

ICTR-98-44-T
27-4-2009
(45930-45925)

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THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA

CASE No. ICTR-98-44-T

IN TRIAL CHAMBER No. 3

Before: Judge Dennis C.M. Byron, Presiding
Judge G. Gustave Kam
Judge Vagn Joensen

Registrar: Mr. Adama Dieng

Date Filed: 27 April 2009

THE PROSECUTOR

v.

JOSEPH NZIRORERA

JUDICIAL RECORDS/ARCHIVES
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Y. J. Dieng

JOSEPH NZIRORERA'S MOTION FOR
JUDICIAL NOTICE OF ADJUDICATED FACTS:
BAGOSORA JUDGEMENT

The Office of the Prosecutor:

Mr. Don Webster
Mr. Saidou N'Dow

Defence Counsel:

Mr. Peter Robinson
Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Felix Sow for Edouard Karemera
Ms. Chantal Hounkpatin and Mr. Frederick Weyl for Mathieu Ngirumpatse

1. Joseph Nzirorera respectfully moves, pursuant to Rule 94(B), for the Trial Chamber to take judicial notice of certain adjudicated facts from the judgement in the case of *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T (18 December 2008). Those facts are enumerated in Annex A to this motion.

2. Rule 94(B) 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.

3. There are two requirements of judicial notice of adjudicated facts. (1) the facts proposed for notice under Rule 94(B) must have been adjudicated in other proceedings before the Tribunal; facts contained in judgments based on guilty pleas, or admissions voluntarily made by the Parties cannot be the subject matter of judicial notice under the above Rule; and (2) the facts must be relevant-and not just remotely connected to the current proceedings, so that judicial notice of such facts must advance judicial economy.¹

4. Both of these factors are present in this case. The facts were contested in the *Bagosora* trial, and they relate to exhibits and testimony which have been introduced during the prosecution's case against Mr. Nzirorera. Judicial notice will result in shorter direct examinations of some of the military witnesses to be called in the defence case such as Colonel Bagosora, Colonel Nsengiyumva, General Bizimungu, and General Kabiligi, and therefore will promote judicial economy.

¹ *Prosecutor v Bizimungu et al.*, No. ICTR-99-50-T, *Decision on the Prosecutor's Motion and Notice of Adjudicated Facts* (10 December 2004) at para. 11; *Prosecutor v Karemera et al.*, No. ICTR-98-44-T, *Decision on Prosecution's Motion for Judicial Notice* (9 November 2005) at para. 14

5. A request must specifically point out the paragraphs or parts of each document of which it wishes judicial notice to be taken, and refer to particular facts.² Mr. Nzirorera has done that in Annex A.

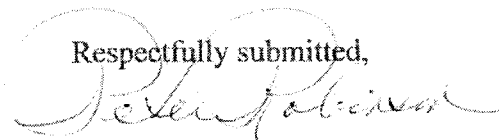
6. Because the prosecution did not appeal any part of the *Bagosora* judgement, these facts have been finally adjudicated and may be the subject of judicial notice.³

7. None of the proposed adjudicated facts go directly to the acts and conduct of the accused.⁴

8. Many of the facts are expressed in language that indicates that an allegation was not proven beyond a reasonable doubt. Such language constitutes a factual finding, just as a factual finding is constituted when a Chamber indicates that a fact has been proven beyond a reasonable doubt. To hold otherwise would be to deprive the defence of the same opportunity for judicial notice as the prosecution.

9. Therefore, because all of the requirements for taking judicial notice of adjudicated facts are met, it is respectfully requested that the adjudicated facts from the *Bagosora* judgement contained in Annex A be judicially noticed.

Respectfully submitted,



PETER ROBINSON

Lead Counsel for Joseph Nzirorera

² *Prosecutor v Bizimungu et al*, No. ICTR-99-50-T, *Decision on the Prosecution's Motion for Judicial Notice Pursuant to Rules 73,89, and 94* (2 December 2003) at para. 38

³ *Prosecutor v Perisic*, No. IT-04-81-PT, *Decision on Prosecution's Motion for Judicial Notice of Facts and Documents Relevant to the Zagreb Crime Base* (2 September 2008) at para. 28

⁴ *Prosecutor v Karemera et al*, No. ICTR-98-44-AR73(C), *Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice* (16 June 2006)

ANNEX "A"

ADJUDICATED FACTS FROM *BAGOSORA* JUDGEMENT⁵

1. The Definition of the Enemy document⁶: Neither the document itself nor its subsequent circulation to soldiers, in particular by Ntabakuze in 1992 and 1993, demonstrate a conspiracy to commit genocide.⁷
2. The establishment of the Enemy Commission on 4 December 1991 was not in itself unusual or illegitimate, in particular in view of the fact that there had been hostilities on Rwandan territory since the RPF invasion on 1 October 1990.⁸
3. When viewed in the context of the immediate aftermath of the RPF's violation of the cease fire agreement, [the arming and training of civilians] does not necessarily show an intention to use the forces to commit genocide.⁹
4. It cannot be excluded that the training of civilians and the distribution of weapons prior to 6 April 1994 were part of a larger civilian self-defence strategy in response to the fear of resumed hostilities.¹⁰
5. It was not proven beyond reasonable doubt that the maintenance of lists of suspected accomplices of the RPF or others opposed to the ruling regime, the creation, arming and training of civilian militia were directed at killing Tutsi civilians with the intention to commit genocide.¹¹
6. The creation of Rwanda's civil defence system does not in itself demonstrate intent on the part of the relevant authorities to kill civilians.¹²
7. There are...concerns with the reliability of the information provided by an informant, Jean-Pierre.¹³
8. Witnesses A and BY, who were both well placed *Interahamwe* officials, did not corroborate Jean-Pierre's information about the plan to kill Tutsis. These concerns warrant considerable caution in relying on this main aspect of Jean Pierre's information.¹⁴

⁵ *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Judgement and Sentence* (18 December 2008)

⁶ Admitted as Exhibit P198 in the *Karemera et al* trial

⁷ Para. 10

⁸ Para 201

⁹ Para 2102

¹⁰ Para 521

¹¹ Para 11

¹² Para 490

¹³ Para 12

¹⁴ Para 519

9. ...[T]he *Interahamwe* had at least one weapons cache with firearms and traditional weapons in early 1994. However, the existence of a weapons cache is not inconsistent with civil defence preparations, which would have had to be kept secret, in view of the ongoing peace process.¹⁵
10. ...Witness A and BY's suggestion that Jean-Pierre was involved in diverting weapons raises questions about his motivations and the reliability of some of the specific details of his information.¹⁶
11. The Prosecution has not proven beyond reasonable doubt that Bagosora participated in a meeting at the Umuganda stadium in Gisenyi prefecture in October 1993.¹⁷
12. The Prosecution has not proven beyond reasonable doubt that Bagosora attended a meeting at MRND headquarters in Gisenyi prefecture in February 1994.¹⁸
13. Witness XBM is the only witness to testify about Bagosora and Nsengiyumva's alleged participation in a meeting at the MRND headquarters in Gisenyi prefecture in early June... In view of the credibility concerns with Witness XBM's uncorroborated testimony, [this allegation was not proven beyond a reasonable doubt.]¹⁹
14. Nsengiyumva's alleged participation in the inauguration of RTLM's radio antenna, [as alleged by] Witness XBM [was not proven beyond a reasonable doubt].²⁰
15. The Prosecution has not proven that beyond reasonable doubt that Nsengiyumva addressed and distributed weapons to militiamen on 6 and 7 April.²¹
16. Eventually, civilians involved in the killings in Rwanda from 7 April were commonly referred to as *Interahamwe* even if they were not specifically members of the MRND youth wing.²²
17. The Chamber does not find it proven beyond reasonable doubt that Bagosora and Nsengiyumva were members of the Zero Network and operated a secret radio network.²³

¹⁵ Para 520

¹⁶ Para 520

¹⁷ Para 256

¹⁸ Para 310

¹⁹ Paras. 1686,1688

²⁰ Para 644

²¹ Para 1060

²² Para 459

²³ Para 542

18. There is no evidence that ownership of these [RTLM] shares gave the Accused any role in RTLM's operation or in the shaping of its broadcasts.²⁴
19. Witnesses A²⁵ and BY²⁶, as senior *Interahamwe* leaders, have an interest in minimising their own involvement and shifting blame to senior authorities, such as Bagosora.²⁷
20. The Prosecution has not proven beyond reasonable doubt that Bagosora met with prominent *Interahamwe* leaders at the *Hôtel des Diplomates* around 24 April 1994.²⁸
21. The Prosecution has [not] proven beyond reasonable doubt that the four Accused conspired amongst themselves or with others to commit genocide before it unfolded on 7 April 1994.²⁹

²⁴ Para 642

²⁵ Witness G in the *Karemera et al* trial

²⁶ Witness T in the *Karemera et al* trial

²⁷ Para 1544

²⁸ Para 1545

²⁹ Para 2113



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Case Name:	The Prosecutor vs. Joseph Nzirorera			Case Number: ICTR-98-44-T
Dates:	Transmitted: 27 April 2009		Document's date: 27 April 2009	
No. of Pages:	6	Original Language:	<input checked="" type="checkbox"/> English	<input type="checkbox"/> French <input type="checkbox"/> Kinyarwanda
Title of Document:	JOSEPH NZIRORERA'S MOTION FOR JUDICIAL NOTICE OF ADJUDICATED FACTS: BAGOSORA JUDGEMENT			
Classification Level:		TRIM Document Type:		
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