SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER

Before: Justice Ayoola, President
Justice A. Raja N. Fernando
Justice Renate Winter
Justice Geoffrey Robertson
Justice Gelaga King

Registrar: Robin Vincent

Date: 9 November 2004

THE PROSECUTOR

-Against-

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

Case No. SCSL-2004-14-T

MOININA FOFANA REPLY IN SUPPORT OF THE NOTICE OF APPEAL AND SUBMISSIONS AGAINST THE "DECISION ON PROSECUTION'S MOTION FOR JUDICIAL NOTICE AND ADMISSION OF EVIDENCE"

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REPLY

1. The Defence for Mr. Moinina Fofana (the "Defence") hereby files its Reply in Support of the Notice of Appeal and Submissions Against the "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (the "Decision") delivered by the Trial Chamber on 2 June 2004. A Corrigendum to the Decision was filed on 23 June 2004.

Summary of Proceedings

2. On 19 October 2004, in the "Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice," the Defence was granted leave to appeal the Trial Chamber's 2 June 2004 Decision.

3. On 28 October 2004, the Defence filed the "Moinina Fofana Notice of Appeal and Submissions Against the Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (the "Notice of Appeal").

4. On 5 November 2004, one day beyond the due date, the Prosecution filed its "Response to Fofana Notice of Appeal and Submissions Against the Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (the "Response").

5. On 8 November 2004, the Prosecution filed its "Request for an Extension of Time to File Prosecution Response to Fofana Notice of Appeal and Submissions Against the Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence" (the "Request for Extension").

SUBMISSIONS

Because the Response is Untimely, This Chamber Should Disregard the Prosecution's Submissions

6. On 5 October 2004, the President of the Special Court issued its Practice Direction for Certain Appeals Before the Special Court (the "Direction")

indicating, *inter alia*, that responses to appeals from decisions where appeal lies only with leave shall be filed "within seven days of the filing of the appeal."[1] This Direction has been in force since the time of its filing, and no subsequent direction or decision of the Court has altered its effect.

7. While the Prosecution admits that—by filing an untimely Response—it has not complied with the Directive, it has advanced no substantive reason for its oversight. The mere filing of its subsequent Request for Extension should not cure the defect.

8. Accordingly, this Chamber should disregard the Prosecution's untimely submission. However, should the court chose to consider the Response, the Defence submits the following in support of its Notice of Appeal.

The Defence Has Supplied Ample Authority to Support its Claim That the Trial Chamber Erred in Taking Judicial Notice of Items Which Cannot be Said to be Facts of Common Knowledge

9. The Prosecution's contention that the Defence fails to substantiate its arguments "with any legal authority or sound application of the criteria established under the Decision"[2] is a disingenuous characterization of the Defence's previous submissions. The Defence specifically refers this Chamber to paragraphs 15 through 22 of the Notice of Appeal where the Defence methodically applies the criteria adopted by the Trial Chamber to each disputed item. Indeed, it is the Prosecution that fails to supply the requisite legal showing, relying solely on the *Semanza* case, as though its mere mention should operate to vitiate each of the Defence's articulated and well-supported submissions.

10. The Defence hereby reiterates its contention that items A, D, H, K, L, M, and U—set forth at Annex I of the Decision—are not "facts of common knowledge" under

[1] Direction, para. 12.
[2] Response, para. 15.

Rule 94 as that term has been defined by the relevant jurisprudence. Accordingly, it was improper for the Trial Chamber to take judicial notice of these items.[3]

11. The parties agree that—pursuant to Rule 94—the Trial Chamber shall take judicial notice of "facts of common knowledge" only when such "facts" meet *each* of the following criteria:
    (a) the "facts" are relevant to the case against the Accused person;
    (b) the "facts" are not subject to reasonable dispute;
    (c) the "facts" do not include legal findings; and
    (d) the "facts" do not attest to the criminal responsibility of the Accused.

12. The Defence reasserts that the items enumerated in paragraph 10 are either subject to reasonable dispute, include implicit legal findings, or attest to the criminal responsibility of the Accused. Accordingly, judicial notice of these items was not properly taken by the Trial Chamber.

Items A, D and H

13. Contrary to the Prosecution's assertions, items A, D and H amount to implicit legal findings which directly implicate the criminal responsibility of the accused. The terms "armed conflict" and "organized armed faction" are not mere factual elements, as the Prosecution would have it. Rather, they are subtle terms of art whose establishment trigger the application of a particular legal regime. [4]

14. Whether an "armed conflict" occurred in Sierra Leone and whether the CDF was an "organized armed faction" are legal questions of great importance and

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[3] The Defence does not object to the taking of judicial notice of items B, E and W, nor does it object to the taking of judicial notice of the *existence and authenticity* of the UN Security Council Resolutions enumerated in Annex II of the Decision.

[4] *See Prosecutor v. Ntakirutimana*, ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts," 22 November 2001, where the Trial Chamber declined to take judicial notice of the application of Common Article 3 of the Geneva Conventions and the non-international character of the conflict in Rwanda, finding that such "facts" amounted to legal conclusions based on interpretation of facts.

constitute both requirements for, and elements of, crimes under Article 3 of the Statute. Additionally, "armed conflict" is a necessary pre-condition for criminal responsibility under Article 4(C) of the Statute. To take judicial notice of these items would be to take them out of contention, thus minimizing the Prosecution's burden of proof and placing the Accused at a severe disadvantage from the outset.

15. Furthermore, items A, D and H are subject to reasonable dispute in so far as they make assertions as to when, where, and to what extent particular factual events are said to have transpired, as well as to particular individual's involvement in such events. These "facts" are by no means generally known, even within this Court's jurisdiction. It must be stressed that this Court has yet to make any factual findings with respect to these crucial elements, and testimony is currently being taken of these very points.[5]

Items K, L and M

16. Again contrary to the Prosecution's assertions, items K, L and M are highly contentious and disputed points. That Moinina Fofana was the National Director of War of the CDF is a matter disputed by the Defence.

17. Additionally, not only are the scope and duties of the positions mentioned in items K, L and M subject to dispute, these items make no limitation as to time. Whether such positions ever existed and whether and when the Accused actually held them are central questions of this trial. It is the Prosecutions burden to establish these "facts," especially in light of the rather ambiguous nature of the positions. For example, to say that the position of "High Priest" falls within the realm of common knowledge of this tribunal is to seriously stretch the meaning of that concept.

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[5] Consistent with Rule 94(B), the Trial Chambers at the ICTY and ICTR took judicial notice of facts which are elements of the crimes charged only when such facts had been adduced in prior proceedings before the court. *See, e.g., Prosecutor v. Simic et al.*, Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina, 25 March 1999.

18. Furthermore, the question of whether the Accused can be held responsible as superiors or co-perpetrators in a joint criminal enterprise, for crimes allegedly committed by other CDF members is directly related to their positions within that group. Because items K, L and M suggests positions of authority and therefore attest to the criminal responsibility of the Accused, they must be proven by the Prosecution in due course.

Item U

19. Item U, by its very terms, indicates that it is a "fact" subject to reasonable dispute. Unable to state with any degree of certainty when this alleged event supposedly took place, the Prosecution places the occurrence "in or about November and/or December 1997."

20. Furthermore, this language is lifted wholesale from the indictment[6] placing it squarely outside the requirements that items judicially noticed not include legal findings or attest to the criminal responsibility of the accused. The taking of judicial notice of item U amounts to the taking of judicial notice of one of the counts in the indictment. This is clearly improper.[7]

Security Council Resolutions

21. As to the Prosecution's assertion that "facts" contained as part of Security Council Resolutions automatically amount to facts of common knowledge, the Defence submits that not only is this position unsupported by the jurisprudence, it is at odds with the inherent power of this Court as an independent finder of fact.

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[6] *See Prosecutor v. Norman, et al.*, SCSL-03-14-T, "Indictment," 4 February 2004, at paragraphs 24(f) and 25(g).

[7] *See Prosecutor v. Semanza*, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54," 3 November 2000 (hereinafter the "Semanza Decision"), at paragraph 35, where the Trial Chamber declined to take judicial notice of items that "merely recite bare legal terminology borrowed verbatim from Article 3 of the Statute of the Tribunal."

22. In reply to the Prosecution's characterization of the Defence's reading of the Semanza Decision as illogical,[8] the Defence reminds the Prosecution that this Court exists not as a creation of the Security Council but rather by virtue of a treaty between the United Nations and the Republic of Sierra Leone. To take judicial notice of the contents of Security Council Resolutions here would amount to an affront to both the judicial independence of this Court as well as the sovereignty of its host nation.

23. The Resolutions referred to in paragraphs 22-30 of Annex II include facts that are subject to reasonable dispute as well as legal findings or characterizations and are therefore improperly noticed by the Trial Chamber. For example, Resolution 1181 refers to the term "armed conflict" to describe the situation in Sierra Leone. Resolution 1346 refers to "forced recruitment" of children. As discussed previously, these are essential elements of crimes alleged in the Indictment of which the Trial Chamber must not take judicial notice.

24. The Security Council is a political body whose resolutions necessarily reflect political compromise. The contents cannot be characterised as neutral and are therefore subject to reasonable dispute. As previously noted, fact-finding remains the privileged domain of the Trial Chamber. To take judicial notice of such contents risks placing the independence of the court in jeopardy and casting its function in a political rather than judicial light.[9] For obvious reasons, courts should avoid the danger of creating a real and reasonable apprehension in the

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[8] Response, para 27 and para. 28 where the Prosecution suggests that this Court was "established by the Security Council."

[9] *See Prosecutor v. Norman, et al.*, SCSL-03-14-T, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), 13 March 2004, at paragraph 24, where the Appeals Chamber stressed its independence from the U.N. in the context of its funding arrangements negotiated by the Secretary General of the UN. In rejecting the motion, the Chamber—noting the independence of the Court from the funding body—stressed its concern that a court might improperly be influenced by such arrangements to give decisions, not on the merits of the case, but rather to please the funding body.

public consciousness that they are unable to decide cases fairly on the adjudicated facts and not on a record predetermined by a political body.[10]

25. Allowing the Trial Chamber's Decision to stand will severely prejudice the Defence because it will prevent the Accused from disproving such "facts" – facts of common knowledge cannot be disproved.[11]

CONCLUSION

26. For the reasons stated above, the Defence respectfully requests the Appeals Chamber to annul the Decision of the Trial Chamber.

COUNSEL FOR MOININA FOFANA

Michiel Pestman

[10] *Ibid*, para. 30, *citing Turney v. Ohio*, 273 U.S. 510 (1927), where the Court held that: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."

[11] *Semanza Decision*, para. 41.

INDEX OF DOCUMENTS NECESSARY FOR THE DECISION IN APPEAL

1. "Prosecution's Motion for Judicial Notice and Admission of Evidence", 2 April 2004.

2. Trial Chamber, "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 2 June 2004.

3. Defence, "Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice", 7 June 2004.

4. Trial Chamber, "Corrigendum to the Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 23 June 2004.

5. Prosecution's "Response to the Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice", 16 June 2004.

6. Defence, "Reply to the Prosecution's Response to the Joint Request of Second and Third Accused for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice", 22 June 2004.

7. Trial Chamber, "Decision on Joint Request for Leave to Appeal Against Decision on Prosecution's Motion for Judicial Notice", 19 October 2004.

8. Defence, "Notice of Appeal and Submissions Against the Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 28 October 2004.

9. Prosecution's "Response to Notice of Appeal and Submissions Against the 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 5 November 2004.

10. Prosecution's "Request for an Extension of Time to File Prosecution Response to Fofana Notice of Appeal and Submissions Against the Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence", 8 November 2004.

DEFENCE LIST OF ATTACHED AUTHORITIES

1. Prosecutor v. Ntakirutimana, ICTR-96-10-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts", 22 November 2001.

2. Prosecutor v. Simic et al., ICTY, "Decision on the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina", 25 March 1999.

3. Prosecutor v. Semanza, ICTR-97-20-T, "Decision on the Prosecutor's Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54", 3 November 2000.

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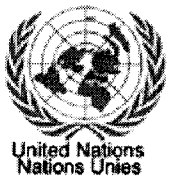

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER I

Before:
Judge Erik Møse, presiding
Judge Navanethem Pillay
Judge Andrésia Vaz

Decision of: 22 November 2001

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GERARD 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

Rule 94(B) of the Rules of Procedure and Evidence

For the Prosecutor:
Mr. Charles Adeogun-Phillips
Mr. Wallace Kapaya
Ms. Boi-Tia Stevens

For the Defence:
Mr. Ramsey Clark
Mr. Edward M. Medvene

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Navanethem Pillay, and Judge Andrésia Vaz ("the Chamber");

BEING SEIZED OF the Prosecution's motion of 26 July 2001 for judicial notice of adjudicated facts ("the motion") pursuant to Rule 94(B) of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

CONSIDERING a submission by the Defence dated 19 August 2001 in opposition to the Prosecution's motion ("the response");

TAKING ACCOUNT of the oral hearing on 10 October 2001;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 27 April 2001 the Defence responded to the Prosecution's "Request to Admit" form, which had requested admission of forty-three alleged facts. The Defence also submitted a document entitled "Explanations and Additions to Responses to Requests for Admissions".[1]

2. At the Status Conference on 27 August 2001, following receipt of the Prosecution's motion for judicial notice under Rule 94(B), the Chamber requested the parties to make a further attempt to reach agreement on the facts in question.[2] On 10 September 2001 the Defence filed a document concerning "Additional Areas of Factual Agreement".[3]

3. The common ground that emerged through this admissions' process was, in the Prosecution's view, insufficient. At the Pre-trial Conference on 17 September 2001, the Prosecution therefore stood by its original motion.[4] However, as will become evident below, some of the facts that the Prosecution seeks to have judicially noticed have already been admitted through the admissions' process.

SUBMISSIONS OF THE PARTIES

Prosecution

4. In its motion, the Prosecution requested the Trial Chamber to take judicial notice of purported adjudicated facts set out in the Annexure thereto. The Annexure contains five items, which are reproduced in full below. The Prosecution submitted that these items, "having been upheld on appeal by the Appeals Chamber in the *Kambanda*, *Serushago*, *Akayesu* and *Kayishema/Ruzindana* cases", may be considered adjudicated facts within the meaning of Rule 94(B).

5. The Prosecution submitted that its motion seeks "to ensure judicial economy and uniformity of judgements on general facts regarding the events in Rwanda".[5] It also submitted that Rule 94(B) empowers the Chamber to take judicial notice of legal conclusions reached in other proceedings, provided that those conclusions do not tend to prove the guilt of an accused person. According to the Prosecution, the Defence in this case would suffer no prejudice should the motion be granted.

6. The alleged adjudicated facts appear in the Annexure as follows:

> 1) Between 6 April and 17 July 1994, citizens native to Rwanda were identified according to the following ethnic classifications: Tutsi, Hutu and Twa.
>
> 2) On 6 April 1994, the President of the Republic of Rwanda, Juvénal Habyarimana, was killed when his plane was shot down on its approach to Kigali airport.
>
> 3) The following state of affairs prevailed in Rwanda between 1 January 1994 and 17 July 1994:
>
> > a) there were throughout Rwanda widespread or systematic attacks against human beings.

b) the widespread or systematic attacks were directed against a civilian population.

c) the widespread or systematic attacks were directed against a civilian population on the grounds of political persuasion, Tutsi ethnic identification or Tutsi racial origin.

4) Between 1 January 1994 and 17 July 1994, a total of between 500,000 and 1,000,000 people died in Rwanda as a result of the widespread violence.

5) The following state of affairs, among others, prevailed in Rwanda between 6 April 1994 and 17 July 1994:

a) There was in existence in Rwanda between 6 April-17 July 1994 a genocidal plan to exterminate the Tutsi ethnic group in Rwanda.

b) The modus operandi of the genocidal plan to exterminate the Tutsi ethnic group in Rwanda consisted of the following:

i) The preparation and execution of lists, targeting Tutsi elite, government officials, intellectuals, and other moderate Hutu sympathetic to the Arusha peace accords.

ii) The dissemination of an extremist ideology through the media designed to facilitate a campaign of incitement to exterminate the Tutsi population.

iii) The use of local government official[s] in the administration of a civil defence programme involving the wide distribution of weapons to the civilian population.

iv) The screening of identification cards carried out at roadblocks erected throughout the country following the death of the President.

v) The use of a meticulously planned programme of gathering Tutsi civilians in historically 'safe havens' or community centres such as churches, stadiums, commune offices assuring them that their safety was guaranteed and thereafter confining them to such locations following which attacks were launched upon them therein.

c) A plan of genocide was planned and executed in Rwanda between April-June 1994, in the course of which, the following acts were done with the intent to destroy wholly or partially in Rwanda the ethnic group identified as Tutsi:

i) persons perceived to be Tutsi were killed.

ii) serious bodily or mental harm was inflicted upon persons perceived to be Tutsi.

iii) conditions of life calculated to bring about the whole or

partial physical destruction of Tutsi in Rwanda were deliberately inflicted upon them.

d) A plan of genocide was planned and executed in the Prefecture of Kibuye, Republic of Rwanda, between April and June 1994, in the course of which, the following acts were done with the intent to destroy wholly or partially in Rwanda the ethnic group identified as Tutsi:

i) persons perceived to be Tutsi were killed.

ii) serious bodily or mental harm was inflicted upon persons perceived to be Tutsi.

iii) conditions of life calculated to bring about the whole or partial physical destruction of Tutsi in Rwanda were deliberately inflicted upon them.

e) Some Rwandan citizens committed murder as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.

f) Some Rwandan citizens committed extermination of human beings as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.

g) Some Rwandan citizens committed inhumane acts as part of a widespread or systematic attack against a civilian population on ethnic, political, national or racial grounds.

h) Many of the victims of the above-mentioned crimes were protected persons, within the meaning of Article 3 common to the Geneva Conventions and Additional Protocol II.

i) The Tutsi ethnic group constitutes a group protected by the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) and hence, by Article 2 of the Statute.

j) Between 1 January 1994 and 17 July 1994, the following state of affairs existed in Rwanda:

i) an armed conflict between the Rwandan Armed Forces (FAR) and the Rwandan Patriotic Front (RPF).

ii) the armed conflict was non-international in character.

k) Between 1 January 1994 and 17 July 1994, Rwanda was a state party to the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (1948) – having acceded to it on 12 February 1975.

l) Between 1 January 1994 and 17 July 1994, Rwanda was a Contracting 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 acceded to Protocols

additional thereto of 8 June 1977 on 19 November 1984.

Defence

7. In response to the Prosecution's claim that the judicial notice sought by it assists judicial economy, the Defence argued that "familiarity acquired in prior cases is a dangerous source of judicial economy if the Trial Chamber remains influenced by them".[6] It submitted that the Prosecution's motion seeks to have "virtually every fact essential to conviction, except individual participation, established by judicial notice", and argued that legal conclusions that are essential elements of the Prosecution's criminal charges are not within the ambit of matters that can be judicially noticed.[7]

8. According to the Defence, the matters allegedly adjudicated include generalisations and other allegations that are factually incorrect or questionable, or so imprecise and vague that they cannot be assessed. Some of them are only part of the subject matter and therefore misleading, or are legal conclusions involving questions of law or mixed questions of law and fact.

9. The Defence's position is that the application of Rule 94(B) as sought by the Prosecution would violate fundamental rights of the Accused, namely the presumption of innocence and the right to present a full defence in the course of a fair trial. Accordingly, the Defence requested the dismissal of the motion.

DELIBERATIONS OF THE CHAMBER

1. Facts Agreed upon through the Admissions' Process

10. By way of introduction, the Chamber notes that through the admissions' process the parties have agreed on several matters. The Defence is in agreement with the Prosecution on items 1 to 7 as set out in the "Request to Admit" form, which also cover items 1 and 2 of the Annexure to the Prosecution's motion, with some qualifications (below). Agreement has also been reached in relation to parts of item 5 of the Annexure.

Annexure Item 1 - Ethnicity

11. The Prosecution submitted that "[b]etween 6 April and 17 July 1994, citizens native to Rwanda were identified according to the following ethnic classifications: Tutsi, Hutu and Twa".

12. The Defence made a "partial" admission on this point, namely that "some people identified Tutsi, Hutu and Twa as ethnic groups before, during and after 1994".[8]

13. The Chamber finds that the parties agree that between 6 April and 17 July 1994 in Rwanda, people were identified as Tutsi, Hutu or Twa.

14. The Chamber considers that item 1 of the Annexure adequately expresses the common ground between the parties and sees no need to take judicial notice.[9]

Annexure Item 2 - Shooting Down of Airplane

15. The Prosecution's request for judicial notice included the fact that President Habyarimana was killed when his airplane was shot down on its approach to Kigali airport. The Defence accepted this formulation.[10] The fact is therefore regarded as admitted and no judicial notice is required.

Annexure Items 5 (k) and 5(l) - International Conventions binding Rwanda

16. The Defence, through the admissions' process, has already expressed its agreement with items 5 (k) and 5(l) of the Annexure to the motion, concerning the Genocide Convention and the Geneva Conventions and Protocols.[11] Since there is no dispute the Chamber is not required to take judicial notice of these issues.[12]

Matters Not Covered by the Annexure

17. The admissions' process has also clarified that the parties agree on certain matters that are not covered by the Prosecution's request for judicial notice. The Chamber finds it useful to recall these matters in the present decision.

(i) Rwandan Administrative Structures. Bisesero

18. The parties agree on aspects of the Rwandan administrative structure, such as the eleven prefectures and the subdivision of prefectures into communes, secteurs and cellules. They also agree that Ngoma secteur formed part of Gishyita commune, which together with Gisovu were two communes of Kibuye prefecture.[13] However, whereas the Prosecution stated that the area known as Bisesero "spanned" the communes of Gishyita and Gisovu in Kibuye prefecture, the Defence asserted that Bisesero lies "partially in both communes, but is a minor part of each".[14]

19. The Chamber observes that the parties agree that the Bisesero area comprises a part of Gishyita and a part of Gisovu communes. It is noted that there is also agreement on the physical situation of the Mugonero complex.[15]

(ii) Personal History of the Two Accused

20. With respect to further items that are not covered by the Prosecution's motion, the Chamber notes that the Defence and the Prosecution also agree on the following items in the "Request to Admit" form: items 19 (date of birth of Elizaphan Ntakirutimana), 23 (date of birth of Gérard Ntakirutimana), and 24 (occupation of Gérard Ntakirutimana).

21. There is also at least partial agreement between the parties in respect of items 20 (occupation of Elizaphan Ntakirutimana), and 21 (presidency of Elizaphan Ntakirutimana). Whether there is any real disagreement on these points will be clarified during the trial.

2. Contested items

22. There being no other admitted common ground between the parties, it remains for the Chamber to decide whether it should take judicial notice of items 3, 4, and 5(a) to 5(j) of the Annexure to the Prosecution's motion.

General Observations on Rule 94(B)

23. The Prosecution's motion for judicial notice was made pursuant to paragraph (B) of Rule 94 of the Rules. The Rule in full states:

Judicial Notice

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) 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.

24. Rule 94(B) was added to the ICTR's Rules at the Ninth Plenary Session on 3 November 2000. The wording is the same as Rule 94(B) of the ICTY Rules. Until now there has been only one decision by a Trial Chamber of the ICTR pursuant to Rule 94(B).[16] ICTY case law under the equivalent provision is dealt with below.

25. According to Rule 94(B) a Chamber may take judicial notice of "adjudicated facts" and of "documentary evidence from other proceedings of the Tribunal". In the present case the Prosecution's request refers only to the former. Under Rule 94(A) judicial notice shall be taken of "facts of common knowledge". It is the Chamber's view that "facts of common knowledge" and "adjudicated facts" constitute different, albeit possibly overlapping, categories: a fact of common knowledge is not necessarily an adjudicated fact, and vice versa.

26. It follows from Rule 94(B) that the facts proposed for notice must have been "adjudicated" in other proceedings of this Tribunal. The Chamber is of the view that this reference to previous findings of the ICTR does not include judgements based on guilty pleas, or admissions voluntarily made by an accused during the proceedings. Such instances, which do not call for the same scrutiny of facts by a Chamber as in a trial situation where the Prosecutor has the usual burden of proof, are not proper sources of judicial notice.[17] Consequently, the Chamber will not take account of facts allegedly adjudicated in the *Kambanda* and the *Serushago* judgements, as urged by the Prosecution. As for the *Musema* judgement, the Chamber will not take judicial notice of admissions by the accused during the trial. Moreover, it notes that in a decision in the *Kupreskic* case, the Appeals Chamber observed that only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed "adjudicated facts" within the meaning of Rule 94(B).[18]

27. Rule 94 (B) also requires that the proposed adjudicated facts must "relate" to matters at issue in the current proceedings. This means that matters which have only an indirect or remote bearing on the present case should not be the subject of judicial notice. That would not serve the main purpose of such notice, which is to ensure judicial economy (see para. 28).

28. If the above-mentioned conditions are fulfilled, the Chamber "may" take judicial notice. Unlike Rule 94(A), litra (B) therefore is discretionary. It is for the Chamber to decide whether justice is best served by its taking judicial notice of adjudicated facts. In this connection, the Chamber recalls that the doctrine of judicial notice serves two purposes, judicial economy and consistency of case law. These aims must be balanced against the fundamental right of an accused to a fair trial. Reference is made to Article 20 of the Statute. The Chamber agrees with the *Simic* decision, in which an ICTY Trial Chamber, in relation to a motion pursuant to Rules 94(A) and (B), stated that "a balance should be struck between judicial economy and the right of the accused to a fair trial".[19] Similar statements have been made by ICTR and ICTY Chambers under Rule 94 (A). The Chamber endorses previous case law of the ICTR which has emphasised that the discretion to take judicial notice must not be exercised in a way that may result in prejudice to the accused.[20]

29. In striking this balance, the Chamber will avoid taking judicial notice of facts that are the subject of reasonable dispute.[21] Such matters should not be settled by judicial notice, but should be determined on the merits after the parties have had the opportunity to submit evidence and arguments.

30. Moreover, the Chamber is not inclined to take judicial notice of legal characterisations or legal conclusions based on interpretation of facts. This is consistent with the position adopted by other Trial Chambers in decisions on judicial notice, such as the *Simic* and the *Sikirica* decisions.[22] The Chamber's apprehension in relation to judicial notice of such matters would be alleviated in the event of clear guidance from the Appeals Chamber.

31. In its assessment the Chamber will also consider whether taking judicial notice would

significantly assist judicial economy. The Chamber observes that in the present case, the Prosecution's case rested after 27 trial days. The witnesses for the Defence will be heard in the period from 14 January to 15 February 2002. Consequently, at this stage of the proceedings, the Chamber is not inclined to view judicial notice as significantly influencing judicial economy.

Annexure Item 3 - Widespread or Systematic Attacks

32. The Prosecutor has requested the Chamber to take judicial notice of a state of affairs prevailing in Rwanda between 1 January 1994 and 17 July 1994, namely widespread or systematic attacks directed against a civilian population on the grounds of political persuasion, Tutsi ethnic identification or Tutsi racial origin.

33. The Chamber accepts that judgements of this Tribunal have established that from April 1994, in Rwanda, attacks were suffered by civilians on the grounds of their perceived political affiliation or ethnic identification. However, the Prosecution's request is far-reaching and relates to the situation "throughout Rwanda". The Tribunal's findings so far do not relate to all prefectures of the country, but only certain regions. It is true that some judgements contain statements about the general situation in Rwanda, but they are formulated in a different way than the Prosecution's present request. For instance, in the *Akayesu* judgement the Trial Chamber stated that "... no one can reasonably refute the fact that *widespread killings* were perpetrated throughout Rwanda in 1994" (para. 114; italics added).[23]

34. More relevant is the Prosecution's reference to the Trial Chamber's conclusion in the *Akayesu* judgement that "a widespread and systematic attack began in April 1994 in Rwanda, targeting the civilian Tutsi population" (para. 173). However, the Prosecution's present request alleges that the attacks commenced on 1 January 1994 and not in April of that year.

35. Even if previous case law gives some support to the view that the there was a "widespread or systematic attack" against a "civilian population", the Chamber prefers in the circumstances of the present case to hear evidence and arguments on the issue, rather than to take judicial notice.

36. Consequently, the Chamber does not take judicial notice of item 3 of the Annexure, as formulated by the Prosecution.

Annexure Item 4 - Total Number of Persons Killed

37. The Prosecution is seeking judicial notice for the alleged adjudicated fact that "[b]etween 1 January 1994 and 17 July 1994, a total of between 500,000 and 1,000,000 people died in Rwanda as a result of widespread violence". The main problem with this formulation is that the numbers are mere estimates. Paragraph 111 of the *Akayesu* judgement, relied on by the Prosecution, concludes a brief introductory chapter on the "Historical Context" of the alleged events. It states that "[t]he estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more". No source is given for this estimate. The formulation even indicates that the number may be higher than one million. Factual findings are made in later chapters of the *Akayesu* judgement. Clearly, the cited paragraph does not state an adjudicated fact.

38. The Prosecutor's other reference is paragraph 291 of the *Kayishema and Ruzindana* judgement, of which the first sentence reads: "Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million ...". The Chamber notes that the estimate in the lowest part of the range is different from that in the *Akayesu* judgement. Again, this cannot be regarded as stating an adjudicated fact.[24]

39. For these reasons the Chamber will not take judicial notice of item 4.

Annexure Items 5(a)-5(d) - Existence and Execution of a Genocidal Plan

40. These items represent as adjudicated fact that there was, in Rwanda, during the relevant time, a "genocidal plan" to exterminate Tutsi; that among other methods used, the plan was executed by assembling Tutsi in "safe havens", such as community centres or churches, and killing them there; and that, in consequence, a genocide occurred in Rwanda and, in particular, in Kibuye Prefecture.

41. The Prosecution has referred the Chamber to the *Kambanda* sentencing judgement. As mentioned above, this proceeded from a guilty plea and not from findings of fact proven beyond reasonable doubt at trial. Consequently, it cannot be considered a source of adjudicated facts (see para. 26, above). It should be noted, nonetheless, that Kambanda did not admit to a "genocidal plan", and that there is no explicit finding by the Trial Chamber in that case that he participated in a planned genocide.[25] The Chamber sees no need to address the Prosecution's reference to *Serushago*, another guilty plea. As for the Prosecution's reference to the *Musema* case, Alfred Musema admitted that there had been a genocide, so the Trial Chamber made no finding on this point.[26]

42. Turning to other judgements, the Chamber notes that the paragraphs of the *Rutaganda* judgement cited by the Prosecution do not contain any findings by the Trial Chamber of a planned genocide.[27] In any case, that judgement is still subject to appeal and therefore not *res judicata.* Pertinent statements are to be found only in the *Akayesu* judgement and in the *Kayishema and Ruzindana* judgement. In the former it was found that "genocide was indeed committed in Rwanda in 1994 and more particularly in Taba" (in Gitarama Prefecture).[28] In *Kayishema and Ruzindana* the Chamber found that "a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994";[29] and that "in Kibuye Prefecture, the plan of genocide was implemented by the public officials".[30]

43. In the Chamber's opinion, the cited conclusions are inferences from adjudicated facts, that is inferences from findings relating to charges of genocide brought against the three accused, in those two cases, as individuals. In its request, the Prosecution is, by contrast, inviting the Chamber to take notice of a "genocidal plan", its modus operandi and execution. The Chamber's view is that the case law of the Tribunal is still limited in relation to these matters.

44. Second, and of greatest concern to the Chamber, is the possibility that judicial notice of the alleged facts at 5(a) to 5(d) of the Annexure may compromise the Accused's defence. Counsel for the Accused have indicated that they dispute the Prosecution's theory about a genocide, or about a single genocide, having occurred.[31] The Chamber is mindful of the risk that a prior finding as to the context of the alleged crimes poses to the Accused's right to a fair trial, who will then inevitably have their actions examined against that context. The Chamber recalls the following statements from *Akayesu*, which were repeated in *Rutaganda* and in *Musema*:

> ... in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged *from the general context of the perpetration of other culpable acts systematically directed against that same group*, whether these acts were committed by the same offender or by others. [32]

45. Without necessarily adopting this statement, it is evident to the Chamber that to accede to the Prosecution's request may be seen as detrimental to the Defence. Moreover, to the extent the request relates to a genocidal plan in Rwanda as a whole, it is difficult to see how this would assist the assessment in the present case. The same applies to the preparation of lists targeting the Tutsi elite, the civil defence programme and the screening of identity cards. As for the alleged genocidal plan in Kibuye, counsel for the Prosecution stressed, during the oral hearing, the need to see the present case "in a broad perspective"; "as one, an overall picture, just executed in different locations".[33] More specifically, reference was made to the events in Mubuga Parish, the Mugonero complex, Home St.

Jean Parish and the Kibuye stadium, from 15 to 18 April 1994.[34] However, such issues are matters for factual determination after a full trial on the merits and should not be subject to judicial notice.

46. The Chamber therefore declines to take judicial notice of items 5(a) to 5(d).

Annexure Items 5(e)-5(g) - Commission of Crimes against Humanity

47. The Chamber does not see how the three general statements that "some Rwandan citizens", during the April-to-July 1994 period, committed murder, extermination, or other inhumane acts (as crimes against humanity), are related to the present case. If items 5(e) to 5(g) are not related to the present case, the Chamber does not have to consider whether they constitute adjudicated facts.

48. If the Prosecution is attempting to have judicial notice taken of the alleged "widespread or systematic" nature of attacks in Rwanda, the Chamber refers to its consideration of item 3, above.

Annexure Item 5(h) - Protection by Common Article 3

49. By this item the Prosecution wishes to have judicial notice taken of the alleged adjudicated fact that persons in Rwanda, and by implication in Kibuye Prefecture, were, at the relevant time, protected by Common Article 3 of the Geneva Conventions and by Additional Protocol II. The Chamber is doubtful that it would assist judicial economy to take judicial notice of this item at the present stage of the proceedings. It also observes that the proposed formulation involves the legal interpretation of facts. To date the Tribunal has not handed down a conviction for war crimes pursuant to Article 4 of the Statute, and this area has received limited scrutiny by the Appeals Chamber of the ICTR.

Annexure Item 5(i) - "Tutsi Ethnic Group" Protected by Genocide Convention

50. The Prosecution is requesting the Chamber to take judicial notice of the alleged adjudicated fact that "[t]he Tutsi ethnic group constitutes a group protected by the Genocide Convention ... and hence, by Article 2 of the Statute". The Chamber recalls that the Prosecution has also requested (Item 1 of the Annexure) that such notice be taken of the fact that citizens native to Rwanda were identified according to "the following ethnic classifications: Tutsi, Hutu and Twa", and that there is adequate common ground between the parties in this respect (see paras. 11-14 above). In the context of the present case, the Chamber considers this to be sufficient. The Prosecution is, of course, free to refer to previous case law as support for its request that the Tutsi are an "ethnic group" within the meaning of the Genocide Convention and the Statute.

Annexure Item 5(j) - Non-international Armed Conflict between FAR and RPF

51. The Chamber declines to take judicial notice of this item. As noted above (para. 49), the Chamber is not convinced that the taking of judicial notice of this issue will assist judicial economy in the present case. Moreover, the Tribunal has made only limited findings on the subject of war crimes.

Final Remarks

52. The Chamber's deliberations should not be taken to exclude the possibility that certain facts alleged in the Annexure to the Prosecution's motion may be judicially noticed in a different context.

53. Moreover, nothing in these deliberations prevents the Prosecution from drawing support for its arguments in the present case from findings made in judgements of the Tribunal. That is a different matter entirely.

54. Finally, the Chamber has not seen it as its task to reformulate the requests made by the Prosecution.

FOR THESE REASONS THE CHAMBER:

DENIES the motion.

Arusha, 22 November 2001

Erik Møse	Navanethem Pillay	Andrésia Vaz
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

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[1] Hereinafter referred to as the Defence's First Set of Admissions.

[2] Transcripts of 27 August 2001 pp. 25-26.

[3] Hereinafter referred to as the Defence's Second Set of Admissions.

[4] Transcripts of 17 September 2001 p. 100.

[5] Motion para. 5. See also transcripts of 10 October 2001 p. 2.

[6] Response p. 14.

[7] Response pp. 3 and 14, respectively.

[8] Defence's First Set of Admissions, comment on item 6.

[9] In *The Prosecutor v. Laurent Semanza*, Decision of 3 November 2000 on the Prosecutor's motion for judicial notice and presumptions of facts pursuant to Rules 94 and 54 (Case No. ICTR-97-20-I), Trial Chamber III took judicial notice of facts of common knowledge under then Rule 94, now Rule 94 (A). One fact of common knowledge was that "[b]etween 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa" (Annex A item 1). This decision is hereinafter referred to as the First *Semanza* Decision.

[10] Defence's Second Set of Admissions, para. 2.

[11] Ibid., para. 6.

[12] Rwanda's adherence to these conventions was considered common knowledge in the First *Semanza* Decision; see Annex A items 4 and 5.

[13] Request to Admit, items 1 to 4.

[14] Defence's Second Set of Admissions, para. 1.

[15] Request to Admit, item 5.

[16] *The Prosecutor v. Laurent Semanza*, Decision of 15 March 2001 on the Prosecutor's further motion for judicial notice pursuant to Rules 94 and 54, hereinafter referred to as the Second *Semanza* Decision. The Chamber denied the

motion. Paras. 33-40 of the First *Semanza* Decision contain references to previous case law on judicial notice under Rule 94, now 94 (A).

[17] See, similarly, First *Semanza* Decision para. 34, in relation to present Rule 94 (A).

[18] *Prosecutor v. Zoran Kupreskic*, decision of 8 May 2001 para. 6. In relation to judgements of the ICTR it should be noted that the Appeals Chamber rendered its decision in the *Musema* case on 16 November 2001.

[19] See, *Prosecutor v. Simic et al.*, Decision of 25 March 1999 on the Pre-trial motion by the Prosecution requesting the Trial Chamber to take judicial notice of the international character of the conflict in Bosnia-Herzegovina.

[20] See, for instance, Second *Semanza* Decision para. 10.

[21] In support of this position, see *Prosecutor v. Sikirica et al.*, Decision of 27 September 2000 on the Prosecution motion for judicial notice of adjudicated facts: "Considering that the Trial Chamber can only take judicial notice of facts which are not the subject of reasonable dispute and ... that it is appropriate for the Trial Chamber to take judicial notice of facts which are agreed between the parties ...".

[22] See *Simic* (above, n. 19): "Considering ... that Rule 94 is intended to cover facts and not legal consequences inferred from them, [and] that the Trial Chamber can only take judicial notice of factual findings but not of a legal characterisation as such ..."; and *Sikirica* (above, n. 21): "Considering that ... facts involving interpretation or legal characterisation of facts are not capable of admission under Rule 94 ...". See also First *Semanza* Decision para. 35, in relation to present Rule 94(A): "... the Chamber cannot take judicial notice of matters, which are unadorned legal conclusions".

[23] Other references to the *Akayesu* judgement (TC) provided by the Prosecution also deal with different aspects (paras. 118-121, 126 and 128). The same applies to the *Kayishema and Ruzindana* judgement (TC, paras. 54, 275, 289 and 291). Paras. 358 and 360 of the *Musema* judgement (TC) were based on admissions by the accused.

[24] Para. 291 in the *Kayishema and Ruzindana* judgement referred to Prosecution Exhibit 331B, i.e. the report of 17 January 1995 of the Special Rapporteur of the Commission of Human Rights. The formulation in that report is also an estimate ("... the loss of human life has been extremely heavy, possibly reaching 1 million"; see p. 5 para. 8 of that report).

[25] See *Kambanda* judgement paras. 39 and 44.

[26] See *Musema* judgement (TC) para. 360.

[27] *Rutaganda* judgment (TC) paras. 359-361 and 369-372.

[28] *Akayesu* judgement (TC) para. 129.

[29] *Kayishema and Ruzindana* judgement (TC) para. 291.

[30] Ibid. para. 312.

[31] Transcripts of 10 October 2001 pp. 28-35. On the Prosecution's theory of a single, planned genocide see pp. 2, 5-6, 8-10, and 19-20.

[32] *Akayesu* para. 523, emphasis added; *Rutaganda* judgement (TC) para. 61 and *Musema* judgement (TC) para. 166; see also *Kayishema and Ruzindana* (TC) para. 93.

[33] Transcripts of 10 October 2001 pp. 19-20.

[34] Ibid. pp. 8-9.

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
25 March 1999

PROSECUTOR

v.

BLAGOJE SIMIC
MILAN SIMIC
MIROSLAV TADIC
STEVAN TODOROVIC
SIMO ZARIC

DECISION ON THE PRE-TRIAL MOTION BY THE PROSECUTION REQUESTING THE TRIAL CHAMBER TO TAKE JUDICIAL NOTICE OF THE INTERNATIONAL CHARACTER OF THE CONFLICT IN BOSNIA-HERZEGOVINA

The Office of the Prosecutor

Ms. Anne-Birgitte Haslund
Ms. Mary MacFadyen
Ms. Nancy Paterson

Counsel for the accused

Mr. Branimir Avramovic for Milan Simic
Mr. IgorPantelic, for Miroslav Tadic
Mr. Deyan Ranko Brashich, for Stevan Todorovic
Mr. Borislav Pisarevic, for Simo Zaric

THIS TRIAL CHAMBER of 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 ("the International Tribunal"),

BEING SEISED of the Pre-Trial Motion by the Prosecution Requesting the Trial Chamber to Take Judicial Notice of the International Character of the Conflict in Bosnia-Herzegovina ("the Motion"), filed by the Office of the Prosecutor ("the Prosecution") on 16 December 1998, and the Defence Response to the Motion filed by counsel for the accused Simi}, Tadi} and Zari} on 3 February 1999,

NOTING the written submissions of the parties and their oral arguments heard on 23 February 1999,

NOTING that, pursuant to Rules 73 and 94 of the Rules of Procedure and Evidence ("the Rules"), the Prosecution requests the Trial Chamber to take judicial notice of the international character of the armed conflict in Bosnia and Herzegovina ("BiH") at least for the period starting on 6 March 1992 or at the latest by 6 April 1992, and ending at the earliest on 19 May 1992 ("international character of the conflict").

NOTING that the Prosecution submits that the international nature of the conflict is based on the facts that BiH declared its independence on 6 March 1992, which was internationally recognised in April 1992, and that at that time there was an armed conflict taking place on the BiH territory, in which the National Yugoslav Army (JNA), and the armed forces of another state, the Socialist Federal Republic of Yugoslavia, was involved,

NOTING that the Prosecution bases its request alternatively on Rule 94(A) (facts of common knowledge) or Rule 94(B) (adjudicated facts or documentary evidence from other proceedings of the Tribunal),

NOTING FURTHER that as to Rule 94(A), the Prosecution submits that "because of the unanimous jurisprudence" of the Tribunal, the international character of the conflict is a fact of common knowledge or "at the very least" a fact of common knowledge "within this Tribunal", and that the international character of the conflict also is a historical fact of common knowledge,

NOTING that as to Rule 94(B), the Prosecution argues that the international character of the conflict is an adjudicated fact that was already determined in other proceedings before the Tribunal, that the judgements in the *Tadic*[1] and *Celebici*[2] cases addressing this issue fall within the scope of Rule 94 (B), that if the issue at hand in both cases is not under appeal, it can be considered as final and thus be considered as an adjudicated fact,

NOTING that the Defence opposes the Motion and submits, based on a review of international and national practice, that a Trial Chamber may only take judicial notice of notorious facts which cannot be reasonably disputed, "or capable of immediate and accurate demonstration by resorting to readily accessible sources of indispensable accuracy", and that the issue of judicial notice should be approached in criminal proceedings "with great caution and care",

NOTING that the Defence contends that the character of the conflict in BiH is a controversial issue,

NOTING FURTHER that the Defence contends that the *Tadi}* and *Celebici* judgements cannot be considered as adjudicated facts under Rule 94(B) as the issue of the international character of the conflict is, or likely to be, under appeal in both judgements,

NOTING that the Defence further submits that judicial notice of the international character of the conflict would jeopardise the rights of the accused under Article 21 of the Tribunal's Statute, in particular their right to a fair trial and right to examine or have examined the evidence presented by the Prosecutor, and that the accused have a right to an independent determination of the facts at issue,

NOTING that the Defence argues that the characterisation of the conflict is an issue of interpretation of historical facts which requires *inter partes* discussion, and that a Trial Chamber may not take judicial notice of legal conclusions by other Trial Chambers based on their interpretation of facts,

NOTING that during the hearing the Defence also made an oral offer of proof which was rejected by the Trial Chamber,

CONSIDERING that Sub-Rule 94(A) of the Rules provides that a Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof, and that pursuant to Sub-Rule 94(B), a Trial Chamber, after hearing the parties, at the request of a party or *proprio motu*, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings,

CONSIDERING that the issue is whether the Trial Chamber may take judicial notice of the international character of the conflict, i.e. whether the character of the conflict may be considered as either a fact of common knowledge, or an adjudicated fact for the purpose of judicial notice under Rule 94, and that this issue does not warrant, at this stage, examining the evidence on the character of the conflict,

CONSIDERING that the purpose of judicial notice under Rule 94 is judicial economy, that Rule 94 should be interpreted as covering facts not subject to reasonable dispute, and that a balance should be struck between judicial economy and the right of the accused to a fair trial,

CONSIDERING that the request is aimed at permitting the application of the counts of the indictment based on the grave breaches regime of the Geneva Convention (Article 2 of the Statute), as, according to the Tribunal's jurisprudence, the Prosecution must *inter alia* prove the existence of an international armed conflict for this purpose,

CONSIDERING as to the issue of the characterisation of the conflict, that the Appeals Chamber in its Jurisdiction Decision in the *Tadi}* case held that different conflicts of different nature took place in the former Yugoslavia and that it would be for each Trial Chamber, depending on the circumstances of each case, to make its own determination on the nature of the armed conflict upon the specific evidence presented to it,

CONSIDERING that along the lines of the Tribunal's jurisprudence on the binding character of other Trial Chambers' finding as to the international character of the conflict, these findings have no binding force except between the parties in respect of a particular case ("effet relatif de la chose jugée" in French), that the circumstances of each case are different, and that as regards the controversial issue of the nature of the conflict, which involve an interpretation of facts, both parties should be able to present arguments and evidence on them,

CONSIDERING FURTHER that Rule 94 is intended to cover facts and not legal consequences inferred from them, that the Trial Chamber can only take judicial notice of factual findings but not of a legal characterisation as such,

CONSIDERING however that (1) BiH's proclamation of independence on 6 March 1992, and (2) its recognition by the European Community on 6 April 1992 and by the United States on 7 April 1992, are facts of common knowledge under Sub-Rule 94(A) of which the Trial Chamber will *proprio motu* take judicial notice[3],

PURSUANT TO Rules 73 and 94 of the Rules of the International Tribunal,

HEREBY DISMISSES THE MOTION as to judicial notice of the international character of the conflict in Bosnia and Herzegovina, and *proprio motu* takes judicial notice of the following facts

1. Bosnia and Herzegovina proclaimed its independence from the Socialist Federal Republic of Yugoslavia on 6 March 1992;
2. The independence of Bosnia and Herzegovina as a State was recognised by the European Community on 6 April 1992 and by the United States on 7 April 1992.

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

_____

Richard May
Presiding Judge

Dated this twenty-fifth day of March 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

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1. *Prosecutor v. Dusko Tadic*, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997 ("*Tadic* judgment").
2. *Prosecutor v. Zejnil Delalic et. al.*, Case No. IT-96-21-T, 16 November 1998 ("*Celebici* judgment")
3. See for instance Order on Prosecution Request for Judicial Notice, *The Prosecutor v. Milan Kovacevic*, Case no. IT-97-24-PT, 12 May 1998.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

TRIAL CHAMBER III

Original: English

Before:
Judge Lloyd George Williams, Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Agwu U. Okali

Date: 3 November 2000

THE PROSECUTOR
v.
LAURENT SEMANZA
Case No. ICTR-97-20-I

DECISION ON THE PROSECUTOR'S MOTION FOR JUDICIAL NOTICE AND PRESUMPTIONS OF FACTS PURSUANT TO RULES 94 AND 54

The Office of the Prosecutor:
Chile Eboe-Osuji
Frédéric Ossogo
Honoré Tougouri
Patricia Wildermuth
Holo Makwaia

Defence Counsel for the Accused:
Charles Achaleke Taku

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber III, composed of Judge Lloyd George Williams, Presiding, Judge Yakov Ostrovsky and Judge Pavel Dolenc (the "Chamber");

BEING SEIZED of the Prosecutor's Notice of Motion for Judicial Notice and Presumptions of Facts Pursuant to Rule 94 and 54 of the Rules of Procedure and Evidence, filed on 19 January 1999 (the "Motion").

CONSIDERING the Prosecutor's Memorial in Support of Prosecutor's Motion for Judicial Notice and Presumptions of Facts together with Appendix A and Appendix B (the "Memorial")[1];

CONSIDERING the Prosecutor's Book of Authorities in the Prosecution's Motion for Judicial

Notice (Rules 54 and 73), filed on 17 July 2000 (the "Prosecutor's Book of Authorities");

CONSIDERING the Prosecutor's Revised Memorial in the Prosecutor's Motion for Judicial Notice (Rule 54 and 73) filed on 14 July 2000 (the "Revised Memorial");

CONSIDERING Appendix A and Appendix B to the Revised Memorial;

CONSIDERING the Defence Notice to File Further Written Replies to Prosecutor's Response in the Defence Motion for Dismissal of the Entire Proceeding Filed on the 30 June 2000 and 14 July 2000 and Prosecutor's Revised Memorial in the Prosecutor's Motion for Judicial Notice (Rules 54 and 73), filed on 17 August 2000 (the "Defence Notice");

CONSIDERING the Preliminary Response of the Defence to the Prosecutor's Revised Memorial in the Prosecutor's Motion for Judicial Notice, filed on 1 September 2000 (the "Preliminary Response"); and

CONSIDERING the Preliminary Reply to Prosecutor's Supplementary Appendixes to Motion for Judicial Notice Filed on 15\8\2000, filed on 5 September 2000 (the "Defence Preliminary Reply").

NOW CONSIDERS the matter pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the "Rules") without a hearing, solely on the basis of the written submissions of the parties.

I

THE PARTIES' SUBMISSIONS

A. The Prosecutor's Submissions

1. The Prosecutor submits that she served on the Defence a Request to Admit Facts and Documents, including some facts and documents of a general nature relating to the general events in Rwanda at material times, with the aim of conducting a trial without undue delay. The Defence has not admitted any facts or documents, as requested.

2. By the instant motion, the Prosecutor seeks a declaration by the Tribunal taking judicial notice of factual matters described in Appendix A and of documents listed in Appendix B to the Motion. In the alternative, the Prosecutor urges the Chamber to accept the presumptions of fact as they are stated in Appendix A and in the documents listed in Appendix B. The Prosecutor requests that the Chamber upon taking judicial notice of the facts in Appendices A and B accept such facts as established in the trial of the Accused.

3. The Prosecutor cautions, however, that she does not request that the Chamber take judicial notice of the ultimate facts at issue in this case with regard to the specific conduct of the Accused and his alleged responsibility for committing the crimes charged in the indictment. The Prosecutor insists judicial notice notwithstanding, the burden of adducing formal proofs of the facts supporting the alleged guilt of the Accused remains with the Prosecution.

4. In Appendix A to the Motion, the Prosecutor prays that this Chamber takes judicial notice of a panoply of facts, which collectively may fairly be characterised as socio-political historical background facts relating to the existence of "genocide" "armed conflict" and "widespread systematic attacks" against the Tutsi civilian population in Rwanda during the months of April through July, 1994. By submitting Appendix B to the Motion, the Prosecutor argues for admission into evidence by judicial notice of certain documents that comprise legislative and administrative regulations and governmental investigative reports of the genocide in Rwanda, including among others, United Nations reports.

5. The Prosecutor's request for judicial notice rests on the following principal legal grounds. Notably, the Prosecutor submits that the facts in Appendix A belong to the category of facts of common knowledge, which, under Rule 94, are entitled to judicial notice. Pursuing her thesis, the Prosecutor maintains that the Chamber may equally take judicial notice of the facts pursuant to Rule 89. Moreover, the Prosecutor cites Rules 54 and 89 as providing support for the Chamber to take judicial notice of, or accept presumptions of facts contained in Appendices A and B. More specifically, citing Rule 94, the Prosecution contends that the factual matters delineated in Appendix A belong to the category of facts of "common knowledge around the world, facts which are not subject to reasonable dispute, matters which are within the knowledge of the Tribunal, or matters which are self-evident in the circumstances." Alternatively, the Prosecutor argues, without the benefit of Statutory authority or support in the Rules, that the facts in Appendix A qualify to be treated as presumptions because the facts are the logical consequences of basic established facts.

6. With respect to the documents listed in Appendix B to the Revised Memorial, the Prosecutor contends that the documents eminently qualify for judicial notice inasmuch as they are "public documents," created by public officials acting in pursuance of their designated public functions. Further, the documents in Appendix B, the Prosecutor argues, are the proper subject of judicial notice because the facts contained therein have been established in previous proceedings before the Tribunal either through judicial notice or by the formal introduction of positive proof. In this regard, the Prosecutor notes that the Tribunal took judicial notice of United Nations documents previously in, among other cases, *Prosecutor v. Akayesu*, ICTR-95-1-T, at ¶¶ 157, 165 and 627 (Judgement) (2 September 1998). Among a myriad of other legal arguments and authority, the Prosecutor also invokes Article 21 of the Charter of the International Military Tribunal at Nuremberg as additional authority to take judicial notice in the instant case.

7. Finally, the Prosecutor maintains that taking judicial notice or accepting the presumptions of fact it urges will not encroach upon the ultimate question of the guilt or innocence of the Accused in this case. The Prosecutor contends that the taking of judicial notice or the acceptance of factual presumptions she advocates will significantly reduce the length of the trial of this matter without visiting unfair prejudice upon the rights of the Accused to a fair trial.

B. The Defence's Submissions in Opposition To the Motion

8. In its Preliminary Response to the Motion, the Defence submits the Defence Notice in which, among other things, he asks this Chamber to grant him additional time to file a written response to the Motion on the grounds that the Motion was filed while lead counsel for the Defence, Mr. Taku, was on mission in Europe pursuant to a mission order. Additional time is necessary, argues Mr. Taku, because filing a written response would entail extensive references to several of the transcripts of this Chamber and decisions.[2]

9. In the Preliminary Response, the Defence advances the following arguments. First, the Defence contends that the Chamber should deny the Motion because it was brought pursuant to the authority of Rules 54 and 73, Rules which merely provide authority for directing the parties to make admissions of fact, and therefore do not allow for the judicial notice and presumptions of facts the Prosecution seeks in the instant Motion. In this regard, the Defence claims that the Chamber should not permit the Prosecutor to rely upon the authority of Rules 94 and 89(b) as it does in the table of contents to the Revised Memorial.

10. The Defence next expostulates that the Motion should be denied because it is premature. Thus, even if it were proper for the Chamber to take judicial notice or recognize presumptions of fact, the proper time for such an order would be during the course of the trial of this matter but, not before. In addition, the Defence argues that the Motion should be dismissed because it suffers from certain internal inconsistencies, namely the point made in Part III of the table of contents is at odds with points 12 and 15 of the Prosecutor's submissions because the Defence has consistently refused to

make admission of fact in this matter since such was never ordered by the Chamber. Similarly, the Defence submits that the Motion must fail because it contradicts the not-guilty plea entered by the Accused and is therefore an impermissible attempt to relieve the Prosecutor of the burden of proof on contested issues of fact which rest exclusively upon the Prosecutor throughout the trial of this matter. More significantly, the Defence claims that granting the Motion at this juncture would constitute a violation of Article 20 of the Statute and result in gross unfairness and prejudice to the Defendant by rendering nugatory the full scope of the testimony of several witnesses appearing on the Prosecutor's Supplementary List of Witnesses, filed on 19 April 2000. Consequently, argues the Defence, the request for judicial notice is premature and should be allowed only when and if such witnesses are called to testify under oath at trial.

11. The Defence further submits that the Chamber should dismiss the Motion because it calls upon the Chamber to take judicial notice of facts that are contrary to the Statute of the Tribunal and to abdicate its role as an impartial arbiter of the facts. As an example of this alleged contradiction, the Defence notes that the Statute never sanctioned the prosecution of Hutus for committing genocide and other violations against Tutsis as insinuated in Point 4 of the Revised Memorial. In effect, claims the Defence, taking judicial notice of such facts would be tantamount to foreclosing *in futuro* the indictment of any Tutsi or non-Rwandans for committing the very same offences against Hutus, Tutsis, Twas or any other protected persons. In further support of this argument, the Defence claims that judicial notice does not lie because the Defence possesses documents evidencing that the RPF and mercenaries employed by them committed genocide and other serious violations against Rwandan citizens during the temporal jurisdiction of this Tribunal. As evidence of such contradictory facts, the Defence submits copies of certain excerpts from books, pamphlets and United Nations reports.

12. The Defence next attempts to lay waste to the Prosecution's principal argument in support of the Motion by stating that the facts for which judicial notice is sought or the recognition of a presumption are not of such an indisputable character as would qualify them for admission through judicial notice. For example, the Defence argues that the Chamber should not take judicial notice of the fact placing the death toll at between 500,000 and 1,000,000. Similarly, the facts relating to the general political circumstance extant in Rwanda do not belong to the genus of indisputable facts. In the same vein, but perhaps more fundamentally, the Defence is vehement in his argument that the Chamber cannot take judicial notice that certain elements of Hutus committed acts of genocide targeting Tutsis, as alleged in Point 4 of the Revised Memorial. Indeed, claims the Defence, the United Nations resolution and other documents cited by the Prosecutor mandates that all who are believed to have committed the subject offences and violations be tried by the Tribunal, rather than only "certain elements of the Hutu ethnic group," as urged by the Prosecutor.

13. The Defence contends that the Prosecutor's Motion is without legal authority. It is neither supported by the Statute of the Tribunal nor by the previous decisions rendered by the Tribunal. Significantly, the Defence maintains that the fact that matters may have been judicially noticed in other cases does not authorize the same result in the instant Motion since those previous decisions are limited to their particular underlying circumstances. Moreover, the Defence underscores that the Prosecutor has failed to cite to any specific *ratio decidendi* in the Tribunal's previous cases in which judicial notice was taken as would authorize the same result to obtain under the circumstances in this case. In any event, argues the Defence, the Chamber should not predicate judicial notice in the instant matter upon the precedents set in previous decisions since those matters are still being reviewed by the Appeals Chamber and are therefore inconclusive.

14. When countering the Prosecutor's arguments for the admission of the documents listed in Appendix B, the Defence submits that the documents likewise lack the requisite indisputability as would entitle the Prosecutor to admit them through judicial notice. Moreover, states the Defence, the documents contain statements on political issues that are beyond the parameters of the Tribunal's mandate.

15. Finally, the Defence cautions the Chamber to avoid confounding, as did the Prosecutor, the similar but very discrete concepts of judicial notice and admissions. In this regard the Defence submits Exhibit E, an excerpt from Sakar's Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon, 15th ed. (India, 1999). Relying on Sakar's Law of Evidence, the Defence stresses that even if a court takes judicial notice of a fact, such a ruling cannot deprive the opponent of its opportunity to present contradicting evidence on that fact.

II.

DELIBERATIONS AND FINDINGS

A. The Defence Motion For Additional Time To File Written Submissions In Opposition To The Motion

16. As a threshold matter, the Chamber finds that it is neither necessary nor proper for it togrant the Defence additional time to submit more written submissions in opposition to the Prosecutor's Motion. Indeed, since the filing of the Motion the Defence availed itself of the opportunity to make not less than three submissions, complete with supporting legal authorities and exhibits, in opposition to the instant Motion. Notwithstanding its protestation that additional time was necessary to enable it to fully address the issues raised by the Motion, the Chamber finds that the Defence itself concedes that it has adequately, in its own estimation, responded to the Motion. Notably in this regard, at the Pre-Trial Conference in this matter, the Defence upon being denied its motion to postpone the trial asked the Chamber to render decisions on all pending motions. Surely, the Defence would not have insisted on issuance of a decision on the Motion if it still believed that it had not adequately and fully addressed the issues raised in the Motion. *See* Transcript of 25 September 2000, at 66:18-25--67:1-6. Consequently, the Chamber denies the Defence request for additional time to submit written opposition to the Motion. There must be some closure and finality with regard to submissions on pending motions. There must be some finality to litigation.

B. The Prosecution's Motion For Judicial Notice

17. The Chamber notes the importance of the issues raised in the Motion and the Defence's opposition to the Motion. These matters merit full discussion inasmuch as the Defence cogently argues that none of the previous decisions of this Tribunal reveals the *ratio decidendi* by which judicial notice was taken or denied. Consequently, none of the decisions seems to disclose principled guidance as to what genre of facts properly allow a trial court to take judicial notice thereby relieving the Prosecutor of her burden of formally adducing evidence at trial.

18. As a point of departure, it is imperative that the Chamber identify the issues and interests it must balance in rendering its decision on the Motion. As is plainly evident in the Prosecutor's Motion, the Chamber must contend with the issue of whether the Rules, Statute and previous jurisprudence of the Tribunal properly permit taking judicial notice of the facts contained in Appendix A and of the documents listed in Appendix B. The Chamber must assess whether it may take judicial notice of the reasonable inferences and conclusions that may be drawn from the noticed facts. Under the same rubric, the Chamber must determine whether the noticed fact is to be given conclusive effect, i.e., to be taken as proving a particular relevant fact beyond a reasonable doubt, consequently foreclosing the opportunity of the Defence to present evidence disputing the noticed fact. In addition, the Chamber must consider when is the proper time for taking judicial notice. Finally, the Chamber must assess all of the foregoing issues, against its momentous countervailing mandate to ensure a fair and equitable trial for the Accused.

1. Judicial Notice Under the Rules

19. The Defence invites the Chamber to restrict consideration of the Motion solely on the basis

of Rules 54 and 73, as indicated in the title to the Motion. Rule 73(A) invests the parties with the power to make motions for appropriate relief before the Chamber. Rule 54, which is also cited by the Prosecutor as supporting the grant of the relief it seeks in the Motion, reinforces the mandate of Rule 89 by authorising the Chamber, upon the request of a party or *sua sponte*, to issue such orders and other measures as are necessary for purposes of preparation or conduct of the trial. Inasmuch as the Motion and the Revised Memorial correctly invoke Rule 94 and Rule 89, in addition to Rule 54 and Rule 73, the Chamber declines the Defence's invitation to restrict consideration of the Motion to Rules 54 and 73.

a. Policy Reasons for Doctrine of Judicial Notice

20. Legal scholars invariably recite two reasons justifying the application of the doctrine of judicial notice. First, resort to judicial notice expedites the trial by dispensing with the need to formally submit proof on issues that are patently indisputable. Second, the doctrine fosters consistency and uniformity of decisions on factual issues where diversity in factual findings would be unfair. *See* Cross and Tapper on Evidence, 8th ed., Colin Tapper (United Kingdom, 1995) p. 78.

21. One learned legal authority, Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, p. 303 (England, 1993) (emphasis added) has described judicial notice as follows:

> [C]ertain allegations of the parties that are within the knowledge of the tribunal need no evidence in support. '*Judicial* notice' is taken of the facts averred. Proof may be dispensed with as regards facts, which are of ***common knowledge*** or ***public notoriety*** . .
> .

b. Judicial Notice of Facts of "Common Knowledge:" Rule 94

22. Rule 94 entitled "Judicial Notice," provides "A Trial Chamber shall not require proof of facts of ***common knowledge*** but shall take judicial notice thereof." Rule 94 (emphasis added). Thus, following Rule 94, a Trial Chamber is permitted to take judicial notice of facts if such facts are "of common knowledge." Rule 94, however, provides no guidance as to what manner of facts constitutes "common knowledge." For an understanding as to what is encompassed under the broad rubric "common knowledge," the Chamber resorts to the learned legal treatises for guidance.

23. The term "common knowledge" is generally accepted as encompassing ". . . those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature." M. Cherif Bassiouni & P. Manikas The Law of the International Tribunal for the Former Yugoslavia, (United States of America, 1996) p. 952. *See also*; Phipson on Evidence, 14th ed., §2-06-2-16 (England, 1990); Sakar's Law of Evidence in India, Pakistan, Bangladesh, Burma and Ceylon, 15th ed. (India, 1999) p. 1015; Hon. Roger E. Salhany Criminal Trial Handbook, (Canada, 1994), § 9.5. A common example of a fact of common knowledge are the days of the week. In addition, and perhaps more importantly for the present purposes, "common knowledge" also encompasses those facts that are generally known within a tribunal's territorial jurisdiction. The Law of the International Tribunal for the Former Yugoslavia, at p. 952.

24. Once a Trial Chamber deems a fact to be of "common knowledge" under Rule 94, it must determine also that the matter is reasonably indisputable. A fact is said to be indisputable if it is either generally known within the territorial jurisdiction of a court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be called into question. *See* General Principles of Law as Applied by International Tribunals, pp. 303-304; 29 American Jurisprudence §33 (United States of America, 1994).

c. Judicial Notice of Notorious *Facts of History*

25. Under the rubric matters of "common knowledge," a court may generally take judicial notice of matters " . . . so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative source that evidence of their existence is unnecessary . . . ." Archibold Criminal Pleading, Evidence & Practice § 10-71 (England, 2000); *see also* Phipson on Evidence, at § 2-06; United States of America Federal Rule of Civil Procedure § 201(B).

26. Article 21 of the Charter of the International Military Tribunal at Nuremberg, which provided for judicial notice of certain matters of common knowledge, further bolsters the propriety of taking judicial notice of some of the facts contained in Appendix A and the documents in Appendix B. In this connection, Article 21 of the Charter provided, in relevant portion:

> The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations.

27. Perhaps the best support of the propriety and fairness of taking judicial notice of certain matters stated in Appendix A and documents in Appendix B comes from the Bangladesh International Crimes (Tribunal) Act of July 19, 1973 because its language coincides with that of Rules 89 and 94. In April of 1973 the newly emerged state of Bangladesh announced its intention to try Pakistani nationals for "serious crimes," including genocide, war crimes, crimes against humanity, breaches of Article 3 of the Geneva Conventions, murder, rape and arson. To facilitate the trials of the accuseds, the Act permits a tribunal to take judicial notice of common knowledge facts. The Act provides in relevant respect:

> (1) A Tribunal shall not be bound by technical rules of evidence; and it shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and may admit any evidence, including reports, and photographs published in newspapers, periodicals and magazines, films and tape-recordings and other materials as may be tendered before it, which it deems to have probative value. . . .
>
> (3) A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof.
>
> (4) A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.[3]

28. A prominent legal treatise, Sakar's Law of Evidence, upon which the Defence heavily relies, states the matter more categorically still. "No court insists upon formal proof by evidence of notorious facts of history past or present." Sakar's at p. 1016. To the extent that the matters in Appendix A are matters of public history, the Chamber may properly dispense with formal proof of such notorious matters. In addition, to illustrate the type of facts that are the proper subject of judicial notice, Sakar's, provides a list of thirteen matters that are so notorious and indisputable that one ought to take judicial notice of them. Sakar's, at p. 999, f.n. 15. According to Sakar's, among the facts that a court is compelled to recognise are facts evidencing: (1) accession to office, names, titles and functions of public officers; (2) commencement or continuation of hostilities between the State and a body of persons; (3) constitutional and political matters; (4) that a government is run by certain political parties. Sakar's, at pp. 1005, 1007-1009.

2. Judicial Notice of Certain Facts in Appendix A

29. Some of the facts the Prosecutor seeks judicial notice of in Appendix A belong to that genus of "common knowledge " or "notorious historical facts" permitting a court to dispense with the submission of formal proofs. For example, the Prosecutor first calls on the Chamber to take judicial notice of the fact that Rwandan citizens were classified into three ethnic groups, namely, Hutu, Tutsi and Twa. Similarly, the fact that during the period from 6 April 1994 to 17 July 1994 there existed throughout Rwanda "widespread and systematic attacks" against the civilian population based on certain invidious classifications including Tutsi ethnic identity, is a notorious historical fact of which this Chamber may take judicial notice. Moreover, the powers of the office of *Bourgmestre* is a proper subject of judicial notice because it falls squarely into the category of matters that are of common knowledge within the jurisdiction of this Tribunal and which may readily be determined by reference to such reliable sources such as the written laws of Rwanda.[4]

30. It also bears noting that within the area of its territorial jurisdiction[5] and within the sphere of its specialised competence, a court is allowed to take judicial notice of an even wider scope of facts of common knowledge and notorious history. Phipson on Evidence, §2-21. *See also*, Sakar's, at p. 1015. Thus, the Chamber may take judicial notice of facts that are notorious within the territories of Rwanda, Burundi and other neighbouring states. *Prosecutor v. Tadic*, IT-94-1-AR72, Transcript of Hearing on Interlocutory Appeal on Jurisdictional Challenge at pp. 107-10 (ICTY Appeals Chamber, 7 September 1995) (finding that that Tribunal must in the interest of fairness take judicial notice of notorious facts). Accordingly, this Chamber may properly take judicial notice of the factual elements constituting the crime of genocide, crimes against humanity and violations of certain provisions of the Geneva Convention with respect to the large number of deaths of civilians in Rwanda during 1994.

31. Disputed facts, necessarily do not belong to that realm of indisputability as historical facts, and other matters of common knowledge as would properly place them within the reach of the Chamber's power to take judicial notice. Having entered a plea of not guilty to all the counts in the indictment, the Accused has placed even the most patent of facts in dispute. However, this alone cannot rob the Chamber of its discretion to take judicial notice of those facts not subject to dispute among reasonable persons. There is no requirement that a matter be universally accepted in order to qualify for judicial notice. *See* Sakar's at 1015.

32. In the instant case, some of the matters the Prosecutor seeks judicial notice of do not appear to be disputed by the Defence. Rather, the Defence disputes Semanza's personal involvement in the offences cited within the facts. Palpably absent from the Defence submissions, is any argument or authority negating the existence of either the "widespread or systematic attacks" or the elemental components of the crime of genocide against Tutsis. Consequently, there is no impediment to taking judicial notice of those matters which are of common knowledge and reasonably indisputable contained in Annexes A and B to this Decision.

3. *Previous Tribunal Cases Taking Judicial Notice*

33. Although no additional authority is needed to support the propriety of taking judicial notice of facts in the instant matter, additional authority may be found in the jurisprudence of this Tribunal. *See e.g.*, *Prosecutor v. Kanyabashi*, ICTR-96-15-T, (Decision on Jurisdiction) (18 June 1997). In rendering a decision on a defence pre-trial motion challenging the jurisdiction of the Tribunal, a unanimous Chamber in *Kanyabashi* rejected the Defence arguments that the Tribunal lacked the jurisdictional predicate under Article 3 of the 1949 Geneva Conventions, by, among other things, taking judicial notice of the fact that the Special Rapporteur for Rwanda, the Commission of Experts on Rwanda and the Security Council had all concluded that the conflict in Rwanda as well as the stream of refugees had created a highly volatile situation in the neighbouring states. *Prosecutor v. Akayesu*, ICTR-96-4-T, (Judgement) at ¶ 627 (2 September 1998); (taking judicial notice of United Nations reports); *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, (Judgement) at ¶¶ 273-274 (21 May 1999) (finding that Article 2 of the Statute which defines genocide is not aimed at

determining individual responsibility or guilt, rather a finding that genocide occurred merely provided a context in which the crimes alleged in the indictment may have been perpetrated).

34. The Chamber is mindful not to confound the related but discrete concepts of admissions and judicial notice. Thus, the Chamber notes that the Prosecutor's reliance on those cases in which the accused entered a plea of guilty pursuant to a plea agreement or in which the accused voluntarily admitted facts, thereby relieving the Prosecutor of its burden to prove such facts by formal proof, is misplaced. That an accused admits a fact pursuant to a plea agreement reveals nothing about the nature of the facts as either common knowledge or as indisputable. Similarly, facts that are voluntarily admitted by a an accused in the context of a proceeding are not the proper subject of judicial notice because such admissions speak neither to the general currency of the fact nor to its indisputable character. For these reasons, the Chamber is not persuaded to take judicial notice of the facts at issue in the instant Motion on the basis of the jurisprudence in the cases cited by the Prosecution.[6] Accordingly, the Chamber shall not take judicial notice of the matters in Appendix A at ¶¶ 8(e), 9, 10, 11, 12, 13, and 14.

35. In addition, the Chamber cannot take judicial notice of matters, which are unadorned legal conclusions. Accordingly, the Chamber shall not take judicial notice of the matters in ¶¶ 3(a) (ii), (iii); (e), (d) (f), (g), (i), (j), (k), and (l) in Appendix A because these paragraphs do not contain facts of common knowledge or matters of public notoriety. Rather, they merely recite bare legal terminology borrowed verbatim from Article 3 of Statute of the Tribunal, which lists Crimes Against Humanity. In order to make the matters stated in the foregoing paragraphs eligible for judicial notice, the Prosecutor must state the specific acts or factual matters of which the Trial Chamber is being asked to take judicial notice. Moreover, the Chamber shall not take judicial notice of those facts recited in ¶¶ 4, 5(a), 8(e), and 9-21 in Appendix A because such matters are not reasonably indisputable.

4. Judicial Notice of enumerated Acts Comprising Crime of "Genocide"

36. A fundamental question in this case is whether "genocide" took place in Rwanda. Notwithstanding the over-abundance of official reports, including United Nations reports confirming the occurrence of genocide, this Chamber believes that the question is so fundamental, that formal proofs should be submitted bearing out the existence of this jurisdictional elemental crime. *Kayishema*, Judgement at ¶ 273 (referring to "genocide," and holding "the question is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on the issue"). The Chamber shall take judicial notice of the existence of the enumerated acts comprising the crime of genocide as provided in Article 2 and recited in ¶3(a) of Appendix A, including killing or causing serious bodily harm to members of a group.

37. In the interest of safeguarding the Accused's right to a fair trial and in the interest of fostering judicial economy and consistency, this Chamber takes judicial notice of some of the facts contained in Appendix A to the Revised Memorial, as indicated in Annex A to this Decision.

5. Judicial Notice of Documents in Appendix B

38. Similarly, concerning the documents listed in Appendix B, there is ample precedent in this Tribunal to take judicial notice of the existence and authenticity of such documents without taking judicial notice of the contents thereof. The Chamber, nevertheless, shall take judicial notice of the contents of resolutions of the Security Council and of statements made by the President of the Security Council because it is an organ of the United Nations which established the Tribunal. In addition, the Chamber takes judicial notice of the contents of Décret-Loi no. 01/81 and Arrete ministeriel no. 01/03, which are the copies of certain portions of the laws of Rwanda and properly qualify for judicial notice. The Chamber stresses, however, that by taking judicial notice of the existence and authenticity of the other documents in Appendix B, the Chamber does not take judicial

notice of the facts recited therein.

39. It bears noting that the Tribunal has previously taken judicial notice of the very documents listed in Appendix B for purposes of providing an historical and political context for the offences with which an accused is charged. *Prosecutor v. Akayesu*, ICTR-96-4-T, (Judgement) at ¶¶ 157, 165 (2 September 1998). The Defence provides no principled reason why this Chamber should depart from the authority of *Akayesu*. The Tribunal having previously adjudicated the existence of the very documents and facts of which the Prosecutor seeks judicial notice, it would be wasteful of the Tribunal's resources for this Chamber to now insist upon formal proof of matters of notorious public history. To adopt such an approach would flout the very principles underlying the doctrine of judicial notice: judicial economy and consistency of judgements.

40. Accordingly, this Chamber takes judicial notice of the documents listed in and appended to Appendix B to the Revised Memorial, without modification, as indicated in Annex B to this Decision.

6. Judicially Noticed Facts Serve as Conclusive Evidence

41. In the case before this Chamber, in exercise of its sound discretion under Rules 94 and 89(B), the Chamber holds that the judicially noticed facts shall serve as conclusive proof of the facts recited in Annexes A and B. The taking of judicial notice of those facts in Annexes A and B will end the evidentiary inquiry. To permit the Defence to submit evidence in rebuttal of the judicially noticed facts would undermine the very nature of the doctrine which is aimed at dispensing with formal proofs for matters that are of common knowledge and reasonably indisputable. The facts in Annex A that the Chamber has judicially noticed are of common knowledge or public notoriety and reasonably indisputable. Such an approach safeguards the right of the Accused to a fair trial without undue delay, as is his due pursuant to the Statute and the Rules. *See* Article 20; Rule 87(A).

7. No Judicial Notice of Inferences

42. The Prosecutor requests that the Chamber take judicial notice of the inferences, without elaboration, that may be fairly drawn from judicially noticed facts. In this regard, Rule 89 permits this Chamber to determine whether it may properly take judicial notice of the logical inferences that may be drawn from the judicially noticed facts in Appendix A and documents in Appendix B. In the interest of protecting the rights of the Accused, the Chamber finds that pursuant to Rule 94 it cannot take judicial notice of inferences to be drawn from the judicially noticed facts in Appendix A. If and when those facts are presented in evidence, that will be the appropriate time for the Chamber to draw the relevant conclusions.

43. It must be stressed, at this time the Chamber draws no impermissible inferences regarding the Accused's involvement in those matters of which it takes judicial notice. The burden of proving the Accused's guilt, therefore, continues to rest squarely upon the shoulders of the Prosecutor for the duration of the trial proceeding. The critical issue is what part, if any, did the Accused play in the events that took place.

8. Time for Taking Judicial Notice

44. The Chamber finds that the proper time for taking judicial notice of the matters contained in Appendices A and B is at this stage of the proceedings. In the interest of aiding the parties in preparing their respective trial presentations the Chamber is constrained to take judicial notice of some of the facts contained in Appendix A, as modified, and of the documents in Appendix B at this time. This Decision shall become part of the trial record of this case.

9. No Presumptions of Fact

45. Having found that Rule 94 adequately provides for the judicial notice of some of the facts sought to be admitted in Appendix A and the documents in Appendix B, the Chamber need not reach that portion of the Prosecutor's Motion requesting the Chamber to create evidentiary presumptions on the basis of the facts stated in the two appendices. Rule 89(B) already provides for the particular matter under consideration, There is, therefore, no need for the Tribunal to apply any other evidentiary rules or principles.

Conclusion

46. In conclusion, the Chamber considers that it is appropriate to apply the doctrine of judicial notice in the context of this case in some of the instances requested by the Prosecutor because to do so will ensure the Accused a fair trial without undue delay rather than one unnecessarily drawn out by the introduction of evidence on matters which are patently of common knowledge in the territorial area of the Tribunal and reasonably indisputable. The facts of which the Chamber takes judicial notice will not place even the smallest chink in the armour of presumed innocence in which the Accused is cloaked throughout the proceeding. In this regard the Tribunal's pronouncement in *Prosecutor v. Akayesu*, ICTR-96-4-T, (Judgement) at ¶129 (2 September 1998), with respect to the "general allegations" of which it took judicial notice, is particularly instructive. The *Akayesu* Chamber stated:

> [T]he Chamber holds that the fact that the [enumerated crimes constituting] genocide [were] indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence its decision in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the prosecutor. [Footnote omitted] In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent.

47. By taking judicial notice of some of the facts in Appendix A and the documents in Appendix B, the Chamber merely provides a backdrop -- a blank canvas-- against which the Prosecutor is still saddled with the daunting burden of adducing formal evidence to paint the picture establishing the personal responsibility of the Accused for the offences with which he is charged in the indictment beyond a reasonable doubt.

48. **FOR THESE REASONS THE CHAMBER:**

(a) **DENIES** those portions of the Defence's Notice to File Further Written Replies to Prosecutor's Response in the Defence Motion For Dismissal of the Entire Proceeding Filed on the 30 June 2000 and 14 July 2000 and the Prosecutor's Revised Memorial in the Prosecution's Motion for Judicial Notice (Rules 54 and 73), seeking additional time to file written responses to the instant Motion.

(b) **GRANTS** the Prosecutor's Motion and takes judicial notice of the facts and documents described in **Annex A** and **Annex B**, attached hereto.

(c) **ORDERS** that this Decision become part of the trial record of this case.

(d) **DENIES** the Prosecutor's requests made in the Motion: (i) to create evidentiary presumptions on the basis of the facts in Appendices A and B and (ii) to take judicial notice of inferences that may be drawn from the judicially noticed facts.

Arusha, 3 November 2000.

Lloyd George Williams	Yakov Ostrovsky	Pavel Dolenc
Judge, Presiding	Judge	Judge

[Seal of the Tribunal]

ANNEX A

1. Between 6 April 1994 and 17 July 1994, citizens native to Rwanda were severally identified according to the following ethnic classifications: Tutsi, Hutu and Twa.

2. The following state of affairs existed in Rwanda between 6 April 1994 to 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, there was a large number of deaths of persons of Tutsi ethnic identity.

3. Between 1 January 1994 and 17 July 1994 in Rwanda there was an armed conflict not of an international character.

4. 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.

5. 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 succeeded 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.

6. Before the introduction of multi-party politics in Rwanda in 1991, the office of the *Bourgmestre* was characterised by the following features:

(a) The *Bourgmestre* represented executive power at the *commune* level.

(b) The *Bourgmestre* was appointed and removed by the President of the Republic on the recommendation of the Minister of the Interior.

(c) The *Bourgmestre* had authority over the civil servants posted in his *commune*.

(d) The *Bourgmestre* had policing duties in regard to maintaining law and order.

ANNEX B

i. Décret-Loi no. 01/81 du 16 janvier 1981 relatif au recensement à la carte d'identité, au domicile et à la residence des Rwandais.

ii. Arrete ministeriel no. 01/03 du 19 janvier 1981 portant mesures d'execution du décret-Loi no. 01/81 du 16 janvier 1981 relatif au recensement à la carte d'identite, au domicile et à la résidence des Rwandais: J.O. no. 2 *bis* du 20 janvier 1981.

iii. Commission pour le memorial du génocide et des massacres au Rwanda, "Rapport préliminaire d'identification des sites du génocide et des massacres d'avril–juillet 1994 au Rwanda."

iv. UN Secretary-General, "Report on the situation of Human Rights in Rwanda" submitted by Mr. R Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of commission resolution E/DN.4/S-3/1 of 25 May 1994, 28 June 1994, pages 5, 6, 7, 8 and 17. UN Document E/CD.4/1995/7.

v. UN Secretary General, 'Report on the situation of Human Rights in Rwanda' submitted by Mr R. Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of commission resolution E/DN.4/S-3/1 of 25 May 1994, 18 January 1995. UN Document E/CD.4/1995/7.

vi. UN Secretary-General, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)". UN Document S/1994/1405, 9 December 1994.

vii. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on his mission to Rwanda, submitted by Mr. Bacre Waly Ndiaye, 8–17 April 1993, including as annex II the statement of 7 April 1993 of the Government of Rwanda concerning the final report of the independent International Commission of Inquiry on human rights violations in Rwanda since 1 October 1990. UN Document E/CN.4/1994/7/add.1, 11 août 1993.

viii. Rapport spécial du Secrétaire Général sur la Mission des Nations Unies pour l'assistance au Rwanda (MINUAR), le 20 avril 1994. UN Document S/1994/470.

ix. Report of the United Nations High Commission for Human Rights on his Mission to Rwanda of 11–12 May 1994, dated 19 May 1994. UN Document E/CN.4/S-3/3.

x. The United Nations and Rwanda 1993–1996. The United Nations Blue Books Series, Volume X (New York: Department of Public Information, United Nations, 1996).

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[1] By memorandum dated 14 July 2000 and filed on the same date, the Prosecutor transmitted the Revised Memorial including Appendices A and B with the express intent that the Revised Memorial supersede and replace the Memorial. Accordingly, the Chamber did not consider the Memorial together with its Appendices A and B in its deliberations on the instant motion.

[2] Appended to the Defence Notice, is a copy of letter dated 10 July 2000 from the Registry informing the reader that Mr. Taku "will be on mission in Tanzania, France, Belgium, Holland, Norway and Germany during the moth of July, August and September 2000." (Emphasis in original). The letter does not indicate what portion of Mr. Taku's mission was to be spent in Tanzania.

[3] Prominent legal commentators have hailed the Bangladesh International Crimes (Tribunal) Act as a model of international due process. *See* Jordan J. Paust, M Cherif Bassiouni, et al., International Criminal Law: Cases and Materials, p. 751 (United States of America, 1996).

[4] The powers of the *Bourgmestre* of which the Prosecutor seeks judicial notice are described in the following Articles of Loi du 23 November 1963 (reprinted in Code et Loi du Rwanda, Reyntjens, F. et Gorus, J. eds. (1995): Art. 57 (the *Bourgmestre* is charged with the execution of the laws and regulations at the commune); Art. 38 (the *Bourgmestre* is nominated by the President of the Republic on the recommendation of the Minister of the Interior); Art. 58(11) (the *Bourgmestre* is charged with exercising administrative control over civil servants or agents of the government assigned to the commune); and Art. 62, 103 and 104 (The *Bourgmestre* hire and is the sole authority over communal police. In addition, he may incarcerate anyone causing public disorder).

[5] Article 7 of the Statute of the Tribunal provides, in relevant portion: "The territorial jurisdiction of the [Tribunal] shall extend to the territory of Rwanda including its land surface and airspace as well as the territory of neighbouring

States. . . . "

[6] *See*, *Prosecutor v. Kambanda*, ICTR-97-23-S, Judgement and Sentence, (4 September 1998) (defendant made wide variety of admissions of disputed facts in indictment as part of plea agreement); *Prosecutor v. Serushago*, ICTR-98-39-S, Sentence (5 February 1999) (defendant made many admissions incident to a plea agreement); and *Prosecutor v. Musema*, (ICTR-96-13-T), Judgement and Sentence (defendant made several admissions before trial, including admissions of existence of genocide, armed conflict and Tusti extermination) (27 January 2000).