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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 22 September 2006

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON PROSECUTOR'S MOTION FOR JUDICIAL NOTICE

Rule 94(A) of the Rules

Office of the Prosecutor:
Mr. Paul Ng'arua
Mr. Ibukunolu Babajide
Mr. Justus Bwonwonga
Mr. Elvis Bazawule
Mr. Shyamlal Rajapaksa
Mr. Olivier de Shutter
Mr. William Mubiru

Counsel for the Defence:
Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

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

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

BEING SEIZED of the "Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)", filed on 19 July 2006 (the "Motion").

CONSIDERING the

(i) "*Réponse de Casimir Bizimungu à la Troisième Requête du Procureur en Constat Judicaire, Intitulée* Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)", dated 23 July 2006 and filed on 24 July 2006 (the "Response of Casimir Bizimungu")[1];

(ii) "Response to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)", dated 3 August 2006 and filed on 7 August 2006 (the "Response of Jérôme Bicamumpaka");

(iii) "Prosper Mugiraneza's Reply to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)", dated 3 August 2006 and filed on 7 August 2006 (the "Response of Prosper Mugiraneza");

(iv) "Justin Mugenzi's Response to the Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)", filed on 14 August 2006 (the "Response of Justin Mugenzi");

NOTING that the Prosecution did not file a Reply to the Defence Responses;

NOW DECIDES the Motion solely on the basis of the briefs of the Parties, pursuant to Rule 73 (A) of the Rules.

INTRODUCTION

1. The Prosecution moves the Trial Chamber, pursuant to Rule 94(A), to take judicial notice of the following seven facts, which it submits are "facts of common knowledge"[2]:

Fact One:

Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda.

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[1] LCSS translation available in draft at time of filing: "Casimir Bizimungu's Response to Prosecutor's Third Motion for Judicial Notice entitled Prosecutor's Motion for the Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A)", DH06-0171 (E).

[2] Motion, paragraph 1.

Fact Two:

Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified, according to the following ethnic classifications: Hutu, Tutsi, and Twa.
OR
Between 6 April 1994 and 17 July 1994, in Rwanda, Hutu, Tutsi and Twa were protected groups falling within the scope of the Genocide Convention of 1948.
OR
Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Hutu, Tutsi, and Twa, which were protected groups falling within the scope of the Genocide Convention of 1948.

Fact Three:

The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed and or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.

Fact Four:

Between 6 April 1994 and 17 July 1994, there was an armed conflict in Rwanda that was NOT of an international character.

Fact Five:

Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

Fact Six:

Between 1 January 1994 and 17 July 1994, Rwanda was a State 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 having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

Fact Seven:

Before the introduction of multi-party politics in Rwanda in 1991, the office of the *Bourgmestre* was characterized by the following features:
(a) The *Bourgmestre* represented executive power at the commune level.
(b) The *Bourgmestre* was appointed and removed by the President of the republic on the recommendation of the Minister of interior.
(c) The *Bourgmestre* had authority over the civil servants posted in his commune.
(d) The *Bourgmestre* had policing duties in regard to maintaining law and order.

2. The Prosecution's request stems from a recent Decision of the Appeals Chamber in *Karemera et al.*[3] in which the Appeals Chamber, finding that the Trial Chamber had

[3] Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (AC)*, 16 June 2006 (henceforth, the "*Karemera* Decision").

erred, directed the Trial Chamber to take judicial notice, under Rule 94(A), of the following facts:

> The following state of affairs existed in Rwanda between 6 April 1994 to 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed or caused serious bodily or mental harm to person[s] perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.[4]
>
> Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character.[5]
>
> Between 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group.[6]

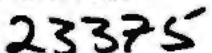
The *Karemera* Appeals Chamber also held that the *Semanza* Appeals Chamber endorsed the *Semanza* Trial Chamber's decision to take judicial notice of the following facts of common knowledge:

> Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified, according to the following ethnic classifications: Hutu, Tutsi, and Twa.
>
> Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.
>
> Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the Geneva Conventions of 12 August 1949 and their Additional Protocol II of 8 June 1977, having succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and having acceded to Protocols Additional thereto of 1977 on 19 November 1984.
>
> Before the introduction of multi-party politics in Rwanda in 1991, the office of the *Bourgmestre* was characterized by the following features:
> (a) The *Bourgmestre* represented executive power at the *commune* level.
> (b) The *Bourgmestre* was appointed and removed by the President of the Republic on the recommendation of the Minister of the Interior.
> (c) The *Bourgmestre* had authority over the civil servants posted in his *commune*.
> (d) The *Bourgmestre* had policing duties in regard to maintaining law and order.

The *Karemera* Appeals Chamber concluded that these facts are notorious and not reasonably subject to dispute.

3. The Motion is opposed in its entirety by Casimir Bizimungu, Jérôme Bicamumpaka and Justin Mugenzi. Prosper Mugiraneza makes submissions on the characterisation of the conflict within Rwanda during 1994, and urges the Trial Chamber not to take judicial notice of Fact Four above.

[4] *Karemera* Decision, paragraphs 26-32.
[5] *Ibid.*
[6] *Karemera* Decision, paragraphs 33-38.



4. A prior Prosecution motion for judicial notice of facts of common knowledge under Rule 94(A) of the Rules was denied by the Trial Chamber on the basis that a Trial Chamber cannot take judicial notice of any document under Rule 94(A).[7]

PRELIMINARY MATTERS

5. The Defence for Justin Mugenzi filed its Response outside of the time limits given by the Chamber. Counsel for Mugenzi explains that the Mugenzi legal team was busy with other commitments. The Chamber does not find this to be an acceptable reason for the late filing. However, considering the significance of the issues at stake, the Trial Chamber will fully consider the submissions of all the Parties.

DISCUSSION

6. Rule 94(A) states: "A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof." Judicial notice under Rule 94(A) is mandatory. If a Trial Chamber determines that a fact is one "of common knowledge", it must take judicial notice of it. As the Appeals Chamber stated in the *Semanza* Appeal Judgement:

> As the ICTY Appeals Chamber explained in *Prosecution v. Milošević*, Rule 94(A) "commands the taking of judicial notice" of material that is "notorious." The term "common knowledge" encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts, such as general facts of history or geography, or the laws of nature. Such facts are not only widely known but also beyond reasonable dispute.[8]

The Appeals Chamber also considered the nature of a finding of judicial notice under Rule 94(A), and stated that:

> Whether a fact qualifies as a "fact of common knowledge" is a legal question. By definition, it cannot turn on the evidence introduced in a particular case, and so the deferential standard of review ordinarily applied by the Appeals Chamber to the Trial Chamber's assessment of and inferences from such evidence has no application.[9]

7. The Trial Chamber cannot accept the Defence arguments that the Appeals Chamber rulings on Rule 94(A) judicial notice in the *Karemera* Decision, the *Semanza* Judgement have no applicability in this case. Neither can it accept Justin Mugenzi's argument that the determination that a fact is one of common knowledge is a question of fact, which only the Trial Chamber can make. In essence, the legal effect of the *Karemera* Decision is that a determination by the Appeals Chamber that any given fact is one of common knowledge and of which judicial notice should be taken under Rule 94(A) is binding upon all Trial Chambers.

8. Casimir Bizimungu, Jérôme Bicamumpaka and Justin Mugenzi submit that, since the Trial Chamber has already made rulings with respect to most of the facts which form the basis of the present application, these matters are barred from re-litigation hy

[7] Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003, paragraphs 25-26.
[8] *Semanza*, Judgement (AC) (hereinafter, the "*Semanza* Judgement"), paragraph 194.
[9] *Karemera* Decision, paragraph 23.

virtue of the doctrine of *res judicata.* A review of the Trial Chamber's prior Decisions concerning Prosecution requests for judicial notice reveals that, except for Fact Four, none of the facts currently before the Chamber in the present Motion have been the subject of an application for judicial notice before the Trial Chamber under Rule 94(A), which concerns facts of common knowledge. The Chamber's *first* Decision on judicial notice, which was brought under both Rule 94(A) and Rule 94(B), did not concern any of the facts currently before the Chamber.[10] That Decision related to certain *documents*, and the Chamber held that it cannot take judicial notice of documents as facts of common knowledge under Rule 94(A). The Chamber's *second* Decision on judicial notice dealt exclusively with an application brought under Rule 94(B) of the Rules, which concerns only adjudicated facts or documentary evidence from other proceedings of the Tribunal.[11] Fact Four has, however, been the subject of a previous application before the Trial Chamber pursuant to Rules 94(A) of the Rules. In its "Decision on Defence Motions Pursuant to Rule 98 *bis*" of 22 November 2005, the Trial Chamber declined to take judicial notice of Fact Four, either as an adjudicated fact, or as a fact of common knowledge.[12] Furthermore, in a subsequent decision relating to certification to appeal the Decision on Defence Motions Pursuant to Rule 98 *bis*, the Trial Chamber stated that the characterization of the conflict in Rwanda as international or non-international in nature was an issue which was still open, and the Defence was at liberty to present evidence on the matter.[13] However, the Trial Chamber considers that the Appeals Chamber's ruling in *Karemera*, which is binding on all Trial Chambers, requires this Trial Chamber to reconsider its earlier Decision on this issue insofar as it is contrary to the Appeal Chambers ruling. For that reason, the argument based on *res judicata* cannot be sustained.

9. Casimir Bizimungu, Jérôme Bicamumpaka and Justin Mugenzi argue that the Motion is belated and that granting it would hinder judicial economy and cause them prejudice, since considerable effort has already gone into the preparation of their defence strategies.[14] Mugenzi's Defence argues that granting the Motion would cause Mugenzi particular prejudice, since he is close to completing the presentation of his evidence and, had he known at an earlier stage that the Prosecution was still seeking judicial notice, additional questions could have been asked of his witnesses.[15]

10. Where the Appeals Chamber has taken judicial notice of certain facts as facts of common knowledge, Trial Chambers are bound to follow such findings. It is proper for the Chamber to take judicial notice of such facts at any stage of the Trial. The Trial Chamber is also of the view that the identification of a fact as one of common knowledge fosters judicial economy by dispensing with the need to consider evidence on matters which do not require proof.

[10] Decision on Prosecutor's Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003
[11] *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004;
[12] *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Defence Motions Pursuant to Rule 98 *bis*, 22 November 2005, paragraph 100.
[13] *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Justin Mugenzi's Application for Certification to Appeal the Trial Chamber's Decision on Defence Motions Pursuant to Rule 98 *bis*, paragraph 11.
[14] Response of Casimir Bizimungu, paragraphs 33-43, 131, 134-149, 150-158; Response of Jérôme Bicamumpaka, paragraphs 17-19, 21-22, 29; Response of Justin Mugenzi, paragraphs 3-5.
[15] Response of Justin Mugenzi, paragraph 4.

11. The Appeals Chamber ruling in *Karemera*, directing the *Karemera* Trial Chamber to reconsider its ruling on facts of common knowledge under Rule 94(A), related to the same facts that the Prosecution formulates as Facts One, Three and Four in the present Motion. Due to the binding nature of the Appeals Chamber finding, the Trial Chamber thus takes judicial notice under Rule 94(A) of Facts One, Three and Four above.

12. The Trial Chamber recalls that the *Semanza* Trial Chamber took judicial notice, under Rule 94 of the Rules[16] of, among others, Facts Five and Six above, a position which was subsequently upheld on appeal in both the *Semanza* Appeals Chamber Judgement,[17] and endorsed in the *Karemera* Decision.[18] Thus, the Chamber takes judicial notice of these two facts as facts of common knowledge under Rule 94(A) of the Rules.

13. In relation to Fact Two, the Prosecution proposes three alternatives in relation to which it seeks judicial notice. Judicial notice of the first alternative was taken by the *Semanza* Trial Chamber, and subsequently endorsed by the *Semanza* Appeals Chamber. Judicial notice of the second alternative was taken by the *Karemera et al.* Trial Chamber, and subsequently endorsed by the Appeals Chamber. The third alternative proposed by the Prosecution encompasses the facts embodied in the first two alternatives. As neither of the first two alternatives has been disturbed on appeal, the Chamber takes judicial notice of the third alternative since it comprises all of the facts endorsed by the Appeals Chamber.

14. Casimir Bizimungu and Jérôme Bicamumpaka submit that the Prosecution has not shown how Fact Seven is relevant to the proceedings and therefore it should not be admitted as a fact of common knowledge.[19] The Trial Chamber agrees. The Appeals Chamber noted in the *Semanza* Judgement that:

> The Appeals Chamber affirms that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the ordinary requirement of relevance and thereby clutter the record with matters that would not otherwise be admitted.[20]

Before the Trial Chamber enters into a consideration of whether a fact is one of common knowledge of which judicial notice can be taken under Rule 94(A) of the Rules, that fact should be relevant to the issues that fall to be decided in the case. The Prosecution has not attempted to demonstrate the relevance of Fact Seven to the case against the Accused, and its relevance is not evident to the Trial Chamber, as is the case with Facts One through Six. Therefore the Trial Chamber does not presently take judicial notice of Fact Seven as a fact of common knowledge under Rule 94(A) of the Rules.

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[16] Rule 94 of the Rules at that time is the exact equivalent to Rule 94(A) of our current Rules.
[17] *Semanza* Judgement, paragraphs 191-194.
[18] *Karemera* Decision, paragraphs 28-29.
[19] Response of Casimir Bizimungu, paragraphs 23, 163-164; Response of Jérôme Bicamumpaka, paragraph 28.
[20] *Semanza*, Judgement (AC), paragraph 189.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the Motion in part, by taking judicial notice under Rule 94(A) of the following facts of common knowledge:

(i) Between 6 April 1994 and 17 July 1994, genocide against the Tutsi ethnic group occurred in Rwanda.

(ii) Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Hutu, Tutsi, and Twa, which were protected groups falling within the scope of the Genocide Convention of 1948.

(iii) The following state of affairs existed in Rwanda between 6 April 1994 and 17 July 1994: There were throughout Rwanda widespread or systematic attacks against a civilian population based on Tutsi ethnic identification. During the attacks, some Rwandan citizens killed and or caused serious bodily or mental harm to persons perceived to be Tutsi. As a result of the attacks, there were a large number of deaths of persons of Tutsi ethnic identity.

(iv) Between 6 April 1994 and 17 July 1994, there was an armed conflict in Rwanda that was NOT of an international character.

(v) Between 1 January 1994 and 17 July 1994, Rwanda was a State Party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), having acceded to it on 16 April 1975.

(vi) Between 1 January 1994 and 17 July 1994, Rwanda was a State 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 having acceded to Protocols Additional thereto of 1977 on 19 November 1984.

DENIES the Motion in respect of Fact Seven.

Arusha, 22 September 2006

Khalida Rachid Khan	Lee Gacuiga Muthoga	Emile Francis Short
Presiding Judge	Judge	Judge

[Seal of the Tribunal]