ICTR-98-44A-T
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 16 April 2002

The PROSECUTOR
v.
Juvénal KAJELIJELI

Case No. ICTR-98-44A-T

DECISION ON THE PROSECUTOR'S MOTION FOR JUDICIAL NOTICE PURSUANT TO RULE 94 OF THE RULES

The Office of the Prosecutor:
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal");

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Winston C. Matanzima Maqutu and Arlette Ramaroson (the "Chamber");

BEING SEIZED of:

(i) the "Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules of Procedure and Evidence," with Appendix A consisting of the facts to be judicially noticed, (the "Motion") as well as the "Prosecutor's Book of Authorities for Judicial Notice and Admission of Evidence", (the "Prosecutor's Book of Authorities"), both filed on 26 July 2001;

(ii) the "Response to the Prosecutor's Motion for Judicial Notice Pursuant to Rule 94 of the Rules of Procedure and Evidence," (the "Defence Response") filed on 10 September 2001;

(iii) the "Supplément à la réponse de la défense à la Requête du Procureur aux fins de constat judiciaire sur le fondement de l'article 94 du règlement de procédure et de preuve," filed on 25 October 2001 (the "Supplement to the Response");

CONSIDERING the Statute of the Tribunal (the "Statute"), particularly Article 20 and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 94;

CONSIDERING that the Motion was heard on 30 November 2001, the Chamber now decides the Motion;

HAVING DELIBERATED

1. The Chamber notes that the Prosecutor moves the Trial Chamber to take judicial notice of the facts presented in Appendix A pursuant to Rule 94(A) of the Rules because they belong to the category of facts of either "[c]ommon knowledge generally known within the Tribunal's jurisdiction or legal conclusions that flow inevitably from them." Supplemental to this argument, the Prosecutor requests that facts presented in Appendix A, which she submits "[c]onstitute adjudicated facts from other proceedings of the Tribunal," should be judicially noticed pursuant to Rule 94(B) of the Rules.[1] The Prosecutor argues that judicial notice of the said facts will ensure judicial economy and uniformity of judgements on general facts regarding the events in Rwanda.

2. However, the Prosecutor cautions that she does not request the Tribunal to take judicial notice of the facts in the present case that directly prove the guilt of the Accused. The Prosecutor submits that she remains with the burden of proving those facts in the ordinary course of trial.

Preliminary Considerations

3. The Chamber notes that during the hearing of the Motion the Defence accepted certain categories of facts in Appendix A of the Motion. These facts are the following: 1, 2, 3(a), (b), (c), and (d), 4(a), (b), (c), (e), and (f), 5(a), (c), (d), (e), (f), and 7. Accordingly, the

[1] *See* Appendix A, consisting of the factual propositions attached to this Decision

Chamber takes judicial notice of the said facts, which appear as Annex A to this Decision, thereby requiring no proof by the Prosecutor.

4. The Chamber shall decide whether or not to take judicial notice of all facts contested by the Defence in Appendix A.

5. The Chamber recalls the provisions of Rule 94 of the Rules to be:

Rule 94: Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) 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.

As to Whether the Aim of Judicial Notice is Judicial Economy and Consistency in Judgements

6. On this issue, the Chamber recalls the Prosecutor's oral arguments. The Prosecution maintains that contrary to the findings in the Ntakirutimana Decision of 22 November 2001, the fundamental reason for judicial notice is that it "[a]ids in the proof and admission of evidence so that such receipt of evidence is not encumbered by the traditional rules on admissibility of evidence."[2] The Prosecutor argues that judicial notice of facts thereby admitted into evidence, shall only be encumbered by the provisions of Rule 89(C) of the Rules, which provides that "[t]he Chamber may admit any relevant evidence which it deems to have probative value." The Prosecutor also submits that before taking judicial notice of any facts, the Trial Chamber should consider whether the said facts are relevant and are of probative value. The Prosecutor further argues that judicial economy and is one of the consequences of judicial notice, just as consistency in judgements, particularly pursuant to Rule 94(B) of the Rules. (emphasis theirs)

7. The Chamber agrees with the Defence that a balance must be struck between doctrine and the fundamental rights of an accused to a fair trial, as provided under Article 20 of the Statute.[3] The Chamber concurs with the Semanza Decision that, the doctrine of judicial notice is applied for two reasons: it "[e]xpedites the trial by dispensing with the need to formally submit proof on issues that are patently indisputable [and, it] fosters consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair."[4]

8. While the Chamber agrees with the Prosecutor that judicially noticed facts must be "relevant" and have "probative value," it finds that those facts must also foster judicial economy and uniformity in judgements without encroaching upon the fundamental rights of the accused to a fair trial.

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[2] *See* the "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts Rule 94(B) of the Rules of Procedure and Evidence," of 22 November 2001 in *Prosecutor v. Ntakirutimana and Ntakirutimana* (Case No. ICTR-96-10-T and ICTR-96-17-T) at para.28 [the "Ntakirutimana Decision"]; and Transcript of the hearing of 30 November 2001 at page 22, lines 11, 12 and 16 - 18

[3] *See* the *Ntakirutimana* Decision at para 28

[4] *See* the "Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54," of 3 November 2000 in *Prosecutor v. Semanza* (Case No. ICTR-97-20-I) at para. 20 [the "*Semanza Decision*"]

Regarding the Facts Sought to Be Judicially Noticed for Being Either of "Common Knowledge Generally Known Within the Tribunal's Jurisdiction" or "Legal Conclusions that Flow Inevitably From Them" or for Being "Adjudicated Facts"

9. The Prosecutor argues that Appendix A consists of facts of either common knowledge within the Tribunal's jurisdiction or legal conclusions that flow inevitably from such facts. The Prosecutor further submits that Appendix A consists of adjudicated facts based on the volume of references pertaining to each of the factual propositions.

10. The Defence objects to this proposition and argues that most of the facts in Appendix A, in particular paragraphs 8-16, are hardly "common knowledge," akin to the hours in a day or the dates in a calendar year but rather are legal conclusions or characterizations, which the Prosecutor bears the burden to prove, under Article 20 of the Statute. Furthermore, the Defence argues that the above-mentioned facts are similar to the facts for which the Prosecutor sought judicial notice in the *Semanza* Decision of 3 November 2000. In the said Decision, the Trial Chamber found these facts to be "unadorned legal conclusions" and matters "not reasonably indisputable."

11. The Defence argues against judicial notice of the facts in Appendix A as adjudicated facts in view of past jurisprudence of the Tribunal which has rejected such requests. The Defence relies on the general principal of law of *actori incumbit probatio*, whereby a person who relies on a fact or a rule bears the burden of proof with regard to the fact or preconditions for the application of the rule. The Defence argues that the Prosecutor bears the burden of proof and that, in seeking application of Rule 94(B) of the Rules, the Prosecutor must demonstrate that taking judicial notice of adjudicated facts will not inevitably undermine the very nature of the judicial process.

12. The Trial Chamber notes that Rule 94(A) of the Rules makes it mandatory that a Trial Chamber take judicial notice of facts of "common knowledge" and thereby dispenses with the requirement of proving the facts. The Tribunal, by its jurisprudence, has defines "common knowledge" to encompass *inter alia* matters, "[s]o notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary [and] those facts that are generally known within a tribunal's territorial jurisdiction [and that] there is no requirement that a matter be universally accepted in order to qualify for judicial notice."[5]

13. The Chamber further notes that "[o]nce it has deemed a fact to be of common knowledge, under Rule 94, it must determine that it is reasonably indisputable [and this is so] if it [the fact] is generally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question."[6]

14. Likewise, the Chamber finds that, pursuant to Rule 94(B) of the Rules, the facts that may be judicially noticed must have been adjudicated in other proceedings and must relate to matters at issue in the current proceedings. As stated in the *Ntakirutimana* Decision, "unlike Rule 94(A), litra (B) therefore, is discretionary. It is for the Chamber to decide whether

[5] *See* the "Decision on Prosecutor's Motion for Judicial Notice and Presumptions of Facts pursuant to Rules 94 and 54," of 3 November 2000 *in Prosecutor v. Semanza* (Case No. ICTR-97-20-I) at para. 20.
[6] *See* the Semanza Decision at para 24

justice is best served by its taking judicial notice of adjudicated facts."[7] Furthermore, the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") Appeals Chamber, acting in the case of *The Prosecutor v. Kupreskic* of 8 May 2001, found that, "[o]nly facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed adjudicated facts within the meaning of Rule 94(B)." The Chamber agrees with this ruling and also concurs with the reasoning in the Semanza Decision, whereby judicial notice of certain facts was not taken because of the Prosecutor's reliance on cases in which the accused had entered a plea of guilt pursuant to a plea agreement, such as in the *Kambada Judgement* of 4 September 1998. Similarly, the Chamber shall not judicially notice facts in which the Prosecutor relies on cases in which the accused voluntarily admitted facts, such as in the *Musema Judgement* of 27 January 2000.

As Regards Fact (6) in Appendix A that, "Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character"

15. Regarding this proposition the Prosecutor relies on various United Nations ("UN") publications and case law from the Tribunal. The Prosecutor specifically cites the *Akayesu Judgment* of 2 September 1998, which considered the armed conflict in Rwanda and found at para. 174 "[b]eyond a reasonable doubt that armed conflict existed in Rwanda during the events alleged in the indictment." The Chamber notes that the judgements did not indicate whether or not said armed conflict was of an international nature. On the other hand, the *Kayishema & Ruzindana Judgement* of 21 May 1999 and the *Rutaganda Judgement* of 6 December 1999, relying on the *Akayesu Judgement,* concluded that there was an internal armed conflict in Rwanda during the above mentioned period.

16. In objection to the said proposition, the Defence submit *inter alia* that countries such as Uganda, Burundi, Tanzania, Belgium and the United States of America played a non-negligible role, without which the RPF would not have had a successful war. (their emphasis)

17. Given the varying statements regarding the nature of the armed conflict in Rwanda during the above-mentioned period, the Chamber is of the opinion that this proposition is reasonably disputable because it is a proposition which cannot be accurately and readily determined through the sources provided by the Prosecutor. Accordingly, the Chamber shall not take judicial notice of fact 6 in Appendix A.

Regarding Facts 4(d), 5(b), 5(e) and Facts 8 Through 16 in Appendix A

18. The Defence disputes facts 4(b), 5(b) and 5(e) because, during the period specified, the Accused was elected and not appointed to office as *Bourgmestre,* which was the procedure established after the advent of multiple political parties in Rwanda. Furthermore, the Defence argues that policing duties by the *Bourgmestre* at that time could not be performed because of the armed conflict. Similarly, the Defence argues that, during the war, the *Préfet* could not perform his duties to administer the *Préfecture* by ensuring peace, public order and safety of people and property. In view of the charges against the Accused for alleged criminal responsibility, pursuant to Article 6(1) and 6(3) of the Statute, for the various crimes with which he is charged in the indictment, the Chamber is of the opinion that the

[7] See the Ntakirutimana Decision at para 28

Prosecutor bears the burden of proving said facts beyond a reasonable doubt. The Chamber therefore shall not take judicial notice of facts 4(d), 5(b) and 5(e) in Appendix A.

19. Regarding facts 8 through 16, the Defence objects to the propositions disputing, for instance, the allegations that only Tutsis were attacked, insofar as certain reports affirm the massacres of Hutus and Twas. The Defence further argues that judicial notice of widespread and systematic attacks, which were organized and planned, would amount to a determination that a conspiracy to commit such attacks did exist. To judicially notice said facts, the Defence argues, would rob the Accused of his right to defend himself against the charge of conspiracy. The Chamber is of the opinion that indeed the said propositions are reasonably disputable and that, in order to properly serve the cause of justice, the Prosecutor must prove the alleged facts beyond a reasonable doubt. Therefore, the Chamber shall not take judicial notice of facts 8 through 16 in Appendix A.

FOR THE ABOVE REASONS, THE TRIAL CHAMBER

GRANTS the Motion and judicially notices the facts which are reproduced in Annex A to this Decision.

DENIES the Motion in every other respect.

Arusha, 16 April 2002

William H. Sekule
Judge, Presiding

Wilson C. Matanzima Maqutu
Judge

Arlette Ramaroson
Judge

(Seal of the Tribunal)

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ANNEX A
JUDICIALLY NOTICED FACTS IN THE "DECISION ON THE PROSECUTOR'S MOTION FOR JUDICIAL NOTICE PURSUANT TO RULE 94 OF THE RULES"

(1) Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) – having acceded to it on 12 February 1975.

(2) Between 1 January 1994 and 17 July 1994, Rwanda was a Contracting Party to the Geneva Conventions of 12 August 1949 and their additional Protocol II of 8 June 1977 – having acceded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and acceded to Protocols additional thereto of 8 June 1977 on 19 November 1984.

(3) During the events referred to in the indictments, Rwanda consisted of the following administrative structures:
   (a) Eleven (11) *prefectures*: Butare, Byumba, Cyangugu, Gikongoro, Gisenyi, Gitarama, Kibungo, Kibuye, Kigali-Ville, Kigali-Rural and Ruhengeri.
   (b) Each *prefecture* was subdivided into *communes*.
   (c) Each *commune* was subdivided into *secteurs*.
   (d) Each *secteur* was subdivided into *cellules*.

(4) Between 1 January 1994 and 17 July 1994, the office of the prefect was characterised by the following features:
   (a) The *Prefet* represents executive power at prefectural level.
   (b) The *Prefet* is appointed by the President of the Republic on the recommendation of the Minister of the Interior and carries out his duties under that Minister's hierarchical authority.
   (c) The *Prefet*'s authority covers the entire *prefecture*.
   (d) In his capacity as administrator of the *prefecture*, the *Prefet* is responsible for ensuring peace, public order and the safety of people and property.
   (e) The *Prefet* has hierarchical authority over all civil servants and all persons holding public office within the boundaries of the prefecture, including the *bourgmestres* and *conseillers de secteur*.

(5) Between 1 January 1994 and 17 July 1994, the office of the bourgmestre was characterised by the following features:
   (a) The *Bourgmestre* represented executive power at the *commune* level.
   (b) The *Bourgmestre* was under the hierarchical authority of the *prefet*.
   (c) The *Bourgmestre* had authority over the civil servants posted in his *commune*.
   (d) In discharging his duties, the *Bougmestre* may request for the intervention of the *police communale*.

(6) Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa.