

ICTR-00-55C-T
(12-7-2011
(1783-T179)

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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Lee Gacuiga Muthoga, *Presiding*
Seon Ki Park
Robert Fremr

Registrar: Adama Dieng

Date: 12 July 2011

THE PROSECUTOR

v.

Ildéphonse NIZEYIMANA

CASE NO. ICTR-00-55C-T

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**DECISION ON DEFENCE MOTION TO TAKE JUDICIAL NOTICE OF
ADJUDICATED FACTS**

Office of the Prosecution:

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Drew White
Kirsten Gray
Yasmine Chubin
Zahida Virani

Defence Counsel for Ildéphonse Nizeyimana:

John Philpot
Cainnech Lussiaà-Berdou
Myriam Bouazdi
Sébastien Chartrand

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INTRODUCTION

1. The trial commenced on 17 January 2011 with the opening statements of both the Prosecution and the Defence. The Prosecution closed its case-in-chief on 25 February 2011, after having called 38 witnesses. The Defence closed its case on 16 June 2011, after having called 38 witnesses.
2. On 20 June 2011, the Defence team of the Accused, Ildéphonse Nizeyimana (“the Defence” and “the Accused” respectively) filed a motion requesting the Chamber to take judicial notice of certain adjudicated facts.¹ Specifically, the Defence requests that the Chamber take notice of adjudicated facts surrounding Tharcisse Muvunyi’s role as a superior at ESO as determined by the Trial Chamber in his case.² The Defence submits that the facts “are no longer appealable and the Appeals Chamber has declined to consider them on appeal,” justifying the taking of judicial notice.³ The Defence lastly contends that judicial notice should be resolved “in favour of the Accused because judicial notice is only restricted when there is a risk that it infringes on the rights of the Accused.”⁴
3. On 27 June 2011, the Office of the Prosecutor (“Prosecution”) filed its response.⁵ The Prosecution submits that the criteria for Rule 94(B) of the Rules of Procedure and Evidence (“Rules”) have not been met,⁶ and that the facts of which the Defence seeks to obtain judicial notice have not been finally determined.⁷
4. The Defence did not file a reply.

DELIBERATIONS

Standard for taking Judicial Notice of Adjudicated Facts

5. Rule 94(B) grants the Chamber the discretion 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.”⁸ The taking of notice of adjudicated facts is a method of

¹ Motion to Take Judicial Notice of Adjudicated Facts (“Motion”), 20 June 2011.

² Motion, paras. 20-22.

³ Motion, para. 23.

⁴ Motion, para. 24.

⁵ Prosecutor’s Response to the Defence Motion to Take Judicial Notice of Adjudicated Facts (“Response”), 27 June 2011.

⁶ Response, para. 4.

⁷ Response, paras. 4-18.

⁸ See *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73(c), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice (AC) (“Karemera Appeals Decision”), 16 June 2006, para. 41. The *Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-2000-55C-T

achieving judicial economy and harmonizing judgements of the Tribunal, while ensuring the Accused's right to a fair, public and expeditious trial.⁹ According to the Tribunal's jurisprudence, "adjudicated facts" are "facts which have been finally determined in a 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 there from or if instituted, the facts have been upheld."¹⁰

6. The Appeals Chamber further held that adjudicated facts are "facts that have been established in a proceeding between other parties on the basis of the evidence the parties to that proceeding introduce, in the particular context of that proceeding. For this reason, they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had a chance to contest them."¹¹ Indeed, a Trial Chamber "can and indeed must decline to take judicial notice of facts if it considers that the way they are formulated – abstracted from the context in the judgement from which they came – is misleading, or inconsistent with the facts actually adjudicated in the cases in question."¹²

Adjudicated facts

7. The Defence seeks to have the following facts, contained in the first *Muvunyi* Trial Judgement,¹³ admitted pursuant to Rule 94(B):

In the Chamber's opinion, even if Muvunyi was never formally appointed ESO Commander, this does not detract from the fact that he effectively remained the most senior officer and commander on the ground with power and authority to make day-to-day operational decisions at ESO. Therefore, having considered the totality of the evidence adduced by the Prosecution and the Defence, the Chamber makes the following findings of fact:

- On 6 April 1994, Colonel Marcel Gatsinzi was the Commander of ESO and Tharcisse Muvunyi was the second most senior officer;
- On 7 April 1994, Gatsinzi was appointed Interim Chief of Staff of the Rwandan Army, a position he held until 17 April 1994;

Appeals Chamber therein held that contrary to Rule 94(A), judicial notice pursuant to Rule 94(B) is discretionary.

⁹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Appeals Chamber Remand of Judicial Notice (TC), 11 December 2006, para. 21.

¹⁰ *Prosecutor v. Bizimungu et al.*, Decision on Bicomumpaka's Motion for Judicial Notice (TC), 11 February 2004, paras. 4-5; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-R94, Decision on Prosecution Motion for Judicial Notice (TC), 9 November 2005, para. 14. See also *Prosecutor v. Ntakirutimana & 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.

¹¹ Karemera Appeals Decision, para. 40.

¹² Karemera Appeals Decision, para. 55.

¹³ *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgement (TC) ("First Trial Judgement"), 12 September 2006.

- While he might have returned to Butare on a few occasions, Gatsinzi did not return to the position of ESO Commander;
 - Colonel Tharcisse Muvunyi, as the second most senior officer at ESO, assumed the position of ESO Commander after his superior officer, Marcel Gatsinzi, was appointed Interim Chief of Staff on 7 April 1994; although there was no formal instrument or other official communication appointing him as such, his assumption of the post of ESO Commander was based, *inter alia*, on the provisions of Law No. 23/1986 on the Establishment and Organization of ESO, which provides that in the absence of the Commander, the Deputy Commander shall assume his responsibilities.
 - Muvunyi held this position until mid-June 1994, and during this period he had effective control over the actions of ESO soldiers.¹⁴
- (...)
- (...) However, the Chamber is satisfied that as an Interim Commander at ESO, the Accused had authority over ESO Camp with responsibility for the security of the civilian population within the central sector of Butare *préfecture* and had responsibility for the actions of the ESO soldiers within the area.¹⁵

8. The Chamber notes that Muvunyi was first convicted on 12 September 2006 on charges of genocide, direct and public incitement to commit genocide and other inhumane acts. On 29 August 2008, the Appeals Chamber reversed all convictions and the sentence,¹⁶ with the exception of one count, for which it ordered a retrial.¹⁷ The retrial was ordered in respect to an allegation concerning a meeting held at Gikore, which related to the charge of direct and public incitement to commit genocide.¹⁸

9. The Trial Chamber thereafter conducted the retrial on the single standing allegation of direct and public incitement to commit genocide, upon which Muvunyi was ultimately convicted on 11 February 2010.¹⁹ The Trial Judgement rendered on 11 February 2010 was subsequently upheld by the Appeals Chamber on 1 April 2011.²⁰ The Appeals Chamber did not need to consider the facts underpinning Muvunyi's superior responsibility as provided for

¹⁴ First Trial Judgement, para. 57.

¹⁵ First Trial Judgement, para. 90.

¹⁶ *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Appeals Judgement ("First Appeal Judgement"), 29 August 2008, paras. 32, 46-47, 56-57, 70-71, 87-88, 99-101, 112-113, 131-132, 156-157.

¹⁷ First Appeal Judgement, para. 148.

¹⁸ *Ibid.*

¹⁹ *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgement (TC) ("Final Trial Judgement"), 11 February 2010.

²⁰ *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-A, Judgement ("Final Appeals Judgement") (AC), 1 April 2011.

in Article 6(3), as all these allegations were determined void for a variety of other reasons in its prior Appeals judgement.²¹

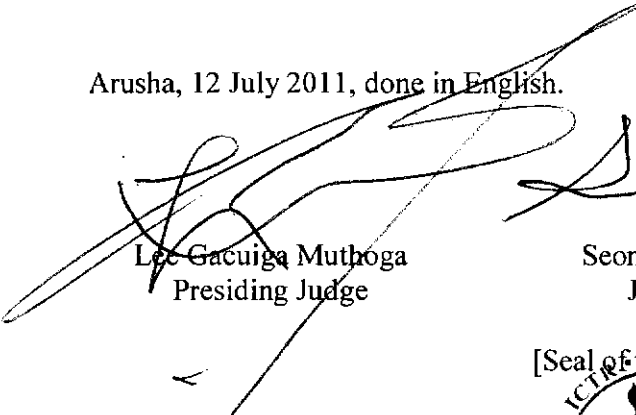
10. The Chamber notes that the Final Trial Judgement states with respect to Muvunyi's position at ESO that "[b]oth parties agree that in 1994, Muvunyi was a Lieutenant Colonel in the Rwandan Army and was stationed at the *École des Sous-Officiers* ("ESO") in Butare *préfecture*. The Prosecution did not lead any further evidence concerning Muvunyi's particular position in the ESO at the time."²² The Chamber observes that the Final Trial Judgement does not contain the facts the Defence now seeks to have admitted as adjudicated facts in the current trial.

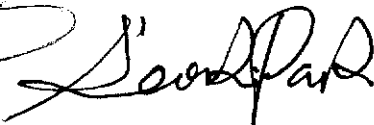
11. The Chamber is of the view that the Final Trial Judgement is the final and operative trial judgement, following the reversal by the Appeals Chamber of the majority of the counts contained in the First Trial Judgement.²³ The Chamber therefore does not consider the facts contained in the First Trial Judgement to constitute facts "which have been finally determined." Accordingly, the Chamber declines to take judicial notice of paragraphs 57 and 90 contained in the First Trial Judgement.

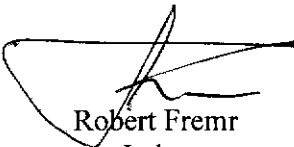
FOR THESE REASONS, THE CHAMBER

DENIES the Defence Motion.

Arusha, 12 July 2011, done in English.


Lee Gacuiya Muthoga
Presiding Judge


Seon Ki Park
Judge


Robert Fremr
Judge

[Seal of the Tribunal]



²¹ First Appeal Judgement, para. 159.

²² Final Trial Judgement, para. 32.

²³ See Final Appeals Judgement, para. 3.