



ICTR-02-78-I
14-05-09
(2836-2830)

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PM

OR: ENG

TRIAL CHAMBER II

Before Judges: Emile Francis Short, Presiding
Seon Ki Park
Joseph Masanche

Registrar: Adama Dieng

Date: 14 May 2009

THE PROSECUTOR

v.

Gaspard KANYARUKIGA

Case No. ICTR-2002-78-I

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DECISION ON THE PROSECUTION MOTION FOR JUDICIAL NOTICE

Rules 94 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hola Makwaia
Thembile Segoete
Didace Nyirinkwaya
Jonathan Moses

Defence Counsel:
David Jacobs
Paul Skolnik
Marc Nerenberg

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INTRODUCTION

1. The trial in this matter is scheduled to commence on 1 June 2009.
2. On 4 December 2008, the Prosecution filed a Motion before Trial Chamber I requesting the Trial Chamber to take judicial notice of facts of common knowledge pursuant Rule 94(A) of the Rules of Procedure and Evidence ("Rules") and of adjudicated facts pursuant to Rule 94(B).¹
3. On 7 December 2008, Lead Counsel for Kanyarukiga died. On 9 January 2009, the new Lead Counsel for the Accused was appointed.
4. On 26 March 2009, the President of the Tribunal assigned the case to Trial Chamber II as acting pre-Trial Chamber, comprising of Judge Short, presiding, Judge Park and Judge Masanche.²
5. On 31 March 2009, co-Counsel for the Accused was appointed.
6. On 3 April 2009, the new pre-Trial Chamber requested the Defence to file its response to the Prosecution Motion, if any, by 6 April 2009. On 6 April 2009, the Defence filed a "preliminary response" opposing the Prosecution Motion and requested for additional time to file a definitive response.³ On the same day, the new pre-Trial Chamber extended the deadline to file the response to 14 April 2009. On 7 April 2009, upon an additional request by the Defence, the Chamber further extended the deadline to 22 April 2009.
7. On 23 April 2009, the Prosecution filed a revised version of its request for judicial notice.⁴ On 27 April 2009, the Defence responded to the Motion.⁵

DELIBERATIONS

Law on Judicial Notice

8. Rule 94 (A) provides that a "Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof."

¹ Motion for Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A), and to take Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), filed on 4 December 2008.

² Subject to the approval of the appointments of the Secretary General, this bench will also conduct the trial.

³ Defence Preliminary Response to Prosecutor's "Motion for Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A), and to take Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)", and Defence Request for additional time to file a Definitive Response until after having met with, and taken instructions from the Accused, filed on 6 April 2009.

⁴ Motion for Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A), and to take Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), filed on 23 April 2009.

⁵ Defence Response to Prosecutor's 2nd "Motion for Trial Chamber to take Judicial Notice of Facts of Common Knowledge Pursuant to Rule 94(A), and to take Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)", filed on 27 April 2009.

9. As stated by the Appeals Chamber in the *Semanza* Appeal Judgment:

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.⁶

10. Where a Trial Chamber determines that a fact is one “of common knowledge”, it must take judicial notice of it. In *Karemera et al.*, the Appeals Chamber emphasised that the “Trial Chamber has no discretion to determine that a fact, although ‘of common knowledge’, must nonetheless be proven through evidence at trial”.⁷

11. Further, 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.⁸

12. The Prosecution moves the Chamber to take judicial notice of the following, 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 1994 and 17 July 1994, citizens native to Rwanda were severally identified, according to the following ethnic classifications: Hutu, Tutsi, and Twa.
- iii. 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, a large number of deaths of persons of the Tutsi ethnic group occurred.
- iv. Between 6 April 1994 and 17 July 1994, there was in Rwanda, an armed conflict that was not of an international character.

⁶ *The Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, (“*Semanza* Judgment (AC)”), para. 194. The Appeals Chamber cited *The Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.5, 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.

⁷ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-48-AR73, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (AC), 16 June 2006 (“*Karemera* Decision (AC)”), para. 23.

⁸ *Karemera* Decision (AC), para. 29.

- 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 1984.⁹

13. The Defence notes that the Appeals Chamber had recognized in the six propositions proposed by the Prosecution as facts of common knowledge. It however submits that "the time may be ripe for appellate reconsideration of these issues" that go to the guilt or innocence of the accused and are not matters that are not subject to reasonable dispute.¹⁰

14. The Chamber holds that the Prosecution's proposed facts (i) to (vi) have already been established by the Appeals Chamber as facts of common knowledge, not subject to reasonable dispute.¹¹ The Chamber is therefore obliged to take judicial notice of these facts.

Law on Adjudicated Facts

15. 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.

16. Taking judicial notice of adjudicated facts under Rule 94(B) is a method of achieving judicial economy and harmonizing judgements of the Tribunal while ensuring the right of the Accused to a fair, public and expeditious trial.¹²

17. Rule 94(B) confers a discretionary power on the Trial Chamber to decide whether or not to take judicial notice of adjudicated facts or documentary evidence. Facts noticed under Rule 94(B) are merely

⁹ Motion, paras. 2, 9-20.

¹⁰ Response, paras. 4-26.

¹¹ *Karemera* Decision (AC), para. 35 for fact (i); para. 25 for fact (ii) (Note, that while 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.); paras. 29 and 31 for facts (iii) and (iv); *Semanza* Judgment (AC), para. 192 accepted facts (iii), (iv), (v) and (vi).

¹² *Karemera* Decision (AC), para. 39.

presumptions that may be rebutted by the defence with evidence at trial. Judicial notice does not shift the ultimate burden of persuasion, which remains with the Prosecution. In the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point into question by introducing reliable and credible evidence to the contrary.¹³

18. A fact, of which judicial notice is taken, must be relevant to the matters at issue in the current proceedings.¹⁴ An adjudicated fact must be one on which the Tribunal has deliberated and made a final determination. Judicial notice, however, should not be taken of adjudicated facts relating to the acts, conduct, and mental state of the accused.¹⁵ Furthermore, judicial notice pursuant to Rule 94(B) is not designed for the importing of legal conclusions from past proceedings. It is therefore necessary to determine on a case-by-case basis whether the proposed fact contains findings or characterizations which are of an essentially legal nature and which must, therefore, be excluded.¹⁶

19. Trial Chambers of this Tribunal and of the ICTY have considered, in the particular context of their case, that facts which are core issues should not be judicially noticed.¹⁷ Where a certain fact concerns a core issue in the case, the taking of judicial notice of that fact may place such a significant burden on the Accused to produce rebuttal evidence that it would jeopardise the Accused's right to fair trial.¹⁸

20. The Prosecution requests the Trial Chamber to take judicial notice of the following adjudicated facts of the Trial Chamber and Appeals Chamber judgements in the case of the *The Prosecutor v Athanase Seromba*:

- i. Nyange Church was destroyed by a bulldozer on 16 April 1994.

¹³ *Karemera* Decision (AC), para. 42.

¹⁴ *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 Catalogue of Agreed Facts, 26 June 2007 ("*Milosevic* Decision (AC)"), para. 13; *Karemera* Decision (AC), para. 50; and *The Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T, Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 22 November 2001, paras. 26-28.

¹⁵ *Karemera* Decision (AC), para. 50.

¹⁶ *Milosevic* Decision (AC), para. 22.

¹⁷ *Prosecutor v. Krajisnik*, Case No. IT-00-39-T, Decision on the Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis, 10 March 2003; *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on the Prosecutor's Motion and Notice of Adjudicated Facts, 10 December 2004; and *Prosecutor v. Popović*, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex, 26 September 2006 ("*Popović* Decision (TC)"), para. 19.

¹⁸ *Popović* Decision (TC), para. 16.

- ii. Athanase Seromba was convicted of committing genocide with respect to approximately 1500 Tutsi refugees who had taken refuge at Nyange church.¹⁹

21. The Prosecution submits that adjudicated fact one is a fact found by the Trial Chamber in the *Seromba* Judgement and was not disputed in the Appeal Judgement. Concerning adjudicated fact two, the Prosecution submits that it also has been found in the *Seromba* Appeal Judgement.²⁰

22. The Defence submits that acceding to the Prosecution's motion will infringe upon the right of the Accused to a fair trial since the Accused will be deprived of the opportunity to confront and cross-examine the witnesses against him.²¹ The Defence avers that the two proposed adjudicated facts are utterly central to the core issue of the trial and as such not susceptible to judicial notice.²² With regards to the second proposed fact, it also submits that it is not a finding of fact but a legal conclusion.²³ Moreover, the Defence submits that there will be no gain in trial efficiency since the Prosecution is still likely to elicit testimony on such core issues and the Accused will be forced to bring witnesses to rebut the adjudicated facts.²⁴

23. The Chamber notes that adjudicated fact one of which judicial notice is sought is relevant to the current proceedings. The destruction of Nyange church by means of a bulldozer on 16 April 1994 is part of the allegations against the Accused.²⁵ The Chamber further notes that the above mentioned fact has been deliberated by the Trial Chamber and was upheld by the Appeals Chamber. A final determination therefore was made on it.

24. However, the Chamber considers that the proposed adjudicated fact goes to an issue which is at the core of this case. Taking judicial notice of this adjudicated fact may place a significant burden on the Accused to produce rebuttal evidence and would not serve the interests of justice. The Chamber thus exercises its discretion to withhold judicial notice of this proposed adjudicated fact because, in the circumstances, judicially noticing it would not further the interests of justice.

25. Concerning the second proposed adjudicated fact, the Chamber notes that it is permissible to take judicial notice under Rule 94(B) of facts related to, *inter alia*, the conduct of the members of a joint criminal enterprise other than the accused.²⁶ The Chamber, however, finds that the proposed adjudicated fact contains findings or characterizations which are of an essentially legal nature. The Chamber will therefore not take judicial notice of fact two.

¹⁹ Motion, para. 3.

²⁰ Motion, paras. 22-23.

²¹ Response, paras. 30-31, 42, 45.

²² Response, paras. 33, 37, 40, 43.

²³ Response, paras. 35, 41, 44.

²⁴ Response, paras. 32, 38, 42.

²⁵ Paras. 16-18 of the Amended Indictment of 14 November 2007 ("Amended Indictment").

²⁶ *Karemera* Decision (AC), para. 52. Paragraph 4 of the Amended Indictment alleges that the Accused together with Athanase Seromba and others participated in a joint criminal enterprise.

FOR THESE REASONS, the Chamber

GRANTS the Prosecution Motion with respect to its request to take judicial notice under Rule 94(A);

DENIES the Prosecution Motion with respect to its request to take judicial notice under Rule 94 (B).

14 May 2009

For/Seon Ki Park

Emile Francis Short

Presiding Judge

Seon Ki Park

Seon Ki Park

Judge

JR

Joseph Masanche

Judge



[Seal of the Tribunal]