



Mechanism for International Criminal Tribunals

Case No. MICT-12-09-AR14

Date: 5 October 2012

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Carmel Agius
Judge Liu Daqun
Judge Prisca Matimba Nyambe

Registrar: Mr. John Hocking

Decision of: 5 October 2012

PHÉNÉAS MUNYARUGARAMA

v.

PROSECUTOR

**DECISION ON APPEAL
AGAINST THE REFERRAL OF PHÉNÉAS
MUNYARUGARAMA'S CASE TO RWANDA AND
PROSECUTION MOTION TO STRIKE**

Duty Counsel:
Francis K. Stolla

The Office of the Prosecutor:
Hassan Bubacar Jallow
James J. Arguin
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Received by the Registry
Mechanism for International Criminal Tribunals

05/10/2012 10:09

Two handwritten signatures in black ink, one appearing to be 'McCall' and the other 'Carter'.

1. The Appeals Chamber of the International Residual Mechanism for Criminal Tribunals (“Appeals Chamber” and “Mechanism”, respectively) is seised of an appeal filed before the Mechanism on 17 July 2012 in the case of Mr. Phénéas Munyarugarama (“Munyarugarama”)¹ against the 28 June 2012 decision² of the Referral Chamber designated under Rule 11*bis* of the ICTR Rules of Procedure and Evidence (“Referral Chamber” and “ICTR Rules”, respectively).

I. BACKGROUND

2. According to the Indictment, Munyarugarama was the commander of Gako military camp and the highest ranking military officer in the Bugesera region, Kigali-Rural prefecture.³ He was charged before the ICTR with genocide, complicity in genocide, direct and public incitement to commit genocide, as well as extermination, murder, persecution, and rape as crimes against humanity.⁴ Munyarugarama remains at large.

3. On 28 June 2012, the Referral Chamber ordered that Munyarugarama’s case be transferred to the Republic of Rwanda (“Rwanda”) for trial proceedings.⁵ On 11 July 2012, Munyarugarama’s Duty Counsel filed a notice of appeal before the ICTR, which was re-filed before the Mechanism on 17 July 2012.⁶ Duty Counsel filed the Appeal Brief before the Mechanism on 1 August 2012.⁷ The Prosecution filed a response on 7 August 2012⁸ and Duty Counsel filed a reply on 17 August 2012.⁹ On 24 August 2012, the Prosecution submitted a motion to strike the Reply Brief on the basis that it

¹ On 11 July 2012, Munyarugarama’s Duty Counsel (“Duty Counsel”) filed a notice of appeal before the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 (“ICTR”). See *Phénéas Munyarugarama v. The Prosecutor*, Case No. ICTR-02-79-AR11*bis*, Notice of Appeal, 11 July 2012 (confidential) (“Notice of Appeal”). The Notice of Appeal was re-filed before the Mechanism by the ICTR’s Registry on 17 July 2012 pursuant to an order of the Presiding Judge of the Appeals Chamber of the ICTR. See *Phénéas Munyarugarama v. The Prosecutor*, Case No. ICTR-02-79-AR11*bis*, Order Regarding Notice of Appeal, 17 July 2012 (“Order of 17 July 2012”), p. 1.

² *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-R11*bis*, Decision on the Prosecutor’s Request for Referral of the Case to the Republic of Rwanda, 28 June 2012 (“Impugned Decision”).

³ *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-1, Amended Indictment, 13 June 2012 (confidential and *ex parte*) (“Indictment”), para. 11.

⁴ Indictment, paras. 1, 47.

⁵ Impugned Decision, pp. 15, 16.

⁶ See *supra* fn. 1.

⁷ Duty Counsel Submissions in Support of the Grounds of Appeal, 1 August 2012 (“Appeal Brief”). Duty Counsel initially filed the Appeal Brief before the ICTR on 31 July 2012. See *Phénéas Munyarugarama v. The Prosecutor*, Case No. ICTR-02-79-AR11*bis*, Duty Counsel Submissions in Support of the Grounds of Appeal, 31 July 2012 (confidential). However, the proceedings before the ICTR were terminated in light of the fact that the ICTR lacked competence. See *Phénéas Munyarugarama v. The Prosecutor*, Case No. ICTR-02-79-AR11*bis*, Order Regarding Appeal Brief, 22 August 2012, pp. 1, 2.

⁸ Prosecutor’s Response Brief, 7 August 2012 (“Response Brief”).

⁹ Duty Counsel Submissions in Reply to the Prosecutor’s Response Brief, 17 August 2012 (confidential) (“Reply Brief”).

had been filed in an untimely manner.¹⁰ Duty Counsel has not filed any response to the Motion to Strike.

II. PRELIMINARY MATTERS

A. Introduction

4. The Appeals Chamber recalls that the Mechanism was established pursuant to United Nations Security Council Resolution 1966 (2010) and possesses the material, territorial, temporal, and personal jurisdiction of the ICTR.¹¹ The Mechanism's current mandate is to continue the jurisdiction, rights and obligations, and essential functions of the ICTR.¹² On 1 July 2013, this mandate shall expand to include the same responsibilities with respect to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY").¹³

5. In this vein, the Statute and the Mechanism's Rules of Procedure and Evidence ("Rules") reflect normative continuity with the Statute of the ICTR ("ICTR Statute"), the Statute of the ICTY ("ICTY Statute") as well as the ICTR Rules and the ICTY Rules of Procedure and Evidence ("ICTY Rules"). These parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice.

6. The Appeals Chamber accordingly considers that it is bound to interpret its Statute and Rules in a manner consistent with the jurisprudence of the ICTR and ICTY, which developed for over a decade prior to the establishment of the Mechanism. Likewise, where the respective Rules or Statutes of the ICTR or ICTY are at issue, the Appeals Chamber is bound to consider the relevant precedent of these tribunals when interpreting them. The Appeals Chamber will bear these principles in mind when considering the parties' submissions.

B. Late Filing of the Appeal Brief

7. Duty Counsel filed the Appeal Brief on 1 August 2012, 21 days after he filed the Notice of Appeal before the ICTR and 15 days after it was re-filed by the ICTR Registry before the Mechanism.¹⁴ Duty Counsel concedes that he filed the Appeal Brief after the prescribed time.¹⁵

¹⁰ Prosecutor's Motion to Strike Reply Brief, 24 August 2012 ("Motion to Strike").

¹¹ United Nations Security Council Resolution 1966, U.N. Doc. S/RES/1966, 22 December 2010 ("Security Council Resolution 1966"), paras. 1, 4, and Annex 2; Statute of the Mechanism ("Statute"), preamble, Art. 1.

¹² Security Council Resolution 1966, paras. 1, 4; Statute, preamble, Arts. 1, 2.

¹³ Security Council Resolution 1966, paras. 1, 4; Statute, preamble, Arts. 1, 2.

¹⁴ See Notice of Appeal; Order of 17 July 2012, p. 1; Appeal Brief.

However, he argues that he needed to “attend [to his] sick mother”, starting on 23 July 2012.¹⁶ He submits that while doing so he had no access to scanning facilities to “assist” him in filing the Appeal Brief in a timely manner.¹⁷ He adds that he returned to his regular place of business on the evening of 30 July 2012.¹⁸ According to Duty Counsel, on 31 July 2012, he finalized the Appeal Brief and made arrangements for it to be filed.¹⁹ In light of these circumstances, he requests that an extension be granted and the late filing be accepted.²⁰

8. The Prosecution responds that Duty Counsel has not demonstrated good cause justifying the late filing.²¹ The Prosecution submits that the Appeals Chamber should strike the Appeal Brief, find the Notice of Appeal insufficient to support the appeal, and determine that the appeal has been “waived or abandoned”.²²

9. An appellant is required to file an appeal brief within fifteen days after filing the notice of appeal concerning a decision to refer a case.²³ Duty Counsel filed the Notice of Appeal on 11 July 2012.²⁴ Although the Notice of Appeal was re-filed before the Mechanism on 17 July 2012 pursuant to an order of the Presiding Judge of the ICTR’s Appeals Chamber,²⁵ the Appeals Chamber considers that the time-limit for Duty Counsel to file the Appeal Brief began to run on 11 July 2012, when he filed the Notice of Appeal. Consequently, Duty Counsel was required to file the Appeal Brief before the Mechanism by 26 July 2012. Duty Counsel failed to do so.

10. Rule 154(A)(ii) of the Rules allows a Chamber of the Mechanism, on good cause being shown by motion, to recognize as validly done any act done after the expiration of the prescribed time-limit. In this respect, the Appeals Chamber recalls that unforeseen logistical problems have been considered insufficient to establish good cause warranting extensions of filing deadlines.²⁶

11. Duty Counsel has failed to establish good cause justifying the late filing of the Appeal Brief. The Appeals Chamber notes that his personal commitments and the logistical hurdles he

¹⁵ See Appeal Brief, para. 4.

¹⁶ Appeal Brief, para. 4(3).

¹⁷ Appeal Brief, para. 4(3).

¹⁸ Appeal Brief, para. 4(3).

¹⁹ Appeal Brief, para. 4(3).

²⁰ Appeal Brief, paras. 4(1), 4(5).

²¹ Response Brief, paras. 1, 3-7.

²² Response Brief, para. 7. See also Response Brief, para. 2.

²³ The briefing deadlines set forth in Rule 14(E) of the Rules correspond with those set forth in Rule 11bis(H) of the ICTR Rules and paragraphs 5 and 6 of the ICTR’s Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the Tribunal, 8 December 2006 (“ICTR Practice Direction”). The ICTR Practice Direction applies *mutatis mutandis* to appeals filed before the Mechanism. See Practice Direction Related to Appeals, MICT/4, 5 July 2012 (“Practice Direction”), para. 1.

²⁴ See *supra* fn. 1.

²⁵ See Order of 17 July 2012, p. 1.

encountered may have been significant. However, Duty Counsel's submissions fail to demonstrate that he made any efforts to request an extension of time, or to finalize and file the Appeal Brief, in a timely manner.

12. Even where counsel has failed to demonstrate good cause justifying the late filing, the Appeals Chamber may recognize submissions as validly filed where they are of such substantial importance to the appeal that doing so is in the interests of justice.²⁷ Extensions may also be granted where counsel's conduct has not sufficiently protected the rights of the appellant.²⁸ The Appeals Chamber considers that the Appeal Brief is of substantial importance to the protection of the rights of the appellant. To reject it could result in the dismissal of Munyarugarama's appeal.²⁹ Moreover, recognizing the Appeal Brief as validly filed would not prejudice the Prosecution, which responded to the Appeal Brief, or impact the timely consideration of this appeal.³⁰ Consequently, the Appeals Chamber finds that it is in the interests of justice to recognize the Appeal Brief as validly filed.

C. Late Filing of the Reply Brief

13. Duty Counsel filed the Reply Brief on 17 August 2012. On 24 August 2012, the Prosecution filed the Motion to Strike, arguing that there is no good cause justifying the late submission of the Reply Brief and requesting the Appeals Chamber to strike it.³¹

14. An appellant "may" file a reply within four days of the filing of the response.³² Given that the Response Brief was filed on 7 August 2012, any reply thereto had to be filed no later than 13 August 2012.³³ Duty Counsel, without previously seeking and receiving an extension, filed the

²⁶ See, e.g., *Ildéphonse Hategekimana v. The Prosecutor*, Case No. ICTR-00-55B-A, Decision on Ildéphonse Hategekimana's Second Motion for an Extension of Time to File his Appellant's Brief, 20 May 2011, paras. 3, 8, 10.

²⁷ See *Édouard Karemera and Matthieu Ndirumpatse v. The Prosecutor*, Case No. ICTR-98-44-A, Decision on Matthieu Ndirumpatse's Motion for an Extension of Time for the Filing of his Brief in Reply, 22 August 2012 ("Karemera Decision of 22 August 2012"), para. 7. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 8; *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-AR65.3, Decision on Ljube Bošković's Interlocutory Appeal on Second Motion for Provisional Release, 28 August 2006, para. 9.

²⁸ See *Justin Mugenzi and Prosper Mugiraneza v. The Prosecutor*, Case No. ICTR-99-50-A, Decision on Prosper Mugiraneza's Motion for Extension of Time to File his Appellant's Brief, 26 January 2012, para. 10.

²⁹ Rule 14(E) of the Rules states that an appellant "shall" file an appeal brief within fifteen days after the filing of the notice of appeal. Likewise, the ICTR Practice Direction, which applies *mutatis mutandis* to appeals filed before the Mechanism, states that an appellant "must" file the appeal brief within 15 days after the filing of the notice of appeal. See ICTR Practice Direction, para. 5; Practice Direction, para. 1. Failure to file an appeal brief may lead the Appeals Chamber to consider that the right of appeal has been waived. Cf. *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-I-A, Judgement (Reasons), 1 June 2001 ("Kayishema and Ruzindana Appeal Judgement"), para. 46.

³⁰ See *Karemera Decision of 22 August 2012*, para. 7; *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR11bis, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and Related Motions, 16 December 2011 ("Uwinkindi Decision of 16 December 2011"), para. 16.

³¹ Motion to Strike, paras. 2-5.

³² Rule 14(E) of the Rules. See also ICTR Practice Direction, para. 7; Practice Direction, para. 1.

³³ The fourth day after 7 August 2012 fell on Saturday, 11 August 2012. Consequently, Monday, 13 August 2012, was the first day that the Registry would accept submissions after Saturday, 11 August 2012. See Rule 152(B) of the Rules.

Reply Brief on 17 August 2012. The Reply Brief contains no submissions justifying the late filing.³⁴

15. Considering that Duty Counsel has not provided any justification for the late filing, the Appeals Chamber finds that he has failed to establish good cause pursuant to Rule 154(A)(ii) of the Rules. Moreover, the Appeals Chamber considers that striking the Reply Brief does not run counter to the interests of justice in the same manner as striking the Appeal Brief would in this case.³⁵ In this context, the Appeals Chamber considers that a reply is an optional filing and finds that it is not necessary to the consideration of this appeal. In view of the foregoing, the Appeals Chamber grants the Motion to Strike and shall not consider the Reply Brief.

16. The Appeals Chamber emphasises that procedural time-limits are to be respected as they are indispensable to the proper functioning of the Mechanism.³⁶ Violations of time-limits, unaccompanied by any showing of good cause, will not be tolerated.³⁷ The Appeals Chamber warns Duty Counsel that failure to respect filing deadlines may result in a determination that Duty Counsel is ineligible to represent an accused or suspect before the Mechanism.³⁸

III. APPEAL

A. Introduction

17. Duty Counsel advances a single ground of appeal against the Impugned Decision. He argues that the Referral Chamber erred in law and fact in finding that members of the Rwandan judiciary are impartial.³⁹

B. Applicable Law

18. The Referral Chamber transferred Munyarugarama's case to Rwanda pursuant to Rule 11*bis* of the ICTR Rules.⁴⁰ Rule 11*bis* of the ICTR Rules allows a designated trial chamber to refer a case

³⁴ The Reply Brief only provides further argument concerning the late filing of the Appeal Brief and does not address the late filing of the Reply Brief itself. See Reply Brief, para. 3.

³⁵ See *supra* para. 12.

³⁶ See *The Prosecutor v. Ildéphonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on a Request for an Extension of Time to File a Cross-Appeal, 16 September 2008 ("*Hategekimana* Decision of 16 September 2008"), p. 4; *Prosecutor v. Baton Haxhiu*, Case No. IT-04-84-R77.5-A, Decision on Admissibility of Notice of Appeal against Trial Judgement, 4 September 2008 ("*Haxhiu* Decision of 4 September 2008"), para. 16; *Kayishema and Ruzindana* Appeal Judgement, para. 46.

³⁷ See, e.g., *Ladislav Ntaganzwa v. The Prosecutor*, Case No. ICTR-96-9-AR11*bis*, Decision on Admissibility of Notice of Appeal against Referral Decision, 5 July 2012, p. 2; *Haxhiu* Decision of 4 September 2008, para. 16; *Kayishema and Ruzindana* Appeal Judgement, para. 46. Cf. *Hategekimana* Decision of 16 September 2008, pp. 4, 5.

³⁸ See Rule 47(A)(ii) of the Rules.

³⁹ Notice of Appeal, p. 1; Appeal Brief, paras. 5-16.

⁴⁰ Impugned Decision, pp. 15, 16.

to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. In assessing whether a State is competent within the meaning of Rule 11*bis* of the ICTR Rules to accept a case from the ICTR, a designated trial chamber must consider whether the accused will be accorded the fair trial rights set out in Article 20 of the ICTR Statute, whether the State in question has a legal framework which criminalizes the alleged conduct of the accused, and whether it provides an adequate penalty structure.⁴¹ The penalty structure within the State must provide an appropriate punishment for the offences for which the accused is charged, and conditions of detention must accord with internationally recognized standards.⁴²

19. In considering an appeal from a decision under Rule 11*bis* of the ICTR Rules, the Appeals Chamber of the ICTR has stated:

The trial chamber has the discretion to decide whether to refer a case to a national jurisdiction, and the Appeals Chamber will only intervene if the trial chamber's decision was based on a discernible error. To demonstrate such error, an appellant must show that the trial chamber: misdirected itself either as to the legal principle to be applied or as to the law which is relevant to the exercise of its discretion; gave weight to irrelevant considerations; failed to give sufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly.⁴³

The Appeals Chamber of the Mechanism adopts this standard of review in considering the present appeal.

C. Analysis

20. Duty Counsel submits that the Referral Chamber erred in law and in fact by applying a presumption of impartiality to the Rwandan judiciary.⁴⁴ Although Duty Counsel concedes that the Rwandan judiciary enjoys "institutional independence"⁴⁵ and does not challenge the competence of members of the Rwandan judiciary,⁴⁶ he posits that the judiciary comprises Rwandan citizens who must have "witnessed", "experienced", or "felt the commission of the alleged crimes" during the

⁴¹ *Uwinkindi* Decision of 16 December 2011, para. 22; *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 4 December 2008 ("*Hategekimana* Decision of 4 December 2008"), para. 4; *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 30 October 2008 ("*Kanyarukiga* Decision of 30 October 2008"), para. 4. See also *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11*bis*, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11*bis*, 9 October 2008 ("*Munyakazi* Decision of 9 October 2008"), para. 4.

⁴² *Uwinkindi* Decision of 16 December 2011, para. 22; *Hategekimana* Decision of 4 December 2008, para. 4; *Kanyarukiga* Decision of 30 October 2008, para. 4; *Munyakazi* Decision of 9 October 2008, para. 4.

⁴³ *Uwinkindi* Decision of 16 December 2011, para. 23 (internal citations omitted).

⁴⁴ See Appeal Brief, paras. 7(ii), 8-10.

⁴⁵ Appeal Brief, paras. 7(i), 8, 9.

⁴⁶ Appeal Brief, paras. 7(ii), 7(iii), 9.

genocide and who, therefore, could not be impartial.⁴⁷ In his view, the Referral Chamber was required to take judicial notice of the genocide “and that it affected all Rwandan Citizens including Judges”.⁴⁸ According to Duty Counsel, this would have prevented the Referral Chamber from applying the presumption of impartiality to members of the Rwandan judiciary, and would have compelled it to conclude that Munyarugarama could not receive a fair trial in Rwanda.⁴⁹

21. The Prosecution responds that the Referral Chamber correctly applied the presumption of impartiality to members of the Rwandan judiciary.⁵⁰ The Prosecution further suggests that Duty Counsel merely repeats unsupported arguments rejected by the Referral Chamber that members of the Rwandan judiciary lack impartiality and are biased.⁵¹ Finally, the Prosecution argues that there is no basis for taking judicial notice that Rwandan judges were impacted by the genocide and are biased, as these are not facts that are widely known and, to the contrary, are subject to reasonable dispute.⁵²

22. The Appeals Chamber observes that the Referral Chamber explicitly considered Rwanda’s legal framework and the evidence presented by the Prosecution to demonstrate the professionalism, independence, and impartiality of the Rwandan judiciary.⁵³ The Referral Chamber likewise considered internationally accepted criteria that “define an independent judiciary”.⁵⁴ In this context, the Referral Chamber was satisfied that the judges of Rwanda are impartial.⁵⁵ It also found that, under the circumstances, the Rwandan judiciary, comprised of professional judges, benefited from the “presumption of independence and impartiality” that applies to judges of the ICTR and ICTY.⁵⁶

23. In making this finding, the Referral Chamber considered Duty Counsel’s argument that members of the Rwandan judiciary must have “witnessed”, “experienced”, or “felt the commission of the alleged crimes” during the genocide and that “any judge that is a Rwandan citizen necessarily lacks the required impartiality to try cases involving crimes that occurred during 1994”.⁵⁷ It concluded, however, that “Duty Counsel has not provided any specific instances or examples of the

⁴⁷ Appeal Brief, paras. 7(ii), 7(iii), 9, 14.

⁴⁸ Appeal Brief, para. 10. *See also* Appeal Brief, paras. 11-13.

⁴⁹ Appeal Brief, paras. 10-15.

⁵⁰ Response, paras. 2, 11, 13-16, 20, 21.

⁵¹ Response, paras. 15-17.

⁵² Response, paras. 17-19.

⁵³ Impugned Decision, paras. 43, 44, 49.

⁵⁴ Impugned Decision, para. 47.

⁵⁵ Impugned Decision, para. 51.

⁵⁶ Impugned Decision, para. 50.

⁵⁷ Impugned Decision, para. 45.

bias he attributes to the Rwandan judiciary” and that he had failed to rebut the presumption of impartiality.⁵⁸

24. The Appeals Chamber considers that the Referral Chamber acted within its discretion by relying on unchallenged submissions concerning both the legal framework and the empirical evidence demonstrating the independence and impartiality of the Rwandan judiciary to find that the judges of Rwanda are impartial. Moreover, the Appeals Chamber finds no error in the Referral Chamber’s conclusion that, as professional judges, members of the Rwandan judiciary benefit from a presumption of independence and impartiality.⁵⁹

25. Likewise, the Appeals Chamber considers that Duty Counsel’s submissions that the Referral Chamber erred by not taking judicial notice that a genocide occurred in Rwanda and that all Rwandan citizens, including the country’s judges, were “affected” by it are unpersuasive. Rule 94(A) of the ICTR Rules requires that a trial chamber take judicial notice “of facts of common knowledge”.⁶⁰ The term “common knowledge” encompasses facts that are widely known and 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.⁶¹

26. Duty Counsel did not request that the Referral Chamber take judicial notice of these facts⁶² and the Referral Chamber was not required to make such determinations *proprio motu*.⁶³ Moreover, while the Rwandan genocide is a fact of common knowledge subject to judicial notice pursuant to Rule 94(A) of the ICTR Rules,⁶⁴ the assertion that members of the Rwandan judiciary are biased as a result is subject to reasonable dispute and, as such, is not subject to judicial notice. Indeed, the Referral Chamber was presented with uncontested evidence supporting the position that the

⁵⁸ Impugned Decision, para. 51.

⁵⁹ Impugned Decision, para. 50.

⁶⁰ See also *Simon Bikindi v. The Prosecutor*, Case No. ICTR-01-72-A, Judgement, 18 March 2010 (“*Bikindi Appeal Judgement*”), para. 99; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza Appeal Judgement*”), para. 194.

⁶¹ *Bikindi Appeal Judgement*, para. 99; *Semanza Appeal Judgement*, para. 194.

⁶² The Appeals Chamber observes that Duty Counsel referred to the “Doctrine of Judicial Notice” during the proceedings before the Referral Chamber but did not request that judicial notice be taken in relation to the occurrence of a genocide in Rwanda or its impact on Rwandan judges. See *The Prosecutor v. Phénéas Munyarugarama*, Case No. ICTR-02-79-R11bis, Duty Counsel Submissions in Response to the Prosecutors [*sic*] Request for Referral of the Case of Pheneas [*sic*] Munyarugarama to Rwanda pursuant to Rule 11 bis of the Tribunal’s Rules of Evidence and Procedure [*sic*], 27 June 2012 (confidential), para. 13 (emphasis omitted). The Referral Chamber was under no obligation to explore in the Impugned Decision Duty Counsel’s vague and undeveloped arguments in this respect. See *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal against Decision on Referral under Rule 11bis, 4 July 2006, para. 47.

⁶³ A trial chamber must take judicial notice once it “determines that a fact is ‘common knowledge’”. See *Bikindi Appeal Judgement*, para. 99, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006 (“*Karemera Decision of 16 June 2006*”), para. 22. There is no requirement pursuant to Rule 94(A) of the ICTR Rules that a trial chamber search for such facts and make such rulings *proprio motu*.

⁶⁴ See *Karemera Decision of 16 June 2006*, paras. 29, 31, 35.


Rwandan judiciary is *not* biased.⁶⁵ In these circumstances, the Duty Counsel has not demonstrated that the Referral Chamber failed to sufficiently consider the impact of the genocide on the Rwandan judiciary.⁶⁶ Consequently, Duty Counsel has not shown that the Referral Chamber erred in finding that members of the Rwandan judiciary are impartial.

IV. DISPOSITION

27. For the foregoing reasons, the Appeals Chamber **GRANTS** the Prosecution's Motion to Strike and **DISMISSES** the appeal.

Done in English and French, the English version being authoritative.

Done this 5th day of October 2012,
At Arusha,
Tanzania


Judge Theodor Meron
Presiding

[Seal of the Mechanism]



⁶⁵ See Impugned Decision, para. 44. See also Impugned Decision, paras, 50, 51.

⁶⁶ Moreover, the Referral Chamber's conclusion reflects the position that the "personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality". *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 699.



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II - TRANSLATION STATUS ON THE FILING DATE/ ETAT DE LA TRADUCTION AU JOUR DU DÉPÔT

<input type="checkbox"/> Translation not required/ La traduction n'est pas requise
<input checked="" type="checkbox"/> Filing Party hereby submits only the original, and requests the Registry to translate/ La Partie déposante ne soumet que l'original et sollicite que le Greffe prenne en charge la traduction (Word version of the document is attached/ La version en Word se trouve en annexe)
<input type="checkbox"/> English/ Anglais <input checked="" type="checkbox"/> French/ Français <input type="checkbox"/> Kinyarwanda
<input type="checkbox"/> Filing Party hereby submits both the original and the translated version for filing, as follows/ La Partie déposante soumet ci-joint l'original et la version traduite pour dépôt, comme suit :
Original/ Original en <input type="checkbox"/> English/ Anglais <input type="checkbox"/> French/ Français <input type="checkbox"/> Kinyarwanda
Translation/ Traduction en <input type="checkbox"/> English/ Anglais <input type="checkbox"/> French/ Français <input type="checkbox"/> Kinyarwanda
<input type="checkbox"/> Filing Party will be submitting the translated version(s) in due course in the following language(s)/ La Partie déposante soumettra la (les) version(s) traduite(e) sous peu, dans la (les) langue(s) suivante(s):
<input type="checkbox"/> English/ Anglais <input type="checkbox"/> French/ Français <input type="checkbox"/> Kinyarwanda

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