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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-97-20-T
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6495

TRIAL CHAMBER III

Original: English

Before: Judge Yakov Ostrovsky, Presiding
Judge Lloyd George Williams, Q.C.
Judge Pavel Dolenc

Registrar: Mr. Adama Dieng

Date: 6 February 2002

THE PROSECUTOR

v.

LAURENT SEMANZA

Case No. ICTR-97-20-T

2002 FEB -6 P 12: 27
JUDICIAL RECORDS/DOCS/FILES
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**DECISION ON DEFENCE MOTION FOR JUDICIAL NOTICE AND
PRESUMPTION OF FACTS PURSUANT TO RULES 94(B) AND 54**

The Office of the Prosecutor:

Mr. Chile Eboe-Osuji
Ms. Patricia Wildermuth
Ms. Amanda Reichmann

Defence Counsel for the Accused:
Mr. Charles Achaleke Taku
Mr. Sadikou Alao

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III, composed of, Judge Yakov Ostrovsky, Presiding, Judge Lloyd George Williams and Judge Pavel Dolenc (hereinafter, the "Chamber");

BEING SEIZED of the Defence Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94(B) and 54, filed on 13 November 2001 (hereinafter, the "Motion");

CONSIDERING the oral submissions of the parties at the hearing on the Motion on 22 November 2001, at which the Prosecutor indicated that she intended to oppose the Motion relying solely on the basis of her oral submissions, waiving her right to make written submissions (hereinafter, the "Hearing");

NOW CONSIDERS the matter on the basis of the written and oral submissions of the parties.

I.

THE PARTIES' SUBMISSIONS

A. THE DEFENCE'S SUBMISSIONS

1. The Defence interposes the instant Motion based on leave of the Chamber received during the hearing of 1 November 2001.
2. The Defence declares that the Motion is based on the following jurisprudence of the Tribunal: *Prosecutor v. Semanza*, Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54 (3 November 2000); Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rule 94 and 54 (15 March 2001). The Defence also relies on excerpts from "Sekar" (sic), Part II at pp. 993-1021 and Criminal Evidence (Third Edition) Richard May.
3. Citing to the reasoning in the Judicial Notice Decision, the Defence seeks "elucidation" of the following phrase in connection with the Chamber's decision taking judicial notice of the documents authored by the General Assembly of the United Nations: "an organ of the United Nations, which established the Tribunal" The Defence requests that the Chamber explain its previous decision in light of paragraph 8 of General Assembly Resolution 40/32, UN GAOR, 40th Session, UN Doc A/Res/40/32 (29 November 1985).
4. Stating that the *ratio decidendi* of paragraph 8 of the Chamber's judicial notice decision with respect to the Prosecutor's motion was correct, the Defence urges the Chamber to apply it with equal force to take judicial notice of four categories of documents listed at pages 2 through 7 of the Motion. The documents fall into the following broad categories. First, in Appendix A-1¹ to the Motion, the Defence seeks judicial notice of six discrete

¹ . The Chamber notes that the Defence employs the term "Appendix A" with respect to two categories of documents in the Motion. The first class of documents referred to by the Defence, as "Appendix A" comprises a list of six documents from the List of Defence Exhibits in the Defence's Rule 73 *ter* submission. The second "Appendix A" refers to an additional twenty-four documents also listed in the Defence Rule 73 *ter* submission

documents relating to Rwandan laws governing, *inter alia*, the competence of the Rwandan judiciary, the functioning of prefectures in Rwanda, the statute of the MRND, and the Arusha Accords.

5. With regard to the documents listed in Appendix A-2, the Defence similarly requests the Chamber to take judicial notice of the authenticity of such documents without taking judicial notice of the truth of their contents. Among other documents listed in Appendix A-2 are the following: journal entries regarding certain events in Rwanda predating the date of the mandate of the Tribunal; correspondence between Church authorities and certain Rwandan governmental bodies; correspondence between the RPF and Rwandan governmental authorities; transcripts of certain video and audio cassette recordings of MRND conferences and atrocities committed by the RPF in Rwanda and intercepted telephone conversations; and a statement of a protected witness who is known by the pseudonym "VZ".

6. In Appendix B-1,² the Defence lists eight documents in respect of which it seeks judicial notice. The documents include, among others, an extract of an official Cameroonian gazette which indicates that a certain Mr. Mbale is the Advocate-General of the Supreme Court in Cameroon; a letter dated 4 August 1994 from the Chargé d'affaires of France addressed to the Secretary General of the United Nations; excerpts of a certain report about the crisis in Rwanda by the UN Secretary General dated 31 May 1994; two Appeals Chamber decisions regarding the lawfulness of detention and arrests of the Accused Semanza and Barayagwiza; and a letter dated 16 May 1994 from the Permanent Representative of Rwanda to the President of the UN Security Council.

7. Appendix B-2 lists some twenty-three documents that the Defence submits qualify for judicial notice. Among the documents listed are the following: The Report of Michael Hourigan dated 1 August 1997; a news wire from the Associated Press dated 3 March 2000 entitled "Rwanda Report Blames Tutsi Group"; various press and other communiqués from the Forces Armées Rwandaises and from the President of Rwanda and other Rwandan governmental bodies; correspondence from UNAMIR, including letters written by General Roméo Dallaire; and various articles and scholarly works on human rights violations in Rwanda, including a work entitled, "La situation actuelle au Rwanda sur le plan de la sécurité" authored by the Ambassador of Rwanda to Brussels; and various UN documents, including documents regarding Opération Turquoise and a Chronology of Events.

8. Under the title "Presumption of Facts", the Defence seeks judicial notice of seven discrete facts previously adjudicated in other cases of the Tribunal or facts of historical notoriety for which formal proofs may be dispensed. Among the facts the Defence wishes the Chamber to judicially notice are the following: that the Rwandese Patriotic Front, made up of largely Tutsi refugees, invaded Rwanda on 1 October 1990; that in a separate letter to the Security Council, Rwanda and Uganda sought the deployment of United Nations Military Observers along their common border "but RPF control of the border became extensive"; that

in this case. For ease of reference, the Chamber shall refer to the two appendices as Appendix A-1 and Appendix A-2, respectively.

² . Again, the Defence employs the title "Appendix B" to refer to two discrete groups of documents. First, "Appendix B" refers to eight documents that are appended to the Motion. The second reference to "Appendix B", indicates some twenty-three documents extracted from the Defence Rule 73 *ter* submission. For ease of reference, the Chamber shall refer to the documents listed in the two appendices "B" as Appendix B-1 and Appendix B-2, respectively.

the Arusha Accords were signed on 3 August 1993; that the shooting down of the Presidential plane set off the violence that spread throughout Rwanda, including areas controlled by the RPF; and that there was a collapse of order in Rwanda after 8 April 1994 when the RPF's moved from a demilitarised zone into Kigali. By way of providing a factual basis for the foregoing facts, the Defence refers the Chamber to the documentary evidence listed in Appendices A-1, A-2, B-1, and B-2. The Defence also relies upon the judgements, without specification of particular passages, in *Prosecutor v. Akayesu*, *Prosecutor v. Kayishema and Ruzindana* and *Prosecutor v. Musema*.

B. PROSECUTOR'S SUBMISSION

9. In response to the Motion, the Prosecutor first submitted at the Hearing that she does not oppose the taking of judicial notice with respect to the following two discrete classes of documents among the many for which the Defence seeks judicial notice, namely: (i) United Nations Documents and (ii) laws, statutes and regulation of certain countries, including Rwanda, and the reports of official investigations led by Rwanda and governmental bodies of other countries. Nevertheless, the Prosecutor reserved her right to make objections to certain documents falling within the aforementioned categories after thoroughly reviewing the subject documents owing to the fact that the Prosecutor had a very limited time to peruse the extensive number of documents within a short notice period.

10. Although the Prosecutor indicated that she brooks no opposition to the foregoing classes of documents, she nevertheless indicated that she wished to receive additional clarification from the Defence as to whether these matters were to be judicially noticed by reason of having been previously adjudicated by this Tribunal or by reason of being matters of public notoriety. In addition, the Prosecutor sought clarification as to which specific previously adjudicated facts the Defence was invoking in support of the Motion. *See* Hearing Transcript at 56:25-59:13.

11. Citing a lack of legal foundation, the Prosecutor opposed the admission of all other documents and facts listed in the Motion. *See* Hearing Transcript at 69:6-21.

II.

DELIBERATIONS AND FINDINGS

12. As a threshold matter, the Chamber finds that it need not provide any "elucidation" of the portion of its previous Judicial Notice Decision regarding the treatment of documents authored by the United Nations General Assembly because the decision, in sufficiently clear terms, stated the basis for its various findings. The decision therefore speaks for itself.

13. Addressing the substantive basis for the instant Motion, the Chamber notes that the Defence invokes Rule 94(B) and Rule 54 as the basis for the instant Motion. The Defence's reliance on Rule 94(B) is entirely misplaced because the Rule deals with judicial notice of adjudicated facts. Rule 94(B) provides: "At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings." The Defence failed to demonstrate that any of the facts for which they now seek judicial notice falls within the rubric "adjudicated facts or documentary

evidence from other proceedings of the Tribunal.” The Motion must be dismissed because it fails to make any showing of the necessary predicates for the application of Rule 94(B). For example, conspicuously absent from the hundreds of pages comprising the Motion and its various appendices is any reference to the previous proceedings of the Tribunal in which the facts of which the Defence seeks judicial notice were previously adjudicated.³ During the Hearing the Defence Counsel conceded, as he must, that rule 94(B) was not applicable for the relief he seeks in the Motion. Similarly, since Rule 94 is a specific rule that regulates the admission of evidence via judicial notice, the Defence’s incantation of the general provisions of Rule 54 is erroneous.

14. Notwithstanding the fact that the Defence invoked inapposite rules to support the Motion, the Chamber shall address the substance of the Defence submissions under the relevant rule, namely, Rule 94(A), which provides: “A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof”. Rule 94(A) is not to be applied, however, without regard for the limitations imposed by Rule 89(C), which mandates that a Chamber admit only relevant evidence with probative value.

15. First, applying Rule 94(A) to the documents listed in Appendix A-1 to the Motion, the Chamber finds that the relief the Defence seeks cannot be granted with respect to all the documents. For example, the Chamber cannot divine, nor has the Defence indicated, the relevance of the laws regarding the operations of the Rwandan judiciary. Similarly, there is no immediately discernible relevance of the incomplete and therefore unintelligible excerpts from a judgement rendered by a Belgian court.

16. The Chamber notes that the laws of Rwanda regarding the operation of prefectures as well as the Arusha Accords are proper subjects for judicial notice under Rule 94(A) because they are matters of public notoriety and facts of common knowledge on which courts do not ordinarily require formal proofs. The Chamber further notes that on the occasions of its Decision on the Prosecutor’s Notice of Motion for Judicial Notice and Presumptions of Facts Pursuant to Rule 94 and 54 of the Rules of Procedure and Evidence on 3 November 2000 it took judicial notice of the Volume X of the United Nations Blue Books Series, The United Nations and Rwanda 1993–1996, a compilation that contains, among other documents, the Arusha Accords. It is therefore not necessary to take judicial notice of the Arusha Accords since they already form part of the evidence before the Chamber. Consequently, the Chamber shall only take judicial notice of the following document listed in Appendix A-1 to the Motion: (i) 11 March 1975 -- Décret- Loi No. 10/75: Organisation et fonctionnement de la préfecture [au Rwanda]. In addition, in the interest of completeness and accuracy, the Chamber shall *proprio motu*, take judicial notice of Décret-Loi No. 18/75 du 14 août 1978 (Journal Officiel 1978 p. 499), to the extent that it amends or otherwise modifies Décret-Loi No. 10/75.

17. The second group of documents collected under the title Appendix A-2, includes, among other documents, certain journal articles and book excerpts about events predating the date of this Tribunal’s mandate; excerpts of a certain preliminary report identifying massacre sites; correspondence between certain Rwandan governmental officials; correspondence between the RPF and governmental representatives; video and audio cassettes of intercepted conversations between the MRND and the President of Rwanda in 1992; and a statement of a

³ The Appeals Chamber in its decision in the matter of the *Prosecutor v. Kupreskic*, (IT-95-16) observed that only facts in a judgement from which there is no appeal or as to which a final appellate determination has been made may properly be deemed “adjudicated facts” within the meaning of Rule 94(B).

protected witness. The Chamber shall not take judicial notice of any of the documents or matters listed in Appendix A-2. None of the documents therein is a matter of adjudicated fact or documentary evidence from other cases of the Tribunal or a matter of common knowledge or public notoriety. Moreover, the Defence has not given any insight as to the relevance of the video and audio cassettes to the matters at issue in this proceeding. Similarly, the Chamber believes it is ill-advised under the current circumstances to admit into evidence via judicial notice certain correspondence between the RPF and certain Rwandan governmental officials. None of these documents bears sufficient indicia of belonging to matters of "common knowledge", about which there is no reasonable dispute. Accordingly, the Chamber denies the Motion with respect to all the documents in Appendix A-2. Finally, the Chamber notes that it would be improper to take judicial notice of an excerpt of a report the entirety of which it had previously judicially noticed.

18. The Chamber next considers whether the documents listed in Appendix B-1 to the Motion qualify for judicial notice as "matters of common knowledge." Appendix B-1 lists some eight documents, comprising, among other things, operational procedures of UNAMIR, excerpts of reports of the United Nations Security Council, excerpts from a Cameroonian official gazette that was previously appended to the Defence's failed attempt to appeal the Decision of this Chamber with regard to the lawfulness of the arrest and detention of the Accused, and decisions of this Chamber and the Appeals Chamber.

19. First, the Chamber takes exception to the Defence's impermissible attempt to revisit issues that have been conclusively litigated through the Appeals Chamber. Accordingly, since the matters of the lawfulness of arrest and detention of the Accused are no longer at issue, the Chamber declines to take judicial notice of the Official Gazette of the Republic of Cameroon. This Trial Chamber as a court of first instance must be cognisant of and deferential to all the jurisprudence of this Tribunal's Appeals Chamber. The Chamber therefore need not use the device of judicial notice to consider the two Appeals Chamber decisions cited by the Defence. The Chamber is similarly constrained to deny the Defence Motion with regard to all the other documents listed in Appendix B-1. First, the Defence seems to ignore the fact that the concept of judicial notice may only be invoked with respect to a relevant issue on which the Chamber would otherwise have to insist on formal proofs. In this regard, none of the matters discussed in any of the documents listed in Appendix B-1 relates to a material matter on which the Chamber would be obligated to receive formal proofs. Significantly, the Defence does not even intimate how any of the matters of which it seeks judicial notice relate to issues relevant in the current proceedings. Moreover, the Chamber must again note that it is duty-bound to be aware of the decisions of the Appeals Chamber and respect the law established by reason of its previous decisions in this case. Accordingly, the Chamber denies the Defence Motion with respect to the entirety of the documents listed in Appendix B-1.

20. The documents in Appendix B-2 do not fare much better than those in Appendix B-1. Again, there is no discernible relevance to any of the documents for which the Defence seeks judicial notice. It bears repeating, judicial notice is not a mechanism that may be employed to litter the trial record with irrelevant matters. In this regard, the Chamber notes that the Defence has not given any insight as to the relevance of certain Rwandan governmental correspondence or correspondence from UNAMIR. In addition, none of the facts contained within the documents listed in Appendix B-2 is of common knowledge and reasonably indisputable. Rather, the facts recited within certain of the documents, for example, the

Hourigan Report, are matters about which there is considerable controversy, which are the subjects of ongoing and inconclusive investigations.

21. Finally, application of Rule 94(A) does not salvage very much of the Defence's Motion with respect to the "presumption of facts". Not a single fact for which judicial notice is sought can fairly be said to fall under the category of "facts of common knowledge". Although the Defence incanted this phrase at several passages during the Hearing, no amount of circumlocution will transform deeply disputed facts into facts of common knowledge. For example, although it may be said that the Presidents of Burundi and Rwanda were killed in a plane crash on 6 April 1994, there is no established causal link between the crash of the presidential plane and the violence that ensued. As such, the Chamber cannot take judicial notice of such a controversial proposition. Similarly, the Chamber cannot take judicial notice of a purported causal connection between the movement of the RPF into Kigali and the alleged collapse of order in Rwanda on 8 April 1994.

22. In conclusion, the Chamber finds it necessary to remind the Defence of one of the very important principles underlying the concept of judicial notice – judicial economy. In making the instant Motion, the Defence appears to have lost sight of this well-established principle. In these circumstances, where the Prosecution has already closed her case-in-chief and the Defence is almost finished with the presentation of the defence case, there is very little in the way of economy of time that is to be realised by such a far-reaching and burdensome motion for judicial notice. Disposition of the Motion and review of its accompanying appendices required the Chamber to review hundreds, if not a thousand pages. Consequently, rather than save time, the disposition of the Motion required the expenditure of a considerable amount of time.

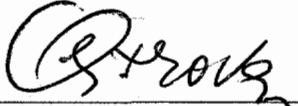
23. Moreover, the Chamber reminds the Defence of another cardinal principle that is implicit in the concept of judicial notice. Judicial notice is a device that permits a party to dispense with submitting formal proofs on matters that are relevant which the party would otherwise have to prove. The Chamber finds that the vast bulk of the materials filed in support of the Defence Motion were irrelevant to the instant trial proceedings. The Chamber has previously brought this to the attention of Defence Counsel in earlier matters. In the Chamber's view, this constitutes an abuse of process. Accordingly, pursuant to Rule 73 (E), Defence Counsel shall be denied one half their fees and costs incurred in making the Motion.

24. Accordingly, the Chamber:

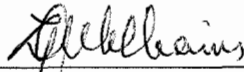
- A. **GRANTS** the Defence Motion in part, taking judicial notice of the following documents:
 - (i) 11 March 1975 -- Décret-Loi No. 10/75: Organisation et fonctionnement de la préfecture [au Rwanda];
 - (ii) Décret-Loi No. 18/75 du 14 août 1978 (Journal Officiel 1978 p. 499), to the extent that it amends or otherwise modifies Décret-Loi No. 10/75; and
- B. **ORDERS** that this Decision become part of the trial record of this case; and
- C. **DENIES** the Defence Motion in all other respects; and

D. **DIRECTS** the Registrar to pay only one half of Defence Counsel fees and costs relative to the making of the Motion.

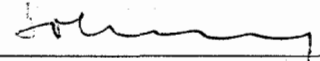
Arusha, 6 February 2002.



Yakov Ostrovsky
Judge, Presiding



Lloyd George Williams, Q.C.
Judge



Pavel Dolenc
Judge

[Seal of the Tribunal]