ICTR-98-44-T
9-11-2005
(24648 - 24642)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 9 November 2005

THE PROSECUTOR

v.

Edouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-R94

DECISION ON PROSECUTION MOTION FOR JUDICIAL NOTICE

Rule 94 of the Rules of Procedure and Evidence

Office of the Prosecutor:
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Defence Counsel for Mathieu Ngirumpatse
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Peter Robinson and Patrick Nimy Mayidika Ngimbi

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Emile Francis Short, and Gberdao Gustave Kam ("Chamber");

BEING SEIZED of the Prosecutor's "Motion for Judicial Notice of Facts of Common Knowledge and Adjudicated Facts" filed on 30 June 2005 ("Motion");

RECALLING the Decision of 12 July 2005 granting extension of time to Defence of each Accused for filing its response to the Motion no later than 12 August 2005;[1]

CONSIDERING Joseph Nzirorera's Responses dated 4 and 14 July and 7 November 2005; Mathieu Ngirumpatse's Response filed on 18 August 2005; and the Prosecutor's Consolidated Reply filed on 19 August 2005;

CONSIDERING that Edouard Karemera has not filed any response;

NOW DECIDES the Motion solely on the basis of the written submissions of the parties pursuant to Rule 73(A) of the Rules.

PRELIMINARY MATTERS

1. The Motion was filed before the commencement of the trial on 19 September 2005. During the first session of the trial, the Chamber heard two Prosecution Witnesses. The Defence for Mathieu Ngirumpatse and Joseph Nzirorera sought an extension of time to file its responses which was granted in the Decision of 12 July 2005.

2. In his first and preliminary response, Joseph Nzirorera requests the Chamber to stay the proceedings regarding the adjudicated facts based on the Judgement delivered in the case against Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze. Pursuant to that argument, Joseph Nzirorera seized the Appeals Chamber for some disclosures in the aforementioned case in order to submit a final response to the Motion. In his submissions of 7 November 2005, Joseph Nzirorera, having received some of the appeals briefs filed in *Nahimana et al.* case, argues that the issue of fairness has been raised and therefore all findings made by the Trial Chamber are challenged. Adding that Nahimana has appealed findings of facts prior to 1994, he therefore requests that no judicial notice be taken of findings in that Judgement. The request for a stay of proceedings in relation with disclosure of appeals filings in *Nahimana et al.* is consequently moot.

3. Joseph Nzirorera also sought the appointment of an expert in relation with the Motion, in order to file his final response on the issue of the non-international character of the Rwandan armed conflict in 1994. In his submissions of 7 November 2005, he requests the Chamber to assist in getting the Registrar to approve such an appointment. The Chamber considers that such an application will be relevant only to adjudicated facts because, for the facts of common knowledge, by their very nature, any argument from the parties cannot change the Chamber's Decision. However, in view of the findings below, the Chamber deems it unnecessary to make any order with regard to the appointment of an expert since none of its

[1] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera*, Case No. ICTR-98-44-PT (*Karemera*), Decision Granting Extension of Time to Respond to the Prosecution Motion for Judicial Notice (TC), 12 July 2005.

conclusions will prejudice the rights of the Accused. Consequently, the counter-motion for an order for the appointment of an expert falls to be dismissed.

PROVISIONS IN THE RULES OF PROCEDURE AND EVIDENCE

4. Rule 94 of the Rules reads as follows:

> (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.

This Rule provides two different approaches to the taking of judicial notice of three categories of elements: facts of common knowledge, adjudicated facts and evidentiary documents. In the present instance, the Prosecutor has requested judicial notice of only two categories: facts of common knowledge and adjudicated facts. The Chamber will now consider the parties' submissions in respect of each of them.

JUDICIAL NOTICE OF FACTS OF COMMON KNOWLEDGE (RULE 94(A) OF THE RULES)

5. Rule 94(A) on the judicial notice of facts of common knowledge does not give any discretion to the Chamber: after having found that a fact is of common knowledge, it has to judicially notice that fact.[2] In the definition of such fact and the assessment of whether it is of common knowledge or not, however, the Chamber has a discretion. The Chamber will rely on the jurisprudence of this Tribunal for the definition of a fact of common knowledge. In previous decisions on the matter, Trial Chambers have consistently defined facts of common knowledge as "facts of such notoriety, so well known and acknowledged that no reasonable individual with relevant concern can possibly dispute them".[3] This definition does not imply in the Chamber's opinion that whenever a fact is challenged, it cannot be found to be of common knowledge; the Chamber still must assess the reasonableness of the challenge.

6. Under Rule 94(A), the Prosecutor submits six facts allegedly of common knowledge. Among those facts, and according to the Motion, five were already judicially noticed in the *Semanza* Appeals Judgement,[4] and four among those five were judicially noticed in *Bagosora*.[5] The sixth fact is that genocide occurred in Rwanda between 6 April and 17 July 1994, and the Prosecutor relies on the jurisprudence, the admitted facts, various United Nations Reports, various Research Papers and the News to support such an assertion. The Prosecutor recognizes that other decisions have previously denied the request for judicial

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2 *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR73.5, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003.

3 *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosecution's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94 (TC), 2 December 2003, para. 23; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on the Prosecutor's Further Motion for Judicial Notice Pursuant to Rules 94 and 54, 15 March 2001, para. 23.

4 The Prosecutor refers to para. 192.

5 *The Prosecutor v. Théoneste Bagosora et al.*, Case No ICTR-98-41-T, Decision on the Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 11 April 2003.

notice of genocide occurring in Rwanda.[6] The Prosecutor argues, however, that in those, the applicant had sought judicial notice of a plan to commit genocide. In the present case, the Prosecutor submits that he does not seek judicial notice of such a plan, nor any acts of the Accused. The Prosecutor also submits that if the Chamber does not take judicial notice of this sixth fact on the basis of Rule 94(A), he alternatively requests consideration under Rule 94(B) as an adjudicated fact. The Chamber will consider this fact before dealing with the five others. At this stage, the Chamber deems it necessary to state, that it is not bound by any finding of previous Trial Chambers.

7. Under Fact 6, the Prosecutor seeks judicial notice of genocide having occurred in Rwanda in 1994. The Chamber recalls that, in each trial before the Tribunal, the Prosecutor has an obligation to prove that the Accused participated in specific acts and that those acts constituted the crime of genocide, showing how such participation took place. In doing so, the Prosecutor has the burden to prove that: (i) the Accused participated in at least one of the prohibited acts; (ii) the Accused committed such act against a person because of his ethnic, racial, national or religious group; (iii) the Accused had the specific intent required for the crime of genocide. As a result, it does not matter whether genocide occurred in Rwanda or not, the Prosecutor must still prove the criminal responsibility of the Accused for the counts he has charged in the Indictment. Taking judicial notice of such a fact as common knowledge does not have any impact on the Prosecution's case against the Accused, because that is not a fact to be proved. In the present case where the Prosecutor alleges that the Accused are responsible for crimes occurring in all parts of Rwanda, taking judicial notice of the fact that genocide has occurred in that country would appear to lessen the Prosecutor's obligation to prove his case. This application falls therefore to be dismissed.

8. In Fact 1, the Prosecutor requests that the Chamber takes judicial notice that "Hutu, Tutsi and Twa are ethnic groups in Rwanda". The jurisprudence has not clearly established that those three groups are ethnic groups *per se*, and as a result, no judicial notice can be taken. The jurisprudence, however, has consistently recognized that the three groups are stable and permanent, and, as such, have to be considered under the Genocide Convention of 1948 as protected groups.[7] The Chamber considers it as so notorious that there is no need to prove the existence of those three groups in Rwanda in 1994. Judicial notice is therefore taken for the existence of the *Twa*, *Tutsi* and *Hutu* as protected groups falling under the Genocide Convention.

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[6] The Prosecutor refers to: *Semanza* Decision of 3 November 2000, *Ntakirutimana* Decision of 22 November 2001, *Kajelijeli* Decision of 16 April 2002, *Nyiramasuhuko* Decision of 15 May 2002, *Niyitegeka* Decision of 4 September 2002, *Bagosora* Decision of 11 April 2003.

[7] See: *The Prosecutor versus Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998. See para. 511: "On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only 'stable' groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner"; and para. 516: "In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group." See also *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence (TC), 6 December 1999, paras. 56-57 and 374, and *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13, Judgement and Sentence (TC), 27 January 2000, paras. 162 and 935.

9. Under Fact 2, the Prosecutor requests that the Chamber takes judicial notice of the existence of widespread or systematic attacks conducted by Rwandans against Tutsi civilians in Rwanda between 6 April 1994 and 17 July 1994. This is a legal finding in the view of the Chamber which constitutes an element of a crime against humanity. The Prosecutor has an obligation to prove the existence of such an attack whenever he alleges that a crime against humanity occurred, and such evidence should be provided in close relation to the facts pleaded. The Chamber considers that judicial notice cannot therefore be taken of it.

10. Fact 3 refers to Rwanda being already a State party of the Genocide Convention in 1994; while Fact 4 refers to Rwanda being a party to the Geneva Convention of 1949 and to its Additional Protocol II of 1977. These are obvious and unchallengeable facts which are well-known through collection of treaties and official websites.[8] Judicial notice is therefore taken of Fact 3 and Fact 4.

11. Under Fact 5, the Prosecutor alleges that between 1 January and 17 July 1994, there was a non-international armed conflict in Rwanda, and requests the Chamber to take judicial notice of it. This also appears to be a legal finding which the Chamber should reach after having considered the evidence adduced by the parties on a case by case basis, the Prosecutor having the burden to prove his case. The Chamber therefore denies the Prosecutor's request for judicial notice of Fact 5.

JUDICIAL NOTICE OF ADJUDICATED FACTS (RULE 94(B) OF THE RULES)

12. Rule 94(B) of the Rules refers to two different categories: adjudicated facts and documentary evidence. In the Motion, the Prosecutor seeks judicial notice to be taken of 153 Facts he extracted from the *Akayesu*, *Kayishema*, *Rutaganda*, *Kajelijeli*, *Musema*, *Nahimana*, *Ndindabahizi*, *Niyitegeka*, *Ntakirutimana* and *Semanza* cases. In the Prosecutor's view, by admitting those or some of those facts as adjudicated, the Chamber will establish a rebuttable factual finding. In other words the Prosecutor will not need to prove those facts, but the Defence can still challenge them by proving that they are not true. The Prosecutor relies on the *Blagojevic* Decision of 19 December 2003.[9]

13. In implementing Rule 94(B), other Chambers have concluded that they have some discretion in deciding "whether justice is best served by [their] taking judicial notice of adjudicated facts".[10] Such discretion should also take into account judicial economy and the necessity of consistency of the jurisprudence.[11] Taking judicial notice of this category of facts

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[8] See the United Nations Treaty Series, vol. 78, p. 277. See also the United Nations Treaty Database online (http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp).

[9] See ICTY, *Prosecutor v. Blagojevic*, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, para. 16.

[10] *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B) (TC), 10 December 2004, para. 9.

[11] *The Prosecutor v. Laurent Semanza*, Case No ICTR-97-20-I, Decision on the Prosecutor's Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 20; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B) (TC), 10 December 2004, paras. 10, 12.

establish a presumption of their accuracy without preventing the opposing party from challenging them.[12]

14. "Adjudicated Facts" have been defined in the jurisprudence as "facts which have been finally determined in a proceeding before the Tribunal [and] [...] one upon which it has deliberated, and thereupon made a finding in proceedings that are final, in that no appeal has been instituted therefrom or if instituted, the facts have been upheld".[13] The jurisprudence has further established 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 previously discussed. Similarly, the Chamber understands the 'historical context' laid out in some judgments of the Tribunal to be essentially introductory."[14] Finally, the Chamber recalls that in some cases, some facts were excluded from being judicially noticed because of their close links with the guilt or innocence of the Accused.[15] The Chamber concurs with the jurisprudence as stated and will decide the Motion accordingly.

15. In the present case, the Prosecutor has extracted specific facts from the paragraphs of the cases quoted. It appears to the Chamber that while most of those facts may go directly or indirectly to the guilt of the Accused, notably in relation with the pleading of their participation in a joint criminal enterprise,[16] others are extracted from cases currently on appeal.[17] It also appears for other facts that they are taken out of context and put together to build new facts which have not been adjudicated.[18] One other fact is a legal characterisation of which judicial notice cannot be taken.[19] Finally, on some other facts,[20] evidence has already

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12 *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR73.5, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003: "by taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven at trial, but which, subject to that presumption, may be challenged at that trial". Read also the Dissenting Opinion of Judge Hunt and the Separate Opinion of Judge Shahabuddeen appended to the Appeals Chamber Decision).

13 *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Bicamumpaka's Motion for Judicial Notice, 11 February 2004, paras. 4-5

14 *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B) (TC), 10 December 2004, para. 14. See also: *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No ICTR-97-21-T, Decision on the Prosecutor's Motion for Judicial Notice and Admission of Evidence, 15 May 2002, para. 127, and *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, paras. 35-36.

15 *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B) (TC), 10 December 2004, para. 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 [for] Rwanda (ICTR) cited previously, the Chamber will not take judicial notice of facts which are essentially legal conclusions".

16 Facts 1-30, 33-74, 79-85, and 111-152.

17 Facts 75-78.

18 Facts 86-110.

19 Fact 153.

20 Facts 31-32.

been adduced at this trial, and it would be unfair to the Accused for the Chamber to take judicial notice of them when relevant evidence has already been heard.[21]

FOR THE ABOVE REASONS, THE CHAMBER

I. TAKES JUDICIAL NOTICE of the fact that Hutu, Tutsi and Twa were protected groups falling with the scope of the Genocide Convention of 1948;

II. TAKES JUDICIAL NOTICE of the fact that, in 1994, Rwanda was a State party to the Genocide Convention of 1948, to the Geneva Convention of 1949, and to the Additional Protocol II of 1977 to the Geneva Conventions;

III. DENIES the remainder of the motion;

IV. DENIES Joseph Nzirorera's request for an order for the appointment of an expert.

Arusha, 9 November 2005, done in English.

Dennis C. M. Byron	Emile Francis Short	Gberdao Gustave Kam
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[21] *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B) (TC), 10 December 2004, para. 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." See also ICTY, *Prosecutor v. Blagojevic*, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence, 19 December 2003, paras. 22-23.