



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

19923
Mwanga

OR: ENG

TRIAL CHAMBER II

Before: Judge Khalida Rachid Khan, Presiding
Judge Lee Gacuiga Muthoga
Judge Emile Francis Short

Registrar: Mr Adama Dieng

Date: 10 December 2004

ICTR-99-50-T
14-12-2004
(19923-19915)

THE PROSECUTOR

v.

CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

JUDICIAL RECORDS ARCHIVES
ICTR
2004 DEC 14 A 11:59

DECISION ON THE PROSECUTOR'S MOTION AND NOTICE OF
ADJUDICATED FACTS

Rule 94 (B) of the Rules of Procedure and Evidence

Office of the Prosecutor:

Mr Paul Ng'arua
Mr Ibukunolu Babajide
Mr Justus Bwonwonga
Mr Elvis Bazawule
Mr Shyamlal Rajapaksa
Mr William Mubiru
Mr Olivier de Schutter

Counsel for the Defence:

Ms Michelyne C. St. Laurent and Ms Alexandra Marcil for Casimir Bizimungu
Mr Ben Gumpert for Justin Mugenzi
Mr Pierre Gaudreau and Mr Michel Croteau for Jérôme-Clément Bicamumpaka
Mr Tom Moran and Mr Christian Gauthier for Prosper Mugiraneza

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, Presiding, Judge Lee Gacuiga Muthoga and Judge Emile Francis Short, (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Motion for Judicial Notice of Adjudicated Facts”, filed on 28 June 2004 (the “Motion”);

CONSIDERING

(i) The “Response of Defendants Bicomumpaka and Mugenzi to the Prosecutor’s Motion for Judicial Notice” filed on 22 July 2004,

(ii) “Prosper Mugiraneza’s Response to the Prosecutor’s Motion to Take Judicial Notice” filed on 29 July 2004,

(iii) “Rèponse de Casimir Bizimungu à La Requête du Procureur pour Constat Judiciaire” filed on 30 July 2004,

(iv) “Duplique de Casimir Bizimungu à la Replique du Procureur Relativement au Constat Judiciaire”, filed on 30 August 2004,

HAVING RECEIVED the “Prosecutor’s Reply to the Defence Responses to the Prosecutor’s Motion for Judicial Notice” filed on 20 August 2004 (the “Reply”);

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), particularly Rule 94(B) of the Rules;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS OF THE PARTIES

The Prosecutor’s Motion and Reply

1. The Prosecutor moves for a list of 65 paragraphs of “adjudicated facts” to be judicially noticed pursuant to Rule 94(B).

2. The Prosecutor, relying on the decision in *Prosecutor v. Kvočka*,¹ submits that under Rule 94(B), the Chamber has the power to take judicial notice of legal conclusions reached in other proceedings, provided that these conclusions do not go to the guilt of the Accused.

3. The Prosecutor points out that in the *Prosecutor v. Kayishema & Ruzindana*² and *Prosecutor v. Akayesu*³ cases, the Chamber took judicial notice of certain generally accepted facts relating to the commission of genocide in Rwanda in 1994.

¹ *Prosecutor v. Kvočka et al*, IT-98-30/1-T, Decision on Judicial Notice, 8 June 2000. The Prosecutor claimed that this was followed in *Prosecutor v. Semanza*, ICTR-97-20-T, Decision on the Prosecutor’s Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001 at para. 9.

² *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-IT, Judgment, 21 May 1999 at para. 273

³ *Prosecutor v. Akayesu*, ICTR- 96-4-T, Judgment, September 1998 at para. 2.



4. The Prosecutor further assures the Chamber that all proposed facts have been adjudicated before the Tribunal and have been finally decided on appeal. The Prosecutor states that those facts originating from the *Prosecutor v. Kajelijeli*⁴ and *Prosecutor v. Semanza*⁵ cases which are sought to be judicially noticed in this case have not been contested in the appeals arising from those cases.

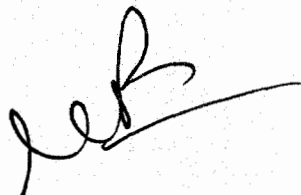
The Defence Response

5. The Defence for Bicamumpaka and Mugenzi do not object to Facts 22, 32 and 33 being judicially noticed, but oppose the remainder of the Motion on the following grounds:

- a) Taking judicial notice of relevant facts will force the Defence to refute such facts which will lengthen the Trial, contrary to the objective of judicial economy.
- b) Facts 1-9, 12-15, 18-21, 23-31, 34-37, 39-50, 52-63 are not distinct, concrete and identifiable.
- c) Facts 28, 39, 40, 41, 42, 43, 47, 50-65 include legal characterizations, and therefore cannot be subject to judicial notice. The Defence asserts that there is ample precedent in both this Tribunal and the ICTY which support this contention.
- d) Facts 1,3, 5, 7-13, 15-18, 20-21, 24, 25, 30-31, 37, 39-41, 44-47, 50-55, 57, 58 a)-d), 60 a)-c), 61-65, cannot be judicially noticed because they emanate from the Judgement in the case of *Prosecutor v. Kajelijeli*, which is currently under appeal. Additionally, some of these "facts" are partially based on admissions made by Accused in other trials.
- e) Facts 1-9, 12-15, 18-20, 26-30, 34-35, 37-45, 47-50, 52-63 cannot be judicially noticed as they are reasonably disputed by the Defence, which stresses that this case involves four high-ranking government Ministers whose positions, powers and responsibilities were completely different from any other Accused tried previously by this Tribunal and that therefore, facts adjudicated in other, inappropriate contexts cannot be applied in this case.
- f) Facts 3, 4, 7, 13, 14, 26-31, 34-50, 54-63 bear on the guilt of the Accused. If judicially noticed they would create a rebuttal presumption and compromise the presumption of innocence in favour of the Accused as guaranteed by Article 20(3) of the Statute.
- g) Facts 1-9, 12-16, 18-21, 23-31, 34-50, 60-63 are too broad, and Facts 3-5, 7-9, 13, 15, 26-31, 37-43, 48-50, 60(a)-(e) are tendentious, and therefore must not be judicially noticed.

⁴ *Prosecutor v. Kajelijeli*, ICTR 98-44A-T, Judgment, 1 December 2003.

⁵ *Prosecutor v. Semanza*, ICTR-97-20-T, Judgment, 15 May 2003 .



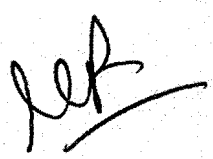
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6. The Defence for Prosper Mugiraneza argues that the Chamber should adhere to the Tribunal's normal practice of caution in judicially noticing facts under Rule 94(B), especially when the supporting judgments only approximate the facts submitted for judicial notice. The Defence for Mugiraneza opposes the Motion on the following grounds:

- a) Facts 28, 29, 39 and 48 are either irrelevant or overbroad or reasonably disputed.
- b) Facts 13, 27, 30, 38 and Fact 3 of Annex A and Facts 5, 8, 9, 13, 29, 30, 32, 39, 41, 60, 62 are contradicted by Prosecution evidence already on the record.
- c) According to the Defence, Facts 13, 27, 30, 38 of the Prosecutor's Motion are contradicted either in a different judgment or within the same judgment. The Defence also contends that that several facts including Facts 5, 8, 9, 13, 29, 30, 32, 39, 41, 60, 62 seek to have the fact that there were different ethnic groups in Rwanda judicially noticed. However, according to the Defence, this is contrary to the testimony of Prosecution Witness Prosper Higiho who testified that ethnicity in Rwanda was a political creation not a scientific fact.
- d) The Defence further contends that certain facts sought to be judicially noticed either do not constitute facts or were not treated by the earlier Chambers as adjudicated facts. The Defence claims that Facts 1, 2, 3, 4, 5, 7, 11, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 60, 61 of the Motion ought not to be judicially noticed for these reasons.
- e) The Defence submits that Facts 1, 2, 3, 4, 5, 7, 11, 13, 14, 16, 18, 19, 20, 21, 22, 23, 24, 25, 29, 36, 43, 44, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 60 and 61 are not supported by the sources cited by the Prosecution. The Defence believes that the Prosecution has often taken facts out of their context or has unjustifiably generalised specific facts.
- f) The Defence states that facts arising from the Trial Judgement in *Prosecutor v. Kajelijeli* cannot be judicially noticed since it is currently under appeal.

7. The Defence for Casimir Bizimungu opposes the Motion on the following grounds:

- a) The Defence argues that the Prosecutor's Reply brings up a new and different legal issue from the one in the original Prosecution Motion.
- b) The Prosecutor is not entitled to change the legal basis of his Motion in his Reply. The original Motion was exclusively based on Rule 94(B) and the Response of the Accused was framed accordingly. The Defence submits that the Prosecutor is now seeking to change the basis for the Motion to one under Rule 94(A) which is fundamentally different from the Motion the Chamber has been seized of.



- c) The Defence submits that the facts the Prosecutor seeks to have judicially noticed form part of the Indictment and judicially noticing them would not only have an impact on the rights of the Accused but would also reverse the burden of proof which would amount to a violation of the rights of the Accused.
- d) The Defence points to the decisions in *Prosecutor v. Nyiramasuhuko et al.*⁶ and *Prosecutor v. Ntakirutimana*⁷ in support of its contention that Rules 94 (A) and (B) cannot be substituted for one another and the Motion must thus be rejected for legal imprecision.

DELIBERATIONS

8. The Chamber recalls Rule 94, which reads as follows:

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.

9. The Chamber wishes to note at the outset that while Rule 94(A) is mandatory, sub-Rule (B) confers a discretionary power on the Chamber to decide whether or not to take judicial notice of adjudicated facts or documentary evidence.

10. The Chamber notes that a substantial body of jurisprudence has developed on the meaning and application of Rule 94, stressing that judicial economy and consistency of case law are the two grounds upon which the exercise of the discretion to take judicial notice is based. In this regard, the Chamber recalls a Decision in the *Semanza* case, in which the Trial Chamber opined that:

First, resort to judicial notice expedites the trial by dispensing with the need to formally submit proof on issues that are patently indisputable. Second, the doctrine fosters consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair.⁸

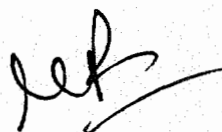
11. The Chamber further recalls that the Decision in *Prosecutor v. Ntakirutimana* stipulated two requirements for the exercise of discretion as conferred by Rule 94(B).⁹ First, the facts proposed for notice under Rule 94(B) must have been adjudicated in other proceedings before the Tribunal; facts contained in judgments based on guilty pleas, or admissions voluntarily made by the Parties

⁶ *Prosecutor v. Nyiramasuhuko*, ICTR-97-21-T, Decision on the Prosecutor's Motion of Judicial Notice and Admission of Evidence, 15 May 2002.

⁷ *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on Prosecutor's Notice for Judicial Notice of Adjudicated Facts, 22 November 2001.

⁸ *The Prosecutor v. Semanza*, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54", 3 November 2000, at para. 20.

⁹ *The Prosecutor v. Ntakirutimana*, ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", 22 November 2001.



cannot be the subject matter of judicial notice under the above Rule. Second, the proposed adjudicated facts must relate to the matters at issue in the current proceedings-in that the facts must be relevant-and not just remotely connected to the current proceedings, so that judicial notice of such facts must advance judicial economy.

12. The Chamber takes the view that, properly construed, Rule 94(B) confers it with the discretion to decide whether or not to judicially notice adjudicated facts. In other words, the Chamber must have a reason to decide to take judicial notice of facts adjudicated upon in prior proceedings before the Tribunal. The Chamber's decision under the Rule might be based on the consideration that judicial notice would advance consistent case law, judicial economy, or is otherwise in the interests of justice.

13. The Prosecutor must clearly indicate which facts he wishes to have judicially noticed. This is especially important if the fact for judicial notice forms part of a paragraph containing several facts or statements. The clear intention under the Rule is that in certain circumstances, the Chamber may decide to take judicial notice of 'adjudicated facts' instead of requiring such facts to be proved by evidence. It is the view of the Chamber that 'adjudication' denotes a process in which a Chamber has considered a fact in issue in the trial and made a finding thereon. Facts in issue are those over which the Parties dispute and on which an adjudicator must make a finding. Clarity as to the specific fact which the Prosecutor seeks to have noticed is therefore essential.

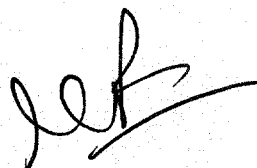
14. It follows from the foregoing analysis that the only facts that the Chamber may decide to take judicial notice of are those that constitute part of the factual findings in previous proceedings of the Tribunal. The Chamber may not take judicial notice of facts contained in the "introductory" part of a judgment since such facts would not have been adjudicated upon in the sense discussed above. Similarly, the Chamber understands the "historical context" laid out in some judgments of the Tribunal to be essentially introductory. The judgment in *Prosecutor v. Kayishema*¹⁰ makes it clear that the "historical context" is essentially a brief explanation of events in deliberately neutral language aimed at allowing the Trial Chamber to form some idea of the historical backdrop within which the events of 1994 took place.

15. The Chamber therefore understands that the "historical context" is essentially a simplified summary of evidence presented before the Chamber in a manner which allows the Chamber to form a background regarding the events of 1994 in Rwanda. The Chamber's emphasis on the usage of "neutral language" shows that these do not amount to legal or factual findings. Therefore, the Chamber holds that the contents of this portion of the judgment cannot be said to contain "facts" for the purposes of Rule 94(B).

16. The Chamber notes that Rule 94(B) allows the Chamber to take judicial notice of adjudicated facts. The Chamber shares the opinion expressed in *Prosecutor v. Nyiramasuhuko* that it is preferable that legal conclusions are arrived at during the trial rather than judicially noticed.¹¹ The Chamber therefore concludes that it will not take judicial notice of legal conclusions under Rule 94(B).

¹⁰ *Prosecutor v. Kayishema*, ICTR-95-1-T, Judgement, 21 May 1999 at paras. 31-33.

¹¹ *Prosecutor v. Nyiramasuhuko et. al.*, ICTR-97-21-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, at para. 127. This decision followed the decision in *Prosecutor v. Ntakirutimana*, ICTR-96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, at paras. 35 and 36.



17. Having stated the law governing judicial notice before this Tribunal, the Chamber now turns to the Prosecutor's Motion. The Chamber notes that although the cover page of the Motion states that the Motion is for judicial notice of adjudicated facts, the first page clarifies this further and adds that the Prosecution asks the Chamber to take judicial notice of 65 "adjudicated facts", pursuant to Rule 94(B). Thus, the Chamber will examine the facts submitted by the Prosecutor within the prism of "adjudicated facts" under Rule 94(B) rather than "facts of common knowledge" under Rule 94(A) since the Motion clearly refers to "judicial notice of adjudicated facts" as part of its title.

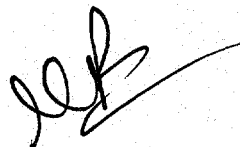
18. The Chamber notes that the majority of the facts sought to be judicially noticed are essentially paragraphs, either taken as a whole from a judgment or made up by putting together extracts from two or more judgments. As discussed above, the Chamber considers that there is no scope within Rule 94(B) to take judicial notice of extracts from judgments if the facts sought to be judicially noticed cannot be clearly ascertained from these extracts. The Rule only confers discretion on the Chamber to judicially notice "adjudicated facts" where the exercise of this discretion would advance consistent case law, judicial economy, or is otherwise in the interests of justice.

19. Having examined the paragraphs that form the subject matter of the Motion, the Chamber notes that each paragraph invariably contains more than one fact. A Motion properly brought under Rule 94(B) should specify exactly which of those facts the Chamber is asked to judicially notice and how each of these relate to the matter at issue in the current proceedings. In the instant application, the Prosecutor has failed to do so. The Chamber reminds the Prosecutor that the mere reproduction of whole paragraphs of a previous judgment is insufficient to trigger the exercise of the Chamber's discretion under Rule 94(B). The Chamber considers that the problem is compounded further when entire paragraphs from different judgments are put together to form a new paragraph as the contexts in which they arise may have been completely different. Accordingly, the Chamber finds that Facts 34, 35, 36, 39, 42, 43, 47, 48 and 49 cannot be judicially noticed.

20. The Chamber finds that Facts 1 -27 and Facts 29-37, 41, 44, 51(c), 51(d), 52, 55, 56, 58(a), 58(b), 58(c), 58(d) and 58(e) of the Motion are either wholly or partly dependent either on the "introductory" portions of Trial Chamber judgments or on the portions which deal with the "historical context" within which the events in Rwanda in 1994 took place. As discussed in paragraphs 14 and 15 above, these do not amount to factual findings and cannot be treated as "adjudicated facts" for the purposes of Rule 94(B).

21. The Chamber declines to judicially notice facts which would have a bearing upon the guilt or innocence of the Accused or which are central to the Prosecution case. Further, and in light of the existing jurisprudence of the International Criminal Tribunal Rwanda (ICTR) cited previously, the Chamber will not take judicial notice of facts which are essentially legal conclusions. The Chamber thus rejects Facts 28, 37, 38, 40, 41, 42, 43, 44, 45, 46, 60(a), 60(b), 60(c), 60(d), 60(e), 61, 62 and 63 of the Prosecutor's Motion as being unsuitable for judicial notice on these grounds.

22. The Chamber notes that the Prosecutor has already adduced evidence as part of the trial on some of the facts that he now seeks to have judicially noticed. The Chamber considers that it would be improper to pre-judge the evaluation of this evidence by taking judicial notice of these facts at this juncture instead of allowing them to be proved during the trial. As stated earlier, the jurisprudence shows that certain facts are more suitable to being proved in the normal course of



the proceedings instead of being judicially noticed either because they go directly to the guilt or innocence of the Accused or because they are reasonably disputed by the Parties. Consequently, the Chamber therefore declines to judicially notice Facts 32, 37, 38, 51(a), 51(b), 51(c), 51(d), 52, 53, 54, 55, 56, 57, 58(a), 58(b), 58(c), 58(d), 58(e), 59, 60(a), 60(b), 60(c), 60(d), 60(e) and 62.

23. Similarly, the Chamber cannot take judicial notice of facts which are admissions or which have not been contested by the opposing Party in that case. Thus, Facts 18, 32, 33 and 63 which are wholly or partly based on paragraphs from the judgment in *Prosecutor v. Musema* cannot be judicially noticed.

24. It is settled law that adjudicated facts in cases under appeal must not be judicially noticed as they have not been finally adjudicated. The Prosecutor's submission that these facts can be judicially noticed as they are not the subject of the appeal in the cited cases is incorrect. The basis upon which the Appeals Chamber may finally admit or reject the appeal and the extent to which it may do so are not matters which this Chamber can presume to know and indeed pronounce upon. As the cases of *Prosecutor v. Kajelijeli* and *Prosecutor v. Semanza* are under appeal, Facts 47, 50, 51(a), 51(b), 51(c), 51(d), 52, 53, 54, 55, 56, 57, 58(a), 58(b), 58(c) and 58(d) of the Prosecutor's Motion will not be judicially noticed.

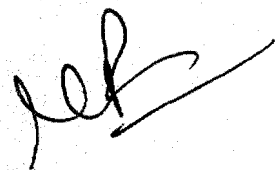
25. The Chamber wishes to add that in addition to the quoted paragraphs failing to qualify as "adjudicated facts" within the meaning of Rule 94(B), the Prosecutor has singularly failed to show how any of the requested facts relate to the current proceedings so as to qualify them for judicial notice under the sub-Rule. The Prosecutor has failed to demonstrate that they are facts in issue in the current proceedings. Thus, the threshold requirement of relevance under the Rule is not met.

26. The Defence for Bicamumpaka and Mugenzi argue that Facts 64 and 65 of the Prosecutor's Motion are too broad and have been put together from paragraphs from a number of judgments and as such are not concrete or distinct and that these facts are in the nature of legal conclusions. The Defence for both Mugiraneza and Bizimungu do not raise any specific allegations with regard to these facts.

27. In the Chamber's view, Facts 64 and 65, unlike several other paragraphs in the Prosecutor's Motion, are specific rather than general and raise a single, clearly identifiable fact for judicial notice, particularly in their amended form. Further, the Chamber considers that they are factual rather than legal findings.

28. However, the Chamber notes that there are certain differences between the facts presented in the Motion and in the sources cited. The Chamber also notes certain inaccuracies in some of the facts presented by the Prosecution. Nevertheless, the Chamber has decided to exercise its power under Rule 94(B) to judicially notice the following facts *proprio motu* with the necessary amendments:

- (i) At the time of the events in 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 12th February 1975.
- (ii) At the time of the events in 1994, Rwanda was a contracting party to the Geneva Conventions of 12th August 1949 and Additional Protocol II of 8th June 1977



having acceded to the Geneva Conventions of 12th August 1949 on 5th May 1964 and acceded to Protocols additional thereto of 8th June 1977 on 19th November 1984.

29. The Chamber notes that it is compelled to reject all the facts which the Prosecutor seeks to have judicially noticed because of the inadequate consideration and thought that went into the preparation of the Motion. The result is that the Parties and the Chamber have expended valuable time and resources in a substantially fruitless exercise. The Chamber urges the Prosecutor, in future, to give much more serious consideration and thought to the manner in which he formulates his Motions to the Chamber so as to foster judicial economy for the benefit of all Parties.

FOR THE ABOVE REASONS,

THE TRIAL CHAMBER

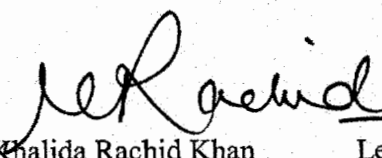
TAKES JUDICIAL NOTICE *proprio motu* and pursuant to Rule 94 (B) of the Rules of the following facts:

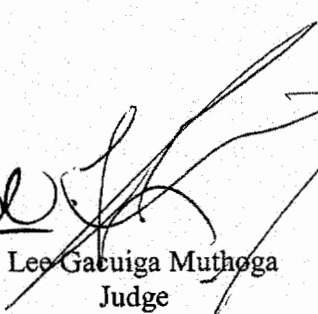
At the time of the events in 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) having acceded to it on 12th February 1975.

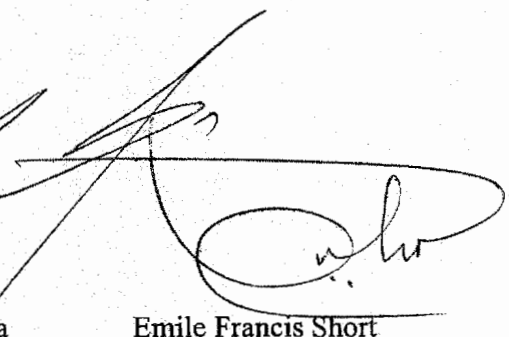
At the time of the events in 1994, Rwanda was a contracting party to the Geneva Conventions of 12th August 1949 and Additional Protocol II of 8th June 1977 having acceded to the Geneva Conventions of 12th August 1949 on 5th May 1964 and acceded to Protocols additional thereto of 8th June 1977 on 19th November 1984.

DENIES the Motion in its entirety.

Arusha, 10 December 2004


Khalida Rachid Khan
Presiding Judge


Lee Gacuga Muthoga
Judge


Emile Francis Short
Judge

