



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1272-00-56-T
(07-12-2005)
(21978-21972)

21978
Mwony

OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, Presiding
Judge Taghrid Hikmet
Judge Seon Ki Park

Registrar: Mr Adama Dieng

Date: 6 December 2005

2005 Dec 6 10:00 AM

The PROSECUTOR
v.
Augustin BIZIMUNGU
Augustin NDINDILYIMANA
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU
Case No. ICTR-00-56-T

DECISION ON THE PROSECUTOR'S MOTION FOR JUDICIAL NOTICE
PURSUANT TO RULES 73(A), 94(A) AND 89 OF THE RULES
AND ARTICLE 7 OF THE STATUTE

Office of the Prosecutor:

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Mr Gilles St-Laurent and Mr Ronnie MacDonald for Augustin Bizimungu
Mr Christopher Black for Augustin Ndingilyimana
Mr Charles Taku for François-Xavier Nzuwonemeye
Mr Fabien Segatwa and Mr Seydou Doumbia for Innocent Sagahutu

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

SITTING as Trial Chamber II, composed of Judge Asoka de Silva, Presiding, Judge Taghrid Hikmet and Judge Seon Ki Park (the “Chamber”);

BEING SEISED OF the “Prosecutor’s Motion for Judicial Notice Pursuant to Rules 73(A), 94(A) and 89 of the Rules of Procedure and Evidence and Article 7 of the Statute”, filed on 28 October 2005 (the “Motion”);

HAVING RECEIVED AND CONSIDERED the

- (i) “Response to Prosecutor’s Motion for Judicial Notice Pursuant to Rules 73(A), 94(A) and 89 of the Rules of Procedure and Evidence and Article 7 of the Statute”, filed on 3 November 2005 by the Defence for Nzuwonemeye (the “Nzuwonemeye Response”);
- (ii) “Réponse de la défense d’Augustin Bizimungu à la Requête du Procureur en constat judiciaire”,¹ filed on 6 November 2005 (the “Bizimungu Response”);
- (iii) “Réplique du Procureur aux réponses apportées par la défense d’Augustin Bizimungu et de François-Xavier Nzuwonemeye à la requête en constat judiciaire du 28 octobre 2005”,² filed on 8 November 2005 (the “Reply”).

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

HEREBY DECIDES the Motion on the basis of the written briefs filed by the Parties pursuant to Rule 73(A) of the Rules.

SUBMISSIONS BY THE PARTIES

The Prosecution

1. The Prosecution requests the Trial Chamber to take judicial notice of the existence of various executive and legislative documents in Rwanda during the temporal jurisdiction of the Tribunal.³

¹ “Response of the Defence for Augustin Bizimungu to the Prosecutor’s Motion for Judicial Notice” (Unofficial translation).

² “The Prosecutor’s Reply to the Responses presented by the Defence for Augustin Bizimungu and for François-Xavier Nzuwonemeye to the Motion for Judicial Notice of 28 October 2005” (Unofficial translation).

³ These documents are: 1. *Ordonnance législative N° R/85/25 du 10 mai 1962 portant création de l’Armée Rwandaise*; 2. *Décret-loi du 23 janvier 1974 portant dénomination de l’Armée Rwandaise*; 3. *Arrêté Présidentiel N° 86/08 du 26 juin 1973 portant intégration de la police dans l’Armée Rwandaise*; 4. *Décret-loi du 23 janvier 1974 portant dénomination de la Gendarmerie Nationale*; 5. *Décret-loi N° 38/79 du 3 décembre 1979 modifiant le décret-loi du 23 janvier 1974 portant dénomination de l’Armée Rwandaise*; 6. *Arrêté Présidentiel N° 413/02 du 13 décembre 1978 portant règlement de discipline des Forces Armées Rwandaises*; 7. *Décret-loi N° 12/79 du 7 mai 1979 sur le régime des armes à feu et de leurs munitions*; 8. *Décret du 7 décembre 1960 sur les mesures intéressant la sécurité publique (milices privées et exhibitions paramilitaires)*; 9. *Arrêté Ministériel N° 963/07 du 22 novembre 1983 portant désignation des officiers de police judiciaire et définition de leurs compétences*; 10. *Décret-loi N° 9/80 du 7 juillet 1980, confirmé par la loi N° 01/82 du 26 janvier 1982, modifié par la loi organique N° 12/85 du 7 mai 1985 portant code d’organisation et de compétence judiciaires*; 11. *Loi N° 28/91 du 18 juin 1991 sur les partis politiques*; 12. *Constitution N° 01/81 du 16 janvier 1981 sur recensement, carte d’identité, domicile et résidence des Rwandais*; 13. *Constitution de la République Rwandaise du 10 juin 1991*; 14. *Code pénal Rwandais*; 15. *Code de procédure pénale du 23 février 1963*; 16. *Adhésion du Rwanda aux Conventions de Genève du 12 août 1949; Arrêté Présidentiel N° 605/16 du 28 septembre 1984 portant*



2. The Prosecution submits that the documents in question concern matters of common knowledge of which the Chamber should take judicial notice pursuant to Rule 94(A). Relying on the "Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts" in *Prosecutor v. Semanza*,⁴ as well as the "Decision on the Prosecutor's Motion for Judicial Notice" in *Prosecutor v. Seromba*,⁵ the Prosecution further submits that it is the established practice of international tribunals to take judicial notice of facts as well as of documents concerning matters of common knowledge. Such facts include those which are not in dispute among reasonable persons as well as those which are "generally known within the area of the Tribunal's territorial jurisdiction" or those which are "readily verifiable by reference to reliable and authoritative sources."⁶

3. The Prosecution asserts that following these criteria, the documents in question qualify for judicial notice. They are moreover publicly accessible, and their existence and content can therefore not reasonably be subject to dispute. They can be easily verified through "readily available and reliable sources such as the Rwandan authorities."⁷ Furthermore, the Prosecution submits that the documents in question are relevant to the case at hand as the Accused were high-ranking officers of the Rwandan Armed Forces at the relevant time, who must have been familiar with them. The Prosecution also points out that some of the laws are mentioned in the Indictment of 23 August 2004 (particularly at paragraphs 17, 18, 19, 20 and 21) and the Pre-Trial Brief of 17 June 2004 (particularly at paragraphs 48, 49, 50, 51 and 69).

4. Finally, the Prosecution stresses that the act of having the documents in question judicially noticed would not relieve it of the obligation to prove beyond reasonable doubt "the very controversial core elements of the crimes" charged in the Indictment.⁸

Response by the Defence for Nzuwonemeye

5. The Defence for Nzuwonemeye moves the Trial Chamber to deny the Prosecution Motion in its entirety. It submits that the Prosecution has misinterpreted Rule 94(A) and is consequently trying to "circumvent the proper procedure of tendering evidence before this Trial Chamber",⁹ thereby denying the Accused his right to a fair trial. The Defence points out that there is a distinction between Rule 94(A), which relates only to *facts* of common knowledge, and Rule 94(B), which refers to "adjudicated facts or documentary evidence."

6. In support of its submissions, the Defence cites the *Semanza* Judicial Notice Decision,¹⁰ which in its view is the only decision in which judicial notice was taken of the content of documents under Rule 94(A), and at that time subsection (B) had not yet been

adhésion aux protocoles additionnels aux conventions de Genève du 12 août 1949, et Loi du 3 septembre 1952 portant approbation des Conventions de Genève; 17. Accords d'Arusha du 30 octobre 1992 tel qu'amendés le 9 janvier et le 3-4 août 1993.

⁴ Case No. ICTR-97-20-I, 3 November 2000 [hereinafter '*Semanza* Judicial Notice Decision'].

⁵ Case No. ICTR-2001-66-T, 14 July 2005 [hereinafter '*Seromba* Judicial Notice Decision'].

⁶ Motion, para. 9, referring to *Semanza* Judicial Notice, paras. 23 & 25; *Prosecutor v. 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. 38 [hereinafter '*Nyiramasuhuko* Judicial Notice Decision']; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Judicial Notice, 11 April 2003, para. 44 [hereinafter '*Bagosora* Judicial Notice Decision'].

⁷ Motion, para. 12.

⁸ Motion, para. 4.

⁹ Nzuwonemeye Response, para. 2.

¹⁰ Nzuwonemeye Response, para. 7.

adopted. Furthermore, the Defence refers to the *Nyiramasuhuko* Judicial Notice Decision,¹¹ in which the Trial Chamber took judicial notice only of the existence and authenticity, but not the content of certain documents. The Defence finally points to the "Decision on the Prosecutor's Motion for Judicial Notice" in *Prosecutor v. Bizimungu et al.*,¹² in which the Chamber held that "a vague and generalised request to take judicial notice of the content of an entire batch of documents is insufficient to invoke Rule 94(B)."¹³

7. The Defence concludes that the appropriate legal basis for taking judicial notice of documents is to be found in Rule 94(B) which relates to documentary evidence from other proceedings before the Tribunal. Only documents 1, 2, 3, 4, 12 and 13 have been adjudicated in this manner. Therefore, none of the other documents qualify for judicial notice, and consequently judicial notice cannot be taken of their existence or their content. The Defence does not object to documents 4 and 13, as these have already been tendered into evidence by the Defence for Augustin Bizimungu as exhibits D25 and D26. With regard to documents 1, 2, 3 and 12, the Defence contends that only their existence and authenticity have been adjudicated upon and can thus be judicially noticed for that limited purpose; however, the content of these documents would have to be entered into evidence through a witness. The Defence therefore objects to the Chamber's taking judicial notice of the content of those documents.

Response by the Defence for Bizimungu

8. The Defence for Augustin Bizimungu similarly objects and advances essentially the same arguments as the Defence for Nzuwonemeye. In addition, it refers to the *Bizimungu* Judicial Notice Decision, arguing that the Trial Chamber in that case restrictively interpreted Rule 94 in that it held that Rule 94(A) did not apply to documents but only to facts of public notoriety. The Defence submits that the Chamber may only take judicial notice of those legislative documents which have been admitted in the past, and may do so only pursuant to Rule 94(B), with the sole aim of recognizing the existence and authenticity of these documents.

9. Moreover, the Defence submits that the taking of judicial notice would be seriously prejudicial to the rights of the Accused to have a fair trial. According to the Defence, the Prosecution's attempt to have these documents judicially noticed without an appropriate legal debate will have the effect of binding the Chamber to the Rwandan legislation in reaching its factual and legal conclusions about the guilt of the Accused.¹⁴

The Prosecution's Reply

10. In its Reply, the Prosecution submits that laws are, by definition, matters of common knowledge. It further contends that taking judicial notice of the laws in force in Rwanda in 1994 is very advantageous in that it would favour the speediness and efficaciousness of the debates. The Prosecution submits that it is impossible to judge those responsible for a military structure without knowing the laws by which they were bound, and what their obligations and prerogatives were. The Prosecution also wishes to recall that in its Motion, it is not asking the Chamber to draw any conclusion of a legal or factual nature, but merely

¹¹ Nzuwonemeye Response, para. 8.

¹² Case No. ICTR-99-50-1, 2 December 2003 [hereinafter '*Bizimungu* Judicial Notice Decision'].

¹³ *Ibid.*, para. 38.

¹⁴ Para. 27 of the Bizimungu Response.

seeking that the Chamber take judicial notice of the existence and applicability of the legislative documents in question.

11. The Prosecution also points out that no Trial Chamber of the ICTR has ever refused to take judicial notice of a law or regulation applicable in Rwanda in 1994. Taking judicial notice in this way does not presume what the Chamber's Decision will be with regard to the eventual judicial or factual analysis. Finally, the Prosecution recalls the *Bagosora* Judicial Notice Decision¹⁵ and the *Seromba* Judicial Notice Decision,¹⁶ which in its view prove that Rule 94(A) is an appropriate legal basis on which to take judicial notice of the documents listed by the Prosecution.

DELIBERATIONS

Judicial Notice Pursuant to 94(A): Facts of Common Knowledge

12. The Chamber recalls that according to the Tribunal's jurisprudence judicial notice is a mechanism that fosters judicial efficiency and consistency by permitting parties to dispense with the obligation to present formal proof of "facts of common knowledge" or public notoriety where the proof of such facts would be both difficult and "prohibitively time consuming".¹⁷

13. The Chamber further recalls that "facts of common knowledge" have been defined as encompassing "those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature."¹⁸ The requirement that such facts must be "reasonably indisputable" has been interpreted to mean that they must be "either 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."¹⁹ The Chamber agrees that courts may take judicial notice of matters which are "so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary."²⁰ Consequently, the Chamber recalls that judicial notice may not be taken of "facts involving interpretation or legal characterisations of facts."²¹

14. With respect to the type of document that may be judicially noticed, the Chamber notes that judicial notice of the adoption of a United Nations General Assembly Resolution under Rule 94(A) was taken by a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia.²² Moreover, the Chamber recalls that in the *Semanza* Judicial Notice

¹⁵ *Bagosora* Judicial Notice Decision, para. 53.

¹⁶ *Seromba* Judicial Notice Decision, para. 14.

¹⁷ *Bagosora* Judicial Notice Decision, para. 43; *Semanza* Judicial Notice Decision, para. 20; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 28; See also Judge Richard May & Marieke Wierda, *International Criminal Evidence*, Ardsley, New York 2002, para. 4.97, p. 134.

¹⁸ *Semanza* Judicial Notice Decision, para. 23.

¹⁹ *Semanza* Judicial Notice Decision, para. 24. See also *Prosecutor v. Sikirica*, Case No. IT-95-8-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 27 September 2000.

²⁰ *Archibald Criminal Pleading, Evidence and Practice*, England 2000, para. 10-71.

²¹ *Sikirica* Judicial Notice.

²² *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, para. 152 (A/RES/46/242 of 25 August 1992).

Decision, the Chamber found that there is “ample precedent in this Tribunal to take judicial notice of the existence and authenticity of such documents [as legislative and administrative regulations] without taking judicial notice of the contents thereof.”²³ Similarly, in the *Nyiramasuhuko* Judicial Notice Decision, the Chamber held that certain Rwandan laws and parts of laws, as well as the Rwandan Constitution were “proper subjects for judicial notice, pursuant to Rule 94(A), as they are matters of public notoriety that should not normally require proof.”²⁴ Moreover, in the *Bagosora* Judicial Notice Decision, the Chamber found that “the relevant legislative, executive, and administrative and organizational laws of Rwanda” could properly qualify for judicial notice.²⁵ It explained that it was “well settled that the legislation and documents relating to the administrative organisation of a geographic area and the legislative law of a country fall within matters of common knowledge, which may fairly be judicially noticed.”²⁶ The Chamber agrees with these findings.

15. Accordingly, the Chamber is of the view that the existence of the laws and regulations in Rwanda annexed to the Motion cannot reasonably be disputed and consequently constitutes a “fact of common knowledge” within the meaning of Rule 94(A) which is suitable for judicial notice by this Chamber.

16. With respect to applicability, the Chamber notes that the laws and regulations it is being asked to take judicial notice of were enacted over a period of four decades, *i.e.* between 1952 and 1993. However, it is not certain which of the laws and regulations were applicable in Rwanda in 1994 since any of them could have been repealed or amended by subsequent legislation. Furthermore, taking judicial notice of the applicability of these laws and regulations may lead the Chamber to draw legal conclusions that are not beyond dispute. Therefore, the applicability of the documents in question in Rwanda in 1994 is not a proper subject for judicial notice and the Motion is denied in that respect.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion in part and

TAKES JUDICIAL NOTICE of the existence of the following laws and regulations in Rwanda pursuant to Rule 94(A):

1. *Ordonnance législative N° R/85/25 du 10 mai 1962 portant création de l'Armée Rwandaise;*
2. *Décret-loi du 23 janvier 1974 portant dénomination de l'Armée Rwandaise;*
3. *Arrêté Présidentiel N° 86/08 du 26 juin 1973 portant intégration de la police dans l'Armée Rwandaise;*
4. *Décret-loi du 23 janvier 1974 portant dénomination de la Gendarmerie Nationale;*
5. *Décret-loi N° 38/79 du 3 décembre 1979 modifiant le décret-loi du 23 janvier 1974 portant dénomination de l'Armée Rwandaise;*

²³ *Semanza* Judicial Notice Decision, para. 38.

²⁴ *Nyiramasuhuko* Judicial Notice Decision, para. 133.

²⁵ *Bagosora* Judicial Notice Decision, para. 45.

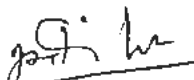
²⁶ *Ibid.*, para. 53. See also *Le Procureur c. Seromba*, Affaire No. TPIR-2001-66-T, Décision Relative à la Requête du Procureur aux Fins de Constat Judiciaire, 14 juillet 2005 ; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice, 9 November 2005, para. 10.

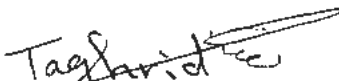


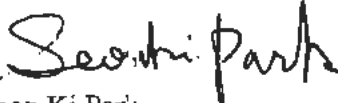
6. Arrêté Présidentiel N° 413/02 du 13 décembre 1978 portant règlement de discipline des Forces Armées Rwandaises;
7. Décret-loi N° 12/79 du 7 mai 1979 sur le régime des armes à feu et de leurs munitions;
8. Décret du 7 décembre 1960 sur les mesures intéressant la sécurité publique (milices privées et exhibitions paramilitaires);
9. Arrêté Ministériel N° 963/07 du 22 novembre 1983 portant désignation des officiers de police judiciaire et définition de leurs compétences;
10. Décret-loi N° 9/80 du 7 juillet 1980, confirmé par la loi N° 01/82 du 26 janvier 1982, modifié par la loi organique N° 12/85 du 7 mai 1985 portant code d'organisation et de compétence judiciaires;
11. Loi N° 28/91 du 18 juin 1991 sur les partis politiques;
12. Décret-loi N° 01/81 du 16 janvier 1981 sur recensement, carte d'identité, domicile et résidence des Rwandais;
13. Constitution de la République Rwandaise du 10 juin 1991;
14. Code pénal Rwandais;
15. Code de procédure pénale du 23 février 1963;
16. Adhésion du Rwanda aux Conventions de Genève du 12 août 1949; Arrêté Présidentiel N° 605/16 du 28 septembre 1984 portant adhésion aux protocoles additionnels aux conventions de Genève du 12 août 1949, et Loi du 3 septembre 1952 portant approbation des Conventions de Genève;
17. Accords d'Arusha du 30 octobre 1992 tel qu'amendés le 9 janvier et le 3-4 août 1993.

DENIES the Motion in all other respects.

Arusha, 6 December 2005


Asoka de Silva
Presiding Judge


Taghard Hikmet
Judge


Seon Ki Park
Judge

[Seal of the Tribunal]