



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

23524
MUB

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 11 December 2006

OR: ENG
ICTR-99-50-T
11-12-2006
(23524-23519)

JUDICIAL RECORDS/ARCHIVES
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THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

DECISION ON JUSTIN MUGENZI'S APPLICATION FOR CERTIFICATION FOR
INTERLOCUTORY APPEAL OF THE DECISION ON THE PROSECUTION'S
MOTION FOR JUDICIAL NOTICE

Rule 73 (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. Olivier De Schutter
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**

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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 Gacúga Muthoga and Judge Emile Francis Short (the "Trial Chamber");

BEING SEIZED of "Justin Mugenzi's Application for Certification for Interlocutory Appeal (In Accordance with Rule 73B) of the Decision on Prosecutor's Motion for Judicial Notice", filed on 10 October 2006;

CONSIDERING the

- (i) "Prosecutor's Response to Justin Mugenzi's Application for Certification for Interlocutory Appeal (In Accordance with Rule 73B) of the Decision on Prosecutor's Motion for Judicial Notice", filed on 17 October 2006;
- (ii) "Prosper Mugiraneza's Memorandum Related to Justin Mugenzi's Motion for Certification to Appeal", filed on 30 October 2006;
- (iii) "Prosecutor's Response to Prosper Mugiraneza's Memorandum Related to Justin Mugenzi's Motion for Certification to Appeal", filed on 3 November 2006;
- (iv) "Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", filed on 5 November 2006;
- (v) "Prosecutor's Response to Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", filed on 9 November 2006;
- (vi) "Casimir Bizimungu's Reply to the Prosecutor's Response to Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", filed on 11 November 2006;

NOTING the

- (i) *Prosecutor v. 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;
- (ii) *Prosecutor v. Kaeremera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Motion for Reconsideration (AC), 1 December 2006;

HEREBY DECIDES the motion.

11 December 2006

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INTRODUCTION

1. On 22 September 2006 the Trial Chamber granted in part the Prosecution's Motion for Judicial Notice.¹ In so doing, it relied on the Appeals Chamber's Decision in *Karemera*, which clarified the nature of judicial notice under Rule 94 (A) of the Rules of Procedure and Evidence (the "Rules"), and directed that certain facts be recognized by the Trial Chamber as facts of common knowledge pursuant to that rule.²

2. The Defence for Mugenzi now seeks certification, under Rule 73 (B) of the Rules, to appeal the Trial Chamber's Decision on the Prosecutor's Motion for Judicial Notice. Mugiraneza supports Mugenzi's application, but suggests that he might not join Mugenzi in appealing if certification is granted. The Bizimungu Defence joins Mugenzi's application, and expresses its intention to file submissions with the Appeals Chamber if certification is granted. The Prosecution opposes Mugenzi's application and argues that Mugiraneza's and Bizimungu's submissions are improper.

3. On 1 December 2006, the Appeals Chamber dismissed three motions for reconsideration of the *Karemera* Appeals Chamber Decision.³

PRELIMINARY ISSUE

4. The Prosecution suggests that Mugiraneza's and Bizimungu's submissions are procedurally improper and frivolous, and prays that the Chamber dismiss them and sanction their respective Counsel. The Chamber disagrees with the Prosecution's characterization of Bizimungu's submissions, which clearly state his intention to join Mugenzi in seeking certification to appeal the Trial Chamber Decision.⁴

5. Mugiraneza's Memorandum is procedurally improper. Mugiraneza states that he does not seek certification to appeal, but offers arguments in support of Mugenzi's application and challenges the Chamber's judicial notice of the existence of a non-international armed conflict. Nonetheless, the Chamber will consider Mugiraneza's arguments, as he was also affected by the Chamber's Decision.

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosecutor's Motion for Judicial Notice (TC), 22 September 2006 ("Trial Chamber Decision").

² *Prosecutor v. 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 ("*Karemera* Appeals Chamber Decision").

³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Motions for Reconsideration (AC), 1 December 2006 ("*Karemera* Appeals Chamber Reconsideration Decision" or "Reconsideration Decision"). Each of the Accused in *Karemera et al* filed a separate motion for reconsideration.

⁴ "Requête de Casimir Bizimungu en Certification et en Appui à La Requête en Certification de Justin Mugenzi Contre la Décision Intitulée : Decision on Prosecutor's Motion for Judicial Notice", para. 9. Even the title of the Motion makes Bizimungu's position clear.



6. The Chamber declines the Prosecution's invitation to dismiss the submissions and sanction the Counsel for Bizimungu or Mugiraneza.

DISCUSSION

7. Rule 73 (B) states that leave to file an interlocutory appeal of a decision may be granted if the issue involved "would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and where "immediate resolution may materially advance the proceedings".⁵

8. Judicial notice of a fact of common knowledge provides an alternative means for the Prosecution to meet its burden of proof on issues of fact, such as the existence of a non-international conflict. As such, the Chamber finds that the decision to take judicial notice is one that could significantly affect the outcome of the trial.⁶ Therefore the Chamber will consider whether immediate resolution of the issues by the Appeals Chamber would materially advance the proceedings.

9. Mugenzi submits that immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings because there is serious doubt as to the correctness of the legal principles applied in the Trial Chamber Decision. According to Mugenzi and Bizimungu, the Trial Chamber is not bound to take judicial notice of the "facts of common knowledge" from the *Karemera* Appeals Chamber Decision. Mugenzi argues that the Trial Chamber misunderstood a question of fact for a question of law when it determined that it was bound to take judicial notice of certain specified facts.

10. Mugenzi adds that the Trial Chamber should grant certification so the Appeals Chamber can clarify the nature of the judicial notice taken. Mugiraneza argues that the *Karemera* Appeals Chamber Decision was based on the Appeals Chamber's misinterpretation of its judgement in *Semanza*, and that judicial notice should not be taken of "relevant facts", because this deprives the accused of the "right" to contest them.⁷ Bizimungu argues that, because he did not have the opportunity to argue the issues before the Appeals Chamber, the Trial Chamber's application of the *Karemera* Appeals Chamber Decision to this case contravenes his right to be heard.

11. Mugenzi also argues that the Trial Chamber Decision was particularly unfair to him given that he had finished presenting his Defence before the Decision was rendered. Specifically, Mugenzi suggests that the consequence of the Trial Chamber

⁵ Rule 73 (B) of the Rules of Procedure and Evidence.

⁶ "[A]llowing judicial notice of a fact of common knowledge— even one that is an element of an offence, such as the existence of a 'widespread or systematic' attack—does not lessen the Prosecution's burden of proof or violate the procedural rights of the Accused. Rather, it provides an alternative way that the burden can be satisfied, obviating the necessity to introduce evidence documenting what is already common knowledge". *Karemera* Appeals Chamber Decision, para. 37 (citing *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement (AC), 20 May 2005, para. 192.

⁷ The Chamber notes that, pursuant to Rule 94 (A) and the relevant jurisprudence, judicial notice may *only* be taken of relevant facts, and cannot be taken of irrelevant facts.



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Decision is that the Prosecution has been allowed to re-open its case and introduce factual evidence without allowing Mugenzi to respond. Mugenzi also argues that it is unfair for the Trial Chamber to take judicial notice of a fact after hearing contrary evidence. Bizimungu argues that fairness requires the Chamber to consider the stage of the proceedings and its own prior decisions before taking judicial notice of any fact.

12. The Appeals Chamber recently reaffirmed the principles of the *Karemera* Appeals Chamber Decision, stressing “whether a fact qualifies as ‘a fact of common knowledge’ under Rule 94 (A) is a legal question” that “does not turn on evidence introduced in a particular case”.⁸ In dismissing the request for reconsideration, the Appeals Chamber addressed many of the arguments that Mugenzi and Bizimungu seek to raise on appeal if this Chamber were to grant certification.

13. Regarding the binding nature of the *Karemera* Appeals Chamber Decision on Trial Chambers, the Appeals Chamber stated:

The Appeals Chamber recalls that in the Decision on Judicial Notice it determined that the Trial Chamber has no discretion to rule that a fact of common knowledge must be proved through evidence at trial. This determination was based on an interpretation of Rule 94 (A) of the Rules. The express language of this Rule does not allow the Trial Chamber the discretion to require proof of facts of common knowledge. Such discretion only exists for matters of judicial notice which fall within the ambit of Rule 94 (B) of the Rules, that is, adjudicated facts or documentary evidence from other proceedings of the Tribunal.⁹

In reaching this conclusion the Appeals Chamber considered and rejected submissions to the effect that (i) “failing to allow the Trial Chamber the discretion not to take judicial notice of a fact of common knowledge given the late stage of the trial proceedings, ... would be unfair to [Karemera] and the other Applicants”, and (ii) “that even if the Appeals Chamber found a certain fact to be a fact of common knowledge, it does not necessarily follow that judicial notice of that fact must be taken in a particular case”.¹⁰ The Appeals Chamber rejected the request “to leave discretion to the Trial Chamber to decline to take judicial notice of facts of common knowledge, if, considering the stage of the proceedings or other facts, it believes that it is unfair to do so”.¹¹

14. In the Reconsideration Decision, the Appeals Chamber also addressed the argument that, because it purported to bind all trial chambers, the *Karemera* Appeals Chamber Decision violated “the principle of *inter partes* proceedings and was inconsistent with the *audi alteram partem* doctrine”. Similar arguments were raised by Bizimungu in his submissions. The Appeals Chamber rejected this argument,

⁸ *Karemera* Appeals Chamber Reconsideration Decision, paras. 8, 11.

⁹ *Karemera* Appeals Chamber Reconsideration Decision, para. 24.

¹⁰ *Karemera* Appeals Chamber Reconsideration Decision, para. 22.

¹¹ *Karemera* Appeals Chamber Reconsideration Decision, para. 22.



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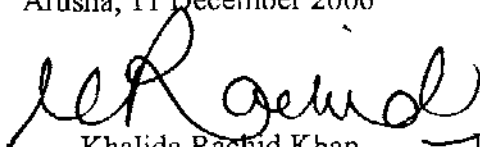
noting that “[p]arties in other cases are not prevented from challenging the implication of the Decision on Judicial Notice in their respective cases in proceedings before their respective Trial Chambers”.¹² The parties have been afforded this opportunity in the case at hand.

15. The arguments raised by the Defence have already been considered and rejected by the *Karemera* Appeals Chamber Reconsideration Decision. Requesting the Appeals Chamber to revisit these legal principles would not materially advance the proceedings.¹³

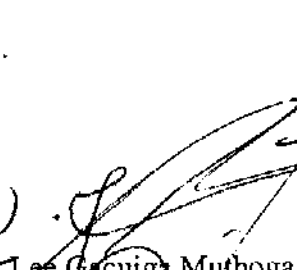
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Application.

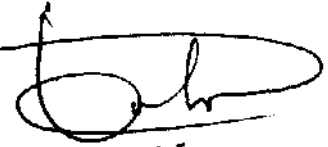
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Khalida Rachid Khan
Presiding Judge



Lee Gacuga Muthoga
Judge



Emile Francis Short
Judge

[Seal of the Tribunal]



¹² *Karemera* Appeals Chamber Reconsideration Decision, para. 27.

¹³ See *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Decision on Nsengiyunva Request for Certification to Appeal Decision on Exclusion of Evidence (TC), 6 November 2006, para. 4.

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