations and other state practices contained legal gaps on the issue. As our survey and research show, there were only sporadic instances of restricting judicial notice from the fair trial standpoint, despite the former's universality and jus cogens status.

This thesis provided unique understanding of judicial notice as a form of presumption. It shows that there is a possibility of rebutting judicial notice at any stage of the proceedings, thus ensuring the rights of defense in criminal proceedings. This definition and limitation gives an opportunity to the defendants to protect their cases properly and if respective rules are incorporated in legislation and case laws it would be beneficial for every state's commitment to the rule of law and human rights protection process. Adversariality and equality of arms had a central role in the thesis and a number of certain and concrete threshold requirements have been set in order to preserve proper human rights protection. Additionally, the principle of *reformatio in pejus* has been used to restrict the use of judicial notice at every stage of the proceedings by the judge to the detriment of the accused.

This understanding of judicial notice and respective requirements will have practical and theoretical consequences. Courts and other adjudicative bodies will have the concrete and better possibility of understanding limitation clauses on judicial notice when applying the law in each case. Clear and implicit regulations will assist the judicial process and make it more compatible with human rights guarantees. Additionally, the necessity for further academic debate commencement on this particular issue has been demonstrated. There are just a few books or articles that contain exact problem detections. Systematic analysis of judicial notice

from a fair trial guarantee perspective will make it more properly applied and thus the aim of human rights protection will be fulfilled. The author hopes that after this paper further academic attention will be devoted to the issue and more theoretical background and critiques will be provided around limitation clauses on judicial notice.

The goal of the paper was to set limitation clauses for judicial notice from a fair trial standpoint and this was successfully achieved. The paper contains threshold provisions for judicial notice. These rules can be applied in both common and civil criminal law jurisdictions and be regarded as systematic and standardized regulations for ensuring particular aspects of fair trials. The ad hoc nature and uniqueness of each legal case and also gradual development of international human rights law can reveal additional aspects of limiting judicial notice, but for now they are ongoing, actual and real problems that have to be responded adequately.

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