Criminal Law Forum (2015) 26:403–418
DOI 10.1007/s10609-015-9264-1 © Springer Science + Business Media Dordrecht 2015

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ASSESSING CIRCUMSTANTIAL EVIDENCE AND INFERENCE AT THE ICTR

ABSTRACT. This article examines the practice of fact-finding at the ICTR, with a particular focus on inferential reasoning. With reference to a number of recent judgments where findings of fact were disputed on appeal, the author argues that the ICTR's Trial Chambers would benefit from a clearer elucidation of the basis of their judgments on circumstantial evidence. It is recalled that convictions based on such evidence may only be entered where a conclusion of guilt is 'the only reasonable inference' that can be drawn. However, the author shows that there is a largely hidden or under-explained layer of 'intermediate inferences' that lie between evidence and ultimate conclusions. He argues that both Trial and Appeals Chambers would benefit from a more explicit recognition of these intermediate inferences in their judgments.

I INTRODUCTION

It is often argued that inference is a complicated subject, hence the growing call for the use of Wigmore charts at the international level.[1]

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[1] See, *inter alia*, P. Roberts, 'The Priority of Procedure and the Neglect of Evidence and Proof: Facing Facts in International Criminal Law' (2015) 13(3) *Journal of International Criminal Justice* 479; Y. McDermott, 'Inferential Reasoning and Proof in International Criminal Trials: The Potentials of Wigmorean Analysis' (2015) 13(3) *Journal of International Criminal Justice* 507 and T. Anderson and W. Twining, 'Evidential Reasoning in the International Criminal Tribunal For Rwanda: A Case Study of Tharcisse Muvunyi', in this volume.

At the centre of such arguments is the question of whether the supposed complication is simply inherent when making inferential findings or as a result of a vague and confused approach. This article examines the practice of the International Criminal Tribunal for Rwanda (ICTR) in relation to circumstantial evidence, thus hopefully providing some insights into how inferential reasoning has worked in practice before the Tribunal. At the heart of this article, it is argued that the ICTR Trial and Appeals Chambers have consistently failed to recognize that between evidence, described herein as 'primary evidence', and the ultimate conclusion on an element of a crime or mode of liability, described herein as the 'ultimate inference', there exist a number of intermediate inferences that are crucial in understanding the delicate nature of inferential reasoning. It will suggest that the ICTR Trial Chamber indulges in, and the Appeals Chamber upholds, a two-tier approach that identifies first the 'evidence', and then the ultimate inference that can be drawn. However, in reality, such findings involve a number of intermediate inferences being drawn before the ultimate inference can be reached, and these intermediate inferences are not always fully elucidated. The article will conclude by assessing the consequences of this approach for the fair trial rights of the accused.[2]

II DEFINITIONAL FRAMEWORK: INFERENCE, CIRCUMSTANTIAL EVIDENCE, AND —THE ONLY REASONABLE CONCLUSION'

In its judgment in *Delalić et al.*, the ICTY Appeals Chamber framed the *ad hoc* tribunals' approach to circumstantial evidence and inference as follows:

> A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him… Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is *a* reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is

[2] Due to the ICTR's expansive use of inference and the limited space available, this article will focus on recently finalized cases of *Hategekimana v. Prosecutor*, (Appeals Judgement) ICTR-00-55B-A (8 May 2012); *Ndahimana v. Prosecutor*, (Appeals Judgement) ICTR-01-68-A (6 December 2013); *Gatete v. Prosecutor*, (Appeals Judgement) ICTR-00-61-A (9 October 2012); *Mugenzi and Mugiraneza v. Prosecutor*, (Appeals Judgement) ICTR-99-50-A (4 February 2013).

also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[3]

The ICTR has followed this definition, albeit condensing it into the following:

> A conviction may be based on circumstantial evidence, but … where a finding of guilt is based on an inference drawn from such evidence, it must be the only reasonable conclusion that could be drawn from it. If there is another conclusion that could be reasonably reached from the evidence, the conclusion of guilt beyond reasonable doubt cannot be drawn.[4]

In other words, where an explanation alternative to that of the guilt of the accused can be derived from the circumstantial evidence at hand, the Tribunal cannot convict the accused on the basis of that evidence.[5] The ICTR has rarely deviated in its reference to this definition; however, as shall be shown, its application to the standard has proven far more variable, particularly where intermediate inferences, which are not necessarily the only reasonable inferences, are drawn. These intermediate inferences, in turn, lead the Trial Chamber to draw an ultimate conclusion on the basis of those interim inferences.

When examining this application, it is important to note the standard of appeal for factual findings. An alleged error of fact will only be found where 'no reasonable trier of fact' could have reached the same conclusion.[6] For alleged errors of fact arising from the weighing of circumstantial evidence, the standard will therefore be whether no reasonable trier of fact could have concluded that the inference drawn was the 'only reasonable conclusion' that could be drawn from the evidence.

It is also important to recognize that the ICTR Trial Chamber's inferential findings do not, of course, exist in a theoretical vacuum but rather with the specific aim of making findings on elements of crimes and modes of participation. To allow for a clearer understanding of the ICTR's approach, this article uses the term 'primary evidence' to refer to any witness's statement, in-court testimony,

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[3] *Prosecutor v. Delalić, Mucić, Delić and Landžo*, (Appeals Judgement) IT-96-21-A (20 February 2001), para. 458 (emphasis added).

[4] See *e.g.*: *Bagosora and Nsengiyumva v. Prosecutor*, (Appeals Judgement) ICTR-98-41-A (14 December 2011), para. 515; *Prosecutor v. Ntagerura* et al, (Appeals Judgement) ICTR-99-46-A (7 July 2006), para. 306.

[5] See further, M. Klamberg, *Evidence in International Criminal Trials* (Leiden: Brill, 2013), 194.

[6] Article 24, ICTR Statute.

contemporaneous documents, or other evidence from which inferences may be drawn; 'intermediate inference' refers to those inferences that might be immediately drawn from the evidence at hand,[7] and 'ultimate inference' refers to the overall inference that the Trial Chamber draws from the evidence at hand.[8]

To give an example, a prosecution witness might testify that s/he saw the accused speak at a rally—this constitutes 'primary evidence'. The ultimate inference that the Prosecutor wishes to prove from this and other pieces of evidence might be that the accused possessed genocidal intent. Intermediate inferences derived from the evidence at hand and leading to that ultimate inference might include that the accused held a position of authority or control,[9] or that s/he played a role in the implementation of a genocidal plan.[10]

The key argument that this piece seeks to make is that these intermediate-level inferences are crucial in understanding the seemingly precarious nature of a finding on an ultimate inference. Yet, frequently, these mid-level inferences are overlooked by Trial Chambers, which have a tendency to state the evidence and the ultimate inference, leaving the observer unclear as to how that inference was the 'only reasonable conclusion' that could have been drawn from the facts at hand. The ICTR Appeals Chamber appears to have affirmed the Trial Chamber's approach in this regard. The extent to which this approach comports with the accused's fair trial rights will be discussed below.

III THE ICTR TRIAL CHAMBERS' CURRENT TWO-TIER APPROACH

This article argues that the ICTR Trial Chambers, in particular, ignore intermediate inferences and instead classes them alongside pri-

[7] In Wigmorean terms, these would be the 'penultimate probanda'; see further, McDermott (n 1 above) 511.

[8] Wigmore would have referred to this as the 'ultimate probandum'; *id.*

[9] As was the case in, for example, *Prosecutor v. Rutaganda*, (Judgment) ICTR-96-3-T, 6 December 1999, para. 398; *Prosecutor v. Musema*, (Judgment) ICTR-96-13-A, 27 January 2000, para. 167. See further, M. Cupido, 'The Contextual Embedding of Genocide: A Casuistic Analysis of the Interplay between Law and Facts' (2014) 15(2) *Melbourne Journal of International Law*, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2539981 (last accessed 20 August 2015), 7.

[10] E.g. *Prosecutor v. Semanza*, (Judgment and Sentence) ICTR-97-20-T, 15 May 2003, para. 313.

mary evidence in a two-tier approach. This approach is exemplified in the case of *Hategekimana*. Hategekimana, a military leader, was convicted of murder as a crime against humanity for ordering the abduction of a civilian named Rugomboka in April 1994. In convicting Hategekimana, the Trial Chamber found that soldiers acting on Hategekimana's orders abducted Rugomboka on the night of 8 to 9 April 1994, took him to the Ngoma Military Camp, where he was tortured and killed.[11]

On appeal, Hategekimana argued that the inference that he gave an order to kill Rugomboka could not reasonably have been drawn.[12] The Appeals Chamber noted the Trial Chamber's findings, on which it relied to infer Hategekimana's involvement in the killing. These were: (1) Hategekimana played a prominent role in the abduction; (2) Soldiers detained Rugomboka at Ngoma Military Camp; (3) Rugomboka was killed; (4) Soldiers disposed of his body; and (5) Hategekimana monitored and controlled the aftermath of the killing.[13] Considering the above factors, it is clear that the Trial Chamber used a two-tier approach; these five pieces of 'evidence' lead to an inference that the accused ordered the murder of the victim, and the Appeals Chamber upheld this approach. Taking each piece of 'evidence' in turn, however, demonstrates that each of these components are not pieces of evidence as such, but rather intermediate inferences upon which the ultimate inference was drawn. So:

(1) *Hategekimana played a prominent role in the abduction*. The primary evidence on this point was direct testimonial evidence on Hategekimana's presence at Rugomboka's house.[14] That he played a prominent role in the abduction was an intermediate inference drawn from his presence, which itself was an inference drawn from the evidence.
(2) *Soldiers detained Rugomboka at Ngoma Military Camp, killed him and disposed of his body*. Here, the primary evidence alleged that soldiers detained Rugomboka at the Ngoma Military Camp and that his mutilated corpse was discovered in a nearby forest the day after his abduction.[15] The killing of Rugomboka was an

[11] *Hategekimana v. Prosecutor* (n 2 above), paras. 56, 58.

[12] *Ibid*., para. 65.

[13] *Ibid*., para. 68.

[14] *Prosecutor v. Hategekimana*, (Judgment and Sentence) ICTR-00-55B-T (6 December 2010), paras. 263–285.

[15] *Ibid.,* paras. 302, 304.

intermediate inference drawn from this evidence, from which a further intermediate inference was drawn that the soldiers also disposed of his body.

(3) *Hategekimana monitored and controlled the aftermath of the killing*. The primary evidence on this point was on Hategekimana's behaviour and actions after the killing, namely the allegation that Hategekimana monitored and controlled the actions of the local population in the aftermath of Rugomboka's death. Specifically, it was alleged that measures were taken to prevent public mourning and gatherings after the victim's death.[16] From this evidence, the Trial Chamber inferred that Hategekimana controlled the aftermath of Rugomboka's death, an intermediate inference.

Taken on its own, none of the above intermediate inferences explicitly links the accused to the ultimate finding, yet on the basis of all of these factual findings taken together, the Trial Chamber was satisfied that 'the only logical and reasonable inference … [was] that Hategekimana ordered the murder of Rugomboka'.[17] The narrative analysis provided above elucidates to a fuller extent what the basis of the Trial Chamber's findings were, but it does not create an exhaustive map of the alternate inferences available, as a charting method would. Nor does this analysis illustrate the strength of the intermediate inferences drawn. It does, however, show that the Trial Chamber's approach in this case of not explicitly identifying the intermediate inferences and how they relate to the ultimate inference leaves the judgment open to appeal.

The Appeals Chamber judgment does little to remedy this or further elucidate how each of these factual findings led to the final conclusion. It is unclear, for example, how the accused's actions after Rugomboka's death in suppressing the family's public grief support the only reasonable inference that he ordered the victim's murder. However, it considered that these events 'were simply used to provide further context to Hategekimana's role in ordering the murder'.[18] It concluded that Hategekimana had failed to prove that the Trial Chamber had erred in finding that the only reasonable conclusion that could be drawn was that Hategekimana ordered the murder.

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[16] *Ibid.,* para. 304.

[17] *Id.*

[18] *Hategekimana v. Prosecutor* (n 2 above), para. 125.

The case of *Mugenzi and Mugiraneza* again demonstrates the lack of differentiation between primary evidence, intermediate and ultimate inference, especially so when considering that the Appeals Chamber overturned all the Trial Chamber's inferential findings and acquitted the accused on appeal. The first key incident was the removal of politician Habyalimana as *prefect* of Butare on 17 April 1994, and the second was the installation of Nsabimana as *prefect* of Butare on 19 April 1994 following Habyalimana's removal.

With regard to the removal of Habyalimana, the Trial Chamber found that on 17 April 1994, the Rwandan Interim Government made a decision to remove Habyalimana from his position as *prefect* of Butare in order to undermine the resistance posed by Habyalimana to the genocide in Butare.[19] Based on this decision the Trial Chamber convicted Mugenzi and Mugiraneza, who were members of, or closely associated with, the Rwandan Interim Government, of conspiracy to commit genocide.[20]

In support of this finding, the Trial Chamber held that: (1) Habyalimana was considered a moderate by members of the Interim Government, including Mugenzi and Mugiraneza; and (2) Habyalimana was therefore removed by the Interim Government to undercut his resistance to genocidal killings in Butare. In addition, the Trial Chamber found that whilst some killing occurred when Habyalimana was *prefect*, these killing were localized and the common perception was that under Habyalimana, Butare prefecture resisted the killings that gripped the rest of Rwanda. Based on these findings, the Trial Chamber inferred that the decision to remove Habyalimana was taken to undercut the symbolic resistance he posed to the genocide in Butare.[21] On that basis, the Trial Chamber found that Mugenzi and Mugiraneza possessed the genocidal intent required for the crime of conspiracy to commit genocide.[22]

On appeal, the Appeals Chamber noted the Trial Chamber's consideration of: (1) Butare's history of attacks against Tutsis as a defence tactic against the RPF; (2) Habyalimana's Tutsi ethnicity; (3) Butare's population structure; (4) The fact that after the installation of the new *prefect* Nsabimana, the number of killings increased

[19] *Mugenzi and Mugiraneza v. Prosecutor* (n 2 above), para. 65; *Prosecutor v. Bizimungu et al.,* (Judgment and Sentence) ICTR-99-50-T (30 September 2011) paras. 1237–1250.

[20] *Mugenzi and Mugiraneza v. Prosecutor* (n 2 above), para. 65.

[21] *Ibid.*

[22] *Ibid.*, paras. 65, 75.

rapidly; (5) Up to 17 April 1994, Butare was relatively immune to the genocide; (6) The short period between the removal of Habyalimana on 17 April 1994 and the installation of the new *prefect* on 19 April 1994; and (7) The installation speech made by Sindikubwabo and its thematic consistency.[23]

Again, in its treatment of the Trial Chamber's findings, we witness a lack of differentiation by the Appeals Chamber between primary evidence and intermediate inference. Whilst the ultimate inference is genocidal intent, each of the Trial Chamber's factors actually contains intermediate inferences themselves. So:

(1) *Habyalimana was considered a moderate* was an intermediate inference drawn from primary evidence on Habyalimana's political membership and ethnicity, and
(2) *Habyalimana was removed to remove possible resistance to the genocide* was inferred from the intermediate inference that he was a moderate.

As for the historical context evidence:

(1) Habyalimana's Tutsi ethnicity, Butare's population structure up to 17 April 1994, the lack of killings, attacks occurring in Butare, and the short period between the removal of Habyalimana on 17 April 1994 and the installation of the new *prefect* on 19 April 1994 can all be considered primary evidence;
(2) However, with regard to Butare's history of attacks against Tutsis *as a defence tactic against the RPF*, whilst the primary evidence were the attacks themselves, the *reason* for those attacks was an intermediate inference;
(3) Similarly, with regard to the rapid increase in killings after the installation of the new *prefect* on 19 April 1994, whilst the increase in attacks could be considered primary evidence, the reason *why* such an increase occurred was an intermediate inference.

Therefore, the Trial Chamber engaged in multiple intermediate findings in order to reach the ultimate inference of genocidal intent. On appeal, Mugenzi and Mugiraneza renewed their submissions on alternative inferences available from Habyalimana's removal and argued that intermediate inferences, which they described as 'predi-

[23] *Ibid.*, paras. 74, 75.

cate inferences', must also be the only reasonable inference available.[24]

The Appeals Chamber was not convinced that the only reasonable inference was that the removal of Habyalimana showed genocidal intent since his removal could have been political or administrative.[25] However, the Appeals Chamber did not condemn the Trial Chamber's failure to define its 'considerations' as either primary evidence or intermediate inference. Therefore, either consciously or unconsciously, the Appeals Chamber sidestepped the issue of proper differentiation.[26] In fact, the Appeals Chamber also focussed its own findings at the level of intermediate inference for the purpose of the removal, rather than the ultimate inference on genocidal intent. This focus could suggest that the Appeals Chamber recognised the two-tier inference structure this article suggests, although the Appeals Chamber does not explicitly set this out in its findings. Instead, the Appeals Chamber's reasoning boils down to a disappointing one line upholding the appeal ground without reference or footnotes, passing on the opportunity to discuss the issues surrounding inference in greater detail.

A final case demonstrates the two-tier inference approach. In *Gatete*, in order to find the common criminal purpose element of joint criminal enterprise for attacks by *Interahamwe* militia, the Trial Chamber relied on: (1) 'Planning and coordination' inferred from the gathering of *Interahamwe* militia on 7 April 1994; (2) Subsequent attacks involving those militia; and (3) The fact that Gatete was amongst those who devised the plan to attack.[27] On appeal, Gatete submitted that considerable organisation was not the only inference available from his and other officials' presence at the administrative office where the militia met.[28]

The Appeals Chamber looked at the following two pieces of evidence underpinning the Trial Chamber's 'planning and coordination' finding, namely: (1) two high-ranking officials and *Interahamwe* gathered together at the administrative office; and (2) attacks intensified as the day progressed and involved a large range of assailants.[29]

[24] *Ibid.*, para. 77.

[25] *Ibid.*, para. 91.

[26] *Ibid.*

[27] *Gatete v. Prosecutor* (n 1 above), para. 240.

[28] *Ibid.*, para. 241.

[29] *Ibid.*

Gatete argued that the presence of high-ranking officials and *Interahamwe* could be as a result of people attending the sector office spontaneously, therefore challenging the intermediate inference of planning and coordination; however, the Appeals Chamber found that the presence of the officials implied coordination.[30] Again, it should be noted that coordination is not an element of joint criminal enterprise. Coordination is the intermediate inference from which the ultimate inference of the common criminal purpose, needed for any conviction under joint criminal enterprise, was found. Also of note is that the Appeals Chamber saw fit to include in its analysis other evidence demonstrating Gatete's substantial contribution to the common criminal purpose in the form of Gatete issuing instructions to kill, therefore using the mechanism of intermediate inference itself to draw the ultimate inference.[31] Thus, rather than criticizing the Trial Chamber's failure to recognize the difference between primary evidence and intermediate inference, the Appeals Chamber appears to have added its own intermediate inference, albeit without referring to it as such, demonstrating the use of intermediate inference not only by the ICTR Trial Chamber but also by the Appeals Chamber.

In a further example from the *Gatete* case, at Kiziguro Parish on 11 April 1994 Tutsi refugees were separated and Gatete gave instructions for the Tutsi refugees to be killed.[32] The Trial Chamber inferred from this the existence of a common criminal purpose, an element of joint criminal enterprise.[33] In so doing, the Trial Chamber considered the following factors: (1) the killing and burial of victims was systematic in nature which implied a highly organized and preplanned event; (2) that the organization must have included a number of persons including Gatete; and (3) that the organized nature and pre-planning demonstrated the common criminal purpose element of joint criminal enterprise.[34]

Again, the Trial Chamber considered these as one set of factors upon which the ultimate inference of common criminal purpose was found. However, analysing this again reveals several layers of intermediate inference. Whilst the primary evidence appears to be the division of Hutu and Tutsi refugees and the subsequent killing of the

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*, para. 244.

[33] *Ibid.*

[34] *Ibid.*, para. 245.

Tutsi refugees, that this was systematic in nature appears to have been an intermediate inference made from the way the refugees were divided up. This intermediate inference appears in turn to give rise to the intermediate inference that the killings were highly organized and pre-planned. The Trial Chamber then appears to infer from this that an organized plan such as this would require a number of persons in order to execute it, including Gatete; another intermediate inference. On the basis of these intermediate inferences the Trial Chamber draws its ultimate inference of the existence of a common criminal purpose.[35]

IV ALTERNATE AVAILABLE INFERENCES: REQUIREMENTS OF THE ACCUSED AND CHAMBER

Having demonstrated the two-tier approach employed by the ICTR, which in effect ignores or fails to fully acknowledge the existence of intermediate inferences, it is also important to consider what, if any, requirements currently exist for the accused and chambers to consider alternate available inferences.

With regard to the requirement that an accused put forward alternate available inference, in *Gatete*, who was convicted for killings at Rwankuba Sector through participation in a joint criminal enterprise, the question was whether the link between Gatete's actions and killings demonstrated a substantial contribution to the common plan.[36] Gatete challenged whether the only reasonable inference was that his actions constituted a substantial contribution. Gatete did not, however, suggest an alternative inference, but rather simply stated that the Trial Chamber's inference was not the only reasonable one.[37] Whilst the Appeals Chamber noted Gatete's failure to provide an alternative inference when considering the strength of his submissions, this was not fatal to the ground of appeal and the Appeals Chamber considered Gatete's arguments, confirming that an appellant does not invalidate his appeal by not providing an alternative inference.[38]

[35] *Ibid.*

[36] *Ibid.*, paras. 96, 97. We can therefore understand the ultimate inference to be substantial contribution; an *actus reus* element of JCE.

[37] *Ibid.*, para. 97.

[38] *Ibid.*

As for the Trial Chamber's ability to consider its own alternate inferences, in *Mugenzi and Mugiraneza* the Trial Chamber did consider alternative inferences for the removal of Habyalimana, such as his failure to coordinate with the Interim Government and fears concerning his loyalty, demonstrating that a Trial Chamber is entitled to consider its own alternate inferences.[39] This is bolstered by *Ndahimana*, where the Trial Chamber convicted Ndahimana of aiding and abetting genocide and extermination as a crime against humanity, but rejected the notion of Ndahimana's participation in a joint criminal enterprise since an alternate reasonable inference of duress existed that explained Ndahimana's movements despite Ndahimana not advancing duress as a defence or as an alternate reasonable inference.[40]

As for the Trial Chamber's requirement to consider alternative inferences put forward by the Defence, in *Mugenzi and Mugiraneza* the Trial Chamber considered defence submissions which were ultimately dismissed with 'considerable reservations'.[41] While nothing suggests that a Trial Chamber is required to examine alternative inferences put forward by the Defence, its overarching responsibility to give a full and reasoned explanation for its findings would render the consideration of specific alternate inferences put forward by both parties good practice.

It is also clear that the Trial Chamber is required to consider the reliability of primary evidence upon which alternate inferences are drawn. As recalled above, in *Ndahimana* the Trial Chamber placed reliance on its finding that Ndahimana may have been under duress. This was not a defence *per se*, but rather an alternative inference to the ultimate inference of genocidal intent.[42] However, the Appeals Chamber overturned the Trial Chamber's finding on duress due to a lack of realiable evidence.[43] This demonstrates the requirement that primary evidence must bear significant indicia of reliability, and that where the evidence does not meet the standard of proof, a Trial Chamber errs if it then relies on it to form an intermediate inference which in turn leads to an ultimate inference.

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[39] *Mugenzi and Mugiraneza v. Prosecutor* (n 1 above), para. 76.

[40] *Ndahimana v. Prosecutor* (n 1 above), para. 164.

[41] *Mugenzi and Mugiraneza v. Prosecutor* (n 1 above), para. 76.

[42] *Ndahimana v. Prosecutor* (n 1 above), paras. 164, 167.

[43] *Ibid.*, paras. 185, 186.

V FAIR TRIAL RIGHTS

Having demonstrated that the two-tier approach regularly employed by the ICTR fails to properly recognize the difference between primary evidence and intermediate inferences, and having discussed the flexibility afforded to Trial Chambers in considering alternate inferences, the question remains, beyond theoretical intricacies, what potential effect does this have on the verdicts rendered by the ICTR?

5.1 *The recasting of primary evidence on appeal*

The first issue is that the two-tier approach can lead to the appearance of the Appeals Chamber's recasting of primary evidence on appeal to better strengthen the inferences drawn by the Trial Chamber. For example, in *Gatete* the accused argued on appeal that the coordination and planning intermediate inference used to infer the ultimate inference of a common criminal purpose was not the only reasonable inference.[44] The Appeals Chamber referred to the following primary evidence on which it made the intermediate inference of planning and coordination, which in turn inferred the ultimate inference of the existence of a common criminal purpose: (1) The separation of Tutsis prior to the attack; (2) Surviving victims were used to bury others before being killed themselves; (3) Large scale attack involving civilians, *Interahamwe* and military; and (4) The presence of high ranking officials to provide direction.[45] It also considered the intermediate inferences of the systematic and efficient manner in which the attack took place, and that the presence of high ranking officials provided direction.[46] With this approach it appears that the Appeals Chamber recasts the evidence, rearranging it to rely on mainly primary evidence so as to eliminate the need for intermediate inferences.

The Appeals Chamber also looked separately at primary evidence demonstrating Gatete's significant contribution to the common criminal purpose, the ultimate inference on the *actus reus* element of significant contribution. To this end, it considered: (1) Gatete's visit to the parish on the three days prior to the attack; (2) His presence during the separation of Tutsis; and (3) His instructions to kill. The Appeals Chamber found that this circumstantial evidence was

[44] *Gatete v. Prosecutor* (n 1 above), para. 246.

[45] *Ibid*., para. 247.

[46] *Ibid*.

enough to infer Gatete's involvement in the common criminal purpose alone. This approach raises questions of when recasting or rearranging primary evidence on appeal, does the Appeals Chamber in effect conduct a *de novo* assessment of the primary evidence in order to find the ultimate inference on which the common criminal purpose element of the joint criminal enterprise is made out? If so, this raises concerns as to the accused's right to appeal since this appellate recasting is not subject to appeal.

5.2 *The strength of the intermediate inference*

The second fair trial issue is the strength of a verdict which relies on inference upon inference and the failure of a Trial Chamber to set out its reasoning clearly. Recalling the *Delalić* et al. and condensed ICTR definitions outlined above, we see that a conviction can safely be based on circumstantial evidence or primary evidence and that the jurisprudence does not require a Trial Chamber to recognize intermediate inferences. Therefore, where a Trial or Appeals Chamber simply refers to 'evidence' or 'factors' upon which it draws an inference without considering the intermediate inferences, there is no legal error *per se*. However, where a conviction is *based on an inference drawn from such evidence* it must be the only reasonable conclusion. The first concern is therefore whether the *conviction* is drawn from the primary evidence or whether the conviction is in fact drawn from intermediate inference and then ultimate inference. It could be argued that since the intermediate inference is based on primary evidence the ultimate inference must also be based on the same primary evidence. Even if this were the case however, it should be noted that this at the very least results in a weaker inference, since with intermediate inferences the number of alternate inferences expands, since each intermediate inference employed produces in itself alternative inferences. Does this result in weaker convictions? Possibly. But a weaker conviction can still be a conviction; the question is whether it reaches the 'beyond reasonable doubt' standard. The second concern is whether the failure to properly recognize intermediate inference amounts to a failure to provide an accused with a reasoned opinion. This argument is somewhat circular in that since intermediate inferences are not recognized, there is no jurisprudence on their absence. However, it is interesting to note that at the very least the two-tier approach followed by the ICTR fails to properly articulate to an accused the findings on intermediate inferences that underpin their conviction.

VI CONCLUSION

In conclusion, inference is an essential process in determining the criminal culpability of an accused before the ICTR. By its very nature there will always be alternate inferences in any scenario; the issue this article seeks to address is how the ICTR practically goes about approaching inference. At the trial stage, it is the Trial Chamber's duty to consider alternative inferences; it is not the accused's duty to present them. However, in reality the accused usually mounts a defence and will offer up alternative inferences based either on defence evidence or an alternate interpretation of prosecution evidence. On appeal, the standard shifts and requires the accused to demonstrate an error in a Trial Chamber's approach. On appeal, it falls to the appellant to show that a finding of fact was one that no reasonable trier of fact could have reached; it will not suffice to present an alternative reading of the evidence alone.

The jurisprudence on inference remains, possibly deliberately, broad. Whilst Trial Chambers routinely consider both Prosecution and Defence explanations, no jurisprudence requires a Trial Chamber to consider *other* alternatives not put forward by either party, although we see in *Ndahimana* a Trial Chamber taking the initiative to think outside the box by considering alternatives not brought by the parties as evidenced by its—ultimately erroneous—finding on duress as an alternative.

As to intermediate and ultimate inferences themselves, it is hoped that this article demonstrates that the ICTR's current two-layer approach of 'evidence' and 'inference' fails to appreciate the often multiple intermediate inferences that occur before the ultimate inferences are drawn. But beyond showing the Chambers' failure to properly elucidate these intermediate inferences, does it matter? From a fair trial point of view, quite possibly. Firstly, the flexibility, in particular at the appeal level, to recast primary evidence may infringe on an accused's right to fair trial since the accused has no right to further appeal any new findings therein. Furthermore, on a strict reading of the jurisprudence, an inference can only be drawn from primary evidence and therefore logically not from an intermediate inference. In addition, a nod to the vague notion of 'inference' without uniformity or recognition of the intermediate inference on which ultimate inferences are based also risks producing confusing and inconsistent verdicts, which risk undermining an accused's right to a fully reasoned explanation as to why they were convicted.

As to an explanation for the ICTR's approach, it could be argued that a failure to recognise intermediate inferences is simply a failure to understand the nature of evidence and inference. However, given the level of experience and ability in international tribunals, the ICTR's seeming timidity in stating that inference involves intermediate inference is perhaps guided by a sense that when inference is drawn from another inference, the ultimate inference is weakened. However, there is nothing inherently wrong in drawing inference upon inference. The process must be as transparent as possible to allow it to be properly assessed when held up against the standard of proof.

Looking forward, it is therefore suggested that future international tribunals embrace the multi-level inference findings required to make ultimate inferences and acknowledge and explain clearly the use of intermediate inferences. This approach would provide clearer judgments for the benefit of all, and especially accused persons facing conviction for the most serious of crimes.