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22-01-2009
(13237-13283)

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 22 January 2009

The PROSECUTOR v. Pauline NYIRAMASUHUKO

Case No. ICTR-97-21-T

Joint Case No. ICTR-98-42-T

DECISION ON PAULINE NYIRAMASUHUKO'S MOTION FOR JUDICIAL NOTICE OF AN APPEALS CHAMBER FACTUAL FINDING

Office of the Prosecutor
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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Chamber");

BEING SEIZED of the "Motion of the Defendant Pauline Nyiramasuhuko for Judicial Notice of an Appeals Chamber Factual Finding", filed on 12 December 2008 ("Nyiramasuhuko's Motion");

CONSIDERING the:

i. "*Réponse et requête reconventionnelle de Arsène Shalom Ntahobali en constat judiciaire*", filed on 12 December 2008 ("Ntahobali's Response");

ii. "*Réponse du Procureur aux requêtes de Pauline Nyiramasuhuko et de Arsène Shalom Ntahobali en vue de constat judiciaire de faits admis par la chambre d'appel articles 73 et 94 du règlement*", filed on 16 December 2008 ("Prosecution's Response");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

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

SUBMISSIONS OF THE PARTIES

Nyiramasuhuko's Motion

1. The Defence for Nyiramasuhuko seeks admission by judicial notice of a fact allegedly material to the Butare case which was adjudicated by a Trial Chamber and confirmed by the Appeals Chamber, pursuant to Rule 94 (B) of the Rules.[1]

2. The Defence submits that in its "Decision on the Prosecution Appeal against Decision on Referral under Rule 11*bis*" in the *Kanyarukiga* case, the Appeals Chamber held that: it considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances were killed. There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent. The Trial Chamber further noted that some defence witnesses feared that if they testified, they would be indicted to face trial before the *Gacaca* courts, or accused of adhering to "genocidal ideology."[2] The Defence submits that this holding was based on briefs submitted by Human Rights Watch and the International Criminal Defence Attorneys Association as Amici Curiae.

3. The Defence also submits that this Chamber has held that judicial notice may be taken of adjudicated facts that are relevant to the proceedings. Further, it submits that according to the Tribunal's jurisprudence, adjudicated facts are those facts that have been defined in the jurisprudence as facts which have been finally determined in a

[1] Paragraph 1 of the Motion.
[2] Paragraph 2 of the Motion.

proceeding before the Tribunal and 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.[3]

4. The Defence avers that the Appeals Chamber's finding is thus a final adjudication of the fact sought to be taken judicial notice of; this adjudicated fact was not the subject of any concessions by the parties, and was vigorously contested by the Prosecution, which sought to impeach Alison Des Forges, an expert witness it has itself widely used and relied on in the vast majority of cases before the Tribunal; the fact is discrete and identifiable; the fact does not go to Nyiramasuhuko's acts or conduct and does not suffer from any deficiency as it does not relate to the credibility of any particular witness who testified before another Chamber, but relates to the general experience of witnesses in Rwanda.[4]

5. The Defence further submits that the Appeals Chamber finding of fact is relevant to the reliability of evidence of witnesses coming from Rwanda, an issue generally before the Chamber and specifically made central by Witness QA's testimony on recall.[5] Finally, the Defence submits that all the elements of Rule 94 (B) are met and the Chamber in its exercise of reasonable discretion may take judicial notice of the adjudicated fact enumerated above.[6]

Ntahobali's Response and Counter Claim

6. The Defence for Ntahobali supports Nyiramasuhuko's Motion and requests that judicial notice of the alleged Appeals Chamber factual finding identified in the Motion also be taken in its own case.

Prosecution's Response

7. The Prosecution opposes the Motion and submits that the issue in question does not involve facts admitted by the Appeals Chamber, but is simply an observation made by the Appeals Chamber that was based on observations made by Human Rights Watch and the International Criminal Defence Attorneys Association. The Prosecution also contends that the witnesses referred to in the *Kanyarukiga* Decision are witnesses who were expected to testify in Rwanda in the context of Rule 11*bis*.

8. The Prosecution submits that Witness QA's case is different from that of most witnesses from Rwanda who have testified before the Tribunal and is currently under investigation. According to the Prosecution, thousands of Rwandan witnesses have appeared before the Tribunal, testified and then returned to Rwanda without ever having felt threatened.

DELIBERATIONS

9. The Chamber recalls that Rule 94 (B) provides that "at the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial

[3] Paragraphs 3-4 of the Motion, Quoting *Prosecutor v. Nyiramasuhuko et al;* Case No. ICTR-99-50-T(sic): Decision on the Prosecutor's Motion for Judicial Notice and *Prosecutor v. Rwamak*uba, Case No. ICTR-98-44C-T, Decision on Admission of Exhibits (5 April 2006) at para 6.
[4] Paragraphs 5-6, 8 of the Motion.
[5] Paragraph 7 of the Motion.
[6] Paragraph 9 of the Motion.

notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings."

10. Adjudicated facts have been defined as "facts which have been finally determined in a proceeding before the Tribunal [and] [...] upon which a Chamber 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".[7] The Chamber notes that, pursuant to Rule 94 (B) of the Rules, facts that may be judicially noticed must have been "adjudicated in other proceedings and must relate to matters at stake in the current proceeding".[8] As stated in the *Ntakirutimana* Decision, "unlike Rule 94 (A), *litra* (B) therefore is discretionary. It is for the Trial Chamber to decide whether justice is best served by its taking judicial notice of adjudicated facts".[9]

11. The Chamber notes that the alleged fact originates from Paragraph 26 of the Appeals Chamber's Decision in the *Kanyarukiga* case.[10] The Chamber considers that while the Appeals Chamber Decision in the *Kanyarukiga* case cited by the Defence canvassed the circumstances of Defence witnesses in Rwanda, it did so in the context of a request seeking to transfer the case to Rwanda's jurisdiction.[11] The Chamber observes that this Decision was taken in the particular context of an assessment of Rwanda's present-day witness protection program. Therefore, the Chamber will not take judicial notice of the alleged fact in the said paragraph.

12. The Chamber observes that while Witness QA testified on recall that he lied when he first appeared before the Chamber, the question of whether he actually lied on recall or when he first appeared before the Chamber and the identity of any people who may have been involved is the subject of an ongoing investigation. In addition, the Chamber considers that the probative value of all the evidence tendered is yet to be determined.

13. Finally, the Chamber also observes that alleged cases of threats, torture, arrests and detention of witnesses are to be determined on a case by case basis, and it cannot generally be concluded that all or most witnesses from Rwanda are tortured, harassed or feel threatened.

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[7] *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on *Bicamumpaka's* Motion for Judicial Notice, 11 February 2004, par. 4-5; *Prosecutor v. Edouard Karemera et al.*,, Case No. ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice (TC), 9 November 2005, para. 14.

[8] *Nyiramasuhuko* Decision, para 39.

[9] *Ntakirutimana* Decision cited in *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosecutor's Motion for Judicial Notice pursuant to Rules 73, 89 and 94 (TC), 2 December 2003, para 30.

[10] *Prosecutor v. Kanyarukiga* Case No. ICTR- 2002-78-R11bis, (AC), 30 October 2008, para 26: reads: "The Appeals Chamber considers that there was sufficient information before the Trial Chamber of harassment of witnesses testifying in Rwanda, and that witnesses who have given evidence before the Tribunal experienced threats, torture, arrests and detentions, and, in some instances, were killed. There was also information before the Trial Chamber of persons who refused, out of fear, to testify in defence of people they knew to be innocent. The Trial Chamber further noted that some defence witnesses feared that, if they testified, they would be indicted to face trial before the *Gacaca* courts, or accused of adhering to "genocidal ideology". The Appeals Chamber observes that the information available to the Trial Chamber demonstrates that regardless of whether their fears are well-founded, witnesses in Rwanda may be unwilling to testify for the Defence as a result of the fear that they may face serious consequences, including threats, harassment, torture, arrest, or even murder. It therefore finds that the Trial Chamber did not err in concluding that *Kanyarukiga* might face problems in obtaining witnesses residing in Rwanda because they would be afraid to testify."

[11] *Kanyarukiga* Decision (AC), Paragraph 27.

FOR THE ABOVE REASONS, THE TRIBUNAL

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DENIES the Motion in its entirety.

Arusha, 22 January 2009

William H. Sekule
Presiding Judge

(read and approved)
Arlette Ramaroson
Judge
(absent at the time of signature)

(read and approved)
Solomy Balungi Bossa
Judge
(absent at the time of signature)

[Seal of the Tribunal]