



UNITED NATIONS
NATIONS UNIES



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

2861/H

ICTR-98-41-A
29th October 2010
{2861/H – 2856/H}

IN THE APPEALS CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 29 October 2010

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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SIGNATURE: [Handwritten Signature] DATE: 29 Oct. 2010

Théoneste BAGOSORA
Aloys NTABAKUZE
Anatole NSENGIYUMVA

v.

THE PROSECUTOR

Case No. ICTR-98-41-A

ICTR Appeals Chamber
Date: 29th October 2010
Action: *Sumo*
Copied To: *Concerned Judges, SLO, Parties, CMS, LSS, LDO, ALO*

DECISION ON ANATOLE NSENGIYUMVA'S MOTION FOR JUDICIAL NOTICE

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1. The Appeals Chamber of 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 (“Appeals Chamber” and “Tribunal”, respectively), is seized of “Nsengiyumva’s Motion on Judicial Notice pursuant to Rule 94 of the Rules of Procedure and Evidence”, filed by Anatole Nsengiyumva (“Nsengiyumva”) on 29 July 2010 (“Motion for Judicial Notice”).

A. Background

2. On 18 December 2008, Trial Chamber I of the Tribunal (“Trial Chamber”) rendered its Judgement in the *Bagosora et al.* case, finding Nsengiyumva guilty of genocide, murder, extermination, persecution, and other inhumane acts as crimes against humanity, and violence to life as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering killings in Gisenyi town, including the killing of Alphonse Kabiligi, at Nyundo Parish and Mudende University, as well as for aiding and abetting killings in Bisesero.¹ The appeal of Anatole Nsengiyumva against the Trial Judgement is pending.

3. On 29 July 2010, Nsengiyumva filed the present Motion for Judicial Notice, in which he requests the Appeals Chamber to take judicial notice of certain sections of the *Bagaragaza* Sentencing Judgement delivered by Trial Chamber II of the Tribunal on 17 November 2009.² The Prosecution responded on 9 August 2010 that the Motion for Judicial Notice should be dismissed in its entirety.³ Nsengiyumva filed his reply on 13 August 2010.⁴

B. Submissions

4. Nsengiyumva requests that the Appeals Chamber take judicial notice of paragraphs 24 to 27 of the *Bagaragaza* Sentencing Judgement.⁵ He submits that the Appeals Chamber may take judicial notice of these portions of the *Bagaragaza* Sentencing Judgement as the *Bagaragaza* Sentencing Judgement has not been appealed and as they are directly relevant to the factual findings currently under appeal pertaining to Nsengiyumva’s responsibility for the killings in Gisenyi town, including

¹ *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, signed on 18 December 2008, filed on 9 February 2009 (“Trial Judgement”), paras. 2161, 2189, 2197, 2216, 2227, 2248, 2258.

² Motion for Judicial Notice, paras. 1, 10, p. 7; *The Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-T, Sentencing Judgement, 17 November 2009 (“*Bagaragaza* Sentencing Judgement”).

³ Prosecutor’s Response to Appellant Nsengiyumva’s Motion for Judicial Notice, 9 August 2010 (“Response”), paras. 2, 10.

⁴ Nsengiyumva’s Reply to Prosecutor’s Response to Appellant Nsengiyumva’s Motion for Judicial Notice, 13 August 2010 (“Reply”).

the killing of Alphonse Kabiligi, and at Nyundo Parish and Mudende University.⁶ Nsengiyumva asserts that the taking of judicial notice of the requested portions of the *Bagaragaza* Sentencing Judgement would confirm his submissions that there are other possible inferences that could be drawn as to who may have ordered or organised these killings and that the Trial Chamber therefore erred in concluding that these killings could only have been organized and/or ordered by him.⁷

5. The Prosecution responds that the Motion for Judicial Notice should be dismissed in its entirety.⁸ First, the Prosecution argues that Nsengiyumva only filed his Motion for Judicial Notice under Rule 94 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and fails to show how the facts sought to be judicially noticed meet the requirements of Rule 115 of the Rules.⁹ Second, it submits that facts from a judgement based on a guilty plea do not qualify as “adjudicated facts” under Rule 94(B) of the Rules.¹⁰ Finally, the Prosecution asserts that the facts sought to be judicially noticed are not relevant to the matters at issue on appeal and could not have had an impact on the verdict.¹¹ According to the Prosecution, the findings entered in the *Bagaragaza* case, and the underlying facts in that case, are not irreconcilable with and do not invalidate the findings that Nsengiyumva as the highest military authority of the Gisenyi operational sector also ordered the killings in Gisenyi town, including the killing of Alphonse Kabiligi, and at Nyundo Parish and Mudende University.¹²

6. In his Reply, Nsengiyumva submits that he fulfilled the requirements of Rule 115 of the Rules by making reference to the fact that the *Bagaragaza* Sentencing Judgement was delivered on 17 November 2009 and showing that particular findings in the Trial Judgement would be affected if the Appeals Chamber took judicial notice of the relevant paragraphs.¹³ He contends that since the facts sought to be judicially noticed are based on a guilty plea premised on an agreement made between Michel Bagaragaza and the Prosecution, the Prosecution is estopped from disputing the account of such facts and from arguing that such agreement cannot be the basis of judicial notice.¹⁴ He also reiterates that the facts sought to be judicially noticed are relevant to the matters at issue in the appeal proceedings and do have an impact on the verdict.¹⁵

⁵ Motion for Judicial Notice, para. 10.

⁶ Motion for Judicial Notice, paras. 11-13.

⁷ Motion for Judicial Notice, paras. 7-9, 14-22.

⁸ Response, paras. 2, 10.

⁹ Response, paras. 2, 4.

¹⁰ Response, paras. 2, 5.

¹¹ Response, paras. 3, 6.

¹² Response, paras. 6-8.

¹³ Reply, para. 6.

¹⁴ Reply, para. 8.

¹⁵ Reply, paras. 2, 9-13.

C. Discussion

7. Rule 94(B) of the Rules provides that, at a request of a party or *proprio motu*, a Trial Chamber may decide to take judicial notice of adjudicated facts from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.¹⁶ The Appeals Chamber previously 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 chose to introduce, in the particular context of that proceeding.”¹⁷ Only facts which are not under challenge before the Appeals Chamber or, if challenged, have been upheld by the Appeals Chamber can be deemed “adjudicated” within the meaning of Rule 94(B) of the Rules.¹⁸ By taking judicial notice of an adjudicated fact, a Chamber establishes a well-founded presumption for the accuracy of this fact, which therefore does not have to be proven again at trial.¹⁹

8. The Appeal Chamber further recalls that on appeal, a fact qualifying for judicial notice under Rule 94 of the Rules is not automatically admitted and must meet the requirements provided for by Rule 115 of the Rules.²⁰ The Appeals Chamber emphasizes in this regard that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the general rules governing the admissibility of evidence.²¹

9. Nsengiyumva filed his Motion for Judicial Notice without expressly addressing the requirements of Rule 115 of the Rules, which is an incorrect way to seek the admission of facts on appeal.²² While the Motion for Judicial Notice could be summarily dismissed on this basis,²³ without prejudice to Nsengiyumva re-filing a motion consistent with the proper procedure, the Appeals Chamber considers that it serves judicial economy in the present case to state the reasons why the Appeals Chamber is in any event not satisfied that the facts which Nsengiyumva seeks to be judicially noticed meet the requirements of Rule 94(B) of the Rules.

¹⁶ See *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant’s Motion for Judicial Notice, 1 April 2005 (“*Momir Nikolić* Appeal Decision”), para. 11.

¹⁷ *Prosecutor v. Edouard 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 et al.* Appeal Decision”), para. 40.

¹⁸ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Decision on the Motions of Drago Josipović, Zoran Kupreškić and Vlatko Kupreškić to Admit Additional Evidence Pursuant to Rule 115 and for Judicial Notice to be Taken Pursuant to Rule 94(B), 8 May 2001, para. 6. See also *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on Prosecution’s Motion for Judicial Notice Pursuant to Rules 73, 89 and 94, 2 December 2003, para. 34, cited in *Momir Nikolić* Appeal Decision, para. 45; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.5, Decision on the Prosecution’s Interlocutory Appeal Against the Trial Chamber’s 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003 (“*Slobodan Milošević* Appeal Decision”), p. 4, fn. 10.

¹⁹ *Momir Nikolić* Appeal Decision, para. 11; *Slobodan Milošević* Appeal Decision, p. 4. See also *Karemera et al.* Appeal Decision, para. 42;

²⁰ *Momir Nikolić* Appeal Decision, para. 17.

²¹ *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 189; *Momir Nikolić* Appeal Decision, para. 17.

10. Nsengiyumva requests that judicial notice be taken of portions of a sentencing judgement based on a guilty plea. In this respect, the Appeals Chamber notes that Trial Chambers of this Tribunal and of the International Criminal Tribunal for the former Yugoslavia have held that in order to be judicially noticed, facts must not be based on an agreement between the parties to the original proceedings,²⁴ and that, as such, facts shall not be deemed “adjudicated” if they are based on guilty pleas or admissions voluntarily made by an accused during the proceedings.²⁵ This position is based on the consideration that such facts are not proper sources of judicial notice because they have not been subjected to the same level of scrutiny as in other trial situations where one of the parties has the burden of proof,²⁶ and that the accused’s admissions “speak neither to the general currency of the fact nor to its indisputable character.”²⁷

11. The Appeals Chamber agrees that facts based on an agreement between parties in previous proceedings cannot be deemed “adjudicated facts” within the meaning of Rule 94 of the Rules because they have not been *established* by the Trial Chamber on the basis of evidence. Rather, such facts are merely *accepted* by the Trial Chamber upon a less burdensome level of scrutiny than the one applied to instances where the Prosecution must prove the facts upon which convictions are based beyond reasonable doubt. In light of this reasoning, the Appeals Chamber finds that the facts admitted by Michel Bagaragaza as set out in paragraphs 24 and 25 of the *Bagaragaza* Sentencing Judgement are not subject to judicial notice under Rule 94(B) of the Rules.

²² See *Momir Nikolić* Appeal Decision, para. 18.

²³ See *Momir Nikolić* Appeal Decision, para. 19.

²⁴ See, e.g., *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion for Judicial Notice of Facts Adjudicated by *Krajišnik* Case, signed on 23 July 2010, filed on 4 August 2010, para. 7(5); *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts, 14 June 2010, para. 14(g); *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts, 25 November 2009 (“*Stanišić and Simatović* Decision”), para. 56; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts, 22 August 2008, para. 20(g); *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Concerning Sarajevo, 26 June 2008 (“*Perišić* Decision”), para. 27; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 26 September 2006 (“*Popović et al.* Decision”), para. 11; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-PT, Decision on Prosecution Motion for Judicial Notice Pursuant to Rule 94(B), 1 April 2004, p. 4; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-PT, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis, 28 February 2003 (“*Krajišnik* Decision”), para. 14; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Motion for Judicial Notice of Adjudicated Facts Relevant to the Municipality of Brčko, 5 June 2002 (“*Slobodan Milošević* Decision”), p. 3.

²⁵ See, e.g., *Stanišić and Simatović* Decision, para. 27(iv); *Perišić* Decision, paras. 16(iv), 27; *Popović et al.* Decision, para. 11; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-T, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts of 14 and 23 June 2006, signed on 7 September 2006, filed in French on 8 September 2006, in English on 29 November 2006, para. 18(6); *Krajišnik* Decision, para. 15(vii); *Slobodan Milošević* Decision, p. 3; *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Decision on the Prosecutor’s Motion for Judicial Notice of Adjudicated Facts, signed on 22 November 2001, filed on 23 November 2001 (“*Ntakirutimana* Decision”), para. 26; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Decision on the Prosecutor’s Motion for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, signed on 3 November 2000, filed on 6 November 2000 (“*Semanza* Decision”), para. 34.

²⁶ *Ntakirutimana* Decision, para. 26.

²⁷ *Slobodan Milošević* Decision, p. 3, fn. 2; *Semanza* Decision, para. 34.

12. In addition, the Appeals Chamber notes that paragraphs 26 and 27 of the *Bagaragaza* Sentencing Judgement which Nsengiyumva also seeks to have judicially noticed contain legal conclusions on Michel Bagaragaza's criminal responsibility and not facts. The Appeals Chamber recalls that "[j]udicial notice pursuant to Rule 94(B) is not designed for the importing of legal conclusions from past proceedings."²⁸ Therefore, the Appeals Chamber finds that paragraphs 26 and 27 of the *Bagaragaza* Sentencing Judgement cannot be subject to judicial notice under Rule 94(B) of the Rules.

D. Disposition

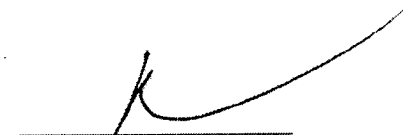
13. For the foregoing reasons, the Appeals Chamber **DISMISSES** Nsengiyumva's Motion for Judicial Notice.

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

Done this 29th day of October 2010,
At The Hague,
The Netherlands.



[Seal of the Tribunal]



Judge Patrick Robinson
Presiding Judge

²⁸ *Prosecutor v. Dragomir Milošević*, 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, para. 22.