



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-99-50-T
03-02-2009
(31554-31550)

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 3 February 2009

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 BICAMUMPAKA'S MOTION FOR JUDICIAL NOTICE OF AN
APPEALS CHAMBER FACTUAL FINDING**

Rules 73 and 94 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
Ms. Ndeye Marie Ka

Counsel for the Defence:

Ms. Michelyne C. St. Laurent and Ms. Andrea Valdivia for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Michel Croteau and Mr. Philippe Larochelle for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Cynthia Cline for **Prosper Mugiraneza**

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INTRODUCTION

1. By Motion filed on 2 December 2008,¹ the Defence for Jérôme-Clément Bicamumpaka (“Defence”) requests that the Chamber take judicial notice of a fact pursuant to Rule 94 (B) of the Rules of Procedure and Evidence (“Rules”). The Defence submits that the fact in question was adjudicated by a Trial Chamber and confirmed by the Appeals Chamber in its Decision on the Prosecution Appeal against Decision on Referral under Rule 11bis in the *Kanyarukiga* case.²
2. The Prosecution opposes the Motion.³

DISCUSSION

Law on Judicial Notice of Adjudicated Facts

3. Rule 94 (B) of the Rules provides: “At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.” Rule 94 (B) therefore confers a discretionary power on the Trial Chamber to decide whether or not to take judicial notice of adjudicated facts or documentary evidence. In the present case, the Defence requests judicial notice of adjudicated facts only.
4. Pursuant to the established jurisprudence of the Tribunal, “adjudicated facts” are “facts which have been finally determined in a proceeding before the Tribunal [and] [...] one 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”.⁴ Further, the Chamber recalls that the fact must be relevant to the matters at issue in the current proceedings,⁵ but must not attest, either directly or indirectly, to the criminal responsibility of the accused.⁶

¹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Motion of Defendant Bicamumpaka for Judicial Notice of an Appeals Chamber Factual Finding, 2 December 2008. On 5 December 2008, the Defence filed a Corrigendum to Motion of Defendant Bicamumpaka for Judicial Notice of an Appeals Chamber Factual Finding (“Motion”).

² See Motion, para. 2. *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral under Rule 11bis, 30 October 2008, para. 26 (“Rule 11bis Decision”).

Rule 11bis of the Rules provides for the referral of an indictment to the courts of another jurisdiction where a Trial Chamber is satisfied that the accused will receive a fair trial in that jurisdiction and the death penalty will not be imposed or carried out.

³ *Bizimungu et al.*, Prosecutor’s Response to Bicamumpaka’s Motion for Judicial Notice of an Appeals Chamber Factual Finding, 10 December 2008 (“Prosecutor’s Response”).

⁴ *Bizimungu et al.*, Decision on Bicamumpaka’s Motion for Judicial Notice, 11 February 2004, paras. 4-5; *Prosecutor v. Edouard Karemera et al.*, Case No. ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice (TC), 9 February 2005, para. 14; *Prosecutor v. Elizaphan Ntakirutimana & Gerard Ntakirutimana*, Case No. ICTR-96-10-T and Case No. ICTR-96-17-T, Decision on the Prosecutor’s Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, para. 29 (“*Ntakirutimana* Decision”).

⁵ *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-AR73.1, Decision on Interlocutory Appeals Against Trial Chamber’s Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts and Prosecution’s



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Does Paragraph 26 of the Rule 11bis Decision Contain an Adjudicated Fact?

5. The Defence submits that the Appeals Chamber's finding in the Rule 11bis Decision is a final adjudication of the fact for which judicial notice is sought. The finding referred to by the Defence is articulated in paragraph 26 of the Rule 11bis Decision:

"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.⁷ 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'."

6. 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 central by Witness GFA's retraction and subsequent ominous disappearance, and Witness GAP's retractions in proceedings before another Chamber."⁸

7. The Prosecution submits that the Defence has failed to satisfy the criteria for judicial notice of adjudicated facts under Rule 94 (B). More specifically, the Prosecution asserts that the "fact" which the Defence seeks judicial notice of is an observation of the Appeals Chamber rather than a factual finding.⁹ In support, the Prosecution refers to the remaining text of paragraph 26 of the Rule 11bis Decision which states:

"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

Catalogue of Agreed Facts, 26 June 2007 (AC), para. 13; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (AC), para. 50; and *Ntakirutimana* Decision, paras. 26-28.

⁶ *Bizimungu et al.*, Decision on Prosper Mugiraneza's First Motion for Judicial Notice Pursuant to Rule 94(B) (TC), 10 December 2004, para. 21: "The Chamber declines to judicially notice facts which would have a bearing upon the guilt or innocence of the Accused or which are central to the Prosecution case. Further, and in light of the existing jurisprudence of the International Criminal Tribunal [for] Rwanda (ICTR) cited previously, the Chamber will not take judicial notice of facts which are essentially legal conclusions".

⁷ Rule 11bis Decision, Brief of Human Rights Watch as Amicus Curiae in Opposition to Rule 11 bis Transfer, 27 February 2008, paras. 89-102; Brief of Amicus Curiae, International Criminal Defence Attorneys Association (ICDAA) Concerning the Request for Referral of the Accused Gaspard Kanyarukiga to Rwanda pursuant to Rule 11bis of the Rules of Procedure and Evidence, paras. 87, 89.

⁸ Motion, para. 7.

⁹ Prosecutor's Response, para. 6.



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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.”¹⁰

8. The Prosecution further submits that the Trial Chamber in the *Kanyarukiga* referral decision based its observations solely on the *amicus curiae* briefs of Human Rights Watch and the International Criminal Defence Attorneys Association. The Prosecutor’s Response states that the Trial Chamber did not hear testimony from a single witness who alleged that they were the victims of threats, torture, arrests and detentions by Rwandan authorities as alleged by the Defence.¹¹ The Prosecution submits that in any event, the Appeals Chamber’s findings regarding witnesses testifying in Rwanda were made in the context of Rule 11*bis* referrals to Rwanda.¹²

9. The Chamber recalls that an adjudicated fact must be one which has been finally determined by the Tribunal and upon which it has deliberated. Further, it should be noted that for a Chamber to have made a factual finding, the Prosecution must have satisfied the standard of “beyond reasonable doubt”, which is distinguishable from the Prosecution’s burden under Rule 11*bis*, pursuant to which the *Kanyarukiga* decision was taken. Under Rule 11*bis*, the Prosecution must satisfy the Chamber that the accused would receive a fair trial.¹³

10. In the present case, the Chamber recalls, that neither the Appeals Chamber, nor the Referral Bench in the *Kanyarukiga* case, made a determination beyond reasonable doubt regarding witnesses in Rwanda. Indeed, it was not necessary for them to do so under Rule 11*bis*. Rather, as submitted by the Prosecution and demonstrated by the full text of paragraph 26 of the Rule 11*bis* Decision, the Appeals Chamber made an observation that there was information before the Trial Chamber which showed that witnesses *may* fear testifying for the Defence and that, therefore, the Trial Chamber did not err in concluding that Kanyarukiga *might* face problems in obtaining witnesses residing in Rwanda. Accordingly, the Chamber finds that paragraph 26 of the Rule 11*bis* Decision does not contain any adjudicated facts.

11. Additionally, the Chamber notes that paragraph 26 refers to the circumstances of Defence witnesses in Rwanda in the context of a request seeking to transfer the *Kanyarukiga* case to Rwanda’s jurisdiction. The Chamber observes that the ruling in paragraph 26 was made in the particular context of assessing Rwanda’s present-day witness protection program.¹⁴ The Chamber further notes that alleged cases of threats, torture, arrests and detention of witnesses are to be determined on a case by case basis.¹⁵

¹⁰ Rule 11*bis* Decision, para. 26. Emphasis added in the Prosecutor’s Response.

¹¹ Prosecutor’s Response, para. 7.

¹² Prosecutor’s Response, para. 8.

¹³ Rule 11*bis* (C).

¹⁴ See also *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Pauline Nyiramasuhuko’s Motion for Judicial Notice of an Appeals Chamber Factual Finding, 22 January 2009, para. 11 (“*Nyiramasuhuko* Decision”).

¹⁵ *Nyiramasuhuko* Decision, para. 13.



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12. Accordingly, the Chamber will not take judicial notice of the Appeals Chamber's findings in paragraph 26 of the *Kanyarukiga* Rule 11bis Decision.

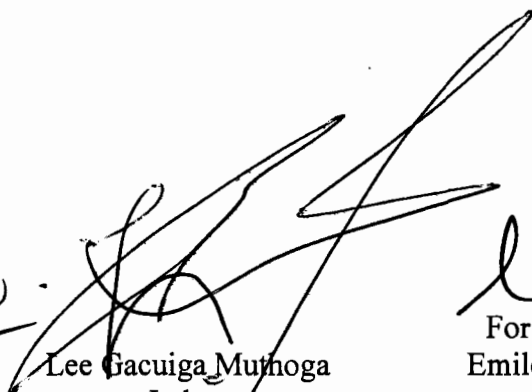
FOR THESE REASONS, the Chamber

DENIES the Defence Motion.

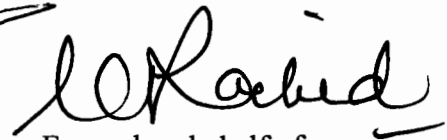
Arusha, 3 February 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



For and on behalf of
Emile Francis Short
Judge

