International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

ORIGINAL: ENGLISH

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Sergei Alekseevich Egorov
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 16 January 2008

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-T

DECISION ON JUDICIAL NOTICE OF FACTS OF COMMON KNOWLEDGE

The Prosecution:
Wallace Kapaya
Sylver Ntukamazina
Brian Wallace
Iskandar Ismail
Jane Mukangira

The Defence:
Emmanuel Altit
David Hooper

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Sergei Alekseevich Egorov, and Judge Florence Rita Arrey;

BEING SEIZED OF the Prosecution "Motion for Trial Chamber to Take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94 (A)", filed on 13 April 2007;

CONSIDERING the Defence Response, filed on 23 April 2007;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Prosecution moves the Chamber, pursuant to Rule 94 (A), to take judicial notice of the following propositions, which it submits are 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 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 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 and 17 July 1994, there was an armed conflict in Rwanda that was not of an international character.

(v): Between 1 January 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 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.

2. The Defence objects to the taking of judicial notice of each point on separate grounds, particularly that the points are not relevant, are not true, avoid debate regarding individual criminal responsibility, and amount to a refusal to consider the complexity of the true situation.[1]

DELIBERATIONS

3. Rule 94 (A) of the Rules of Procedure and Evidence states that a "Trial Chamber shall

[1] Response, paras. 1-5.

not require proof of facts of common knowledge but shall take judicial notice thereof". The Appeals Chamber in *Milosevic* stated that, under Rule 94 (A), judicial notice is taken on the basis that the material is notorious.[2] The Appeals Chamber in *Semanza* noted that the term "common knowledge" "encompasses facts that are not reasonably subject to dispute: in other words, commonly accepted or universally known facts…".[3] 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.[4] In *Karemera et al.*, the Appeals Chamber emphasized that the "Trial Chamber has no discretion to determine that a fact, although 'of common knowledge', must nonetheless be proven through evidence at trial".[5] Further, where the Appeals Chamber has held that a fact is notorious and not subject to reasonable dispute, a Trial Chamber is obliged to take judicial notice thereof under Rule 94 (A).[6]

4. The Prosecution propositions (i), (iii), (iv), (v) and (vi) have already been established by the Appeals Chamber as facts of common knowledge, not subject to reasonable dispute.[7] In *Semanza*, the Appeals Chamber accepted the part of the proposed (ii), relating to Hutu, Tutsi, and Twa as being ethnic groups classifications. The Trial Chamber in *Karemera et al.*, when requested to accept the same formulation, preferred the wording "which were protected groups falling within the scope of the Genocide Convention of 1948." The Appeals Chamber dismissed the appeal against this part of the decision.[8] In the present case, the Prosecution proposes a third wording, combining the two previous formulations.[9] In order to avoid any unnecessary dispute, the Chamber prefers a formula which has been accepted by the Appeals Chamber and chooses the one most recently accepted in the *Karemera et al.* case, which in the Chamber's view expresses a fact of common knowledge. In addition, with respect to point (iv) concerning the nature of the armed conflict, the Chamber prefers to use the formula "non-international armed conflict" instead of "armed conflict ... that was not of an international character", as proposed by the Prosecution.[10]

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[2] *Prosecutor v. Milosevic*, Decision on the Prosecution's Interlocutory Appeal Against the Chamber's 10 April 2003 Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts (AC), 28 October 2003, para. 13.

[3] *Prosecutor v. Semanza*, Judgement (AC), 20 May 2005 ("Semanza Appeals Chamber Judgement"), para. 194.

[4] *Prosecutor v. Karemera et al.*, Decision on Proseuctor's Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 ("Karemera Appeals Chamber Decision"), para. 22.

[5] Karemera Appeals Chamber Decision, para. 23.

[6] Karemera Appeals Chamber Decision, para. 29.

[7] Karemera Appeals Chamber Decision, para. 35 established proposition (i) and paras. 29 and 31 (iii) and (iv); Semanza Appeals Chamber Judgement, para. 192 accepted (iii), (iv), (v) and (vi).

[8] Karemera Appeals Chamber Decision, para. 25. ("Although the Prosecution correctly states that the *Semanza* Appeal Judgement recognized that the Tutsi were an "ethnic" group, it has not attempted to show that the formulation that was instead chosen by the Trial Chamber has any potential to prejudice the Prosecution or render the proceedings less fair and expeditious. The Appeals Chamber can see no potential for such consequences, as the Trial Chamber's formulation equally (or perhaps even more clearly) relieves the Prosecution's burden to introduce evidence proving protected-group status under the Genocide Convention. The Appeals Chamber thus need not consider whether the Trial Chamber erred in choosing not to adopt the Prosecution's formulation; nor, given that the Accused have not appealed, need it consider whether it erred in concluding that protected-group status was a fact of common knowledge. The Prosecution's Interlocutory Appeal as to this point is dismissed.")

[9] Motion, para. 14 ("The third formulation … is simply an amalgamation of the first two. Based on the appellate decisions cited earlier, in relation to the two first formulations of the fact in issue, it is open to the Trial Chamber to take judicial notice of this fact of common knowledge, in accordance with the third suggested formulation").

[10] The Chamber's formulation is consistent with the language of Additional Protocol II and the Appeals Chamber Judgement in *Georges Rutaganda v. the Prosecutor*, Case No. ICTR-96-3-A, 26 May 2003, para. 561 ("The Appeals Chamber notes that it was not disputed at trial that … the government and army of Rwanda (Rwandan Armed Forces, or "RAF"), on the one hand, and the Rwandan Patriotic front ("RPF"), on the other,

5. The Appeals Chamber noted that

> [w]hether genocide occurred in Rwanda is of obvious importance to the Prosecution's case … Plainly, in order to convict an individual of genocide a Trial Chamber must collect evidence of that individual's act and intent. But the fact of the nationwide campaign is relevant; it provides the context for understanding the individual's actions. And indeed, the existence of the genocide may also provide relevant context for other charges against the Accused, such as crimes against humanity.[11]

6. The Accused has been charged with genocide, murder as a crime against humanity, and extermination as a crime against humanity.[12] For similar reasons as those set forth above by the Appeals Chamber, and having regard to the charges against the Accused, the Chamber finds that the points that have been established as facts of common knowledge as outlined above are relevant to the case of the Accused, and may provide the context for understanding his actions.

7. The Defence argues that taking judicial notice of the points submitted by the Prosecution comprises equality between the parties and renders the trial unjust.[13] The Chamber disagrees. As the Appeals Chamber noted in *Karemera et al.*, taking judicial notice of a fact of common knowledge – even one that is an element of an office –

> does not lessen the Prosecutor'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.[14]

The Prosecution must still introduce evidence demonstrating the specific events alleged in the Indictment and show that the conduct and mental state of the Accused specifically makes him culpable of the charges against him.

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were engaged in a non-international armed conflict satisfying the requirements of common Article 3 of the Geneva Conventions and Article 1 of the Additional Protocol II.") (internal citation omitted).

[11] Karemera Appeals Chamber Decision, para. 36.

[12] Amended Indictment, filed 4 April 2007.

[13] Response, paras. 6-7.

[14] Karemera Appeals Chamber Decision, para. 37.

FOR THE ABOVE REASONS, THE CHAMBER

TAKES JUDICIAL NOTICE of facts (i), (iii), (iv), and (vi) above. With regard to (ii), judicial notice is taken of the fact that "Between 6 April and 17 July 1994, citizens native to Rwanda identified as Hutus, Tutsis and Twas were protected groups falling within the scope of the Genocide Convention of 1948". In respect of (iv), judicial notice is taken that "Between 6 April 17 July, there was a non-international armed conflict in Rwanda".

Arusha, 16 January 2008

Erik Møse Presiding Judge	Sergei Alekseevich Egorov Judge	Florence Rita Arrey Judge

[Seal of the Tribunal]